Reducing Unauthorized Digital Downloading of Music by Obtaining Voluntary Compliance with Copyright Law Through the Removal of Corporate Power in the Recording Industry

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Abstract

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Social norms are the predominant influence on one's behavior and can support or supplant a law. The social norm of digital music file-sharing has effectively prevailed over copyright law, market alternatives, and architectural barriers. An explanation, and possibly an answer, to the issue can be found using a psychological jurisprudence approach to social norms, i.e., a voluntary compliance theory of behavior control.

Generally, the standard theory of deterring unwanted behavior through fear of punishment has little actual effect on people's behavior. The two key elements to obtaining voluntary compliance with a law are morality and legitimacy. First, people must perceive the law as consistent with their sense of morality. Second, the public must perceive the making of the law as fair and that the law is fairly enforced by a trusted authority.

The main perceived justification for copyright law is to reward artists, i.e., musicians, for their creative works. But, the public perceives the recording industry as the only beneficiary of recorded music purchases. Thus, the current legal structure fails to meet its justification and, in turn, does not comport with people's morals. For similar reasons, people do not perceive the current legal structure as legitimate. The current copyright structure was largely created under massive lobbying pressure from the recording industry for its own benefit. Moreover, the current enforcing authority for the majority of copyright protected sound recordings is the corporate recording industry. People distrust the recording industry due to the knowledge of artist mistreatment and overpriced record albums. Additionally, the

highly publicized lawsuits against individual file-sharers appeared unfair to many people, especially considering the previous attempts by the recording industry to limit the transferability of digital music.

A possible solution to this non-compliance with copyright law, therefore, could be to return copyright ownership to musicians. This would introduce an external motivating factor that appeals to the morals of digital music file-sharers. At the same time, enforcement of sound recording copyrights by musicians, rather than the large corporate music industry, would legitimate the enforcing authority in the view of file-sharers. Amending the laws to achieve these results could be done by one, or a combination, of the following: (1) return copyright ownership to recording artists by making the copyright in a sound recording non-transferable or reducing the time frame for which an author may terminate a grant, license, or transfer of a copyright protected work; and (2) codify a time and album limit on recording company contracts with recording artists.

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"'We're all fed up with talking about piracy . . . It's boring talking about piracy, but it is the problem and we can't avoid it.'"[1]

I. Introduction

One of the most significant issues in copyright law[2] today is the unauthorized sharing of copyright protected content in digital files over peer-to-peer computer networks[3] – commonly termed "digital piracy."[4] The sharing of digital files over peer-to-peer computer

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[1]Eric Pfanner, *Music Industry Counts the Cost of Piracy*, NY TIMES (Jan. 21, 2010) (quoting John Kennedy, chief executive officer (CEO) of the International Federation of the Phonographic Industry (IFPI)).“CD sales dropped by 34% globally in trade revenues to record companies between 1999 and 2008." IFPI, RECORDING INDUSTRY IN NUMBERS 2009: THE DEFINITIVE SOURCE OF GLOBAL MUSIC MARKET INFORMATION 14 (2010) (hereinafter RIN 2009). However, digital music sales continues to grow and "now account for 21% of total industry revenues, up from 15% in 2007 and 2% in 2004." *Id.* at 6. "Although the retail value of recorded music sales fell by 9.4% in 2008, IFPI estimates that the overall music sector saw modest growth of 0.6%." *Id.* at 23.

[2]The Copyright Act grants exclusive rights to authors, including the right to make and distribute copies of sound recordings. 17 U.S.C. §§ 101 et seq. Liability attaches to any person who infringes one of the copyright owner's exclusive rights. 17 U.S.C. § 501(a).

[3]A peer-to-peer network (often termed P2P) involves individual computers connected on the internet with software that allows individuals to share, search for, and download files contained on each connected computer rather than from files contained on a centralized server. *See* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919-20 (2005).

[4]*See, e.g.*, LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 18 (The Penguin Press New York 2008) (hereinafter REMIX). However, the term "piracy" and the analogy to "theft" are overbroad because not all digital music file-sharing is unauthorized or harmful to copyright owners. *See* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND T LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 67 (2004) (hereinafter FREE CULTURE) ("The question we should be asking about file sharing is how best to preserve its benefits while minimizing (to the extent possible) the wrongful harm it causes artists."); *see also* Lawrence B. Solum, *Book Review: The Future of Copyright: Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, 83 TEX. L. REV. 1137, 1158 (2005) (reviewing LESSIG, FREE CULTURE, *supra* note 4). For example, some peer-to-peer file-sharers may simply sample music before making a purchase, which likely increases music sales. LESSIG, FREE CULTURE, *supra* note 4, at 296. Additionally, some digital music file-sharers may seek

networks currently makes up the largest, global distribution (and reproduction) method for unauthorized, copyright protected content.[5] Despite laws prohibiting the conduct, acceptance

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out-of-print works, non-copyrighted works, or works authorized for free downloading, noone of which harms music sales. *Id.* Thus, resolution of the digital piracy phenomenon need only focus on file-sharers whose acts replace an actual music sale. *Id.* In other words, complete eradication of digital music file-sharing over peer-to-peer networks is not necessary. The focus should instead be on finding a way to convince digital music file-sharers who are substitute purchasers to obey copyright law, while permitting the growth of digital music file-sharing networks for beneficial purposes. Solum includes another category of file-sharers as "those who would not purchase music offline or online even with zero transactions costs, so long as the price includes the royalty charged by the copyright owner." Solum, *supra* note 4, at 1155.

[5]"Peer-to-peer (P2P) piracy remains the most prevalent channel for illegal distribution of unauthorised content, accounting for more than 20% of internet traffic globally. In Latin America this increases to 35% and in Europe to 29%." IFPI, *IFPI Digital Music Report 2010: Music How, When, Where You Want It* 3, *available at*, http://www.ifpi.org/content/library/DMR2010.pdf (hereinafter *Digital Music Report 2010*) (quoting Sandvine, *2009 Global Broadband Phenomena* (2009), *available at* http://www.sandvine.com/downloads/documents/2009%20Global%20Broadband%20Phenomena%20-%20Full%20Report.pdf). "Although P2P file-sharing remains the most damaging form of piracy due to the volume of files shared by users, the last two years have seen a sharp rise in non-P2P piracy, such as downloading from hosting sites, mobile piracy, stream ripping [recording digital files streamed over the internet for immediate listening like radio rather than downloaded], instant message sharing and downloading from forums and blogs. . . . Research by Harris Interactive in the UK shows that, although P2P piracy is the single biggest problem and did not diminish in 2009, the illegal distribution of infringing music through non-P2P channels is growing considerably. The research showed the biggest increases in usage for overseas unlicensed MP3 pay sites (47%) and newsgroups (42%). Other significant rises included MP3 search engines (28%) and forum, blog and board links to cyberlockers [on-line internet sites that store personal digital files] (18%)." *Id.* at 19. "Peer-to-peer (P2P) file-sharing is the application producing most internet traffic – ahead of web browsing, media streaming, e-mail or instant messaging. Its share varies, but it is estimated to range between 43-70% of all internet traffic depending on the market." IFPI, RIN 2009, *supra* note 1, at 14 (citing Hendrik Schulze & Klaus Mochalski, *Internet Study 2008/2009,* ipoque (2009) (This study did not measure traffic in North America)). A different study found that in 2009 web-browsing (33.7%) and real time entertainment (26.6%) has overtaken peer-to-peer file-sharing (20.4%) in aggregate traffic. Sandvine, *2009 Global Broadband Phenomena*, *supra* note 5.

of unauthorized file-sharing of protected digital files has become the social norm.[6] Digital piracy now threatens all forms of digital copyright content,[7] but the problem began with the music industry.

Digital music falls into the copyright protected category of sound recordings[8] – "works that result from the fixation of a series of musical, spoken, or other sounds."[9] Owners of copyright protected sound recordings have exclusive rights to reproduce, adapt, or distribute their works, or to perform them publicly by digital means.[10] The sharing of a digital

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[6]Jason R. Ingram & Sameer Hinduja, *Neutralizing Music Piracy: An Empirical Examination*, 29 DEVIANT BEHAVIOR 344, 359 (2008) (hereinafter *Neutralizing Music Piracy*). "[N]orms . . . refers to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both." Richard H. McAdams, *The Origin, Development, and Regulation of Norms,* 96 MICH. L. REV. 338, 340 (1997). "Social norms are patterns of behavior that are widely adhered to by some group of individuals, at least in part because of social pressures to conform to that norm." Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks,* 89 VA. L. REV. 505, 534 (2003) (hereinafter *Charismatic Code*) (citing Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes,* 75 IND. L.J. 1231, 1234 n.11 (2000)).

[7]"Digital piracy rose sharply on the agenda of all creative industries in 2009. With the rapid advance of technology, games manufacturers, film and television producers and book publishers are now facing the same challenges felt by the music industry at the start of the decade. Simon Renshaw, artist manager, says 'What I worry about is that we are heading into a world where copyright has no value and where there's no incentive for anyone to provide patronage and support for the creators of intellectual property.'" IFPI, *Digital Music Report 2010, supra* note 5, at 7.

[8]17 U.S.C. § 102(a)(7).

[9]*Id.* § 101.

[10]*Id.* §§ 106(1)-(3) & (6); 114. The statement in the text presumes the maker of the sound recording has permission to use the underlying musical composition or has paid the compulsory license for its use. For the distinction between a sound recording and a musical work see *infra* Section II.B. *See also* DAVID NIMMER, 1-2 NIMMER ON COPYRIGHT § 2.10

music file over a peer-to-peer network without authorization from the copyright owner violates that copyright owner's rights to reproduce and distribute copies.[11]

The music industry's struggle with digital piracy is not a new topic and the statistics indicate digital piracy continues in large numbers despite the music industry's efforts to curtail it. Global estimates indicate that more than 200 million computers have at least one

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(2007). Note that owners of copyrighted sound recordings have no legal entitlement to demand payment of royalties for the performance of their works by non-digital means. Thus, terrestrial radio stations (AM and FM stations) that broadcast sound recordings through analog means, need not compensate recording artists or record labels or obtain their permission to perform the work to the public. The Performance Rights Act, introduced in the 110th Congress (H.R. 4789 and S. 2500), would eliminate this royalty exemption that applies to traditional radio stations and attempt to bring parity to the sound recording performance royalty system. The copyright law also provides several types of statutory, or compulsory, licenses for sound recordings. These licenses allow third parties who pay statutorily prescribed fees to use copyrighted sound recordings under certain conditions and according to specific requirements, without having to negotiate private licensing agreements. *See generally* BRIAN T. YEH, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE, CONGRESSIONAL RESEARCH SERVICE REPORT RL33631 (Jan. 29, 2008).

[11]*See, e.g.,* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (enjoining Napster, a centralized server based peer-to-peer network, from allowing its users to upload or download copyrighted works without the permission of the copyright holders based on a theory of contributory infringement); *In re* Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003) (enjoining Aimster, a peer-to-peer network using AOL Instant Messenger as a platform and encrypting shared files so that Aimster could not view what files were being transferred based on a theory of inducement of infringement liability); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, 545 U.S. 913 (2005) (finding Grokster, a decentralized based peer-to-peer network infringed copyright based on an inducement of infringement liability); BMG Music v. Gonzalez, 430 F.3d 888 (7th Cir. 2005) (upholding summary judgment against Gonzalez for copyright infringement for downloading digital music over KaZaA, a decentralized peer-to-peer network); Sony BMG Music Entertainment v. Tenenbaum, 07-CV-11446-NG, 2009 WL 4547019 (D.Mass. Dec. 7, 2009) (holding Tenenbaum liable for copyright infringement for downloading digital music over KaZaA, a decentralized peer-to-peer network).

peer-to-peer network application installed.[12] According to a 2008 survey, "15% of online adults admitted to downloading or sharing files using peer-to-peer or BitTorrent."[13] During

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[12]Mary Madden, *The State of Music Online: Ten Years After Napster,* Pew Internet & American Life Project, 2009, at 9 *available at* http://www.pewinternet.org/Reports/2009/9-The-State-of-Music-Online-Ten-Years-After-Napster.aspx (citing Mike Harvey, *Internet Pirates Walk the Plank Over Free Downloads*, THE TIMES, February 16, 2009).

[13]*Id.* at 8 (citing Pew Internet Project Tracking Survey, May 2008). BitTorrent is a file-sharing program that uploads and downloads files in pieces from more than one networked computer. As a recently filed case indicates, BitTorrent will be the next target and this time by movie producers. (Achte/Neunte Boll Kino Beteiligungs GMBH & CO KG v. Does 1-4577, Case No. 1:10-cv-00453-RMC (D.D.C., filed Mar. 18, 2010); *see also* Worldwide Film Entertainment LLC v. Does 1-749, No. 1:10-cv-00038-HHK-DAR (D.D.C., filed Jan. 8, 2010); G2 Productions LLC v. Does 1-83, No. 1:10-cv-00041-CKK (D.D.C., filed Jan. 8, 2010); Maverick Entertainment Group, Inc. v. Does 1-1000, No. 1:10-cv-00569-RJL (D.D.C., filed April 8, 2010); Voltage Pictures v. Does 1-5000, No. 1:10-cv-00873-RMU (D.D.C. filed May 24, 2010). "While the RIAA had some success putting peer-to-peer companies out of business, file-sharing technology continued to evolve. The most important technical advance was the emergence of BitTorrent. BitTorrent file requests differ from classic full-file HTTP requests in that the client makes many small data requests, similar to internet telephony which breaks voices into small packets of data. In addition, BitTorrent downloads follow a 'rarest-first' order which ensures high availability of files across the network. To start the downloading process, users first obtain a torrent, a small file that contains metadata about the file to be downloaded and information about the tracker, the computer that coordinates the file distribution. Torrents are hosted by a fairly small number of websites. The Pirate Bay is probably the best-known among them. The torrent allows the client to connect to the tracker, from which it receives a list of peers that currently transfer pieces of the file. As more peers connect to a tracker, they form a swarm and begin to trade pieces with one another. The advent of BitTorrent is significant for a number of reasons. First, the improved technology significantly reduces download times. While the user experience varies significantly, it has now become possible to download a feature film in less than two hours. Second, the technology forces users to share the parts of files that they already own while they download the remaining bits. This procedure reduces the opportunity to free-ride that plagued older P2P systems. The protocol also rewards users who contribute more generously, for instance by allowing faster downloads for those with greater upload capacity. Sharing digital files was always non-rivalrous because the original owner of a file retained his copy. But more efficient file distribution systems such as BitTorrent have now also succeeded in reducing the negative externalities that users impose on one another when they transfer files." Felix Oberholzer-Gee & Koleman Strumpf, *File-Sharing and Copyright, in* INNOVATION POLICY AND THE ECONOMY Vol. 10, 19-55

a single twenty-four hour period in 2009, 1.6 million residents of the United States used the infamous Pirate Bay torrent site.[14] Today, some claim, "95 percent of the music downloaded [worldwide] via the Internet is pirated. . . ."[15] Thus, although digital music sales continue to grow exponentially,[16] the recording industry claims it will not survive without a significant

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(National Bureau of Economic Research Book Series) (Josh Lerner and Scott Stern, eds. February 2010 University of Chicago Press).

[14]Harvey, *supra* note 12 ("According to information provided by Pirate Bay, in one 24-hour period [in February 2009] there were 3.3 million unique users in China (22.4 per cent), 1.6 million users in the US (11 per cent) and 824,000 users in Britain (5.6 per cent)"); *see also* Madden, *The State of Music Online: Ten Years After Napster, supra* note 12, at 9 (citing Harvey, *supra* note 12); "A report in June by the analysis firm Forrester Research said that 27 percent of peer-to-peer, or P2P, network music sharers in the United States last year were in the 18 to 24 age group and 43 percent in the 25 to 34 age group. File sharing, a largely clandestine activity, is hard to measure, but Forrester said that, based on admitted cases, it estimated the number of file-sharers, as a percentage of all Internet users, to be two to three times greater in Europe than in the United States." Nazanin Lankarani, *A Push in Law Schools to Reform Copyright*, N.Y. TIMES, Dec. 1, 2009, *available at* http://www.nytimes.com/2009/12/02/business/global/02iht-riedmedia.html?fta=y.

[15]Pfanner, *Music Industry Counts the Cost of Piracy, supra* note 1 (citing statistics from the International Federation of the Phonographic Industry). *But see* Nate Anderson, *IFPI: Music piracy at 95%! (or is it 18%?)*, ARSTECHNICA.COM, January 18, 2009, *available at* http://arstechnica.com/media/news/2009/01/ifpi-music-piracy-at-95-or-is-it-18.ars ("According to a further study, only 18 percent of Internet users in Europe actually share files illegally. IFPI suggests that this number has remained constant even as broadband penetration has soared from 5 to 42 percent over the last few years, but it's hard to see what this could mean. With the rate of file-swapping remaining steady, IFPI's own numbers actually suggest that file-swapping has soared."). IFPI notes that 18% of internet users in the United States regularly download unauthorized music and that this number has remained constant over the last few years; however, IFPI also notes a similar number (16%) in Europe that jumps to 34% when adjusted for the age group of 18-24. IFPI, RIN 2009, *supra* note 1, at 14.

[16]"In 2009 digital formats comprised a record 41 percent of total music shipments in the United States. This is an increase from 34 percent in 2008, and 25 percent in 2007. The total digital music market reached $3.1 billion for 2009. Digital downloads continued double digit growth in the past year reaching $2.0 billion, 19 percent growth over the 2008 total of $1.7 billion. Digital album growth continued to grow faster than single tracks, and on a dollar basis comprised 38 percent of the download market." Joshua P. Friedlander, *News and Notes*

reduction in digital piracy.[17] In fact, the majority of empirical studies have found that online music downloading has a causal connection to the decline in music sales,[18] which dropped

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On 2009 RIAA Shipment Data, *available at* http://76.74.24.142/A200B8A7-6BBF-EF15-3038-582014919F78.pdf (Freidlander is the RIAA Vice President, Research and Strategic Analysis.).

[17]Commenting on the publication of the 2010 edition of the Recording Industry in Numbers, IFPI chairman and CEO John Kennedy said: "The global music business is continuing to fight its corner, investing in talent and developing new business models despite the problems of a market rigged by piracy. . . . Reducing piracy is critical if these improvements are going to translate into long term recovery for our global business. . . . There is no doubt in my mind that growth is within reach for the music business - it depends, to a large extent, on how quickly governments can act to deal with piracy and, in doing so, tackle a market distortion that overshadows not just music but all the creative industries." IFPI, *Digital Music Report 2010, supra* note 5, at 3. *See also* Ben Depoorter, Article: *Technology and Uncertainty: The Shaping Effect on Copyright Law,* 157 U. PA. L. REV. 1831, 1835 (2009) (hereinafter *Technology and Uncertainty*); Stan J. Liebowitz & Richard Watt, *How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and its Alternatives*, *in* 4 JOURNAL OF ECONOMIC SURVEYS Vol. 20, September 2006, at 513-45 ("Without secure property rights market economies cannot function (and non-market economies function very poorly), and that is equally true for the functioning of individual markets.")."The global decline in recorded music sales of eight per cent was driven largely by the United States, the largest market in the world for our industry. The US was responsible for 56 per cent of the decline in revenues generated by physical sales worldwide. Excluding the US, global recorded music sales (including digital sales and performance rights) would have fallen by a more modest 3.9 per cent." IFPI, RIN 2009, *supra* note 1, at 3. According to the Institute for Policy Innovation, annually, copyright piracy affecting the U.S. motion pictures, sound recordings, business software and entertainment software/video game industries cost the U.S. economy $58 billion in total output, 373,375 jobs, $16.3 billion in earnings, and $2.6 billion in Federal/state/local tax revenue. Stephen E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, Policy Report 189, Institute for Policy Innovation, (2007), *available at* http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E4086257 33E00529174/$File/SoundRecordingPiracy.pdf?OpenElement. "Because of music piracy, the U.S. economy loses a total of $12.5 billion in economic output each year. Furthermore the U.S. economy also loses 71,060 jobs. […] As a consequence of piracy in sound recordings, U.S. federal, state, and local governments lose a minimum of $422 million in tax revenues annually." *Id*.

[18]Stan J. Liebowitz, *Filing Sharing: Creative Destruction or Just Plain Destruction?,* 49 J.L. & ECON. 1 (2006); Rafael Rob & Joel Waldfogel, *Piracy on the High C's: Music*

from $23 billion in 2004 to $18.4 billion in 2008 globally and from $632.3 million in 2004 to $456.3 million in 2008 in the United States.[19]

Commentators cite many reasons for the size and severity of the problem.[20] Mostly

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Downloading, Sales Displacement, and Social Welfare in a Sample of College Students, 49 J.L. & ECON. 29 (2006); Alejandro Zentner, *File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries,* 5 TOPICS ECON. ANALYSIS & POL'Y 1 (2005); Alejandro Zentner, *Measuring the Effect of File Sharing on Music Purchases,* 49 J.L & ECON. 63 (2006); Stephen E. Siwek, *Reducing Government Consumption, Increasing Personal Wealth*, Institute for Policy Innovation, *available at* www.ipi.org (finding the piracy of sound recordings costs the U.S. economy $12.5 billion in total output annually, 71,060 jobs, $2.7 billion in earnings annually to U.S. workers, $422 million in tax revenues annually (the numbers, however, are based on a faulty premise that every illegal download is replaced with a legitimate purchase at full price)). *But see,* Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis* (March 2004), *available at* http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf, at 10, 115 J. POL. ECON. 1 (2007) (finding no causality between declining music sales and peer-to-peer file-sharing). Some commentators have also noted that digital music piracy harms the local music scene outside of the United States. *See, e.g.,* Jiarui Liu, Article: *The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China*, 27 CARDOZO ARTS & ENT. L.J. 621, 623 (2010) (hereinafter *The Tough Reality*) (stating that the level of online piracy in the United States is low and arguing the low-priced pirated works in developing countries with poor copyright laws destroys domestic creativity due to unstable royalty income and a reciprocal need for extended tours).

[19]IFPI, *RIN 2009*, *supra* note 1, at 5, 27. Because physical compact disc sales still make up the majority (63%) of music sales in the United States, the increase in trade value for digital recorded music from $2,100,000 in 2004 to 77,000,000 in 2008 has not recouped the loss in sales to other entertainment formats and piracy. *Id.* at 15, 27.

[20]"With every court decision or appeal to Congress, the debate over the proper adjustment of copyright law becomes further polarized. At one end, we find the entertainment industry, while on the other end we have consumers, scholars, and civil libertarians. The former argues that the entertainment industry will not survive unless intellectual property laws are strengthened to meet the threat of new technologies and the widespread theft that occurs over the Internet. The latter maintain that new technology presents opportunities for unprecedented cultural exchange, suggesting that existing legal and institutional arrangements reduce economic welfare by strangling technological progress. At regular intervals, both sides present their arguments before the Supreme Court. Meanwhile, the copyright tug of war attains iconoclastic dimensions." Depoorter, *Technology and*

they blame the combination of the internet and the digitization of music, which effectively creates a simple and cheap copying method,[21] in addition to the non-rivalrous, non-excludable, and intangible quality of intellectual property.[22] The almost completely free, one-click distribution and reproduction of a digital music file does not decrease the availability of that music. For example, a person who purchases music on a compact disc, listens to it, and then gives the album to a friend can no longer listen to that compact disc until it is returned or repurchased. But, a person sharing a digital music file over a peer-to-peer network does not sacrifice the original digital music file. In fact, today's teenagers have never had to associate music with a physical object, such as a long-playing vinyl record, audiotape, or compact disc. Even these combined reasons, however, oversimplify the issue because copyright law has always protected non-rivalrous, non-excludable, and intangible property. Obviously, the technological advances in computer hardware, internet speeds, and the compression of digital music files have augmented the problem, but these advances alone do

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Uncertainty, supra note 17, at 1834-35 (citations omitted).

[21]Steven A. Hetcher, Curb Center Special Feature: *The Music Industry's Failed Attempt to Influence File Sharing Norms*, 7 VAND. J. ENT. L. & PRAC. 10, 14-15 (2004).

[22]When the consumption of a good by one individual does not reduce the availability of that good to others, the good is considered non-rivalrous. A good that cannot be effectively excluded from consumption by others is considered non-excludable. For example, a loaf of bread is rivalrous because if eaten, there is one less loaf of bread available for others and it is excludable because the owner of the loaf can lock the bread away to prevent others from using it. Moreover, whereas a compact disc is a tangible item, the property rights conferred in the music itself are not. *See, e.g.,* LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 46-47 (Ashgate Publishing 2007).

not explain consumers' newfound disrespect for copyright law.[23]

People comply with laws for various reasons.[24] In general, four factors shape human behavior: the law, the market, the physical constraints of the surrounding architecture, and social norms.[25] The recording industry has utilized all four forms in its attempts to reduce digital piracy. On the legal front, the industry has successfully sued file-sharing software manufacturers (the peer-to-peer network intermediaries) and individual file-sharers (the

[23]Though it could be said consumers never respected copyright law and only recently obtained the tools necessary to easily violate the law.

[24]"Human behavior is not shaped by law alone." Mark F. Schultz, *Copynorms: Copyright Law and Social Norms*, *in* INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE Vol. 1, Ch. 10, 201 (Peter K. Yu ed. 2007) (hereinafter *Copynorms*).

[25]*See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (hereinafter ORDER WITHOUT LAW); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662-66 (1998) (discussing the way in which laws, norms, markets, and architecture operate as modalities of constraint); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999) (hereinafter *The Law of the Horse*); Daniel B. Levin, Student Note: *Building Social Norms on the Internet,* 4 YALE J.L. & TECH. 97 (2001/2002).

industry's consumers),[26] and lobbied Congress for stronger copyright laws.[27] In the marketplace, the recording industry introduced legitimate digital music stores and players to lure consumers away from peer-to-peer networks.[28] The recording industry has also manipulated the architecture with digital rights management (DRM).[29] Finally, the recording industry has implemented a large scale education campaign directed at changing social norms by increasing awareness of copyright laws and labeling file-sharing as piracy and theft.[30]

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[26]In an effort to educate the public on copyright laws and the potential penalties for violating them (as well as obtain monetary damages), the Recording Industry Association of America (RIAA) has sued over 35,000 people for the unauthorized file-sharing of music over the internet. *RIAA to Stop Mass Lawsuits,* ROLLING STONE, Feb. 5, 2009, at 18; Electronic Frontier Foundation, *RIAA v. The People: Five Years Later* 1 (Sept. 2008), *available at* http://www.eff.og/fiiles/eff-riaa-whitepaper.pdf. See for example the cases against peer-to-peer network providers: A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); *In re* Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, 545 U.S. 913 (2005); and cases against individual digital music file-sharers who used peer-to-peer networks: BMG Music v. Gonzalez, 430 F.3d 888 (7th Cir. 2005); Sony BMG Music Entertainment v. Tenenbaum, 07-CV-11446-NG, 2009 WL 4547019 (D.Mass. Dec. 7, 2009).

[27]*See, e.g.,* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (Oct. 28, 1998) (DMCA); Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, S. 3325 (PRO-IP Act); *see also* CAL. LABOR CODE § 2855(b).

[28]*See, e.g.,* iTunes, *available at* www.apple.com/itunes; AmazonMP3, *available at* http://www.amazon.com/MP3-Music-Download/b?ie=UTF8&node=163856011.

[29]*See, e.g.*, John Bowman, *Sony and the Rootkit,* CBC NEWS, Nov. 10, 2005, http://www.cbc.ca/news/background/tech/rootkit.html); *Music Execs Criticise DRM Systems,* BBC NEWS, Feb. 15, 2007, http://news.bbc.co.uk/1/hi/technology/6362069.stm; Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 569 (2009).

[30]*See, e.g.*, John Borland, *RIAA to File Swappers: Let's Chat*, CNET NEWS, April 29, 2003, *available at* http://news.cnet.com/2100-1025_3-998825.html (discussing the RIAA's automatic messages through online chat boards to people who are providing copyrighted songs online); RIAA, *Music Rules: Lessons on Respect for Intellectual Property and*

Despite these attempts, file-sharers have continued to download music over peer-to-peer networks in violation of the copyright laws.[31] The social norm of digital music file-sharing has effectively prevailed over copyright law, market alternatives, and architectural barriers.

Because social norms are the predominant influence on one's behavior,[32] the current digital music file-sharing norm raises the question at the root of my solution: why do people obey the law? The literature on the norms of digital music file-sharing is extensive,[33] but this

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Responsible Use of the Internet, *available at* http://music-rules.com/.

[31]IFPI, RIN 2009, *supra* note 1, at 14.

[32]Schultz, *Copynorms, supra* note 24, at 202. "[P]eople are often far more influenced by informal rules, implicit understandings, and behavioral regularities – collectively referred to as social norms." *Id.* at 201 (citing McAdams, *supra* note 6). *See also* H.L.A. HART, THE CONCEPT OF LAW 6–7, 18–25 (2d ed. 1994); John de Monchaux & J. Mark Schuster, *Five Things to Do, in* PRESERVING THE BUILT HERITAGE: TOOLS FOR IMPLEMENTATION 3, 3 (J. Mark Schuster, with John de Monchaux & Charles A. Riley II eds., 1997); LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, *supra* note 25; ELLICKSON, ORDER WITHOUT LAW, *supra* note 25; Lessig, *The New Chicago School*, *supra* note 25, at 662-66 (discussing the way in which laws, norms, markets, and architecture operate as modalities of constraint); Lessig, *The Law of the Horse, supra* note 25, at 507; Levin, *Building Social Norms on the Internet, supra* note 25.

[33]"[T]he majority of [empirical] research has been descriptive in nature and has focused primarily on estimating [the] prevalence [of unauthorized digital music file-sharing] or in identifying its relevant situational and social antecedents. Few attempts, however, have been made to apply theoretical frameworks in order to identify why individuals engage in the behavior." Ingram & Hinduja, *Neutralizing Music Piracy, supra* note 6, at 359 (citing Alain d'Astous, François Colbert, & Daniel Montpetit, *Music Piracy on the Web How Effective are Anti-Piracy Arguments? Evidence from the Theory of Planned Behavior*, 28 J. CONSUMER POLICY 289 (2005); Ram D. Gopal, et al, *A Behavioral Model of Digital Music Piracy*, 89 J. ORG'L COMPUTING & ELEC. COMMERCE 89 (2004); SAMEER HINDUJA, MUSIC PIRACY AND CRIME THEORY (LFB Scholarly, LLC 2006); (Angus Reid Worldwide 2000; Derek Archambault, *MP3 Format and the Purchasing of Music*, Johnson and Wales University, (1999) Retrieved September 30, 2001 from www.mp3.com/new/236.html; Pew Internet and American Life Project, *13 Million Americans 'Freeload' Music on the Internet: 1 Billion Free Music Files Now Sit on Napster Users' Computers*, Pew Internet (2000), *available at*

paper offers new solutions to the problem using a psychological jurisprudence approach, i.e., a voluntary compliance theory of behavior control, to change the digital piracy social norm.

In his book entitled "Why People Obey the Law,"[34] Professor Tom Tyler argues the standard theory of deterring unwanted behavior through fear of punishment has little actual effect on people's behavior.[35] Instead, the more effective method of controlling behavior

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http://www.pewinternet.org/~/media/Files/Reports/2000/MusicReportFull.pdf.pdf; Joachim Stenneken, *MP3 Research Survey*, Glasgow Caledonian University, Retrieved September 28, 2001 from www.joasten.webprovider.com (1999); Webnoize, *Napster University: From File Swapping to the Future of Entertainment*, Retrieved September 21, 2001 from research.webnoize.com (2000); D. Banerjee, T. P. Cronan, & T. W. Jones, *Modeling IT Ethics: A Study in Situational Ethics*, 22 MIS QUARTERLY 31 (1998); Sudip Bhattacharjee, Ram D. Gopal, & G. Lawrence Sanders, *Digital Music and Online Sharing: Software Piracy 2.0?*, 46 COMMUNICATIONS OF THE ACM 107 (2003); Jyh-Shen Chiou, Chien-yi Huang, & Hsin-hui Lee, *The Antecedents of Music Piracy: Attitudes and Intentions*, 57 J. BUS. ETHICS 161 (2005).

[34]TOM R. TYLER, WHY PEOPLE OBEY THE LAW (New Haven, Yale University Press 1990); *see also* 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) (hereinafter *Building a Law-Abiding Society*); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U.J. INT'L L. & POL. 219 (1997) (hereinafter *Compliance with Intellectual Property Laws*).

[35]TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 3; *see also* Tyler & Darley, *Building a Law-Abiding Society, supra* note 34, at 707 (2000). Professor Tyler terms deterrence based strategies of behavior control the "instrumental perspective." TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 3. Professor Tyler has conducted numerous studies on procedural justice and psychological jurisprudence. *See, e.g.,* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117 (2000); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law, in* 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 283 (Michael Tonry ed., 2003); Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institution?,* 19 BEHAV. SCI. & L. 215 (2001). Although Professor Tyler's research focuses on criminal law, he has suggested the findings and theories are equally applicable to intellectual property enforcement. *See* Tyler, *Compliance with Intellectual Property Laws*, *supra* note 34.

requires obtaining voluntary compliance with the law.[36] Therefore, the government must create laws that individuals view as consistent with their individual morals and who perceive the making and enforcement of the law as legitimate to achieve voluntary compliance.[37]

The main justification for copyright law is to reward artists, i.e. musicians, for their creative works.[38] This paper argues that current copyright law in sound recordings does not comply with individuals' morals or perceptions of fairness and many music consumers share digital music files because they do not perceive the musicians as profiting from record sales. Returning copyright ownership to musicians, however, would introduce an external motivating factor that appeals to the morals of digital music file-sharers. At the same time, enforcement of musical copyrights by musicians rather than the large corporate publishers, would legitimate the enforcing authority in the view of file-sharers. In short, if digital music file-sharers perceived the recording artist of a song as the beneficiary of the copyright in the song, the law would be consistent with their moral understanding of the purpose behind copyright law in general, i.e., to benefit authors. Additionally, digital music file-sharers would know that the artist as the copyright law enforcer; thus, legitimating the law in their eyes. Therefore, digital music file-sharers would be much more likely to limit their file-

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[36]TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34. Professor Tyler terms the voluntary compliance strategy at behavior control the "normative perspective." *Id.*

[37]*Id.*; Tyler & Darley, *Building a Law-Abiding Society, supra* note 34, at 707. In the case of copyright laws, the corporate copyright owners must cease their heavy lobbying to allow Congress to create a copyright law that will meet these demands. *See infra* Sections II.C.2. and III.A.1.

[38]*See, e.g.,* Sony Corp. Of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

sharing of unauthorized copyrighted materials to the beneficial uses of peer-to-peer networks, such as sampling before purchasing or downloading out-of-print and non-copyright protected works rather than simply obtaining a free copy of a commercially available album.

Amending the laws to achieve these results could be done by one, or a combination, of the following: (1) return copyright ownership to recording artists by making the copyright in a sound recording non-transferable using 17 U.S.C. section 104A as an example or reducing the time frame for which an author may terminate a grant, license, or transfer of a copyright protected work under 17 U.S.C. section 203 from the current thirty-five years to five years for sound recordings; and (2) codify a time and album limit on recording company contracts with recording artists using section 2855 of the California Labor Code as an example.

Of course, these changes will not be kind to the current corporate copyright holders of America's sound recordings. The recording industry alleges it is already struggling to survive due to decreased sales in general.[39] Moreover, the recording industry claims long-term contracts and long-term copyright holdings are necessary to recoup costs lost on the roughly ninety-seven percent of unsuccessful signed acts, as well as the massive amounts spent on successful acts.[40] Decreasing corporate profits could amount to a reduction in money

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[39] *See* IFPI, *Digital Music Report 2010, supra* note 5, at 3.

[40] *See* Note*, California Labor Code Section 2855 and Recording Artists' Contracts*, 116 HARV. L. REV. 2632, 2645 (2003) (quoting Greg Kot, *You Say You Want a Revolution: A New Artists''Coalition Puts the Record Industry's Billion-Dollar Business Model at the Crossroads: Shrink or Perish,* CHI. TRIB., Feb. 24, 2002, 7 (Arts & Entertainment), at 1 (hereinafter *You Say You Want a Revolution*)). It is unclear however whether this statistic includes acts who would have been profitable with a smaller initial investment by the recording company, such as an artist that has a solid following in a niche market under a

spent on new acts and a reduction in contracted royalties to successful acts. Finally, the amendments are politically difficult, especially considering the lack of assurance that such amendments would convince digital music file-sharers to comply with copyright law. It remains an untried alternative with some theoretical support, however.

Section II of this paper provides a brief background of copyright law, its delayed protection of sound recordings, and the social norm of sharing digital music files over peer-to-peer computer networks. Section III explains the recording industry's failed attempts to control digital piracy. Section IV argues that a psychological jurisprudential perspective suggests returning copyright ownership to recording artists could decrease the harmful effects of digital music file-sharing. Section V concludes the paper.

II. Copyright Law and the Emergence of Digital Music Piracy

Currently, the legal norms of copyright law conflict with the social norms of sharing digital music files. The following subsections provide a brief overview of copyright protection for sound recordings and of the social acceptance of private copying and sharing of sound recordings.

A. A Brief Overview of Copyright Law and Its Protection of Publishers Over Creators

Copyright law in the United States begins with the Constitution, which grants Congress the 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

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smaller label.

and Discoveries."[41] Congress utilized this power to create the first protection of expressive works in the Act of April 10, 1790.[42] The 1790 Act vested property rights in the author of literary works, but the works fell into the public domain upon expiration of the copyright term.[43] Theoretically, copyright law in the United States strikes a balance between artists and consumers – limited, exclusive, private rights to induce creators to create in return for a vast public domain.[44]

The balance, however, actually weighs heavily in favor of publishers, especially in

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[41]U.S. CONST. art. 1, § 8, cl. 8.

[42]Patent Act of 1790, ch. 7, 1 Stat. 109-12 (April 10, 1790) (providing exclusive rights for limited times to new and useful inventions (patents) and to print and reprint books, maps, charts, and pamphlets (copyrights)).

[43]*Id.*; *see also* 17 U.S.C. § 201(a) (2000) ("Copyright in a work protected under this title vests initially in the author or authors of the work."); Tim Wu, *On Copyright's Authorship Policy,* 2008 U. CHI. LEGAL F. 335, 338 (2008) ("With some exceptions, copyright vests in authors at the moment of fixation. . . . The principle exception is in § 201(b), the work-for-hire doctrine.").

[44]*See, e.g.,* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[The Copyright Act] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)). "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (citing 1 M. NIMMER, NIMMER ON COPYRIGHT § 5 (1974); Sayre v. Moore, quoted in a footnote to Cary v. Longman, 1 East 358, 362 n. (b), 102 Eng. Rep. 138, 140 n. (b) (1801) ("Lord Mansfield's statement of the problem almost 200 years ago in Sayre v. Moore, . . . bears repeating: '[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.'").

the recording industry.[45] This creates a conflict with the public's perception that their music purchases should reward the artists since inducing artists to create is the main reason Congress enacted copyright laws. The protection of publishers over artists, and the public, derives from copying England's copyright laws, which "began as a publisher's right, a right which functioned in the interest of the publisher, with no concern for the author."[46] Prior to copyright law, artists generally relied on patronage for support, which limited their expressive interests.[47] In England, Parliament created copyright laws largely in response to the printing press and the prevalence of piracy, but also to remove the book trade's royal monopoly, which provided privileged publishers a monopoly over certain books with nothing offered to authors.[48] As such, England's copyright law managed competition by preventing

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[45]*See* William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 2 (2002) ("[E]ntrepreneurs have secured copyright in the name of the author but use their contractual deals to reap most of the advantages from the exclusive right. So it was in the beginning, with . . . the Statute of Anne . . . and so no doubt it ever shall be."). "It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum." Stewart v. Abend, 495 U.S. 207, 218 (1990) (quoting H.R. REP. NO. 2222, 60th Cong., 2d Sess., 14 (1909)).

[46]L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 8 (Vanderbilt 1968); *see also* Wu, *On Copyright's Authorship Policy, supra* note 43, at 350.

[47]Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413, 423 (2009) (citing MARTHA WOODMANSEE, THE AUTHOR, ART AND THE MARKET: REREADING THE HISTORY OF AESTHITICS 145 (Columbia Univ. Press 1994)) (noting copyright law was created "to provide authors with the freedom to produce works of authorship independent of nobility and state government patronage").

[48]*Id.* (citing WOODMANSEE, THE AUTHOR, ART AND THE MARKET, *supra* note 47, at 145); *see also* Statute of Anne, 1710, 8 Anne, c. 19 (Eng.). Although the claim was to protect authors, "copyright was actually originated by publishers and has a long history of having benefitted entrepreneurs much more than creators." L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 3-4 (Univ. Of Ga. Press

publishers from printing different versions of the same book.[49] In the eighteenth century, English publishers accused foreign publishers of copyright piracy.[50] The "Battle of the Booksellers" ensued and continued for approximately thirty years as English publishers enforced England's copyright law under the 1710 Statute of Anne.[51] Eventually, the courts reinterpreted the Statute of Anne to vest rights in authors rather than privileged publishers,[52] but "musical composers were reluctant to rely on the Act."[53] The United States essentially copied England's copyright law, although as applied to the sound recording industry, the law continues to favor publishers. This will be discussed further below.

B. Copyright Protection of Sound Recordings

Copyright protection of musical recordings emerged slowly. In the early nineteenth century, distribution of music consisted of sheet music and live performances. Copyright law

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[49]*See* Statute of Anne, 1710, 8 Anne, c. 19 (Eng.); Wu, *On Copyright's Authorship Policy*, *supra* note 43, at 350 (citing PATTERSON, *supra* note 46, at 43-44).

[50]Wu, *On Copyright's Authorship Policy*, *supra* note 43, at 350-51 (citing MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 69, 116 (Harvard 1993) (hereinafter AUTHORS AND OWNERS).

[51]*See* Statute of Anne, 1710, 8 Anne, c. 19 (Eng.); Midwinter v. Hamilton, 2 Kam. Rem. 154, 161 (Sess. 1748); Donaldson v. Becket, 98 Eng. Rep. 257 (K.B. 1774); ROSE, AUTHORS AND OWNERS, *supra* note 50, at 67-91.

[52]Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769) (holding authors held a common-law right to works that the Statute of Anne did not abolish), *overruled by*, Donaldson v. Becket, 98 Eng. Rep. 257 (K.B. 1774) (holding that once the term of protection under the Statute of Anne expired the author no longer had any common-law right).

[53]Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 926 (2005) (citing MICHAEL CHANAN, MUSICA PRACTICA: THE SOCIAL PRACTICE OF WESTERN MUSIC FROM GREGORIAN CHANT TO POSTMODERNISM 150-51 (1994)).

first protected sheet music when a New York federal court interpreted sheet music to be a protected literary work.[54] Thus, the composer of a musical work gained exclusive rights under copyright law. Congress later codified the protection of sheet music in 1831[55] and then expanded copyright protection to live performances of musical works in 1897.[56]

The invention of sound recording and radio technologies in the late nineteenth century created new forms of musical performance, reproduction, and distribution.[57] Despite pleas for copyright protection of sound recordings as early as 1906,[58] Congress did not protect them until passage of the Sound Recording Act in 1971.[59] Because the Act was

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[54]Clayton v. Stone, 5 F. Cas. 999, 1000-01 (Cir. Ct. S.D.N.Y. 1829); *see also* Bach v. Longman, 98 Eng. Rep. 1274 (K.B. 1777).

[55]Act of Feb. 3, 1831, 4 Stat. 36.

[56]Act of Jan. 6, 1897.

[57]Thomas Alva Edison, patent number 200,521(Feb. 19, 1878) (phonograph); Emil Welte, patent number 287,599 (Oct. 30, 1883) (piano roll); Chichester A. Bell and Charles Sumner Tainter, patent number 341,214 (May 4, 1886) (graphophone); Nikola Tesla, patent number 645,576 (filed Sept. 2, 1897 and granted March 201900) (radio).

[58]In 1906, a well-known composer, John Philip Sousa, asked Congress to "remedy a serious defect in the . . . law, which permits manufacturers and sellers of phonograph records . . . to appropriate for their own profit the best compositions of the American composer without paying a single cent therefor." *They Ask Protection*, WASHINGTON POST, June 6, 1906, 4; *see also* LESSIG, REMIX, *supra* note 4, at 23.

[59]Sound Recordings Act of 1971, Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971). "[T]he copyrightable work comprised of the aggregation of sounds [is] clearly within the scope of 'writings of an author' capable of protection under the Constitution." H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1570. *See also* 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[A] (2007). Congress expanded on these rights in 1984 with the Record Rental Amendments, which grants the owner of a copyright in a sound recording the right to authorize or prohibit the rental, lease, or lending of phonorecords for direct or indirect commercial purposes. Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727. Many states protected sound recordings under state law prior to the

introduced largely to protect against the economic harm caused by the pirating of records,[60] Congress limited copyright protection to the rights of distribution and physical reproduction.[61] Thus, copyright law now grants separate, exclusive rights in the two layers of musical sound recordings discussed above: (1) the composition or "musical work"[62] layer, consisting of the notes and lyrics of a song, and (2) the "sound recording"[63] layer, meaning

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Sound Recordings Act of 1971. *See* Program on Information Justice and Intellectual Property Washington College of Law American University Under the Supervision of Peter Jaszi with the Assistance of Nick Lewis, *Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis*, *available at* http://www.clir.org/pubs/reports/pub146/body.htm.

[60]Abbott Marie Jones, *Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination Rights in Sound Recordings*, 31 HASTINGS COMM. & ENT. L.J. 127, 129-30 (2008) (hereinafter *Get Ready Cause Here They Come*) (citing H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1578) (noting passage of the Sound Recording Act came "after ten years of discussion between Congress and the record industry and amidst growing concerns over piracy and lost revenues").

[61]Sound Recordings Act of 1971, Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971). "In other words, the independent creation of even identical-sounding sound recordings, for example, does not constitute infringement of the copyrights in a sound recording, though such independent creation would constitute an infringement of other kinds of copyrightable works." Jones, *Get Ready Here They Come*, *supra* note 60, at 130 (citing Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004) (stating that even though an artist would need a compulsory license to record the underlying musical composition, as long as the music was independently created, there would be no infringement of the sound recording); John R. Kettle, III, *Dancing to the Beat of a Different Drummer: Global Harmonization - and the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings,* 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041 (2002)).

[62]17 U.S.C. § 102(a)(2).

[63]*Id.* § 101 ("'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.").

the actual performance of the "musical work" fixed onto a record, tape, compact disc, or digital file. Although copyright law has always confronted piracy, Congress and the music industry largely ignored private copying until the introduction of the internet and digital file compression.[64] This will be discussed further below.

C. Distributing and Copying Digital Music Files Over Peer-to-Peer Computer Networks Becomes Socially Acceptable

The non-rivalrous aspect of copyright protection has made Congress and copyright owners especially sensitive to advances in copying technology.[65] The ease of use, low cost,[66] and perfect copying ability of digital technology, combined with the massive distribution ability of the internet, however, has given rise to unprecedented amounts of copyright infringement.[67] Today, digital file-sharing is one of the most common activities on the

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[64]*See, e.g.,* Raymond Shih Ray Ku, Article: *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 272 (2002) (hereinafter *The Creative Destruction of Copyright*).

[65]Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms*, *supra* note 21, at 13; Oberholzer & Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, *supra* note 18.

[66]Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms*, *supra* note 21, at 13. "Surveys also confirm the simple proposition supported by focus groups and anecdotes everywhere – that the majority of consumers who illegally download, rather than use the many legitimate alternatives available today, do so because of the lure of 'free.'" IFPI, *Digital Music Report 2010*, *supra* note 5, at 5. The basis of this paper is that combating the "lure of free" requires establishing a moral obligation to comply with the copyright law because it is unlikely that the level of risk associated with punishment for such acts will ever be sufficient to deter file-sharers.

[67]Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 13 (citing ROSE, AUTHORS AND OWNERS, *supra* note 50, at 52; Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 973, *aff'd*, 420 U.S. 376 (1975) (per curiam); American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 914 (2nd Cir. 1994);

internet[68] and the American public opinion favors a file-sharing norm.[69]

Social norms act in much the same way as laws and control behavior through social approval or disapproval.[70] The social group, rather than the government authority, rewards and punishes their members "either by withholding or conferring signs of group status and respect, or more directly by channeling material resources toward or away from particular members."[71] Social norms may also influence individual normative behavior "because

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Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991)). For example, the camera presented users with the ability to easily infringe copyright protected material, but was not widely used to do so until implemented in a photocopy machine. [citation needed re photocopy and copyright law changes] Today, however, people commonly copy and paste photos, text, and music on websites, blogs, email, and social networking sites such as FaceBook.

[68]*See* Sandvine, *supra* note 5, at 2 (peer-to-peer file-sharing accounts for 20% of internet traffic); Oberholzer & Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, *supra* note 18.

[69]Daniel Benoliel, Article: *Copyright Distributive Injustice*, 10 YALE J. L. & TECH. 45, 65 (2007/2008) (citing Stacey M. Lantagne, *The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack*, 18 HARV. J.L. & TECH. 269 (2004)). Social norms are "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done." Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996). "[A]lmost 90 percent of sample respondents believed that downloading unauthorized music files was an appropriate behavior." Ingram & Hinduja, *Neutralizing Music Piracy, supra* note 6, at 359. Similarly, a Swedish study found there is no indication of "social norms that hinder illegal file sharing." MÅNS SVENSSON & STEFAN LARSSON, SOCIAL NORMS AND INTELLECTUAL PROPERTY: ONLINE NORMS AND THE EUROPEAN LEGAL DEVELOPMENT 59 (MEDIA-TRYCK, Lund 2009), *available at* http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1510388&fileOId=1515776.

[70]*See, e.g.,* Sunstein, *supra* note 69, at 914.

[71]TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 23-24; *see also* Lessig, *The Law of the Horse, supra* note 25, at 507 ("[U]nlike law, the punishments of norms are not centralized. Norms are enforced (if at all) by a community, not by a government.").

individuals look to their social groups for information about appropriate conduct."[72] Therefore, "[s]ocial norms may supplement, supplant, or suppress the effect of law depending on the circumstances."[73] The discussion below will discuss how the social norm of digital piracy arose due to Congressional delay, the music industry's nonchalant attitude toward private copying, and the public's general distrust of the recording industry.

1. Congress Permitted Fifty Years of Commercial Piracy

Affordable phonographs gave rise to a burgeoning vinyl record business from the 1950s through the 1970s. Although private copying during this time was a nonissue due to the difficulty and expense of making copies,[74] the lack of copyright protection gave rise to a lucrative commercial pirate record business.[75] Congress permitted more than fifty years of

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[72]TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 24. A variety of theories exist as to how social norms control behavior, including coordination benefits, economic signaling, epistemic, and social sanctioning. *See generally* STEVEN A. HETCHER, NORMS IN A WIRED WORLD 17 (Cambridge Univ. Press 2004); *see also* ELLICKSON, ORDER WITHOUT LAW, *supra* note 25; McAdams, *supra* note 6; ERIC POSNER, LAW AND SOCIAL NORMS (2000).

[73]Schultz, *Copynorms, supra* note 24, at 202 ("Social norms influence the creation and enforcement of law and are in turn influenced by the creation and enforcement of law.").

[74]*See* Robert P. Merges, Symposium on Law in the Twentieth Century: *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CALIF. L. REV. 2187, 2195-97 (2000). Reel-to-Reel tape also existed but was of trivial importance because most households listened to music with phonographs or the radio. *See* Martin F. Halstead, *The Regulated Become the Regulators – Problems and Pitfalls in the New World of Digital Copyright Legislation*, 38 TULSA L. REV. 195, 198 (2002).

[75]Glenn M. Reisman, Comment, *The War Against Record Piracy: An Uneasy Rivalry Between the Federal and State Governments*, 39 ALB. L. REV. 87, 89 (1974-1975). "Although states ultimately began to pass statutes criminalizing unauthorized manufacture and distribution of recordings, this did not occur until the late 1960s and early 1970s." Prepared by the Program on Information Justice and Intellectual Property Washington College of Law American University Under the supervision of Peter Jaszi with the assistance

commercial sound recording piracy by failing to protect sound recordings under copyright law.[76] The competitive marketplace created by commercial piracy disappeared once Congress passed the Sound Recording Act of 1971.[77]

It is interesting to compare Congress's past reluctance to expand copyright protection to its recent reaction to digital copying technology.[78] Although Congress acted quickly this

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of Nick Lewis, *Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis*, at 6, *available at* http://www.clir.org/pubs/reports/pub146/body.htm.

[76]Owners of sound recordings initially relied on common law copyright for protection. *See* Goldstein v. California, 412 U.S. 546 (1973). In the absence of a national law, in the late 1960s and early 1970s, individual states passed anti-piracy and other laws to protect producers of sound recordings from unauthorized duplication and sale of recordings. *See, e.g.,* CAL. PENAL CODE § 532h (enacted in 1968); NEW YORK STATE PENAL CODE § 275.05 (1978); *see also* Steven L. Sparkman, *Tape Pirates: the New "Buck"-aneer$,* 21 COPYRIGHT L. SYMP. 98, 119 (1974) (describing the passage of the New York and California laws in the late 1960s and early 1970s as a response to the growing, commercial, piracy of sound recordings). Congress added federal copyright protection of sound recordings in 1971. Sound Recordings Act of 1971, Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

[77]Sound Recordings Act of 1971, Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (applying only to sound recordings fixed on and after February 15, 1972); Act of Dec. 31, 1974, Pub. L. No. 93-573, 88 Stat. 1873; 17 U.S.C. 102(a)(7). "[S]ound recordings gained copyright protection through a 1971 Amendment rushed through to stem a rising tide of piracy, as well as to comply with the Geneva Phonograms Convention of 1971." Daniel Gould, Article: *Time's Up: Copyright Termination, Work-For-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 97-98 (2007) (citing Barbara A. Ringer, General Revision of the Copyright Law Study No. 5: The Unauthorized Duplication of Sound Recordings (1958); Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, art. 2, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67).

[78]In an attempt to stop digital copyright infringement, Congress enacted the No Electronic Theft Act (NET Act) of 1997, Pub. L. No. 105-147, 111 Stat. 2678, enacted Dec. 16, 1997 (NET Act), the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (Oct. 28, 1998) (DMCA), and the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, S. 3325 (PRO-IP

time, the problem of digital music file-sharing over peer-to-peer networks persists.[79] The next subsection discusses how the recording industry's delayed reaction to private copying contributed to the current social norm of digital music file-sharing.

2. Congress and the Music Industry Permitted Thirty Years of Private Copying

The invention of the cassette tape in 1963 provided greater access to private copying.[80] In fact, a survey in the early 1980s indicated that forty-five percent of consumers

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Act). The NET Act broadened the term 'financial gain' in relation to copyright infringement to include "(A) for purposes of commercial advantage or private financial gain; (B) 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; or (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution." 17 U.S.C. § 506(a)(1). The DMCA expanded legal protection for digital works by prohibiting the circumvention of technological measures that control access to copyrighted works. DMCA, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (Oct. 28, 1998). It also criminalized the manufacture and distribution of any technology or tool designed to circumvent encryption technology. 17 U.S.C. §§ 1201 (a) (2), 1201 (b) ("no person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology" that can circumvent access controls or copy protection technologies). The PRO-IP Act increased the penalties in intellectual property counterfeiting cases.

[79]Moreover, evidence suggests that increased deterrent strategies, such as the graduated response plan in ACTA, will also be ineffective. Sameer Hinduja, *Deindividuation and Internet Software Piracy*, 11:4 CYBERPSYCHOLOGY & BEHAVIOR 391, 392 (August 2008) ("anonymity or pseudonymity on the internet releases participants from traditional constraints on their behavior by deindividuating them – by reducing self-awareness and self-regulation"). In a Swedish study, "[l]ess than 10 percent [of respondents] were using an online anonymity service but more than 60 percent claimed that they will use one in the future if new legislation enhances the possibilities for the respondent to be held legally liable when caught file sharing copyrighted material without permission." SVENSSON & LARSSON, *supra* note 69, at 56-57.

[80]FRANCIS RUMSY & TIM MCCORMICK, SOUND AND RECORDING: AN INTRODUCTION 167 (Focal Press 3rd ed. 1998). *See also* Hetcher, *The Music Industry's Failed Attempt to*

pirated cassette tape sound recordings "to avoid purchasing them."[81] But, Congress and the music industry did little to prevent this non-commercial pirating.[82] As a Senate Report stated,

> In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.[83]

Although the music industry disliked the ability of consumers to reproduce musical recordings privately, the analog copying technology then available produced inferior copies that posed no real threat of a secondary market.[84] Additionally, private copying was difficult

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Influence File Sharing Norms, supra note 21, at 13 (citing LESSIG, FREE CULTURE, *supra* note 4, at 69); Schultz, *Copynorms, supra* note 24, at n. 95. Cassette tape technology also increased commercial piracy. *See, e.g.*, Pearl Music Co. v. Recording Indus. Ass'n of Am., 460 F. Supp. 1060, 1061 (C.D. Cal. 1978); S. Rep. No. 104-128, at 10 (1995), as reprinted in 1995 U.S.C.C.A.N. 356, 357.

[81]Schultz, *Copynorms, supra* note 24, at n. 95 ("In 1978, a study found that 21% of the population copied recordings at home, and in the early 1980s, 45% of consumers admitted that they taped recordings to avoid purchasing them." (citing Geoffrey Hull, *The Audio Home Recording Act of 1992: A Digital Dead Duck, or Finally Coming Home to Roost?,* 2 MEIEA JOURNAL 76 (2002), *available at* http://www.meiea.org/Journal/html_ver/Vol02_No01/Vol_2_No_1_A4.html (last visited July 21, 2006)").

[82]Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 13 (citing LESSIG, FREE CULTURE, *supra* note 4, at 69).

[83]KASTENMEIER, PROHIBITING PIRACY OF SOUND RECORDINGS, COMMITTEE ON THE JUDICIARY REPORT TO S. 646, H. REP. NO. 92-487, 92nd Cong., 1st Sess., 7 (Sept. 22, 1971).

[84]Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1073 (9th Cir. 1999) ("For example, when an analog cassette copy of . . . a compact disc is

to trace.[85] This early inaction contributed to the belief that private, non-commercial copying was fair use.[86] An early case on private copying, *Sony Corp. of America v. Universal City Studios, Inc.*,[87] bolstered this belief. In *Sony*, the film industry sued Video Cassette Recorder manufacturers to prevent the private copying of television shows,[88] but the Court held time-shifting of television shows to be a fair use.[89] In other words, *Sony* gave rise to a general norm of permissive non-commercial, home-use copying.[90] From this background, a

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itself copied by analog technology, the resulting 'second- generation' copy of the original will most likely suffer from the hiss and lack of clarity characteristic of older recordings."); Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 13 (citing LESSIG, FREE CULTURE, *supra* note 4, at 69); Sheldon W. Halpern, *The Digital Threat to the Normative Role of Copyright Law*, 62 OHIO ST. L.J. 569, 575 (2001) (noting that this concern gave rise to the Record Rental Amendments).

[85]Whereas, digital file-sharers over peer-to-peer networks may often, but not invariably, be tracked due to the electronic trails left on the internet. Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 13(citing LESSIG, FREE CULTURE, *supra* note 4, at 69 (citing a study by Cap Gemini Ernst & Young)).

[86]*Id.* In contrast, the film industry applied a consistent message against home copying. *Id.* at 14.

[87]Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[88]*Id.*; *see also* Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms*, *supra* note 21, at 14 (noting the film industry feared VCRs would be used to copy movies).

[89]Sony Corp. of America, 464 U.S. 417. "*Sony* came down before the DMCA was enacted and, thus, is superceded to the extent that the DMCA broadened copyright owners' rights beyond the *Sony* holding." Realnetworks, Inc. v. DVD Copy Control Ass'n, 641 F. Supp. 2d 913, 941 (N.D. Cal. 2009) (citing Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000) ("Sony involved a construction of the Copyright Act that has been overruled by the later enactment of the DMCA to the extent of any inconsistency between Sony and the new statute.")).

[90]Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 14.

generation of content users grew accustomed to making private, unauthorized copies of copyright protected material.[91]

The recording industry changed its tune when the perfect copying technology of digital audiotape arrived in the late 1980s.[92] This time, fearing a wave of commercial piracy, the music industry begged Congress for protection.[93] Congress promptly responded with the Audio Home Recording Act in 1992,[94] which provided for copyright management technology in digital audio tape recorders and a system of royalties built into the price of the tape.[95] Interestingly, however, the Audio Home Recording Act specifically authorized private, non-commercial copying, except via a personal computer.[96] However, digital audio tape

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[91] *Id.* at 13.

[92] *Id.* at 14.

[93] *See* S. REP. NO. 94-473, 94th Cong., 1st Sess. 2d at 30 (1975).

[94] Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (Oct. 28, 1992), codified at 17 U.S.C. § 1001 et. seq.; *see also* Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 14.

[95] 17 U.S.C. § 1001 et. seq.; Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 14.

[96] 17 U.S.C. § 1008. "These provisions [of the Audio Home Recording Act], essentially directed at wholesale recording of copyrighted musical works, seek to prevent sequential copying-the making of digital copies of digital copies of a digitally recorded work-and impose royalty obligations on sales of recording equipment and tape. On the assumption that these provisions would alleviate the serious problems, that Act expressly immunizes from liability non-commercial digital or analog copying of musical recordings." Halpern, *The Digital Threat to the Normative Role of Copyright Law, supra* note 84, at 575 (citing 17 U.S.C. § 1008). Moreover, the courts found the Audio Home Recording Act did not apply to the new technology of file-sharing over peer-to-peer networks. *In re* Aimster Copyright Litig., 252 F. Supp. 2d 634 (N.D. Ill. 2002), *aff'd*, 334 F.3d 643 (7th Cir. 2003).

technology never caught on with consumers.[97] Instead, the compact disc flourished in the 1990s and the music industry enjoyed significant growth as consumers replaced their vinyl and tape collections with compact discs.[98]

Because of digital file size and internet speed limitations, early copyright infringements over peer-to-peer file-sharing networks typically involved only text and photograph files.[99] As digital file compression technology and internet speeds advanced, the online exchange of music files blossomed.[100] Today, digital music files are regularly downloaded, uploaded, and streamed over the internet.[101] The uploading of a digital music

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[97]Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 14.

[98]*Id*. (citing Neil Strauss, *Music Lovers Are Voting for Vinyl*, N.Y. TIMES, Dec. 8, 1994, at C13).

[99]*Id.* (citing Playboy Enterprises, Inc. V. Russ Hardenburgh, Inc., 982 F. Supp. 503 (N.D. Ohio 1997); Sega Enterprises, Ltd. v. Maphia, 857 F. Supp. 679 (N.D. Cal. 1994); Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993)). A commercial album generally fills an entire compact disc due to its large file format, but compressing the file using a different format such as MP3 can reduce the file size by a factor of twelve without much loss in audio quality, thereby allowing for quicker internet transmission. *See* David A. Hepler, Comment, *Dropping Slugs in the Celestial Jukebox: Congressional Enabling of Digital Music Piracy Short-Changes Copyright Holders,* 37 SAN DIEGO L. REV. 1165, 1173-77 (2000) (citing Naomi Graychase, *What is MP3?*, CNET NEWS.COM (July 22, 1999), *available at* http:/www.cnet.com/software/0-3227895-7294826.html?st.sw.top10mp3.indexssl.sw). "MP3" stands for MPEG 1 Layer and "MPEG" stands for Moving Picture Experts Group. *Id.* at 1174 n. 44 (citing Graychase, *supra* note 99, at 3).

[100]Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 15; Hepler, *supra* note 99, at 117-77.

[101]Because streaming is analogous to radio in that it does not involve the recording of a duplicate music file on the user's computer, only the downloading and uploading of a digital music file are at issue for this paper. *See, e.g.,* Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions,* 55 U. MIAMI

file may implicate a copyright owner's distribution or publication rights.[102] Downloading a digital music file implicates the copyright owner's reproduction right.[103] For example, iTunes licenses the right to reproduce and distribute digital music files and offers these copies to the public for a fee. The process is simple: A customer logs onto iTunes, searches the song or album titles uploaded to the iTunes server, and purchases a music file. The customer then downloads the file to his or her own computer – creating a new, exact digital copy.

As the name indicates, a peer-to-peer computer network involves the connection of individual computers to each other, as opposed to individual computers that connect to a central server, like iTunes.[104] A computer connected to a peer-to-peer network shares files

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L. REV. 237, 250-51 (2001). Additionally, the broadcast of digital files over the internet now includes a compulsory license to both layers of the songs under the Digital Performance Rights in Sound Recordings Act. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (adding the right "to perform the copyrighted work publicly by means of a digital audio transmission"). Unlike traditional radio broadcasters, who only pay a royalty to the copyright owner of the "musical work" layer, webcasters must now pay royalties to record labels and recording artists. However, the ability to record a digital music stream exists and creates another form of perfect copying.

[102]There is a split in the courts as to whether any proof of actual transfer is necessary to violate the law. Compare BMG Music v. Gonzalez, 430 F.3d 888, 889 (7th Cir. 2005) ("'[P]eople who post or download music files are primary infringers.") *with* Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, 991 F.2d 426, 434 ("'[I]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.'") (quoting 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.11[A] (1998)). *See also* Maverick Recording Co. v. Goldshteyn, No. CV-05-4523, 2006 U.S. Dist. LEXIS 52422, at *8 (E.D.N.Y. July 31, 2006) ("Downloading and uploading [of] copyrighted files from a peer-to-peer network constitutes, respectively, reproducing and distributing copyrighted material in violation of 17 U.S.C. § 106.").

[103]Andrey Spektor, Article: *How 'Choruss' Can Turn Into a Cacophony: The Record Industry's Stranglehold on the Future of Music Business*, 16 RICH. J.L. & TECH. 3 (2009).

[104]*See* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919-20 (2005).

in much the same way as iTunes, only the software enables each individual computer to upload, search, and download digital files from individual computers connected to the network.[105] The fundamental nature of a peer-to-peer network is that no server stores files; instead, all files are located on individual computers connected to the network.[106] In a centralized peer-to-peer network, a centralized server acts to facilitate search requests of individual computers, but does not store any actual files.[107] This was the structure of Napster.[108] After the fall of Napster, most peer-to-peer networks decentralized.[109] Search requests under these new protocols do not go through a central server, but through individual computers acting as "supernodes" that index the shared files on the network[110] or simply chain the request along all connected peers.[111] Again, the actual download of the file occurs directly between the computer requesting the file and the computer storing the file.[112] This

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[105] *Id.*

[106] *Id.*

[107] *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[108] *See id.*

[109] Bridy, *supra* note 29, at 589-90; Jon Healey, *Company Town Suit Fires New Salvo in Copyright Battle*, L.A. TIMES, Oct. 4, 2001, at C4.

[110] *See* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 922 (2005).

[111] *Id.* (In some platforms used by the peer-to-peer network called Morpheus, "peer computers using the protocol communicate directly with each other. When a user enters a search request into the Morpheus software, it sends the request to computers connected with it, which in turn pass the request along to other connected peers. The search results are communicated to the requesting computer, and the user can download desired files directly from peers' computers.").

[112] *Id.*

was the structure of the subsequently felled networks of Grokster, Morpheus, and LimeWire.[113]

Digital music file-sharing over a peer-to-peer network essentially began in 1999 with the peer-to-peer network called Napster.[114] In 2003, a single peer-to-peer network handled over "three million simultaneous users sharing over a half a billion files" on a single platform,[115] and by 2006 "there were about seven million simultaneous users in the U.S."[116] Although difficult to measure, research indicated that the number of file-sharers on peer-to-peer networks doubled between 2000 and 2004 in the United States,[117] and the amount of file-sharing over United States' university internet systems increased tenfold between 2003 and 2009.[118] In short, "[t]here is little debate that U.S. sound recordings are 'pirated' in vast

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[113]*Id.*; Arista Records LLC v. Lime Group LLC, No. 06-CV-5936(KMW), 2010 WL 1914816 at *2 (S.D.N.Y. May 11, 2010).

[114]*See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[115]Oberholzer & Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, *supra* note 18, at 1.

[116]Oberholzer & Strumpf, *Copyright and File-Sharing*, *supra* note 13, at 12 (citing Bigchampagne.com).

[117]Oberholzer & Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, *supra* note 18, at 1 (citing Pew Internet Project, *Downloading Free Music: Internet Music Lovers Don't Think It's Stealing,* (2000), *available at* http://www.pewtrusts.com/pubs/; Pew Internet Project, *Music Downloading, File-Sharing and Copyright*, (2003), *available at* http://www.pewtrusts.com/pubs/).

[118]Oberholzer & Strumpf, *Copyright and File-Sharing*, *supra* note 13, at 11-12 (citing *Internet2 NetFlow: Weekly Reports*, Internet2 Netflow Statistics (2009), *available at* http://netflow.Internet2.edu/weekly/).

numbers in the U.S. and in international markets."[119] Thus, the music industry's delayed response to private copying of sound recordings likely fed the growing social acceptance of digital music piracy. The next section will discuss the great lengths the recording industry has recently undergone to decrease digital piracy.

III. The Recording Industry's Failed Attempts to Change the File-Sharing Norm

Although early threats of private copying had little effect on the recording industry due to poor copying technology and limited levels of distribution,[120] digital copying technology and the internet created a vast distribution network for perfect digital copies. The recent impact of unauthorized, large-scale downloading of digital music files through peer-to-peer networks has created a clash between the legal norms of copyright law and the social norms of peer-to-peer networking. As such, the music industry has attempted to "correct" the

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[119]Siwek, *Reducing Government Consumption, Increasing Personal Wealth*, *supra* note 18. "[F]ile sharing accounted for between forty and sixty percent of all bandwidth usage over 2002-2008." Oberholzer & Strumpf, *Copyright and File-Sharing*, *supra* note 13, at 12 (citing Sandvine, *Occasional White Papers and Press Reports on File Sharing Activity in North America and World-wide* (2002-2007), http://www.sandvine.com; Sandvine, 2008 *Analysis of Traffic Demographics in North-American Broadband Networks* (2008a), http://www.sandvine.com; Sandvine, *2008 Global Broadband Phenomena*, http://www.sandvine.com.Sandvine's 2009 study, however, shows the level has dropped to 20%. Sandvine, *supra* note 5, at 2.

[120]Strahilevitz, *Charismatic Code, supra* note 6, at 534 (citing Tim Wu, *Compliance & Code: Is Peer-to-Peer Really a Challenge to Law?*, 89 VA. L. REV. ___ (pre-publication manuscript at 21), *subsequently published as*, *When Code Isn't Law*, 89 VA. L. REV. 679 (2003) ("While making a copy of an album or reading available to a friend may have been unlawful, there was no social norm constraining such de minimus infringement behavior. As a result, the copyright laws were largely irrelevant, at least among certain close-knit groups of individual actors. . . . [W]idespread anecdotal evidence suggest[s] a normative difference between commercial and non-commercial copying.") (citing JESSICA LITMAN, DIGITAL COPYRIGHT 111-12 (Prometheus Books 2001) (arguing "that in general people 'do not observe copyright rules in their daily behavior,' because 'people don't believe the copyright law says what it does say'").

behavior of digital music file-sharers utilizing each method of behavioral control.[121]

The recording industry has heavily lobbied Congress for stronger laws and sued peer-to-peer network providers and their individual users. The introduction of legal online music stores has proved the most successful solution. The recording industry has also attempted to prohibit or discourage digital music file-sharing through architecture with the introduction of digital rights management. Finally, the recording industry engaged in a massive educational campaign aimed at changing social norms through labeling and raising public awareness of copyright law. In the end, digital music file-sharers "remained shaped more by norms permitting such behavior than by norms proffered by the music industry proscribing it"[122] because most of the recording industry's efforts relied on the ineffective theory of deterrence for behavioral conformity.[123] The following subsections review the music

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[121] *See,* Lessig, *The New Chicago School*, *supra* note 25, at 662-66 (discussing the way in which laws, norms, markets, and architecture operate as modalities of constraint). *See also* Bridy, *supra* note 29, at 567. "The current approach to the file sharing problem is the RIAA's three-pronged attack of legal music services, education, and lawsuits. This strategy is a deterrence-based one, designed to persuade people not to share music files illegally." Daniel Reynolds, Note: *The RIAA Litigation War on File Sharing and Alternatives More Compatible With Public Morality,* 9 MINN. J.L. SCI. & TECH. 977, 988 (2008) (citing RIAA, *Piracy: Online and On the Street*, http://riaa.com/physical piracy.php (last visited Sept. 13, 2007)); *see also* Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 731-35 (2005) (discussing the music industry's lawsuits against individual consumers and their effect on deterring infringement and increasing awareness of copyright law).

[122] Steven A. Hetcher, Article: *Using Social Norms to Regulate Fan Fiction and Remix Culture,* 157 U. PA. L. REV. 1869, 1877 (2009).

[123] TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 23; Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 220; *see also* Bridy, *supra* note 29, at 601 ("The underlying premise [behind the entertainment industry's user-directed anti-piracy intervention] is that permissive social norms – and the unruly behavior they motivate – can be strategically realigned, through punishment and education, to coincide with legal

industry's failed attempts to change digital music file-sharer behavior.

A. The Litigation Strategy: The Recording Industry's Lawsuits Against Peer-to-Peer Network Providers and Individual Users Has Not Stopped Digital Music File-Sharing

The first, and probably most familiar, method of controlling behavior is through the law.[124] People obey the law for a variety of reasons, such as fear of punishment, a calculation of costs and benefits, or because of respect for the law itself.[125] In addition to successfully

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norms.").

[124]"Law (in at least one of its aspects) orders people to behave in certain ways; it threatens punishment if they do not obey." Lessig, *The Law of the Horse, supra* note 25, at 507. "Legislatures enact, prosecutors threaten, courts convict." *Id.* at 508 (citing ACLU, *Online Censorship in the States* (visited Nov. 2, 1999) http://www.aclu.org/issues/cyber/censor/stbills.html; Minnesota Attorney General, *Warning to All Internet Users and Providers* (visited Nov. 2, 1999) http://www.ag.state.mn.us/home/consumer/consumernews/OnlineScams/memo.html (posting warning of Minnesota Attorney General with respect to illicit Internet activities); United States v. Thomas, 74 F.3d 701, 716 (6th Cir. 1996); Playboy Enters. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032, 1034 (S.D.N.Y. 1996)). Under the instrumental or deterrent perspective "people are viewed as shaping their behavior to respond to changes in the tangible, immediate incentives and penalties associated with following the law. . . ." TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 23.

[125]*See* Christopher Jensen, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 534-35 (2003) (hereinafter *The More Things Change*) (citing John Austin, *Lecture XXII: Duty, Injury, and Sanction, in* 1 LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 443, 443-45 (Robert Campbell ed., 5th ed. 1885) (emphasizing the role of fear of punishment in enforcing legal duties and obligations); JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 108 & n.b (J.H. Burns & H.L.A. Hart eds., Cambridge Univ. Press 1988) (1826) (noting that "without the notion of punishment[,] ... no notion can we have of either right or duty"); HART, THE CONCEPT OF LAW, *supra* note 32, at 51-54, 79-96 (criticizing Austin's narrow conception of "legal obligation"); RONALD DWORKIN, LAW'S EMPIRE 192-216 (1986) (arguing that legitimacy of the legal order and hence obedience to the law are based on acceptance of common principles that define rights and duties among members of society); JOHN RAWLS, A THEORY OF JUSTICE 112 (1971) (conceptualizing the social order as "a

lobbying Congress for enhanced copyright protections, the recording industry began a series of lawsuits: first, against the intermediary peer-to-peer network companies and, then, against individual file-sharers.

1. The Recording Industry's Lawsuits Against Peer-to-Peer Network Providers Failed to Stop Illicit File-Sharing Because Networks Simply Emerged in Countries with Less Stringent Copyright Laws

The recording industry initiated its legal campaign with lawsuits against the distributors of peer-to-peer network software because it is easier to stop copyright infringement avenues than to stop individual copyright infringers. These suits provided for potential recovery of lost profits and avoided the public relations fiasco of suing one's customers.[126] The music industry succeeded in its first suit against the centralized search peer-to-peer network called Napster, the largest peer-to-peer network in the United States at

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mutually advantageous cooperative venture according to rules"); A. John Simmons, *Tacit Consent and Political Obligation,* 5 PHIL. & PUB. AFF. 274, 274-91 (1976) (grounding obedience to the law in an implicit promise to obey the law); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation,* 81 B.U. L. REV. 361 (2001) (observing that law-abidingness is strongly influenced by perceptions of procedural fairness and by the nature of personal interactions between citizens and law enforcement authorities)). *See also* Robert J. Lukens, *Discoursing on Democracy & the Law - A Deconstructive Analysis,* 70 TEMP. L. REV. 587, 587 n.1 (1997) (listing several theorists' arguments for why people obey the law); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?,* 82 YALE L.J. 950 (1973) (reviewing various arguments)).

[126]Bridy, *supra* note 29, at 583 (citing Jane Ginsburg, *Putting Cars on "The Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1488 (discussing the reasons to sue intermediaries)).

the time.[127] A federal circuit court enjoined Napster from continued operation based on a theory of contributory copyright infringement.[128] The court held that through Napster's central index of all shared files, the company knew its users were sharing copyrighted materials.[129] Additionally, the court found Napster vicariously liable for its users' copyright infringements because Napster failed to take reasonable steps to police its system and profited from the unauthorized file-sharing of copyrighted material.[130]

Once Napster closed, decentralized networks quickly emerged.[131] By removing the central search function from the peer-to-peer network, these decentralized networks thought they could evade liability for copyright infringement.[132] In *MGM Studios Inc. v. Grokster Ltd.,* however, the court held that decentralized peer-to-peer file-sharing networks could be liable for "inducing" copyright infringement stating, "one who distributes a device with the object of promoting its use to infringe copyright . . . is liable for the resulting acts of

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[127]A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001).

[128]*Id*.

[129]*Id.*; *see also In re* Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003) (finding use of AOL's Instant Messenger service as a base for the peer-to-peer network liable for copyright infringement).

[130]Napster, 239 F.3d at 1004; *see also In re* Aimster, 334 F.3d at 643.

[131]Bridy, *supra* note 29, at 589-90 ("For every network operator that has been sued out of existence, another has come along: exit Napster, Aimster, and Grokster; enter Azureus, LimeWire, and Shareaza.").

[132]Healey, *supra* note 109 ("Analyst P.J. McNealy of GartnerG2, a technology research firm, said file-sharing networks are moving offshore and becoming decentralized to avoid liability for copyright violations").

infringement by third parties."[133] After *Grokster*, the majority of peer-to-peer file sharing services in the United States settled with the music industry and then closed or attempted to become legal online music stores.[134]

Despite the recording industry's initial success, the lawsuits proved ineffective because the courts refused to prohibit peer-to-peer networks entirely and new peer-to-peer file-sharing networks emerged outside of the United States.[135] Therefore, the recording

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[133]MGM Studios Inc. v. Grokster Ltd., 545 U.S. 913 (2005).

[134] Steven Seidenberg, *The Record Business Blues*, ABA JOURNAL, June 1, 2010 ("After Grokster, all the P2P companies save one admitted defeat and settled with the recording companies."). LimeWire, the lone holdout of the decentralized peer-to-peer file-sharing networks, was recently found liable for copyright infringement. Arista Records LLC v. Lime Group LLC, No. 06-CV-5936(KMW), 2010 WL 1914816 (S.D.N.Y. May 11, 2010).

[135]Liu, *The Tough Reality*, *supra* note 18, at 660 ("copyright enforcement is rarely effective if online pirates can find shelter simply by migrating to low-protection countries") (comparing Buma & Stembra/Kazaa, Gerechtshof [Court of Appeals], Amsterdam, 28 maart 2002, LJN-nummer AE0805 (Neth.), *available in English at*, http://w2.eff.org/IP/P2P/BUMA_v_Kazaa/20020328_kazaa_appeal_judgment.html with Universal Music Austl. Proprietary Ltd. v. Sharman License Holding Ltd. [2005] F.C.A. 1242 (Austl.), *available at* http://www.austlii.edu.au/au/cases/scth/federal_ct/2005/1242.html); *see also* Bridy, *supra* note 29, at 589 (2009) ("The industry's high-profile legal victories against P2P network operators have not amounted to a durable or comprehensive network-level solution to the problem of P2P piracy."). The movement of networks abroad has also led to the need for international cooperation at the network level of the problem. The United States is currently negotiating an international treaty currently called the Anti-Counterfeiting Trade Agreement (ACTA), which would "establish standards for enforcing intellectual property rights in order to fight more efficiently the growing problem of counterfeiting and piracy." Office of the United States Trade Representative, *ACTA - Summary of Key Elements Under Discussion*, *available at* http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion. Obviously, international enforcement measures between only a handful of countries will simply force peer-to-peer networks to relocate to a non-treaty country with looser copyright laws. For example, a lower court in Spain recently ruled that "'P2P networks are mere conduits for the transmission of data between Internet users, and on this basis they do not infringe rights protected by [Spanish] Intellectual Property laws.'"

industry expanded its legal campaign to individual file-sharers.

2. The Persistent Problem of Digital Music File-Sharing Over Foreign Peer-to-Peer Networks Forced the Recording Industry to Sue Individual File-Sharers and Caused a Media Backlash

The music industry's inability to curb online piracy at the network level led to litigation against individual consumers. In late 2003, the recording industry initiated its legal campaign against individuals by filing 261 lawsuits against digital music file-sharers using peer-to-peer networks in the United States.[136] The recording industry's private investigative tactics, which proved over-broad and resulted in lawsuits against innocent grandmothers and the deceased, amounted to a public relations gaff.[137] The music industry then shifted from

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Alex Wilhelm, *File Sharing And Torrent Websites Now Legal In Spain*, TNW THE NEXT WEB, March 15, 2010, *available at* http://thenextweb.com/eu/2010/03/15/file-sharing-torrenting-now-legal-spain/ ("File sharing just became legal in Spain, changing the rules on what is legal, and what is fair. In a court ruling that will surely shake the Spanish and European legal scene for years to come, a Spanish judge has today declared not only that sites containing links to copyrighted information are legal, but that torrenting copyrighted information for non-profit reasons is also inside of the law."). Of course, this may become more difficult as each country is pressured to enact protection. *See, e.g.,* Pamela Rolfe, *Spain Passes Anti-Piracy Law New Law Targets Producers, Not Users, of Pirated Content,* THE HOLLYWOOD REPORTER, Jan. 8, 2010, *available at* http://www.hollywoodreporter.com/hr/content_display/film/news/e3if944e88734e00aa3358cfd1b6d614e92.

[136] *See* John Borland, *RIAA Sues 261 File Swappers,* CNET NEWS.COM, Sept. 8, 2003, http://news.com.com/2100-1023_3-5072564.html.

[137] *See* Chris Gaither, *Mistaken Identity Raises Questions on Legal Strategy,* BOSTON GLOBE, Sept. 24, 2003, at C1 (reporting on the RIAA's suit against 66-year old Sarah Seabury Ward); Andrew Orlowski, *RIAA Sues the Dead,* THE REGISTER, Feb. 5, 2005, http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/ (reporting on the RIAA's suit against deceased 83-year old Gertrude Walton)); Bridy, *supra* note 29, at 592; Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording*

secret monitoring to simply using subpoenas issued to internet service providers for identification of alleged copyright infringers using peer-to-peer networks.[138]

Between 2003 and 2008, the recording industry filed, settled, or threatened legal action against well over 30,000 individuals.[139] Consumers across the United States voiced

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Industry's File Sharing Litigation, 4 NW. J. TECH. & INTELL. PROP. 133, 155 (2006) (noting the utility of litigating against individual users). The private investigative tactics were also questioned in a number of lawsuits as unlawful and improperly licensed. *Id.* at 593 (citing Arista Records LLC v. Doe, 584 F. Supp. 2d 240, 256-57 (D. Me. 2008) (addressing the defendant's argument that MediaSentry gathered information in violation of a Maine statute requiring licensure of private investigators); Sony BMG Music Entm't v. Doe, No. 5:08-CV-109-H, 2008 U.S. Dist. LEXIS 106088, at 17 (E.D.N.C. Oct. 21, 2008) (addressing defendant's argument that a declaration offered by plaintiff should be stricken because "MediaSentry unlawfully investigated defendant without a license"); London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 175-76 n.30 (D. Mass 2008) (addressing the defendant's argument that "the Linares affidavit, which forms the basis of some of the plaintiffs' prima facie case, should be stricken [because MediaSentry] does not have the license to undertake private investigations required by Massachusetts General Laws ch. 147, §§ 23-25"); Jaikumar Vijayan, *Mediasentry Defends Work for RIAA in Music Piracy Cases*, COMPUTER WORLD, Sept. 9, 2008, http:// www.computerworld.com/action/article.do?command=printArticleBasic&taxonomyName=Security&articleId=9114371&taxonomyId=17 (reporting on complaints against MediaSentry filed with various state agencies); Ass't Gen. Counsel, Cent. Mich. Univ., Statement of Complaint to Michigan Department of Labor and Economic Growth by Central Michigan University (July 11, 2008), *available at* http://beckermanlegal.com/Documents/centralmichigan_mediasentry_080805Complaint.pdf (last visited Sept. 8, 2009) (pointing out that MediaSentry's unlicensed activities have been challenged in John Doe copyright infringement cases pending in federal courts in eight states)). "MediaSentry (the hired forensics firm) essentially functions as an undercover user of the peer-to-peer networks." London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 160 (D. Mass. 2008). "The RIAA ended its relationship with MediaSentry sometime in 2008, replacing it with a Copenhagen-based company called DtecNet." *Id.* (citing Sarah McBride, *Changing Tack, RIAA Ditches MediaSentry,* WALL ST. J., Jan. 5, 2009, at B2).

[138]Bridy, *supra* note 29, at 592.

[139]Seidenberg, *supra* note 134 ("Since 1999, recording companies have sued some 35,000 individuals. . . ."); Electronic Frontier Foundation, *RIAA v. The People: Five Years Later, supra* note 26; Marc Fisher, *Download Uproar: Record Industry Goes After Personal Use*, WASHINGTON POST, Dec. 30, 2007 ("Despite more than 20,000 lawsuits filed against music fans in the years since they started finding free tunes online rather than buying CDs

their disgust with the music industry's decision to sue its customers and the size of the remedies awarded to the industry.[140] In 2008, the Recording Industry Association of America (RIAA) claimed to discontinue its litigation strategy against individual consumers,[141] but it has proceeded to court with investigations started prior to that date.[142] In the end, the

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from record companies, the recording industry has utterly failed to halt the decline of the record album or the rise of digital music sharing.").

[140]*See, e.g.,* FindLaw, *FindLaw Survey Reveals RIAA Lawsuits Unpopular with Americans*, FindLaw.com, June 29, 2004, *available at* http://company.findlaw.com/pr/2004/062904.musicpiracy.html ("A majority of Americans say the music industry should not sue people who illegally download music off the Internet, according to a new poll by the legal Web site FindLaw."); Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1 ("it created a public-relations disaster for the industry"); Capital Records Inc. v. Thomas-Rassett, 680 F. Supp. 2d 1045 (D. Minn. 2010) (The first trial court awarded $222,000 in statutory damages, the second trial court awarded $1,920,000 in statutory damages, and the court later reduced the amount to $54,000 for downloading and sharing twenty-four sound recordings on Kazaa.).

[141]RIAA, *For Students Doing Reports*, *available at* http://www.riaa.com/faq.php ("In light of new opportunities to deter copyright infringement, the record industry was able to discontinue its broad-based end user litigation program. The step was made possible, in large part, by continued work with the Attorney General of New York and leading Internet Service Providers (ISPs) on a series of voluntary online anti-piracy initiatives. On a parallel track, [the RIAA has] been able to reach a separate agreement in principle with several leading ISPs on a graduated response program for repeat offenders when they are caught engaging in illegal activity online. Importantly, the end of the litigation program was also made possible through the dramatic changes in the music marketplace over the past five years. Today, there is legal clarity about what users can and can't do on peer to peer networks, which has contributed to a vibrant and rapidly growing digital marketplace.").

[142]Nate Anderson, *RIAA: "We Have No Choice" But to File More Named Lawsuits*, ARS TECHNICA, May 6, 2009, *available at* http://arstechnica.com/tech-policy/news/2009/05/riaa-we-have-no-choice-but-to-file-more-named-lawsuits.ars ("An RIAA spokesperson told us at the time that the issue was about fairness (though we raised some obvious questions about just how fair it was). 'We're obviously pleased to transition to a new program going forward but that doesn't mean we can give a free pass to those who downloaded music illegally in the past,' we were told. 'How fair would it be to the thousands of individuals who took responsibility for their actions and

recording industry has claimed the suits a success,[143] but the statistics tell a different story.

According to the RIAA, the lawsuit strategy "was designed to educate fans about the law, the consequences of breaking the law, and raise awareness about all the great legal sites in the music marketplace."[144] The RIAA claims the suits more than doubled consumer awareness of copyright law.[145] While this may be true, the number of simultaneous file-sharers using peer-to-peer networks actually increased by nearly two million users in 2004.[146]

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settled their case while others are let off the hook? We're still in the business of deterrence and it must be credible.'").

[143]Several commentators also recommend continuing the suits. *See, e.g.,* Sag, *supra* note 137, at 1; William Henslee, Article: *Money for Nothing and Music for Free: Why the RIAA Should Continue to Sue Illegal File-Sharers,* 9 J. MARSHALL REV. INTELL. PROP. L. 1 (2009).

[144]RIAA, *For Students Doing Reports*, *supra* note 141.

[145]*Id.* ("Awareness of the illegality of downloading without permission surged from 35 – 72 percent following/during the initiation of the program."). [citation needed for US only numbers]

[146]Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1134-35 (2005) (citing *Kazaa Faces Serious User Decline, P2P Picture Cloudy,* DIGITAL MUSIC NEWS, Mar. 31, 2005, http://www.digitalmusicnews.com/yesterday/march2005_#033005kazaa) (It is unclear whether these numbers were for the United States only or global); Bridy, *supra* note 29, at 604 ("As an empirical matter, the mass lawsuits appear to have had only a transitory deterrent effect.") (citing Lee Rainie, et al., *Pew Internet Project and Comscore Media Metrix Data Memo,* THE STATE OF MUSIC DOWNLOADING AND FILE-SHARING ONLINE 1-2 (2004), http://www.pewinternet.org/~/media//Files/Reports/2004/PIP_Filesharing_April_04.pdf (reporting in early 2004 that a third of music downloaders surveyed said they had stopped because of the RIAA's lawsuits, and 60% of those surveyed who had never tried music downloading said the RIAA lawsuits would keep them from doing so); Michael Bachmann, *Lesson Spurned? Reactions of Online Music Pirates to Legal Prosecutions by the RIAA*, 1 INT'L J. CYBER CRIMINOLOGY 213, 220 (2007) (relying on Pew Internet & American Life Project data to conclude that an upward trend in downloading across all demographic groups between 2003 and 2005 suggests that the deterrent effect of the RIAA lawsuits was 'wearing

By 2008, "40 billion music downloads – 95 percent of the total worldwide – were infringing."[147] The recording industry also considers the massive increase in digital revenues to be a result of these lawsuits – music industry digital revenues grew "from nearly $200 million in '04 to $2.3 billion in '07"[148] to $3.8 billion in 2008.[149] Obviously, these increases are just as likely from the increased use of digital media due to improved portable and home digital media devices, the increased availability of authorized downloading and streaming websites, and the increased number of available titles offered on these sites. Lastly, the RIAA notes the number of file-sharers has remained flat since 2004, but, of course, admits that piracy is still a major problem.[150]

The legal campaign also caused many peer-to-peer users to move "from open networks like LimeWire to closed networks known as friend-to-friend (F2F) or

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off' as the campaign wore on)).

[147]Seidenberg, *supra* note 134 (citing report by the International Federation of the Phonographic Industry).

[148]RIAA, *For Students Doing Reports, supra* note 141 (accounting for twenty-five percent of all retail value revenue (upwards of thirty percent at end of 2008)).

[149]IFPI, RIN 2009, *supra* note 1, at 6. "[D]igital sales continued to grow strongly in the US, which now accounts for as much as 47% of global digital revenues."*Id.* at 7.

[150]RIAA, *For Students Doing Reports, supra* note 141; *see also* IFPI, RIN 2009, *supra* note 1, at 14 (noting the number of internet users file-sharing unauthorized files to be approximately 18% in the United States and 16% in Europe over the last several years); Steven Lysonski & Srinivas Durvasula, *Digital Piracy of MP3s: Consumer and Ethical Predispositions*, 25:3 J. CONSUMER MARKETING 167, 175 (2008) (hereinafter *Digital Piracy of MP3s)* ("lawsuits have not succeeded in stopping or even slowing illegal file sharing").

'darknets.'"[151] These closed networks are not open to the public and often include encrypted files making them extremely difficult to monitor.[152] In other words, peer-to-peer networks have found a way to remain in the United States undetected – though possibly in diminished size.[153]

Although the lawsuits against networks and individuals were likely necessary, the legal campaign failed to stop the problem.[154] The central question of this paper is why did the legal strategy fail? According to Professor Tyler (and others), the deterrence perspective, generally speaking, ineffectively compels compliance with the law. Under a deterrence strategy, an individual weighs the risk of detection and punishment for wrongdoing before

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[151]Bridy, *supra* note 29, at 594 (citing Posting of Ken Fisher to Ars Technica, http://arstechnica.com/ (May 9, 2007, 13:29 EST) (defining darknets as "private networks, usually requiring authentication through 'insider' contacts, loaded with digital content" and that are not "susceptible to deep packet inspection, which is the automated surveillance technology on entertainment industry has pinned its hopes"). *But see* Peter Biddle, et al., *The Darknet and the Future of Content Distribution, in* PROCEEDINGS OF THE 2002 ACM WORKSHOP ON DIGITAL RIGHTS MANAGEMENT 1 (2002) (defining "darknet" more loosely as "a collection of networks and technologies used to share digital content")).

[152]Bridy, *supra* note 29, at 596-97 (citing Anne Broache, *MPAA Wants ISP Help in Online Piracy Fight,* CNET NEWS.COM, Sept. 18, 2007, http://international.com.com/8301-10784_ 3-9780401-7.html?tag= mncol;txt (quoting a statement by Motion Picture Association of America (MPAA) CEO Dan Glickman concerning the entertainment industry's desire to "deepen our relationship" with telephone, cable, and Internet companies "because we're all in this together")).

[153]*Id.* (citing Broache, *supra* note 152). "This means that even if rights owners can convince internet service providers (ISP) to partner with them in policing P2P traffic, as they have lately been trying very hard to do, the ISPs will have no effective means of examining encrypted file contents." *Id.*

[154]*See, e.g.,* SVENSSON & LARSSON, *supra* note 69, at 59 ("there are strong indications that neither the law in itself nor new legal attempts at enforcing copyright will change the social norm on illegal file sharing.").

acting.[155] In the realm of digital file-sharing, a deterrence strategy has serious hurdles. First, research in criminal law indicates people do not consider the risk of detection and punishment.[156] Second, the likelihood of being caught – the risk factor – is extremely low.[157] Additionally, the ease of file-sharing creates "greater opportunities to break rules. . . ."[158] Thus, from a deterrence standpoint, the music industry's lawsuits likely have little effect in deterring the behavior of individual file-sharers over peer-to-peer networks because "there are simply too many copyright infringers and not enough resources to enforce the law."[159]

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[155]Tyler & Darley, *Building a Law-Abiding Society, supra* note 34, at 711-13.

[156]Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 220-21. Some studies indicate that degree of punishment makes little difference, but a change in the probability of detection does make a difference. *See, e.g.,* Anthony N. Doob & Cheril M. Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003).

[157]Consider that the recording industry sued roughly 30,000 file-sharers over a five year period and 1.6 million residents of the United States used the infamous Pirate Bay torrent site in 2009 during a single twenty-four hour period. Even if there are only 1.6 million file-sharers in the United States, the risk of being sued is only 1.8 percent. For comparison, Professor Tyler notes that "the objective risk of being caught, convicted, and imprisoned for [homicide is forty-five percent], rape is twelve percent, for robbery, four percent, and for assault, burglary, larceny, and motor vehicle theft, one percent." Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 222-23 (citing PAUL H. ROBINSON & JOHN M. DARLEY, THE UTILITY OF DESERT 6 (Oct. 11, 1995) (unpublished manuscript on file with the New York University Journal of International Law and Politics)).

[158]Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 223.

[159]Jensen, *The More Things Change, supra* note 125, at 561-62 ("In copyright law, I have observed that the deterrent effect of legal sanction is by itself unlikely to have a direct effect on the enforceability of digital copyright."). *But compare* Rainie, *supra* note 146 (noting a 30% deterrence rate in early 2004) *with* Bachmann, *supra* note 146 (noting that by 2005 the deterrent effect was wearing off). *See also* Chiou et al, *The Antecedents of Music Piracy: Attitudes and Intentions*, *supra* note 33 (finding higher intentions to pirate music in individuals who do not perceive any risks of prosecution or punishment and who believe that society views piracy as acceptable behavior).

Regardless, the recording industry claims to have ceased its legal campaign against individuals; therefore, it must now rely on one of the remaining behavioral controls. Some believe the market, discussed below, to be the best option.[160]

B. The Market Strategy: The Recording Industry's Delay in Providing a Legal Online Digital Music Store Increased the Acceptance of Digital Music File-Sharing Over Peer-to-Peer Networks

The second method of regulating behavior is to adjust the market.[161] The recording industry's slow acceptance of online distribution added to the growth of digital music file-sharing.[162] The absence of an online digital music store meant consumers had to purchase the desired recording on a compact disc and then upload the music to their computer to transfer to a portable digital media device or to make private copies for use in their cars. Instead, many consumers chose the easier route of downloading the album from a file-sharing network. File-sharers justified this copying by pointing to the lack of a viable alternative. Additionally, consumers may have simply refused to pay for a full-length album when they

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[160] *See, e.g.,* Zac Locke, *How to Save the Recording Industry? Charge Less*, 16 UCLA ENT. L. REV. 79 (2009).

[161] Lessig, *The Law of the Horse, supra* note 25, at 507 ("Markets, too, regulate. They regulate by price. . . . Of course the market is able to constrain in this manner only because of other constraints of law and social norms: property and contract law govern markets; markets operate within the domain permitted by social norms.").

[162] "It was our hope that [the DMCA] would give creators incentive to make their products available on the Internet. In short, it was believed that a stable, predictable legal environment would encourage the deployment of business models which would make properly licensed content more widely available. Sadly, this has not yet occurred to any great extent in the music industry, and the DMCA is nearly 2 years old." *Music on the Internet: Is There an Upside to Downloading?*, 106th Cong., 2nd Sess., July 11, 2000, S. HRG. 106–1060, at 13 (statement of Senator Orrin Hatch).

only wanted one hit song from the album.[163] Thus, the establishment of a legal alternative proved to be the most effective tool at recouping lost sales from digital file-sharing.[164] For example, Apple introduced its iTunes Music Store in 2003 and sold more than 25 million songs within the first year.[165] By 2009, iTunes had sold more than ten billion songs[166] and

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[163]Revella Cooke, *Music: The Impact of Digital Distribution on the Duration of Recording Contracts*, 6 VAND. J. ENT. L. & PRAC. 40, 49 (2003) (citing Josh Quittner, *Why I Steal Music*, TIME, May 5, 2003, at 66) ("American consumers are not extremely sympathetic to the plight of the music industry. There is high pressure on music companies to make their products more affordable. An email survey conducted by Time asked downloaders why they steal music online. Many survey respondents answered they 'resented buying an [entire] album when all they wanted was one song.'").

[164]2008 marked the first year legally downloaded music (20%) surpassed illegally downloaded music (18%) as a percentage of internet users. IFPI, RIN 2009, *supra* note 1, at 28. In 2009, "[d]igital music sales rose by 9.2% to US$4.3 billion, more than ten times the digital market value in 2004. Digital channels now account for 25.3% of all trade revenues to record companies. In the US, digital sales account for nearly half - 43% - of the recorded music market. More than 30 countries saw double-digit growth rates in digital sales, and 17 markets, including Argentina, Australia, Austria, Denmark, Finland, Singapore, Sweden and UK, saw digital sales grow by more than 40%. There was a return to growth in 13 markets, including Australia, Mexico, South Korea, Sweden and the UK." IFPI, *Digital Music Report 2010, supra* note 5.

[165]John Paczkowski, *iTunes: 10 Billion Songs Sold in Less Than Seven Years*, DIGITAL DAILY, Feb. 24, 2010, *available at* http://digitaldaily.allthingsd.com/20100224/apples-itunes-thanks-10-billion/. Estimates at iTunes profits in 2007 were roughly $570 million on $1.9 billion in revenue. Eliot Van Buskirk, *Apple Apparently Turned $570 Million Profit from ITunes Last Year,* WIRED, March 12, 2008, *available at* http://www.wired.com/listening_post/2008/03/apple-apparentl/; Matt Rosoff, *iTunes Profitable, Billboard Estimates*, CNET NEWS, March 14, 2008, *available at* http://news.cnet.com/8301-13526_3-9894585-27.html. But, many commented that Apple was not profiting from its sale of digital music and only used the store to promote sales of its iPod. Michael A. Einhorn, *Gorillas in Our Midst: Searching for King Kong in the Music Jungle*, 55 J. COPYRIGHT SOC'Y U.S.A. 145, 153 (2008) ("In the largest market niche, Apple sells its iTunes downloads at no profit in order to sell its market leading iPod playing device, which is capable also of playing unprotected MP3s.").

[166]Paczkowski, *supra* note 165.

captured twenty-eight percent of the year's market for music purchases in the United States,[167] worth roughly $282 million in sales.[168]

But, file-sharing over peer-to-peer networks continued despite the success of an online digital music marketplace.[169] The Electronic Frontier Foundation notes three reasons that legal music services failed to stop piracy: "(1) anti-consumer 'digital rights management' restrictions; (2) limited inventory; and (3) high prices."[170] The first two reasons no longer hold any weight.

Digital rights management restrictions (DRM) are coded limitations in the digital file used to limit the available uses of a digital music file, such as tying the file to a particular type of music player or limiting the number of reproductions. Consumers' dissatisfaction with these anti-consumer restrictions allegedly pushed them to peer-to-peer networks for

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[167]The sales equaled seventy percent of music sales. Greg Sandoval, *With iTunes, Apple Has Thrown Weight Around,* CNET, May 27, 2010, *available at* http://www.cnn.com/2010/TECH/biztech/05/27/cnet.itunes.apple/index.html?hpt=T2. "During the same period that Apple saw double-digit growth, Amazon also was grabbing greater market share in digital music. Amazon's share grew from 6.8 percent in the first half of 2008 to 11.8 percent in the first quarter of 2010." *Id*.

[168]Rafi Mohammed, *iTunes New Pricing: Windfall Profits from Capturing Value*, PRICING FOR PROFIT, May 27, 2009, *available at* http://www.pricingforprofit.com/pricing-strategy-blog/itunes-new-pricing-windfall-profits-from-capturing.htm.

[169]"It would be great to report these innovations have been rewarded by market growth, more investment in artists, more jobs. Sadly that is not the case. Digital piracy remains a huge barrier to market growth." IFPI, *IFPI Digital Music Report 2010, supra* note 5.

[170]Electronic Frontier Foundation, *RIAA v. The People: Four Years Later* 14 (Aug. 2007), http://w2.eff.org/IP/P2P/riaa_at_four.pdf; *see also* Reynolds, *supra* note 121, at 991-92; Cooke, *supra* note 163, at 49 (citing Quittner, *supra* note 163, at 66).

unrestricted files – effectively enhancing the file-sharing norm. Eventually, the recording industry succumbed to consumer demand and removed the most burdensome restriction measures.

Similarly, the initial catalog of music offered over peer-to-peer networks overshadowed the number of titles available from legal sites, but today legal sites offer more than eleven million tracks.[171] For example, The Beatles' catalog of music only became available on iTunes in 2010.[172]

The third reason, however, still holds true. The decreased cost of recording, producing, and distributing digital music files created a consumer expectation of a decrease in price that has yet to arrive.[173] Perhaps consumers also decided to stop repeatedly paying for new copies of music they already owned simply because of a new recording format; for example, a person who purchased "Revolver" by The Beatles on vinyl in 1966 may have

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[171]In 2003, legal digital music sites offered a mere one million tracks. This has increased to over eleven million legal tracks in 2009. IFPI, *Digital Music Report 2010*, *supra* note 5, at 6.

[172]*See* Erica Ogg, *The Beatles Come to iTunes at Last*, CNET.COM Nov. 16, 2010, *available at* http://news.cnet.com/8301-31021_3-20022922-260.html#ixzz1A1I4afzE.

[173]*See* Locke, *supra* note 160, at 85-86. "When CD's debuted in the mid-1980's, record labels sold the shiny discs for $18, more than double the price of what they charged for the same music on LP's and cassettes that cost more to manufacture." Amy Harmon, *What Price Music?*, N.Y. TIMES, Oct. 12, 2003, *available at* http://www.nytimes.com/2003/10/12/arts/music/12HARM.html?scp=13&sq=cost%20of%20music&st=Search. Instead of lower album prices, the industry has successfully pushed single track sales. "Ninety-nine cents is only slightly less than the cost of a song on a CD (given the usual price, around $14, and the usual number of tracks, around 12). And adjusting for inflation, it is about 10 times more than 45-r.p.m. singles cost during their heyday in the 1950's." *Id.* In this sense, a more price sensitive business model will need to develop, such as the free streaming music sites.

repurchased the album on eight-track in the 1970s, cassette tape in the 1980s, compact disc in the 1990s, and as a digital file in the 2000s. However, the music industry always expected consumers to make repeat purchases and it has continued to fight declining prices in an effort to protect profit margins and prevent the devaluation of music.[174]

The marketplace adjustments, therefore, decreased the spread of digital music piracy, but, in the end, it is very difficult to compete with free music. And so, "[f]or every song that is bought legally, in shops or online, around 20 songs are illegally downloaded,"[175] despite popular and profitable legal alternatives like iTunes.[176] This has led to the conclusion that

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[174]"To squeeze more money from downloads, the big labels last year persuaded Apple (AAPL) to raise prices from 99 cents to $1.29 for the newest hit tunes." Ronald Grover & Adam Satariano, *The Fall of Music Downloads Music Streaming Services Are Taking Their Toll as Downloads to iPods, Computers, and Other Devices Plunge*, BLOOMBERG BUSINESSWEEK, July 1, 2010, *available at*, http://www.businessweek.com/magazine/content/10_28/b4186037467816.htm; *see also* Locke, *supra* note 160, at 85-86.

[175]*Internet Piracy, Thanks, Me Hearties: Media Firms Find That Statistics On Internet Piracy Can Be Rather Useful,* THE ECONOMIST, July 17, 2008, http://www.economist.com/business/displaystory.cfm?story_id=11751035 (citing BigChampagne but failing to indicate whether the estimate was for the United States or worldwide). BigChampagne is a firm that monitors P2P traffic. In 2007, BigChampagne reported 9.35 million people used P2P networks in the United States at any given time. Electronic Frontier Foundation, *RIAA v. The People: Five Years Later, supra* note 26, at 10 (Sept. 2008), http://www.eff.org/files/eff-riaa-whitepaper.pdf). The IFPI, in turn, estimates that 95% of music downloads are illegal. Eric Pfanner, *Global Music Sales Fell 7% in '08 as CDs Lost Favor,* NY TIMES, Jan. 17, 2009, http://www.nytimes.com/2009/01/17/business/media/17music.html). "Reliable estimates of P2P traffic are hard to come by, however, and there is reason to suspect the accuracy of estimates that emanate from the content industries themselves." Bridy, *supra* note 29, at n. 2 (citing Majid Yar, *The Global 'Epidemic' of Movie 'Piracy': Crime-wave or Social Construction?,* 27 MEDIA, CULTURE & SOC'Y 677, 690 (2005)).

[176]In 2007, iTunes accounted for seventy-five percent of digital music sales in the United States. Evan Serpick, *Amazon Takes Bite Out of Apple*, ROLLING STONE, Dec. 13, 2007, at 18. Apple's iTunes Music Store provides "millions of high-quality, DRM-free

file-sharing has single-handedly "caused the entire decline in record sales and appears to have vitiated what otherwise would have been growth in the industry."[177] However, the

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songs ... all for just 69¢, 99¢, or $1.29." Apple, *What's on iTunes*, *available at* http://www.apple.com/itunes/whats-on/#music.

[177]Stan J. Liebowitz, Research Note: *Testing File-Sharing's Impact on Music Album Sales in Cities,* 54:4 MANAGEMENT SCIENCE 852 (April 2008). *See also* Liebowitz, *File-sharing: Creative Destruction or Just Plain Destruction?, supra* note 18 ("file-sharing has brought significant harm to the recording industry"); Rob & Waldfogel, *supra* note 18 ("...we show that one downloaded album reduces music purchases by roughly one-fifth of an album, and possibly by much more. Using this conservative estimate and information on the average number of albums purchased and downloaded, we infer that downloading reduced purchases by individuals in the sample by about 10 Percent during 2003."); Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, *supra* note 17 ("Piracy of recorded music costs the US sound recording industries billions of dollars in lost revenue and profits."); JupiterResearch (UK), *The Analysis of the European Online Music Market Development and Assessment of Future Opportunities*, (2009), *available at* http://www.ifpi.org/content/library/Jupiter_Research_study_on_online_piracy.pdf ("A clear associated trend between per capita music spend and music P-to-P penetration is present across most of the European markets surveyed. The markets with the highest incidence of music P-to-P are also those with weakest per capita music spending."); TNO / SEO / IViR, *Ups & Downs – Economic and Cultural Effects of File Sharing on Music, Film and Games,* (Netherlands, 2009) *available at* http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorised_translation.pdf ("The study shows that the economic effects of file sharing on Dutch welfare will be largely positive in the short and long term. On the other hand, it is plausible that there will be a fall in receipts from the sales of sound carriers, DVDs and games. Insofar as file sharing does result in a reduction of sales (replacement), this is juxtaposed by a welfare transfer from the producer to the consumer. It is estimated that the increase in consumer welfare is in the order of € 200 million per year. On the other hand, the maximum loss of sales for producers and publishers of music recordings stands at € 100 million."). *But see*, Oberholzer & Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, *supra* note 18 (finding file-sharing downloads have no effect on sales); TATSUO TANAKA, DOES FILE-SHARING REDUCE MUSIC CD SALES (2004) (finding little evidence that file-sharing reduces music CD sales in Japan); THE BI NORWEGIAN SCHOOL OF MANAGEMENT, CONSUMER CULTURE IN TIMES OF CRISIS (finding that file-sharers were more likely to have used paid download sites than non-file-sharers). These papers, however, have been criticized and discredited. Liebowitz & Watt, *supra* note 17 ("The papers that have examined the impact of file-sharing can be categorised by result and by methodology. By results the classification is quite simple. There is one study (Oberholzer & Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, *supra* note 18) that claims to find a zero impact, although an outside

recording industry's provision of a legal alternative is probably the main reason for compliance with copyright laws by former digital music file-sharers,[178] which bodes well for future price reductions. Consistent with the Professor Tyler's jurisprudential approach discussed in further detail in Section IV, the success of marketplace behavioral control may be attributed to the fact that it is not a deterrence-based strategy. The next subsection discusses DRM under the third means of controlling behavior – architecture.

C. The Architectural Strategy: The Recording Industry's Use of Digital Rights Management Succumbed to Consumer Demands for Versatile Files

The third method of controlling behavior is through architecture. Architecture constrains behavior by limiting one's behavioral options.[179] In the realm of digital music, computer hardware and software control the available options.[180] For example, early digital music formats and slow internet speeds made file-sharing of digital music over peer-to-peer

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reading of both versions of their paper could lead one to conclude that they actually find a positive relationship. All the other studies find some degree of negative relationship between file-sharing and sales of sound recordings.").

[178] *See, e.g.,* Rong-An Shang, Yu-Chen Chen, & Pin-Cheng Chen, *Ethical Decisions About Sharing Music Files in the P2P Environment*, 80:3 J. BUS. ETHICS 349, 359 (2008) ("Consumer rights may be the major and general cause for sharing music files in the P2P network.").

[179] *See* Lessig, *The Law of the Horse, supra* note 25, at 507.

[180] *Id.* at 509 ("The code, or the software and hardware that make cyberspace the way it is, constitutes a set of constraints on how one can behave.").

networks burdensome.[181] As technology advanced, digital piracy emerged. The recording industry, therefore, sought alternative architectural limitations – termed, digital rights management (DRM).[182] The recording industry first implemented DRM to prevent the copying of compact discs.[183] Once legal download sites emerged, distributors used DRM to tie downloaded digital music files to particular playing devices.[184] For example, purchasers of digital music over Apple iTunes, at one time, could only use those files on Apple iPods.[185] Finally, the music industry also connected to peer-to-peer networks and offered incomplete,

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[181]Hepler, *Dropping Slugs in the Celestial Jukebox, supra* note 99, at 1173-77 (citing Graychase, *What is MP3?*, *supra* note 94).

[182]*See* Lessig, *The Law of the Horse, supra* note 25, at 509.

[183]Deirdre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERKELEY TECH. L.J. 1157, 1159 (2007) (citing J. Alex Halderman, *Analysis of the MediaMax CD3 Copy-Prevention System 1*, Princeton University (2003), ftp://ftp.cs.princeton.edu/tech-reports/2003/679.pdf; Evan Hansen, *Celine Dion Disc Could Crash European PCs*, ZDNet.co.uk, Apr. 5, 2002, http://news.zdnet.co.uk/internet/0,1000000097,2107848,-00.htm; John Leyden, *Marker Pens, Sticky Tape Crack Music CD Protection*, THE REGISTER, May 14, 2002, http://www.theregister.co.uk/2002/05/14/marker_pens_sticky_-tape_crack/; Tony Smith, *BMG to Replace Anti-Rip Natalie Imbruglia CDs*, THE REGISTER, Nov. 19, 2001, http://www.theregister.co.uk/2001/11/19/bmg_to_replace_antirip_natalie/).

[184]*See, e.g.,* Bridy, *supra* note 29, at 571 (citing JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 106-07 (2008) ("Insofar as DRM locks digital content to specific devices and operating systems, and insofar as it requires sustained communication with remote servers beyond users' control, users risk losing access to legally purchased content if their systems crash, their device preferences shift, or market conditions change.")).

[185]This allowed Apple to gain massive market share in portable digital music players. Einhorn, *supra* note 165 at 153.

corrupted, or poor quality tracks for uploading.[186]

However, the recording industry's use of DRM backfired because most consumers preferred unrestricted music.[187] As a result, the majority of consumers' digital music libraries contained music copied from compact discs or digital music file-sharing over peer-to-peer networks.[188] The music industry lost potential consumers to file-sharing networks with DRM-free music provided by hackers[189] both of whom justified their actions with the belief that DRM prevented "legitimate personal uses of lawfully acquired content."[190] Thus, use of

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[186]*See* Strahilevitz, *Charismatic Code*, *supra* note 6, at 583-85 (citing Dawn C. Chmielewski, *Labels Open New Fire on Piracy: Barrage of Decoy Music Aims at Online Services*, SAN JOSE MERCURY NEWS, June 28, 2002, *available at* 2002 WL 21858536; Nick Wingfield, *Behind the Fake Music: Record Industry Plants Decoys to Foil Fans of Free Web Tunes: A Decoy for Sheryl Crow*, WALL ST. J., July 11, 2002, at D1).

[187]*See* Bridy, *supra* note 29, at 569 ("DRM has not solved the problem of piracy. Instead, content controls have been received by ordinary consumers as a frustrating impediment to lawful use and by hackers as both an affront to digital freedom and an opportunity to prove their mettle."); Einhorn, *supra* note 165, at n. 35 ("Jupiter Research recently found again that listeners would buy more music without DRM") (citing David Card, *Universal Music's DRM-free Experiment Won't Solve Industry Woes* (Aug. 13, 2007), http:// weblogs.jupiterresearch.com/analysts/card).

[188]"A study from Jupiter Research also shows that the average iPod owner has about twenty tracks (i.e., 5% of total) purchased from iTunes; the rest are from previously owned CDs or file-sharing networks." Einhorn, *supra* note 165, at n. 35 (citing *iPod Fans "Shunning iTunes Store"*, BBC NEWS, Sept., 16, 2006, http://news.bbc.co.uk/2/hi/technology/5350258.stm).

[189]Bridy, *supra* note 29, at 570 (citing LAWRENCE LESSIG, LESSIG 2.0, THIS IS THE CONSTITUTION ON DRM, *available at* http://lessig.org/blog/ (Sept. 24, 2004, 13:23 EST).

[190]Bridy, *supra* note 29, at 570 (citing Schultz, *Copynorms, supra* note 24, at 212-13 (discussing the effect of "hacker norms" and practices on people outside the hacker subculture)). "The fundamental normative problem with DRM as a regulatory mechanism is that it prevents users from doing what they should be able to do in order to keep them from doing what they shouldn't." *Id.* at 578.

DRM created an "arms race" with technologically savvy individuals cracking each new format of DRM implemented by the recording industry.[191] This likely reinforced acceptance of a digital music file-sharing social norm, increased the negative attitude of consumers toward corporate rights holders,[192] and decreased respect for the newly enacted Digital Millennium Copyright Act.[193] The consumer backlash caused the recording industry and large online distributors to remove most DRM from their music files.[194] As the Recording Industry Association of America (RIAA) admits, "[d]evices and technology are not the

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[191]Kenneth W. Dam, *Self-Help in the Digital Jungle,* 28 J. LEGAL STUD. 393, 402 (1999) ("The warfare analogy of a race between offense and defense comes readily to mind. For those who sympathize with content providers, one can view the copier as the attacker, with the content provider responding to copying by using 'defensive' self-help systems. Then offensive techniques will arise to overcome the defenses to copying (or to alteration) not authorized by the content provider, and so on ad infinitum."); *see also* Bridy, *supra* note 29, at 567.

[192]"This development is hard to interpret as anything but a concession by corporate rights owners that DRM for protecting music has been a regulatory failure." Bridy, *supra* note 29, at 567.

[193]DMCA, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (Oct. 28, 1998). "[I]t fundamentally delegitimizes DRM in the eyes of many consumers, who take little comfort in judicial conclusions that '[f]air use is still possible under the DMCA, although such copying will not be as easy, as exact, or as digitally manipulable' as they might wish." Bridy, *supra* note 29, at 567 (quoting Universal City Studios v. Reimerdes, 111 F.Supp.2d 294, 304 (S.D.N.Y. 2000)). The court went on to explain that Congress made a policy choice when it enacted the DMCA "to leave technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so." Universal City Studios, 111 F.Supp.2d at 324.

[194]Bridy, *supra* note 29, at 581 (citing RONALD S. ROSEN, MUSIC AND COPYRIGHTS 570-71 (2008) (tracing the music industry's incremental retreat from DRM)). "Online music distributors, including Amazon, Wal-Mart, and most recently and significantly Apple, have shifted to an entirely DRM-free distribution model." *Id.* (citing Brad Stone, *Copy an iTunes Song? Go Ahead Apple Says,* NY TIMES, Jan. 7, 2009 at B1).

problem."[195] Instead, the problem is with the social norm of digital music file-sharing, which will be discussed further below.

D. The Social Norm Strategy: Attempts to Educate the Public about Copyright Law Have Not Prevented the Massive Amount of Copyright Infringement Taking Place Over Peer-to-Peer Computer Networks

The fourth method of controlling behavior is through social norms. Social norms are "pattern[s] of rationally governed behavior, instantiated in a group, maintained by acts of conformity."[196] Although social norms may supersede the law, they are also a common method of securing compliance with the law.[197] The literature on social norms is voluminous, but it can be divided into two concepts: social relations and normative values. Social

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[195]RIAA, *For Students Doing Reports, supra* note 141 ("It's when people use technology to break the law that we take issue. Again and again, we have embraced the technological advances that have allowed millions upon millions of people around the world to enjoy the music we create. We want fans to enjoy their iPods, CD burners, and other devices, but we want them to do so responsibly, respectfully, and within the law.").

[196]HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 17 ("Social norms are patterns of behavior that are widely adhered to by some group of individuals, at least in part because of social pressures to conform to that norm."). Some commentators use the term "copynorms" to describe the social norms regarding the copying, distribution, and use of expressive works under copyright." *See, e.g.,* Solum, *supra* note 4, at 1148; Schultz, *Copynorms, supra* note 24, at 201 (citing Solum, *supra* note 4, at 1148). Solum defines "copynorm" as "the fundamental set of social norms that shape perceptions of the morality of filesharing and the legitimacy of legislation that shrinks the public domain." Solum, *supra* note 4, at 1139 (citing Wikipedia, *Copynorms*, http://en.wikipedia.org/wiki/Copynorms).

[197]Schultz, *Copynorms, supra* note 24, at 202 ("Social norms may supplement, supplant, or suppress the effect of law depending on the circumstances. Social norms influence the creation and enforcement of law and are in turn influenced by the creation and enforcement of law."); Mark A. Edwards, *Acceptable Deviance and Property Rights*, 43 CONN. L. REV. 457, 459 (2010); HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 17.

relations control behavior due to "the influence of other people's judgments."[198] Although social influence, like legal deterrence, relies on sanctions to compel compliance,[199] some argue peer pressure is more effective than sanctions from a state authority.[200] Normative values, on the other hand, control behavior due to "a person's own ethical views" distinct from the views of others.[201]

Because of the social norm accepting digital music file-sharing,[202] the recording industry has attempted to change the norm by educating the public on copyright law, which included the legal strategy of suing individual file-sharers and labeling the act of digital file-sharing as theft and piracy. The trend of stable, if not increasing, amounts of unauthorized

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[198]TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 23.

[199]The majority of legal literature on social norms utilizes the rational choice theories of sanction-driven norms. HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 1. Close-knit groups can develop mutual sanctioning due to future interactions. ELLICKSON, ORDER WITHOUT LAW, *supra* note 25 (discussing the informal resolution of property disputes among neighboring rancher in Shasta County, California). Similarly, one's desire for esteem in society can lead to esteem-based sanctioning. McAdams, *supra* note 6. Economic signaling develops into future sanctioning. POSNER, LAW AND SOCIAL NORMS, *supra* note 72. Other norms theories include cooperation norms, which "are patterns of behavior made up of act-types performed to achieve a coordination benefit." HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 3 (describing Lewis and Hume). Norms are a form of monkey see, monkey do based on one's information cost savings.

[200]*See, e.g.,* TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34.

[201]*Id.* at 23.

[202]A norm that many copyright owners fear will soon spread to digital film, pictures, and books, as well as to new formats of distribution, such as instant messaging, blogs, and websites. *See, e.g.,* Motoko Rich, *Print Books Are Target of Pirates on the Web*, N.Y. TIMES, May 12, 2009 at B1; IFPI, *Digital Music Report 2010, supra* note 5, at 19; Julie Bosman, *Borders to Meet With Publishers*, N.Y. TIMES, Jan. 3, 2011 (stating "[a]s digital books have risen in popularity, brick-and-mortar bookstores have appeared increasingly vulnerable').

digital music file-sharing indicates that a large segment of the population continues to disregard copyright protection of digital content. Today, most entertainment media consumers are well aware of these advertisements, which portray digital copying as common theft and label it "piracy."[203] The advertising campaign also attempted to change the social norm by labeling the act of sharing digital music as a deviant behavior despite a history that condoned private copying.[204] By attributing the terms of "theft" and "piracy" to the once accepted act of private sharing, the music industry hoped society would begin socially sanctioning others for such acts.[205] Several popular musicians also raised their voices against

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[203] *See, e.g.,* RIAA, *Actions Taken by U.S. Music Community to Step Up Public Education Efforts in Just the Past Twelve Months*, RIAA.COM, June 25, 2003, *available at* http://riaa.com/newsitem.php?id=6653C75B-C1D2-2755-3121-08D4E8CB56B9; Ramon Casadesus-Masanell, Andres Hervas, and Jordan Mitchell, *Peer-to-Peer File Sharing and the Market for Digital Information Goods*, HARVARD BUSINESS SCHOOL at 1 (March 7, 2006), *available at* http://www.rhsmith.umd.edu/seminars/pdfs/masanell.pdf. ("As of 2006, the term 'pirate' was used more frequently to describe a person downloading music, movies and software than a buccaneer robbing ships on the high seas."); Madden, *The State of Music Online: Ten Years After Napster, supra* note 12, at 11-12 ("The industry met the outcries from music-sharing fans by arguing the morality of its case: Taking CDs from a record store was wrong, why should taking digital music online be any different?").

[204] Howard B. Kaplan, *Social Psychological Perspectives on Deviance*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 454 (John Delamater, ed. 2006) (citing HOWARD S. BECKER, OUTSIDERS: STUDIES IN SOCIOLOGY OF DEVIANCE (New York, Free Press 1963) ("People who are labeled tend to be those who have less power to resist being labeled. Defining particular acts or attributes as deviant occurs through complex processes involving among others the sponsorship and diffusion of the deviant definitions by 'moral entrepreneurs' who have a special interest in achieving widespread acceptance of the definition.").

[205] *See id.* at 454 ("[D]eviance is not a quality, a person, act, or attribute. Instead, deviance is the result of the evaluations of others, the applications of sanctions to others, and the labeling of the person, act, or attribute as deviant.") (citing BECKER, OUTSIDERS: STUDIES IN SOCIOLOGY OF DEVIANCE, *supra* note 204). The use of the terms also assisted the recording industry in framing their debate to Congress for greater protections. *See generally* Daniel D. Gimm, *Pirating Piracy: Legislative Discourse and the Framing of Digital Copyright*, Paper Presented at the Annual Meeting of the International Communication

digital music file-sharing over peer-to-peer networks, such as the rock bands U2 and Metallica.[206]

These efforts proved unsuccessful for several reasons. First, the campaign relied on a deterrence-based model using litigation and terming the conduct as theft and piracy.[207] According to Professor Tyler, however, people generally do not change their behavior based on threats of punishment.[208]

Second, the mere size of the group of file-sharers using peer-to-peer networks and

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Association (2005), *available at* http://www.allacademic.com/meta/p15047_index.html.

[206] *See* Christopher Jones, *Metallica Rips Napster*, WIRED.COM, April 13, 2000; Rachel E. Kopp & Marcy R. Wagman, *The Digital Revolution is Being Downloaded: Why and How The Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, n.9 (2006); Madden, *The State of Music Online: Ten Years After Napster, supra* note 12, at 11-12.

[207] *But see* Mohsen Manesh, *The Immorality of Theft, the Amorality of Infringement,* 2006 STAN. TECH. L. REV. 5, ¶94-99 (2006) (citing Lantagne, *supra* note 69, at 277) ("Unlike the legal strategy, which attempts to alter behavior coercively through the threat of legal sanctions, this campaign attempts to appeal to morality, encouraging voluntary compliance with copyright law because it is morally right. Yet, despite its appealing simplicity, the infringement-as-theft analogy has thus far failed to persuade millions that file sharing is morally wrong.").

[208] TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34 at 24; Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 224; *see also* Reynolds, *supra* note 121, at 989 ("The failure of the RIAA approach is probably not due to failure to make users aware of copyright law and the potential consequences of violating it."); Siyoung Chung & Hichang Cho, *Digital Piracy and Risk Judgments: The Influence of Legal and Social risks, Optimistic Bias, and False Consensus Effect*, Paper presented at the annual meeting of the International Communication Association (May 20, 2009), *available at* http://www.allacademic.com/meta/p299524_index.html (noting the "lack of relationship between legal risk and piracy behavior implies that messages of anti-piracy campaigns with emphasis on legal punishment such as imprisonment or fine would not be particularly effective" in a survey of Singapore college students).

their relative anonymity made any threat of social sanction irrelevant.[209] The group is not close-knit with the ability to sanction members in future interactions.[210] Moreover, the practical anonymity diminishes any threat of social sanctions, which in turn, encourages free riding.[211] Thus, any sanction-driven social norm will prove ineffective.[212]

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[209] *See* HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 183; Daniel Castro, Richard Bennett and Scott Andes, *Steal These Policies: Strategies for Reducing Digital Piracycontrols*, THE INFORMATION TECHNOLOGY & INNOVATION FOUNDATION (Dec. 2009), *available at* http://www.itif.org/files/2009-digital-piracy.pdf.; Hinduja, *Deindividuation and Internet Software Piracy*, *supra* note 79*; see also* Shang, et al, *supra* note 178, at 351 ("de-individuation caused by the anonymity of computer-mediated communication may reduce the impact of social norms and stimulate anti-normative behavior") (citations omitted).

[210] HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 183. "[M]embers of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another." ELLICKSON, ORDER WITHOUT LAW, *supra* note 25; *see also* Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006) (hereinafter *Jambands*).

[211] HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 183 ("This anonymity encourages free riding because actors will be unable to make credible threats to sanction malfeasants in the futures, as anonymity means there is no shared futures.").

[212] *Id.* at 72 ("On the orthodox rational choice approach, norm maintenance requires sanctions."). "Ellickson, Cooter, McAdams, and Posner all develop accounts that involve sanction-driven norms." *Id.* at 75. "[Norms] are evidenced by patterns of sanctions, patterns of primary behavior, and aspirational statements." ELLICKSON, ORDER WITHOUT LAW, *supra* note 25, at 183. Under McAdams' theory, norms are established because people seek the esteem of others: "The esteem cost is the probability that a violation of the consensus will be detected multiplied by the value of the esteem that would then be lost." HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 72 (citing McAdams, *supra* note 6, at 358). Posner bases his theory on economic signaling, which becomes sanction based. POSNER, LAW AND SOCIAL NORMS, *supra* note 72. Of these, Cooter offers the closest example to a moral base for decision-making: "[A] social norm is ineffective in a community and does not exist unless people internalize it." Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1665 (1996); *see also* Robert D. Cooter, *Law and Unified Social Theory*, 22 J.L. & SOC'Y 50 (1994). Stated differently, "people will feel guilty if they fail to conform to the norm."

Third, prior to the internet, private copying was largely irrelevant and "commercially unimportant . . . resulting in a failure to socialize users to any 'copyright culture.'"[213] This resulted in a history of copyright owners suing commercial rivals rather than consumers, which, in turn, created a social norm accepting private copying and decreasing any deterrent effect of copyright laws on actual consumers.[214]

Fourth, the use of rich, successful musicians to voice artist disapproval of file-sharing likely portrayed a greedy music industry rather than a needy artist. Additionally, not all artists agreed on the negative impact of file-sharing. Many musicians viewed the public's growing disrespect for corporate record labels as a chance to unify on their own and fight for better contracts.[215] In doing so, musicians separated themselves from the corporate stand against file-sharing hoping to leverage their power against the recording industry's contract

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HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 71.

[213]Jensen, *The More Things Change, supra* note 125, at 539-44.

[214]*Id.* at 543-44; Raghu Seshadri, *Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap*, 2007 UCLA J.L. & TECH., ¶ 31 (2007). "[C]opyright was not meant to exclude use by individual end-users, and trying to make it fit that job description is unlikely to work, and, from a historical point of view, denatures the underlying policy." Daniel Gervais, *Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing in* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 517, 524-25 (Michael Geist ed., 2005); *see also* Tanya M. Woods, *Working Toward Spontaneous Copyright Licensing: A Simple Solution for a Complex Problem*, 11 VAND. J. ENT. & TECH. L. 1141, 1149 (2009).

[215]Madden, *The State of Music Online: Ten Years After Napster, supra* note 12, at 11-12 ("However, when artists spoke on the industry's behalf, they didn't always present a unified message that sharing music in any context without permission was wrong. While Metallica became the iconic anti-file-sharing band, there were many other artists who weren't so quick to decry the networks and the openness of the MP3 format.").

practices.[216] This inconsistency within the artist community may have reinforced the social norm of file-sharing because music consumers tend to idolize their favorite musicians.[217] Thus, an artist's sermon that only the corporate record industry benefits from record sales tends to enhance the perception that unauthorized downloading of digital music only damages the corporate recording industry and may actually help emerging artists through greater dissemination of their music.

Fifth, evidence emerged that file-sharing had no effect on the amount or quality of music produced, recorded, and distributed to the public.[218] This suggests that copyright protection may not be a necessary incentive to musical creators. Moreover, it provides fodder for digital pirates who believe corporations take all profits from retail purchases and therefore piracy does not harm artists, but rather benefits artists because the consumer then has more money to spend on attending concerts from which artists receive a greater percentage of profit.[219]

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[216]*See id.*; Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 32; *see also* Lital Helman, Article: *When Your Recording Agency Turns into an Agency Problem: The True Nature of the Peer-to-Peer Debate*, 50 IDEA 49, 51 (2009) ("propos[ing] that the anti-file-sharing course adopted by the music industry is best understood as an agent-principal problem. It is aimed at strengthening the control for the agents, namely the record companies' control over the market, to the detriment of the principals, namely the artists.").

[217]*See, e.g.,* Chia-chen Wang, Chin-ta Chen, Shu-chen Yang, & Cheng-kiang Farn, *Pirate or Buy? The Moderating Effect of Idolatry*, 90 J. BUS. ETHICS 81 (2009) (hereinafter *Pirate or Buy?)*.

[218]Oberholzer & Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, *supra* note 18.

[219]*See, e.g.,* Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685 (2009) (hereinafter *Live Performances*).

Sixth, the recent music industry lawsuits and massive advertisement campaign may actually support the social norm of file-sharing by implying that a large portion of consumers engage in file-sharing, i.e., a normative acceptance or epistemic social norm.[220] In other words, file-sharing is acceptable because everyone is doing it.

Finally, "the ethereal nature of copyright itself"[221] may simply be too demanding for individuals to grasp. Because intellectual property is non-rivalrous, the infringement appears

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[220]Schultz, *Copynorms, supra* note 24, at 212-13; Seshadri, *Bridging the Digital Divide, supra* note 214, at ¶ 31. *See also* Shang, et al, *supra* note 178, at 351 ("The proliferation of free music via the Internet may also create ethical ambiguity. As a result, consumers may have no idea that they are infringing upon others copyrights when they download music files from the Internet .") (citing Chiou et al., *The Antecedents of Music Piracy: Attitudes and Intentions*, *supra* note 33).

[221]Jensen, *The More Things Change, supra* note 125, at 540; *see also* Seshadri, *supra* note 214, at ¶ 31; Manesh, *supra* note 207, at ¶ 94-99 (arguing that "intellectual property is beyond our intuitive understanding of property ownership" and therefore falls outside man's intuitive moral understandings that equate theft as immoral). "Though the infringement-as-theft analogy may be true in the abstract . . . it has no intuitive salience. The notion that downloading a song from the Internet is no different than stealing a CD from the music store is counterintuitive. Songs and song files are intangible, inexhaustible and incapable of physical possession. CDs are tangible, exhaustible and capable of physical possession. Put differently, CDs accord with our intuitive understanding of ownership, songs and song files do not. Thus, downloading a song file does not trigger the same negative intuitive response as stealing a CD. In short, under the infringement-as-theft analogy, the act of infringement remains intuitively amoral." *Id.* (citing Lantagne, *supra* note 69, at 277). Some research supports this position. *See* Lysonski & Durvasula, *Digital Piracy of MP3s, supra* note 150, at 178. However, the scenario presented by Manesh and the questions posed in the study by Lysonski and Durvasula compared stealing a compact disc from a retail store to downloading an album from a private, peer-to-peer network, as opposed to a more similar scenario of downloading an album from iTunes but circumventing the payment stage. Because private copying has been permitted historically, no guilt is likely associated with the act of sharing music. The same may not be true for downloading a file from an online retail store without payment.

to be a victimless crime[222] and the intangible quality of digital music removes any intuitive illegality to the copying of digital files. Therefore, use of the terms "theft" and "piracy" may have been ineffective because most people relate these terms to tangible items capable of a theft analogy.[223] Similarly, the history of social, government, and industry acceptance of private copying meant consumers had never considered the morality behind copyright law compliance.[224] Thus, the challenge of changing social norms may simply be too difficult.[225]

E. Recap of the Music Industry's Failed Attempts to Change the Behavior of Digital Music File-Sharers

In summary, the music industry failed to control behavior of digital music file-sharers using the law, the market, the architecture, and social norms. Litigation against intermediaries simply forced peer-to-peer networks to relocate abroad. The lawsuits against individual file-sharers succeeded at educating the public and likely deterred some file-sharers, but it also created a public relations disaster. Use of DRM caused a media backlash and eventually gave way to consumer demand for flexibility in their digital music uses. Although the introduction of legal digital music websites into the market proved profitable and the educational campaign succeeded in educating the public on copyright law, these

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[222]Jensen, *The More Things Change, supra* note 125, at 540; *see also* Seshadri, *Bridging the Digital Divide, supra* note 214, at ¶ 31; Ingram & Hinduja, *Neutralizing Music Piracy, supra* note 6, at 346; Jeanne M. Logsdon, Judith K. Reid, & J. Richard, *Software Piracy: Is It Related to Level of Moral Judgment?*, 13(11) J. BUS. ETHICS 849 (Nov 1994).

[223]Manesh, *supra* note 207, at ¶ 94-99.

[224]Schultz, *Copynorms, supra* note 24, at 212-13; Seshadri, *Bridging the Digital Divide, supra* note 214, at ¶ 31.

[225]*See, e.g.,* Schultz, *Jambands, supra* note 210, at 667.

strategies failed to change the social norm of digital music file-sharing. If, however, social norms are the most effective method of controlling behavior, then perhaps a final normative appeal toward voluntary compliance, as discussed in the following section, is worth considering.

IV. Reducing Digital Music Piracy Requires Granting Copyright Ownership of Sound Recordings to Musicians

Professor Mark Schultz presents four potential resolutions to the ongoing battle between copyright law and the social norm of unauthorized digital music file-sharing: (1) the recording industry can increase enforcement and lobby for greater penalties to deter the behavior; (2) the recording industry can adapt new strategies, such as, digital rights management or new business models; (3) the recording industry can persuade people to change their behavior through education, fan involvement in enforcement, and improved perceptions of fairness; or (4) the recording industry can surrender by changing the law or abandoning enforcement in accord with social norms.[226] As described in Section III above, increased enforcement and increased penalties likely failed to significantly reduce digital music file-sharing because "deterrence concerns have a clear, but minor, influence on law-related behavior."[227] Furthermore, fan enforcement may work in smaller, niche groups,

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[226]Mark F. Schultz, Symposium: The Changing Face of Copyright Law: Resolving the Disconnect Between 20th Century Laws and 21st Century Attitudes: Article: *Reconciling Social Norms and Copyright Law: Strategies for Persuading People to Pay for Recorded Music*, 17 J. INTELL. PROP. L. 59, 60-61 (2009) (hereinafter *Reconciling Social Norms and Copyright Law*).

[227]Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 221-22 ("[S]ince most of how people react to laws is not linked to risk judgments, deterrence strategies based upon changing such judgments will have, at best, a minor influence upon

such as jam band fan groups,[228] but the overall file-sharing community is too large and anonymous to rely on social sanctions for compliance.[229] The non-deterrence-based efforts (DRM, a legal marketplace, and the educational campaign) may have increased awareness of the laws, but they did little to reduce the digital piracy problem.[230] Of course, as Professor Schultz notes, the recording industry is not likely to abandon enforcement;[231] however, social

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law-related behavior."); *see also* SVENSSON & LARSSON, *supra* note 69, at 55 (reporting that 72% of respondents to a Swedish survey did not "think that new laws that expand the possibilities to identify and convict file sharers will stop you or others from file sharing" and 76% did not think "illegality alone [should] stop people from file sharing of copyrighted content"); Schultz, *Reconciling Social Norms and Copyright Law, supra* note 226, at 70-73; X. Li & N. Nergadze, *Deterrence Factors for Online Copyright Infringement*, INTERNATIONAL COMMUNICATION ASSOCIATION CONFERENCE PAPERS 20 (October 2004) (concluding that "increasing awareness of the law" and "increasing consensus with the rule" are "more viable" than punishment as deterrents to music piracy); Ram D. Gopal et al., *A Behavioral Model of Digital Music Piracy*, *supra* note 33, at 103 (finding that "legal and educational campaigns" have "no significant deterrent effect on music piracy"). *But see* George E. Higgins et al., *Low Self-Control and Social Learning in Understanding Students' Intention to Pirate Movies in the United States,* 25 SOC. SCI. COMPUTER REV. 339, 353 (2007) (recommending "educational messages that emphasize the risks of movie piracy" and "training that emphasizes piracy as a crime"); Robert LaRose, et al., *Sharing or Piracy? An Exploration of Downloading Behavior,* 11 COMPUTER-MEDIATED COMMC'N 1, 15 (2006) (finding that "in multivariate analyses, only the expectation of punishment remained as a factor supporting discontinuance" of illegal downloading);Trevor T. Moores & Jerry Cha-Jan Chang, *Ethical Decision Making in Software Piracy: Initial Development and a Test of a Four-Component Model*, 30(1) MIS QUARTERLY 167 (March 2006) (finding that "[a]lthough respondents recognized software piracy as an infringement of intellectual property rights, this fact did not affect their judgment of the morality of the act.").

[228] *See* Schultz, *Reconciling Social Norms and Copyright Law, supra* note 226.

[229] *See* Castro, et al, *supra* note 209.

[230] Schultz, *Reconciling Social Norms and Copyright Law, supra* note 226, at 68-71. *But see,* Levin, *supra* note 25; Locke, *supra* note 160.

[231] Schultz, *Reconciling Social Norms and Copyright Law, supra* note 226, at 68-71. "The music recording industry . . . has shown little willingness to give up its fight to rein in illegal file-sharing." Seidenberg, *supra* note 134.

norms can still overcome the law.[232] The remaining options, therefore, are to improve file-sharers' perception of fairness in the creation and enforcement of copyright laws for sound recordings and change the law in accord with social norms.[233] Consumers, after all, wish to reward artists despite the lure of free content via file-sharing.[234] Research indicates that the vast majority of consumers agree with strong copyright laws to protect artists and believe that the artists should be paid for their creations or, at least, be in control of deciding whether

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[232]Schultz, *Reconciling Social Norms and Copyright Law, supra* note 226, at 63.

[233]*See id.* at 60-61. "The behavior of software pirates tends to be policed by their conscience, and perceptions related to moral appropriateness seem to meaningfully inhibit pressures from sources of behavioral learning. As such, strategies that enhance moral misgivings and that sensitize society to them may be the only viable solution." Sameer Hinduja & Jason R. Ingram, *Self-Control and Ethical Beliefs on the Social Learning of Intellectual Property Theft*, 9:2 WESTERN CRIMINOLOGY REV. 52, 64 (2008) (citing Susan Athey, *A Comparison of Experts' and High Tech Students' Ethical Beliefs in Computer Related Situations*, 12 J. BUS. ETHICS 359 (1993); Susan Athey & John Plotnicki, *Would the Software Police Find Your Company Guilty?*, J. SYSTEMS MANAGEMENT 32 (1994); Johannes A. Landsheer, Harm't Hart, & Willem Kox, *Delinquent Values and Victim Damage: Exploring the Limits of Neutralization Theory*, 34 BRITISH J. CRIMINOLOGY 44 (1994); Richard S. Glass & Wallace A. Wood, *Situational Determinants of Software Piracy: An Equity Theory Perspective*, 15 J. BUS. ETHICS 1189 (1996); George E. Higgins & David A. Makin, *Does Social Learning Theory Condition the Effects of Low Self-Control on College Students' Software Piracy?*, 2 J. ECON. CRIME MANAGEMENT 1 (2004); Ranjan B. Kini, Hindapur V. Ramakrishna, & Bindiganavale S. Vijayaraman, *Shaping of Moral Intensity Regarding Software Piracy: A Comparison between Thailand and U. S. Students*, 49 J. BUS. ETHICS 91 (2004); Darryl A. Seale, Michael Polakowski, & Sherry Schneider, *It's Not Really Theft! Personal and Workplace Ethics That Enable Software Piracy*, 17 BEHAVIOUR & INFORMATION TECH. 27 (1998); Susan L. Solomon & James A. O'Brien, *The Effect of Demographic Factors on Attitudes toward Software Piracy*, 30:3 J. COMPUTER INFORMATION SYSTEMS 46 (1990); Stephen G. Taylor, & J. P. Shim, *A Comparative Examination of Attitudes Toward Software Piracy Among Business Professors and Executives*, 46 HUMAN RELATIONS 419 (1993); James Y.L. Thong & Chee-Sing Yap, *Testing an Ethical Decision-Making Theory: The Case of Softlifting*, 15 J. MANAGEMENT INFORMATION SYSTEMS 237 (1998)).

[234]IFPI, RIN 2009, *supra* note 1, at 15.

their work should be offered for a price or for free.[235]

This coincides with Professor Tyler's psychological jurisprudential approach of controlling behavior.[236] Obtaining voluntary compliance, he argues, is more effective at controlling behavior because "people focus not on personal gain or loss within a given situation, but on the relationship between various kinds of potential behavior and their assessments of what behavior is appropriate."[237] The next section will explain that obtaining digital music file-sharers' voluntary compliance with copyright law requires an appeal to

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[235]*Id.* ("Researched commissioned by the Canadian Government (Environics' Annual Social Values Monitor) found that 90% of consumers backed strong copyright laws to protect creators. In the UK 91% of non-file-sharers believe that artists deserve compensation for their work and that paying for music is the 'right and moral thing to do.' (Harris Interactive/BPI) Research by Ipsos in France found that 80% of the French population aged 15+ believes that artists and authors must be remunerated when their songs are downloaded on the internet. In Norway, 84% of Norwegians feel that it is reasonable that those who have created the music should decide whether their music should be sold or given away free. (Norstat AS, 2009)").

[236]Professor Tyler focuses on "a person's own set of normative values" and argues that "[t]he effectiveness of intellectual property law is . . . heavily dependent on gaining voluntary cooperation with law." TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34 at 24; *see also* Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 224; Tyler & Darley, *Building a Law-Abiding Society*, *supra* note 34, at 719 ("To sustain its moral authority, the law must be experienced as consistent with people's sense of morality.").

[237]TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 24. *See also* Tyler & Darley, *Building a Law-Abiding Society, supra* note 34; Schultz, *Reconciling Social Norms and Copyright Law, supra* note 226, at 64 ("[E]fficient and affordable law enforcement requires that most people comply with the law voluntarily, either because they prefer to behave legally in general or because they respect the specific law in question.") (citing Robert B. Cialdini et al, *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, 24 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 201 (1991)). "Voluntary support for the law might arise from internal motivations – what people believe is moral – or external motivations – a desire for approval by others." *Id.* at n. 14 (citing Cialdini et al*, supra* note 237). "In either event, the fear of detection and punishment by authorities is not the primary motivation for compliance." *Id.* (citing Cialdini et al, *supra* note 237).

their reasoned morality and legitimizing the enforcers and the enforcement of the law.[238]

A. To Comply with Digital Pirates' Perception of a Moral Copyright Law in Sound Recordings, the Law Must Benefit Artists, Not the Corporate Recording Industry

"[D]iscouraging online piracy will remain a considerable challenge if people do not accept the moral implications of engaging in such behavior."[239] A person's own sense of right and wrong – morality – is "the most important factor shaping law-related behavior."[240] In fact, most people claim to obey the law due to their own moral choices.[241] Morally motivated

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[238]TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 24; Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 224.

[239]Lysonski & Durvasula, *Digital Piracy of MP3s, supra* note 150, at 178 (finding support for "the widely held belief that downloading by students continues undiminished" driven by a strong belief that it is not ethically wrong). *See also* Robert LaRose & Junghyn Kim, *Share, Steal, or Buy? A Social Cognitive Perspective of Music Downloading*, 10:2 CYBERPSYCHOLOGY & BEHAVIOR 267, 273 (2007) ("Moral justification . . . and descriptive norms . . . were direct causal antecedents to deficient self-regulation. The positive coefficient for moral justification indicates that the more moral justification respondents had for downloading, the more deficient was their self-regulation."); Glass & Wood, *supra* note 233, at 1189 ("a person who fails to recognize [that piracy is] a moral issue will fail to employ moral decision making schemata. There is substantial evidence that many individuals do no perceive software piracy to be an ethical problem").

[240]Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 226 ("[T]he public is most likely to engage in illegal behavior when the formal law diverges from public views about what is fair. In other words, the law can have an important symbolic function if it accords with public views about what is fair, but it loses that power as the formal law diverges from public morality.").

[241]*Id.*; Schultz, *Jambands, supra* note 210, at 665-66 (citing Catherine A. Sanderson & John M. Darley, *"I Am Moral But You Are Deterred": Differential Attribution About Why People Obey the Law*, 32 J. APPLIED SOC. PSYCHOL. 375, 375-88 (2002) ("If you ask people why they obey the law, they most often cite moral reasons.").

acts are independent of the costs and benefits associated with a particular choice.[242] Typical examples of former laws that people disobeyed on moral grounds include laws against sodomy, adultery, and alcoholic beverages.[243] Similarly, people may disobey laws based on who benefits from the law, such as anti-war tax resistors. The current number of war tax resistors in the United States is estimated at 10,000 citizens, however, "the numbers -- though always small -- typically grow when the United States is at war."[244]

Currently, digital music file-sharers do not view violations of copyright law as innately immoral.[245] One study found that 23.6% of college students felt very little guilt about

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[242]"To act morally is to choose freely an action in circumstances in which one is morally motivated and one sees the action as required by morality." HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 97. Whereas, the deterrence based (economic and rational choice) theorists "emphasize peoples' self-interested nature." *Id.* at 99.

[243]*See, e.g.*, U.S. Const. Amend. XVIII, § 1 (prohibition); Lawrence v. Texas, 539 U.S. 558 (2003) (holding a state statute criminalizing intimate homosexual conduct violated the Due Process Clause of the United States Constitution); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding the right to make certain decisions regarding sexual conduct extends beyond the marital relationship).

[244]Aleksandra Todorova, *Against War and the Taxes that Pay for It*, SmartMoney (April 13, 2007), *available at* http://articles.moneycentral.msn.com/Taxes/Advice/AgainstWarAndTaxesToPayForIt.aspx?page=1; *see also* Lee A. Sheppard, *The IRS and Civil Disobedience*, 26 TAX NOTES 851, 852 (1985) (according to IRS Associate Commissioner (Operations) Phillip E. Coates in 1985 "military tax protesters, those who object to a percentage of their tax dollars spent on defense, have declined since the Vietnam war"). "The United States has a long history of tax revolts and tax protests, which include the Boston Tea Party, the Whiskey Rebellion, Shays' Rebellion, the Second Whiskey Rebellion, and protests leading up to the Civil War." Danshera Cords, Article: *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 B.Y.U.L. REV. 1515, 1532-33 (2005) (citing Charles Adams, Those Dirty Rotten Taxes: The Tax Revolts that Built America (1998)).

[245]Manesh, *supra* note 207 (suggesting that copyright infringement does not trigger a person's "intuitive moral response. . . because intellectual property is beyond our intuitive understanding of property ownership."). "While the recording industry perceives music

pirating digital media and believed it to be acceptable behavior.[246] Importantly, the same study found that the 50.7% of respondents who felt more guilt or moral obligation toward unauthorized file-sharing of digital media showed a lower intention to pirate.[247] This does not, however, negate the ability of file-sharers to make a moral judgment based on reason however.[248]

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downloading as illegal, '[s]ome do not even seem to see any real moral, ethical, or even legal dilemma with media piracy over the Internet.'" Benoliel, *supra* note 69, at 65 (quoting *Oversight Hearing on 'Peer-To-Peer Privacy on University Campuses': Hearing Before the Subcomm. on the Courts, the Internet, and Intellectual Property*, 110th Cong. (2003) (statement of John Hale, Assistant Professor of Computer Science, University of Tulsa)). "With members of the general public and the recording community are upset with the RIAA's pursuit of copyright violators, it seems that the public views downloading as morally legitimate." Benoliel, *supra* note 69, at 65 (citing Amanda Lenhart & Susannah Fox, *Downloading Free Music: Internet Music Lovers Don't Think it's Stealing* 2 (Sept. 28, 2000), *available at* http://www.pewinternet.org/pdfs/PIP_Online_Music_Report2.pdf (observing that approximately 80% of music downloaders do not consider what they are doing to be a form of stealing)); *see also* Jon Healey & Jeff Leeds, *Tone Deaf to a Moral Dilemma? Millions Download Songs Illegally But Don't Feel Guilty*, L.A. TIMES, Sept. 2, 2003, at A1; Glass & Wood, *supra* note 233, at 1189; Timothy Paul Cronan & Sulaiman Al-Rafee, *Factors that Influence the Intention to Pirate Software and Media*, 78:4 J. BUS. ETHICS 527, 537 (2008). A Swedish study also found "no moral or normative obstruction for the respondents file sharing of copyrighted content." SVENSSON & LARSSON, *supra* note 69, at 59.

[246]Cronan & Al-Rafee, *Factors that Influence the Intention to Pirate Software and Media*, *supra* note 245, at 537. This coincides with the current statistic that 18% of internet users in the United States participate in unauthorized file-sharing. IFPI, RIN 2009, *supra* note 1, at 14.

[247]Cronan & Al-Rafee, *Factors that Influence the Intention to Pirate Software and Media*, *supra* note 245, at 537.

[248]Manesh, *supra* note 207, at ¶ 97 ("The absence of an innate moral intuition does not mean that all humans will agree that infringement is morally permissible. Rather, moral judgments of intuitively amoral behaviors are primarily made through conscious reasoning."). "Thus, there is still the opportunity for the copyright industries to convince people that copyright infringement, and more specifically, file sharing is morally wrong." *Id.* at ¶ 97.

To achieve a moral judgment based on reason requires "mak[ing] the public aware of the true nature of the formal law [or] bring[ing] the formal law into congruence with public moral values."[249] The former has failed. While the recording industry's educational campaign succeeded in making file-sharers aware of the formal laws,[250] it did little to stop the unwanted behavior.[251] Thus, the legislature should amend the formal law to comply with public moral values if it desires to reduce digital music file-sharing. To do so, copyright ownership of sound recordings must be brought within digital music file-sharers' scope of concern with sufficient weight to change their current behavior.[252] This requires making artists the copyright owners or, at least, changing the perception of unfair contracts in the music industry.

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[249]Tyler & Darley, *Building a Law-Abiding Society, supra* note 34, at 726; *see also* Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 226-27 (citing P.H. ROBINSON & J.M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995)). "[T]he public's awareness of the reasons underlying intellectual property rules needs to be developed more effectively, so that a basis for a positive moral climate can be created." *id.* at 228-29. "In a very real sense, we are in the midst of an intellectual, moral, and legal struggle over the future of copyright. . . . the copyfight includes a moral and ideological battle for the hearts and minds of an increasingly global public." Solum, *supra* note 4, at 1139.

[250]*See* McBride & Smith, *supra* note 140*; see also* Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms*, *supra* note 21, at 21-22; Bridy, *supra* note 29, at 602.

[251]*See, e.g.,* Yuval Feldman & Janice Nadler, Article: *The Law and Norms of File Sharing*, 43 SAN DIEGO L. REV. 577, 608 (2006) ("Simply announcing the law was not enough to shift either perceptions of norms or intentions.").

[252]*See* HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 123-127 (citing Ronald Dworkin, *Law, Community and Moral Reasoning*, 77 CALIF. L. REV. 479, 503 (1989)). Outcome-oriented moral norms "are motivated by desires that are neither selfish nor irrational." *Id.* at 121.

One commentator has noted a number of potential reasons why the public fails to consider unauthorized digital music file-sharing as immoral: (1) the unreasonably high cost of music; (2) digital piracy only harms large corporations, not artists; (3) large corporations are soulless, greedy copyright owners; or (4) the copyright laws are illegitimate and only benefit special interests.[253] These intertwined reasons essentially emerge from corporate power over the recording industry.

First, the recording industry has steadily resisted a price reduction until very recently.[254] As viewed by the average consumer, commercial compact disc prices should have fallen along with the decreased cost of recording, producing, and distributing digital music.[255]

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[253]Manesh, *supra* note 207, at ¶ 98 (citing Lantagne, *supra* note 69, at 277, 279; Aric Jacover, Note, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2212 (2002); Healey & Leeds, *supra* note 245 (quoting one college student as saying "They're big. They're rich. They can deal with it."); Jensen, *The More Things Change, supra* note 125, at 540-41, 566-67; Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 239 (2002)). "A theory of copyright protection based on the innate intuition for reciprocity would be based on labor, not ownership. Infringement is wrong not because it takes something from an owner, but because it unfairly exploits the hard work and resources expended to create that property. It may be that file sharing, in its current incarnation, fails to trigger our reciprocity intuition because it is remote and impersonal, far removed from the exchanges of our ancestors. To trigger this intuition, the copyright industries must personalize file sharing--bring the creators and laborers to the exploiters." Manesh, *supra* note 207, at ¶ 104.

[254]"The Universal Music Group, the world's largest music company, announced plans on Thursday to test broadly whether lower prices — $10 or less — on new CDs will attract consumers who have cut back on buying CDs in recent years." Joseph Plambeck, *Universal's Strategy Tests Lower Price on New CDs*, N.Y. TIMES, Mar. 19, 2010 at B4.

[255]*See* Locke, *supra* note 160. "'It seems pretty obvious to us that a dedicated fan will gladly pay for extra content, for deluxe versions,'" Mr. Urie said. "'But the casual fan isn't willing to pay $15 dollars for a regular CD.'" Plambeck, *supra* note 254 (quoting Jim Urie, the head of distribution at Universal). "'Lower prices are something that consumers and

The public's awareness of recording contracts that favor the recording industry at the expense of the artists added to the perceived unfairness of record prices. Many musicians added to this perception when they "seize[d] upon the rhetoric of the . . . argument that digital piracy did not hurt artists because industry exploitation of artists prevented them from making revenues from CDs."[256] Thus, many file sharers will choose to violate copyright law until they perceive digital albums as reasonably priced[257] or as benefitting the artists.

Similarly, consumers generally believe purchasing an album benefits the distributor

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retailers have been asking for years.'" *Id.* (quoting John H. Marmaduke, the chief executive of Hastings Entertainment, which sells music, books and movies in 153 retail outlets and is participating in the expanded test). "[H]alf of the L.A. area's commercial studios have closed or been sold to artists for private use. A key reason is that recording software emulates what old studio consoles and tape recorders used to do -- at a fraction of the price." Nathan Olivarez-Giles, *Recording Studios Are Being Left Out of the Mix*, L.A. TIMES, Oct. 13, 2009, *available at* http://articles.latimes.com/2009/oct/13/business/fi-smallbiz-studios13.

[256]Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms, supra* note 21, at 32 ("As a result, artists in the [Recording Artists Coalition] have altered their positions on digital piracy, from moral indignation against file-sharing services to a position of neutrality, in order to channel discussion of digital piracy into mobilization against the industry's contract practices.").

[257]Schultz, *Jambands, supra* note 210, at 725. "Freestone and Mitchell (2004) found that Generation Y has identifiable attitudes towards e-ethics and internet related misbehaviors. In particular, they found that Gen Y consumers were more permissive of piracy for the expressed reason that they felt as if they were doing no harm to others, and they were victims of inflated music prices kept artificially high by the music industry." Lysonski & Durvasula, *Digital Piracy of MP3s, supra* note 150, at 169 (citing O. Freestone & V.W. Mitchell, *Generation Y Attitudes Towards E-ethics and Internet-related Misbehaviours*, 54:2 J. BUS. ETHICS 121 (2004). *See also* Ingram & Hinduja, *Neutralizing Music Piracy, supra* note 6, at 358 ("finding that students who believed that little harm is caused by downloading unauthorized MP3s were significantly more likely to participate in moderate levels of piracy.").

rather than the artist.[258] This is a predominately correct perception.[259] The vast majority of recorded music is controlled by one of four major labels and their subsidiary distribution companies.[260] "A typical recording agreement between a record company and a performer

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[258]"'If the money went into the artist's pocket, I'd have more of a dilemma. But the companies make enough money.'" John Leland, *Praise God and Pass the Music Files*, N.Y. TIMES, Apr. 25, 2004, § 4, at 4, *available at* http://www.nytimes.com/2004/04/25/weekinreview/25lela.html?pagewanted=1 (quoting digital music downloader Derek Tang, age 30, in regards to the ethics of downloading Christian rock music). "Copyright law does not put money in the pockets of musicians; rather, it serves as a means of generating financial incentives for the industry which manufactures and distributes the physical embodiment of a musician's labor, such as a phonograph, cassette tape, or compact disc. Indeed, few musicians actually earn money from the royalties generated by the sales of their music." Geoffrey Neri, Note: *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms*, 93 GEO. L.J. 733, 742 (2005) (citing Ku, *The Creative Destruction of Copyright, supra* note 64, at 294 ("Arguably, the need to ensure adequate compensation for distributors is at the heart of the neoclassical economic theory of copyright."); *see also* Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists,* 114 HARV. L. REV. 2438, 2442 (2001) (outlining the early history of publishing and noting that efforts to cultivate publication have historically been "focused on the development of incentives to printers rather than to writers")); Jensen, *The More Things Change, supra* note 125, at 541 ("The widespread sense of unfairness – that copyright protections exist for the benefit of Microsoft and Disney – undermines voluntary compliance with copyright law."); Mary Madden, *Artists, Musicians and the Internet*, The Pew Internet & American Life Project, December 5, 2004, at v, *available at* http://www.pewinternet.org/Reports/2004/Artists-Musicians-and-the-Internet.aspx ("Half of all artists say that copyright regulations generally benefit purveyors of art work more than the original creators. Musicians echo those views."). *But see* Cronan & Al-Rafee, *Factors that Influence the Intention to Pirate Software and Media*, *supra* note 245, at 539 ("Subjects also didn't think that authors/developers were losing money due to piracy, and they believed that authors/developers were making too much money to begin with.").

[259]For example, "When the CD was introduced, labels charged consumers twice as much [as vinyl or cassette] but paid artists only the same amount for many years." Harmon, *supra* note 173.

[260]DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 61-64 (7th ed. Free Press 2009) ("After years of consolidation, there are only four major distributors left, and they're all owned by the major labels (or, more specifically, by the labels' parent companies). They are (alphabetically): EMI (which distributes Capitol and

will provide that the record company is entitled to the exclusive recording services of a performer for a specified term and is the sole copyright owner of all results and proceeds of the performer's recording services during that term."[261] Moreover, the typical recording contract advances money to the artists for producing, manufacturing, distributing, and promoting an album, but then recoups all of these costs from future royalties.[262] In exchange, the artist receives a low royalty rate of around nine to twelve percent of domestic sales (and an even lower rate for foreign sales).[263] After subtracting the advanced costs, an artist's royalty rate ends up closer to four percent before factoring in the promotion costs.[264] As a result, musicians rarely receive royalties from their albums[265] and must subsist on income

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Virgin); Sony (Columbia, Epic, J, Jive, and RCA Records): Universal (Universal, Interscope/A&M/Geffen, MCA, Island/Def Jam, Motown); and WEA (Warner Bros., Elektra, Atlantic).").

[261]NIMMER, 6-30 NIMMER ON COPYRIGHT § 30.03 ("It is possible that a 'superstar' may either be able to retain copyright ownership in the masters and license to the record company the right to exploit the masters for a period of time or be entitled to a reversion of copyright ownership in the masters after a certain time and under certain circumstances.").

[262]Schultz, *Live Performance, supra* note 219, at n. 22 (citing DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 114 (2000)). "The typical record deal ensures that the label, and everyone else involved, gets all expenses paid out of royalties and all of its money out first, long before the band." *Id.* at n. 22 (citing PASSMAN (2000), *supra* note 262, at 88-91; Chuck Philips, *A Woman of Independent Means: Ani DiFranco's Got a Great Royalty Rate – It's Her Label,* L.A. TIMES, July 5, 1996, at D1); Neri, *supra* note 258, at 743 (citing M. WILLIAM KRASILOVSKY & SYDNEY SHEMEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 16 (2003)).

[263]Neri, *supra* note 258, at 743.

[264]*Id.* (citing KRASILOVSKY & SHEMEL (2003), *supra* note 262, at 18); *see also* PASSMAN (2009), *supra* note 260, at 61-64.

[265]Neri, *supra* note 258, at 743 ("Not surprisingly, approximately ninety-five percent of all recording artists actually incur a debt to their record company, often to the tune of

from live performances or other employment.[266] This is true for both new, unknown acts and even successful artists with a large fan base.[267] The movie The Godfather portrayed this lack of bargaining power nicely albeit with a somewhat unusual counter-bargaining strategy.[268]

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hundreds of thousand of dollars, and realize absolutely nothing in royalties from the sales of their albums.") (citing BOBBY BORG, THE MUSICIAN'S HANDBOOK: A PRACTICAL GUIDE TO UNDERSTANDING THE MUSIC BUSINESS 87 (2003); David Segal, *Aspiring Rock Stars Find Major-label Deals – and Debts*, WASH. POST, May 13, 1995, at A1). "One survey of the industry indicates that under the current arrangement, the average musician signed to a major label needs to sell one million albums to begin earning money from royalties. At that same one-million-record threshold, the record label has earned approximately $11 million in gross revenue and $4 million net profit." *Id.* (citing Charles C. Mann, *The Heavenly Jukebox*, ATLANTIC MONTHLY, Sept. 2000, at 50).

[266] *Id.* at 742-43 (citing John Perry Barlow, *The Economy of Ideas,* WIRED, Mar. 1994, at 8, *available at* http://www.wired.com/wired/archive/2.03/economy.ideas.html) (Barlow was a former lyricist for the Grateful Dead).

[267] "Even multimillion-selling pop stars may find themselves in debt to their label under the standard contract. The latest Jennifer Lopez album ... sold 3 million copies ... . Yet ... it's unlikely Lopez will receive royalties from the sales any time soon because her label ... spent more than $ 13 million marketing the disc." Kot, *You Say You Want a Revolution, supra* note 40, at 1. For example, "Jack Ely, the singer whose 1963 version of 'Louie Louie'. . . which gets played twice a day by every oldies radio station everywhere in the world[, says he] 'got one check for $5,000. That's all I ever saw from the sale of Louie Louie' . . . . [Whereas, t]he six children of 'Louie Louie' songwriter Richard Berry today share more than $100,000 in royalties every year." Associated Press, *Congress Hears Some Sad Songs from Singers*, L.A. TIMES, May 04, 2009 (quoting Jack Ely).

[268] "Michael: Well, when Johnny was first starting out, he was signed to a personal services contract with this big-band leader. And as his career got better and better, he wanted to get out of it. But the band leader wouldn't let him. Now, Johnny is my father's godson. So my father went to see this bandleader and offered him $10,000 to let Johnny go, but the bandleader said no. So the next day, my father went back, only this time with Luca Brasi. Within an hour, he had a signed release for a certified check of $1000. Kay Adams: How did he do that? Michael: My father made him an offer he couldn't refuse. Kay Adams: What was that? Michael: Luca Brasi held a gun to his head, and my father assured him that either his brains or his signature would be on the contract." THE GODFATHER (Paramount Pictures 1972).

The trouble is most bands still dream of signing with a major label.[269]

Third, the music industry is not consumer friendly.[270] For example, it delayed introduction of a legal online marketplace and employed DRM to prevent what many viewed as legal uses of their music. In fact, the music industry used the recent decline in music sales to gain more power through "360" deals.[271] These 360 deals retain the recoupable artist advance and low artist royalty rate, but also include an option of increased up front pay in exchange for a percentage "of the net income from all touring, merchandise, endorsements and fan-club fees."[272] Of course, many consider this as simply another "thinly veiled money

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[269] PASSMAN (2009), *supra* note 260, at 86 ("[M]ost new artists still want to sign to a record company. Apart from guaranteeing you money ..., the record companies have the resources to get your music heard over the noise of all the other artists out there. They have staffs of people with experience in marketing and promotion, and they will put up the bucks needed to push your career. Also, at least as of this writing, the reality is that no artist has been able to launch a major career by using the Internet on their own. That may change in the future, but today, most mainstream artists and their managers believe they need a record company's marketing machine to really make it."). Of course, the "guarantee" of money is elusive at best. The initial money given to an artist by a major label is an advance recouped from future royalties for production, distribution, and advertising costs incurred by the label. *See* Neri, *supra* note 258, at 743.

[270]Schultz, *Jambands, supra* note 210, at 723 (noting that "the mainstream music industry . . . seems more oriented toward marketing products than ensuring that fans have a good overall experience" whereas "[j]ambands treat fans with the hyper-sensitive care of the service industry" and in return receive compliance with copyright).

[271]Liu, *The Tough Reality of Copyright Piracy, supra* note 18, at 623-24.

[272]Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES, Nov. 11, 2007, § 2, at 1 (noting contracts paying $200,000.00 for 30% of the added income); *see also* Schultz, *Live Performances*, *supra* note 219, at 700 ("Live performances, once an artist's major income producing service, has become the recording industry's new business model because it has a true scarcity of economics being non-copyable and excludable.") (quoting Chris Anderson, *Posting of Chris Anderson to The Long Tail Blog*, http:/www.longtail.com/the_long_tail/2007/01/give_away_the_m.html (Jan. 28, 2007 20:06 EST) ("Music as a digital product enjoys near-zero costs of production and distribution –

grab" by the recording industry.[273]

Finally, these elements all lead to the perception that copyright law only benefits the special interests of the recording industry, which the recording industry's successful lobbying history supports. In combination, these rationales have likely fostered the public's reasonable belief that music piracy is retribution against a corporate infrastructure that never cared for its consumers or its artists.[274]

Regardless, the evolving music industry is unlikely to relinquish power voluntarily.[275] The record label assumes the financial risk of an album's market failure[276] and, therefore, claims it deserves the copyright protection and the financial reward.[277] Given the corporate

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classic abundance economics. When costs are near zero, you might as well make the price zero, too, something thousands of bands have figured out. Meanwhile, the one thing that you can't digitize and distribute with full fidelity is a live show. That's scarcity economics.").

[273]Leeds, *The New Deal, supra* note 272, at 1; *see also* Schultz, *Live Performances*, *supra* note 219, at 700-01.

[274]Downhill Battle, *Civil Disobedience, p2p,* (Aug. 26, 2003), *available at* http://downhillbattle.org/?m=200308.

[275]Schultz, *Reconciling Social Norms and Copyright Law, supra* note 226, at 68-71 ("Surrender is not a likely option."); Seidenberg, *supra* note 134.

[276]Schultz, *Live Performances*, *supra* note 219, at n. 22 (citing PASSMAN (2000), *supra* note 262, at 105) ("if the record does not sell, the record label swallows the losses."). The recording industry claims ninety-seven percent of acts that do not find consumer popularity. Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 40, at 2645 (quoting Kot, *You Say You Want a Revolution, supra* note 40); Neri, *supra* note 258, at 743 (citing BORG, *supra* note 265, at 87); Segal, *supra* note 265.

[277]"As distributors point out, the bulk of the financial risk in a creative work is usually borne by the distributor, and so it is they, and not the authors, who most need the safeguards against freeriding provided by copyright. In practice, in many creative industries in the United States, copyright already ends up in the hands of distributors or the companies that employ creators." Wu, *On Copyright's Authorship Policy*, *supra* note 43, at 338. "[I]t is only

recording industry's powerful lobbying influence, the recording industry will not likely relinquish power. As a result, the corporate recording industry will continue to control the terms of recording contracts and to own the sound recording copyright, causing the continued perception that the system is unfair and immoral. Therefore, if Congress desires to increase copyright compliance in the digital age, it will have to ignore the heavy lobbying from the recording industry and amend the law to bring copyright protection of sound recordings within the scope of concern of the vast majority of digital music file-sharers.

If the act of conformity to the law for moral reasons is determined by one's scope of concern for others and the weight of that concern,[278] then the current onslaught of digital piracy may be due to corporate ownership of copyrights in sound recordings because corporations are either entirely outside the digital pirates' scope of concern or are given very little weight.[279] If the corporate recording industry falls outside digital pirates' scope of

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equitable that the publisher should obtain a return on his investment . . . Publishing is close to gambling. Many of the [] publisher's books never pay back his original outlay . . . Thus copyright is necessary to make good publishers possible.'" *Id.* at 339 (quoting Zechariah Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 508-10 (1945)). "That fact is clearest in the film and commercial software industries, where the work-for-hire doctrine vests most of the relevant copyrights in distributing firms. In journalism, publishing and music industries, moreover, mandatory assignments of copyright accomplishes much the same effect. There are of course exceptions to this, like the rights held by The American Society of Composers, Artists, and Performers ("ASCAP"), a performing rights organization that licenses and distributes royalties for the public performances of the copyrighted works of its members." *Id.* at 338 n. 12 (citing ASCAP, *About*, http:// www.ascap.com/about/ (last visited Mar 30, 2008)).

[278]HETCHER, NORMS IN A WIRED WORLD, *supra* note 72, at 121.

[279]*See, e.g.,* Kenneth K. Kwong, et al, *The Effects of Attitudinal and Demographic Factors on Intention to Buy Pirated CDs: The Case of Chinese Consumers*, 47(3) J. BUS. ETHICS 223 (2003).

concern, then copyright ownership must be returned to the artists. This also corresponds to the modern understanding that copyright law protects the romantic author,[280] and, consistent with this understanding, "it is the author who deserves legal rights, not the distributor."[281]

This is not the current reality of copyright law as it relates to the recording industry in the United States.[282] If the corporate recording industry already falls within digital pirates' scope of concern, but is granted little weight, then the perception of fairness must be increased within the industry. Thus, this paper proposes amendments for early termination of copyright transfers in sound recordings and limits on the duration of sound recording

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[280]"The older and stronger rationale for authorial copyright is a natural law, or *moral*, argument. It can be described as the adaptation in law of the modern conception of the author. . . ." Wu, *On Copyright's Authorship Policy*, *supra* note 43, at 340 (emphasis added) (citing Peter Jaszi, *On The Author Effect: Contemporary Copyright and Collective Creativity,* 10 CARDOZO ARTS & ENTER. L.J. 293, 298-99 (1992) (describing how the concept of authorship has played a role in shaping legal doctrine).

[281]Wu, *On Copyright's Authorship Policy*, *supra* note 43, at 340.

[282]*See id.* ("While it insists on the symbolic act of giving authors rights in the first place, it does not do that much to keep them there.") For example, Robert McGuinn, a member of the famous folk-rock group The Byrds, stated, "I became a royalty artist when I signed a contract with Columbia Records with a group called the Byrds, and we recorded 15 albums, or so, during that period. Aside from modest advances for each of these albums, I never saw any royalties, and so I am just saying that the protection for artists, the issue of that—the artists don't always get the royalties they are supposed to get from the record companies. When you sign a contract that says you are going to get 15 percent, there are ways the record companies have of not paying these royalties. And in my experience, even though we have had number one hits with ''Mr. Tambourine Man'' and ''Turn, Turn, Turn,'' I saw nothing but the advance, which is divided five ways. It was only a few thousand dollars apiece, and with the advent of MP3.com, I am getting 50 percent of the CD's that come out now. I think it is a wonderful thing." *Music on the Internet: Is There an Upside to Downloading?*, 106th Cong., 2nd Sess., July 11, 2000, S. HRG. 106–1060, at 13 (statement of Roger McGuinn, Former Member and Cofounder of The Byrds musical group). To which, Senator Orrin Hatch replied, "That is a complaint I have heard from a number of people." *Id.* at 14

contracts to bring recording artists within file-sharers' moral scope of concern and to correct the perception of imbalance of power between artists and the recording industry.

B. To Be Perceived as Legitimate by Digital Music Pirates, Copyright Law for Sound Recordings Must Be Fairly Enforced by Musicians and Not the Recording Industry

Generally, Americans respect the law,[283] which creates a feeling that people "'ought to obey' all laws, not just those that are consistent with their own moral principles."[284] Professor Tyler terms this deference to the law and legal authorities as legitimacy.[285] Whether the public perceives a law as legitimate largely depends on "judgments of procedural justice and trustworthiness."[286] Procedural justice refers to "the fairness of the manner in which

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[283]Although, Prof. Tyler notes this has declined in recent years. Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 229-31; *see also* Tom R. Tyler, Symposium: Is the Rule of Law Waning in America? Twelfth Annual Clifford Symposium on Tort Law and Social Policy: Article: *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 661-62 (2007) (hereinafter *Does the American Public Accept the Rule of Law?*).

[284]Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 229 (quoting TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 40-68) ("Hence, legitimacy is a more widespread, 'blanket' endorsement of law's value than morality. If authorities are legitimate, people are generally willing to accept the rules they create, whatever those rules might be.").

[285]"Legitimacy involves one's feeling that one ought to obey the law." Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 224. "Legitimacy is a property of an authority or institution that leads people to feel that that authority or institution is entitled to be deferred to and obeyed." Jason Sunshine & Tom R. Tyler, Article of General Interest: *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 514 (2003).

[286]Tyler, *Does the American Public Accept the Rule of Law?*, *supra* note 283, at 667. Procedural justice is measured by (1) one's opportunity to state their case; (2) the perceived neutrality of the authority; and (3) whether the authority treated them with dignity and respected their rights. *Id.* at 664.

authorities exercise their authority."[287] An authority's trustworthiness is "the perception that the authorities are benevolent and caring and are sincerely trying to do what is best for the public."[288] The common example of a law that lost legitimacy is Prohibition, the ban on the manufacture, sale, and transportation of alcoholic beverages in the 1920s.[289] Disrespect for the law and its aggressive enforcement, led to "widespread lawbreaking" that eventually resulted in repeal of the law.[290]

Presently, the copyright laws for sound recordings lack legitimacy because "the public has no meaningful opportunity to participate in the legislative process"[291] and the laws

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[287]*Id.* at 670; *see also* Tyler, *Compliance with Intellectual Property Law, supra* note 34, at 231-32.

[288]Tyler, *Does the American Public Accept the Rule of Law?*, *supra* note 283, at 664. "In the area of intellectual property law, this means that people need to believe that the rules established serve reasonable social purposes and are not simply efforts to create profits for special interest groups, such as large corporations." Tyler, *Compliance with Intellectual Property Law, supra* note 34, at 233; *see also* Eric Goldman, Article: *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement,* 82 OR. L. REV. 369, 431 (2003) (citing Tyler, *Compliance with Intellectual Property Law, supra* note 34, at 233).

[289]U.S. Const. Amend. XVIII, § 1; *see also* John O. Hayward, *Grokster Unplugged: It's Time to Legalize P2P File Sharing*, 12-13 INTELL. PROP. L. BULL. 1, 12 (2007) (citing DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 25).

[290]Hayward, *supra* note 289, at 12 (citing KYVIG, *supra* note 289, at 25).

[291]LITMAN, DIGITAL COPYRIGHT, *supra* note 120, at 23; *see also* Jessica Litman, *Copyright Legislation and Technological Change,* 68 OR. L. REV. 275, 277 (1989); Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 231 ("The key to a strategy for rebuilding legitimacy lies . . . in people's judgments about the procedures through which legal authorities make rules."); William F. Patry, *Copyright and the Legislative Process: A Personal Perspective,* 14 CARDOZO ARTS & ENT. L.J. 139, 140-42 (1996) (hereinafter *Copyright and the Legislative Process*); Matthew Fagin, Frank Pasquale, & Kim Weatherall, Article: *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI.. & TECH. L. 451, 530 (2002); Jensen, *The More Things Change, supra* note 125, at 540 ("The process of drafting copyright legislation often amounts to little

appear unfairly enforced by a distrusted recording industry.[292]

First, the copyright law's purported beneficiaries, authors and the public,[293] have been largely dismissed due to the recording industry's successful lobbying campaign, which has advanced the sound recording copyright law to their aims.[294] Each time technology created a problem in copyright protection, Congress looked to the affected market and relied on that industry's representatives to make the laws.[295] As a result, Congress generally overlooks the

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more than negotiations among narrow interest groups; without a seat at the bargaining table, the public has no meaningful opportunity to participate in the legislative process. This process fosters the (often accurate) perception that copyright law is designed by and for the benefit of a small circle of vested interests."); Seshadri, *Bridging the Digital Divide, supra* note 214, at ¶ 31.

[292]See *supra* Section III. *See also* Tyler, *Does the American Public Accept the Rule of Law?*, *supra* note 283, at 664; Kwong, et al, *The Effects of Attitudinal and Demographic Factors on Intention to Buy Pirated CDs, supra* note 279 (finding the purchase of pirated CDS to be positively associated to an anti-big business attitude and public dissemination, but also finding it to be negatively associated with the social cost of piracy and ethical beliefs).

[293]LITMAN, DIGITAL COPYRIGHT, *supra* note 120, at 23; *see also* Litman, *Copyright Legislation and Technological Change, supra* note 291, at 277 (noting that "copyright legislation in this century has evolved from meetings among industry representatives"); Patry, *Copyright and the Legislative Process, supra* note 291, at 140-42; Fagin, et al., *supra* note 291, at 530; Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 233 ("In the area of intellectual property law, this means that people need to believe that the rules established serve reasonable social purposes and are not simply efforts to create profits for special interest groups, such as large corporations.").

[294]*See, e.g.,* H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1578; Sound Recordings Act of 1971, Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971); CAL. LABOR CODE § 2855(b). *See also* Jones, *Get Ready Cause Here They Come, supra* note 60, at 129-30; Litman, *Copyright Legislation and Technological Change, supra* note 291, at 277; *Goldman*, *supra* note 288.

[295]"By the 1920s, the process was sufficiently entrenched that whenever a member of Congress came up with a legislative proposal without going through the cumbersome prelegislative process of multiparty negotiation, the affected industries united to block the bill. Copyright bills passed only after private stakeholders agreed with one another on their

public's desires in copyright legislation and gives little weight to artists' voices.[296]

The procedural history of the No Electronic Theft Act (NET Act) provides an example.[297] "Congress's consideration of the NET Act does not evidence any understanding about who the Act was trying to regulate, what motivated these individuals, how the Act would shape those motivations, what mechanisms already tried to motivate those individuals, and the efficacy of the alternative mechanisms."[298] Moreover, the law failed to meet its

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substantive provisions. The pattern has continued to this day." LITMAN, DIGITAL COPYRIGHT, *supra* note 120, at 23; *see also* Litman, *Copyright Legislation and Technological Change, supra* note 291, at 277 (noting that "copyright legislation in this century has evolved from meetings among industry representatives"); Patry, *Copyright and the Legislative Process, supra* note 291, at 140-42; Fagin, et al, *supra* note 291, at 530.

[296] *See* John O. Howard, *Grokster Unplugged: It's Time to Legalize P2P File Sharing*, 12 INTELL. PROP. L. BULL. 1, 13-14 (2007); LITMAN, DIGITAL COPYRIGHT, *supra* note 120, at 23; Litman, *Copyright Legislation and Technological Change, supra* note 291, at 277; Patry, *Copyright and the Legislative Process, supra* note 291, at 140-42; Fagin, et al., *supra* note 291, at 530. *See also* Gimm, *supra* note 205 ("Piracy, as both a metaphor and a narrative frame, was a significant and persistent feature of the legislative discourse. Its appearance signaled the use of the piracy metaphor in conjunction with a frame that structured the issues as a matter of pirates. Together, they were favored as a means to present a narrow vision of the problem of copyright infringement. The results suggest that those who used the piracy metaphor or the narrative frame did so deliberately and consistently in order to frame the definitions, explanations, moral judgments, and remedies of this otherwise complex issue.").

[297] NET Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678, enacted Dec. 16, 1997; *see also* Goldman, *supra* note 288, at 431 ("In the area of intellectual property ... people need to believe that the rules established serve reasonable social purposes and are not simply efforts to create profits for special interest groups, such as large corporations.") (citing Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 233).

[298] *See Goldman*, *supra* note 288, at 431 (citing Douglas N. Husak, *Limitations on Criminalization and the General Part of Criminal Law, in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 36 (Stephen Shute & A.P. Simester eds., 2002).

objective (to reduce piracy)[299] and "seemed unjust and thus unsupportable"[300] because it was broadly written. Lack of a public voice during law-making, however, probably does not motivate file-sharers, but that does not prevent the perception of unfair and lopsided laws created for a special interest of the big four publishing companies due to obscene corporate lobbying power that dwarfs any artist voices.

In addition to perceiving fairness in the making of laws, consumers must also believe enforcement of the law is fair and just.[301] The recording industry's actions against digital piracy have not been viewed as fair by consumers. First, consumers believed the recording industry's first incorporation of DRM with digital music unfairly restricted their ability to use legally purchased music.[302] Then, the recording industry's litigation campaign included publicly ridiculed lawsuits against grandmothers and the deceased.[303] Finally, many of the recording industry's lawsuits against individual file-sharers resulted in absurd damage

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[299] *Id*. (citing William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001)) (suggesting that Congress does not care about the normative implications of new criminal laws it passes).

[300] *Id.* (citing I. Trotter Hardy, *Criminal Copyright Infringement*, 11 WM. & MARY BILL RTS. J. 305 (2002)); *see also* Tyler, *Compliance with Intellectual Property Law, supra* note 34; HUSAK, *supra* note 298, at 43; Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 767-74 (2003).

[301] Tyler, *Compliance with Intellectual Property Law, supra* note 34, at 232-33.

[302] *See* Bridy, *supra* note 29, at 570, 578.

[303] *See* Gaither, *supra* note 137; Orlowski, *supra* note 137; Bridy, *supra* note 29, at 592; Sag, *supra* note 137, at 155.

awards.[304] Thus, consumers have perceived the recording industry's enforcement of copyright in sound recordings as unfair.

Finally, the enforcer must also be trusted.[305] Unlike the government-enforced criminal laws researched by Professor Tyler, copyright law is generally enforced by the private copyright owner, and, in the case of sound recordings, this is usually a large corporation. The private enforcement of copyright law causes problems with legitimacy because consumers distrust the recording industry due to the publicized mistreatment of artists and over-priced products. The recording industry enhanced this perception with its legal campaign against individual consumers, which resulted in outrageous damage awards. Combined, these acts created a reasonable perception of unfairness in the enforcement of sound recording copyright laws from an already distrusted corporate enforcer.

Additionally, some research suggests that people prefer government enforcement over private enforcement.[306] The government, however, has rarely enforced the laws against

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[304] *See, e.g.,* Capital Records Inc. v. Thomas-Rassett, 680 F. Supp. 2d 1045 (D. Minn. 2010) (The first trial court awarded $222,000 in statutory damages, the second trial court awarded $1,920,000 in statutory damages, and the court later reduced the amount to $54,000 for downloading and sharing twenty-four sound recordings on Kazaa.); FindLaw, *supra* note 140; McBride & Smith, *supra* note 140.

[305] Tyler, *Does the American Public Accept the Rule of Law?*, *supra* note 283, at 664; Tyler, *Compliance with Intellectual Property Law, supra* note 34, at 232-33; *see also* Goldman, *supra* note 288, at 431 (citing Tyler, *Compliance with Intellectual Property Law, supra* note 34, at 233).

[306] *See, e.g.,* Tyler, *Does the American Public Accept the Rule of Law?*, *supra* note 283. The International Federation of the Phonographic Industry "blame[s] what it called a 'culture of state-tolerated apathy toward illegal file-sharing.'" Pfanner, *Music Industry Counts the Cost of Piracy, supra* note 1.

copyright infringers.[307] Several new laws, however, provide the government with greater ability to prosecute digital piracy and related conduct.[308] While the switch from private enforcement to government enforcement alleviates the negative publicity against the music industry for such cases, the government continues to face the same difficulties of excessive enforcement costs and jurisdiction. If the government does begin large scale enforcement,[309]

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[307]The Department of Justice obtained its first peer-to-peer trial conviction on June 26, 2008 against Daniel Dove, an administrator of the Elite Torrents piracy group. Dove was sentenced to eighteen months in prison and was fined $20,000 for conspiracy and felony copyright infringement. The file-sharing network "attracted more than 133,000 members and facilitated the illegal distribution of more than 17,800 titles – including movies, software, music and games – that were downloaded over two million times. Dove's conviction was the eighth resulting from Operation D-Elite, a federal crackdown against the illegal distribution of copyrighted works over BitTorrent P2P networks." United States Department of Justice, PRO IP Act First Annual Report 2008-2009, at 13, submitted to Congress on Oct. 13, 2009, *available at* http://www.cybercrime.gov/proipreport2009.pdf. "[I]n FY2007, 287 defendants were convicted and sentenced on IP charges, representing a 35% increase over FY2006 (213) and a 92% increase over FY2005 (149). Additionally, the Department filed 217 IP cases in FY2007, representing a 33% increase over cases reported in FY2005. In 2008, the Department maintained generally the same level of prosecutions." *Id.* at 20. These numbers are already low and include all IP related charges, not just file-sharing. *Id.* at 20 n. 4 (grouping charges under the following statutes together "in order to eliminate any double-counting" 17 U.S.C. § 506 (criminal copyright infringement); 17 U.S.C. §§1201-1205 (circumvention of copyright protection systems); 18 U.S.C. § 1831 (economic espionage) & 1832 (theft of trade secret); 18 U.S.C. § 2318 (counterfeit labeling): 18 U.S.C. § 2319 (criminal copyright infringement); 18 U.S.C. § 2319A (live musical performance infringement); 18 U.S.C. § 2319B (unauthorized recording of motion pictures); 18 U.S.C. § 2320 (trafficking in counterfeit goods); and 47 U.S.C. §§ 553, 605 (signal piracy)).

[308]*See, e.g.,* DMCA, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (Oct. 28, 1998); *see also* David Kravets, *ACTA Draft: No Internet for Copyright Scofflaws*, WIRED, Mar. 24, 2010, *available at* http://www.wired.com/threatlevel/2010/03/terminate-copyright-scofflaws/ ("The United States is nudging the international community to develop protocols to suspend the internet connections of customers caught downloading copyrighted works, according to a leaked draft of the Anti-Counterfeiting Trade Agreement.").

[309]The Department of Justice has recently announced "the appointment of 15 new Assistant U.S. Attorney (AUSA) positions and 20 FBI Special Agents to be dedicated to combating domestic and international IP crimes." Department of Justice, Office of Public

a question remains as to whether file-sharers will trust a government heavily lobbied by the recording industry more than the recording industry.

In conclusion, to create the perception of a fair copyright law, Congress should amend the law to make artists the enforcing authority, which would also create the perception that artists had a voice in the law's legislation. Such a change could lead to the perception that sound recording copyrights are legitimate and thereby increase compliance of digital music pirates with the copyright laws. The proposed amendments are the best hope to accomplish this.

C. Proposed Amendments to Align Copyright Law to the Morals of Digital Music File-Sharers and Increase the Perception of Fairness

Presuming a certain portion of digital music file-sharers would adjust their behavior if they perceived their conduct as negatively affecting musicians instead of punishing the corporate music industry,[310] a number of possible solutions exist: (1) return the sound recording copyright to musicians by either shortening the time in which an artist can

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Affairs, *Department of Justice Announces New Assistant United States Attorneys and FBI Agents to Combat Intellectual Property Crimes,* April 26, 2010, *available at* http://www.justice.gov/opa/pr/2010/April/10-dag-480.html; *see also* Steve Olsen, et al, *United States: DOJ Creates Thirty-Five New Positions to Combat Intellectual Property Crime,* Mondaq, April 29, 2010, *available at* http://www.mondaq.com/unitedstates/article.asp?articleid=99390

[310]For example, a recent study found that "[s]ubjects who felt more guilt or moral obligation toward digital piracy have a lower intention to pirate. A review of the subject responses indicates that on average 50.7% of the subjects felt more guilt or moral obligation that pirating was not right, while 23.6% felt pirating was alright and acceptable behavior. When comparing men and women, both groups felt that pirating was not right (54% and 46.5%, respectively)." Cronan & Al-Rafee, *Factors that Influence the Intention to Pirate Software and Media*, *supra* note 245, at 537. Therefore, increasing the moral justifications to comply with copyright law should increase the moral decisions to comply with law.

terminate a copyright transfer or license or by providing recording artists the ability to retain the copyright in the sound recordings at all times by making their copyrights inalienable and (2) federally codify an amended version of California's time limit on service contracts within the copyright law for sound recordings. These copyright law revisions may succeed where other attempts have failed because the changes will comport with some file-sharers' notions of morality and fairness,[311] and legitimize the authority enforcing the laws; thus, providing a path towards altering music pirates' behavior into voluntary compliance with the copyright law.[312] Additionally, the proposals maintain a copyright framework, as opposed to some commentator suggestions to do away with copyright law altogether.[313] Of course, if file-

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[311]Strahilevitz, *Charismatic Code, supra* note 6, at 538 (citing Cooter, *Decentralized Law for a Complex Economy, supra* note 212, at 1694; Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem,* 67 U. CHI. L. REV. 607, 607-09 (2000); Saul Levmore, *Norms as Supplements,* 86 VA. L. REV. 1989, 1998-99, 2006-08 (2000); Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation, supra* note 125, at 402) ("[B]ecause of the power of social norms, those laws that parallel social norms will be adhered to most widely and enforced most easily."); *see also* Cronan & Al-Rafee, *Factors that Influence the Intention to Pirate Software and Media*, *supra* note 245, at 537 ("conclud[ing] that subjects with high moral obligation will tend to have a lower intention towards pirating digital material.").

[312]Strahilevitz, *Charismatic Code, supra* note 6, at 538 (citing LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, *supra* note 25, at 92-93; Sunstein, *supra* note 69, at 910) ("under certain conditions, government laws and policies can alter social norms"). According to one study, "[e]thical idealists believe that there is a social cost to downloading, that downloading is not ethical, and that there are negative consequences to downloading. Therefore, if ethical idealism can be increased, there is likely to be heightened consciousness about downloading." Lysonski & Durvasula, *Digital Piracy of MP3s, supra* note 150, at 175 (defining "ethical idealism" as "the degree to which a person's moral philosophy is rooted in an understanding of the inherent propriety of an action, regardless of its consequences").

[313]*See, e.g.,* MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY (Cambridge Univ. Press 2008); *see also generally* http://www.questioncopyright.org.

sharers do not care about musicians, then these changes will do little to quell the ongoing digital music file-sharing problem but both logic and data suggest that they have the potential to significantly reduce the problem.

1. Appeal to Digital Music File-Sharers' Morals by Returning Copyrights to Recording Artists

One possible method of gaining digital music file-sharers' voluntary compliance with copyright law is to return copyright ownership to recording artists.[314] Congress could accomplish this by prohibiting copyright transfers of sound recordings altogether,[315] but such a change is politically impossible. A more feasible option, though still politically difficult, would be to shorten the time period in which a recording artist can terminate a copyright transfer or license. For example, the statute could state:

> In the case of a sound recording other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions. . . Termination of the grant may be effected at any time during a period of five years beginning at the end of *five* years from the date of execution of the grant.

Under federal copyright law, artists already have a right to terminate any transfers or

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[314]*See, e.g.,* Melville B. Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 950 (1977) ("The most compelling justification for a reversionary right: an author's property, unlike other forms of property, is by its very nature incapable of accurate monetary evaluation prior to its exploitation.").

[315]For example, an inalienability statute could read as follows: Subject to 17 U.S.C. section 107 and independent of the exclusive rights provided in 17 U.S.C. section 106, the author of a sound recording may not transfer copyright ownership.

licenses of their works and thus reclaim any copyrights granted to third parties.[316] Moreover, an artist cannot waive this termination right by contract.[317] But, an artist of works created after 1978 cannot terminate a copyright transfer or license until thirty-five years after entering the contract.[318]A thirty-five year wait to terminate a copyright grant is far too long to give recording artists the leverage to re-negotiate fair contracts or to impact the public's perception of who owns the music they want and whether ownership includes terms favorable to the artists.

There are two unresolved legal complications for termination rights in sound recordings.[319] First, the statute makes an exception for works made for hire.[320] The standard

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[316]17 U.S.C. § 203(a) ("In the case of any work other than a work for hire ... the exclusive or nonexclusive grant of a transfer or license of copyright or of any other right under a copyright, executed by the author on or after January 1, 1978 ... is subject to termination. . . ."); 17 U.S.C. § 304(c) ("In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978 . . . is subject to termination. . . ."); *see also* Gould, *supra* note 77, at 92 ("The purpose of the termination provisions is to protect artists from exploitation"); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 124 (1976) ("A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it is exploited."); Mills Music, Inc. v. Snyder, 469 U.S. 153, 172-73 (1985) ("[T]he principal purpose of the amendments in § 304 was to provide added benefits to authors.").

[317]17 U.S.C. § 203. However, failure to exercise the right within five-years of that date results in waiver of the termination right. *Id. But see* Penguin Group (USA) Inc. v. Steinbeck, 537 F.3d 193, 204 (2d Cir. 2008) (holding a post-1978 re-grant of a pre-1978 copyright not to be an "agreement to the contrary," even though it effectively extinguished the right to terminate a pre-1978 grant of copyright).

[318]17 U.S.C. § 203.

[319]For an in-depth discussion, see Mark H. Jaffe, *Defusing the Time Bomb Once Again - Determining Authorship in a Sound Recording,* 53 J. COPYRIGHT SOC'Y USA 139, 139 (2006) (hereinafter *Defusing the Time Bomb Once Again*). *See also* Ulloa v. Universal

recording contract includes a clause that sound recordings are works made for hire, which makes the record company the author and thus makes the termination right unavailable.[321] Section 101 of the Copyright Act defines a work made for hire as either (1) a "work prepared by an employee within the scope of employment" or (2) "a work specially ordered or commissioned" under a written contract designating the work as made for hire if the work falls within one of nine enumerated categories of a motion picture, audiovisual work, translation, supplementary work, compilation, instructional text, test, answer material for a test, or an atlas.[322] The recording industry claims that recording artists are employees as the

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Music & Video Distib. Corp., 303 F. Supp. 2d 409, 414-16 (S.D.N.Y. 2003); Kathryn Starshak, *It's the End of the World as Musicians Know It, Or Is It? Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings*, 51 DEPAUL L. REV. 71, 95-105 (2001); Jones, *Get Ready Cause Here They Come, supra* note 60, at 134-35; John P. Strohm, Comment: *Writings in the Margin (of Error): The Authorship Status of Sound Recordings under United States Copyright Law*, 34 CUMB. L. REV. 127, 145-46 (2003-2004); Stephen Adams, Note: *Copyright Issues for Sound Recordings of Volunteer Performers*, 8 VAND. J. ENT. & TECH. L. 119, 143-44 (2005).

[320]17 U.S.C. §§ 203(a); 304(c).

[321]*See, e.g.,* Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM.-VLA J. L. & ARTS 211, 217 (1993) (hereinafter *Termination of Copyrights in Sound Recordings*) (citing Donald Farber, *Negotiating Contracts In The Entertainment Industry*, Form 160-1, ¶ 9.01); Prepared Testimony of Professor Marci A. Hamilton Before the House Committee on the Judiciary Subcommittee on Courts and Intellectual Property on the Subject of Sound Recordings As Work For Hire, May 25, 2000; Prepared Statement of Hillary Rosen, President and CEO Recording Industry Association of America, Before the House Judiciary Committee Subcommittee on Court and Intellectual Property, May 25, 2000; Jones, *Get Ready Cause Here They Come, supra* note 60, at 131.

[322]17 U.S.C. § 101.

contract states[323] and, if not, sound recordings qualify as works made for hire because sound recordings are "contributions to a collective work" and "compilations" – two of the nine specifically enumerated categories of works eligible for works made for hire status.[324] Recording artists, on the other hand, argue that sound recordings are not works made for hire because the second prong of the work made for hire definition does not specifically list sound recordings.[325] In fact, the recording industry successfully lobbied Congress in the late 1990s to include sound recordings in the statutory definition, but opposition to the amendment led to its immediate repeal.[326] Certainly, artists should not be able to terminate a copyright transfer of a work made as an employee or for a true work made for hire, such as advertisement jingles. But, the work made for hire definition should not include a traditional music album or song. Legislators should resolve the confusion by simply codifying that

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[323] *See, e.g.,* Frisch & Fortnow, *Termination of Copyrights in Sound Recordings, supra* note 321, at 217 (citing Farber, *supra* note 310, at ¶ 9.01). *But see* Eriq Gardner, *Snoop Dogg Fights East-West Labor Battle,* July 24, 2006, ALLBUSINESS.COM, *available at* http://www.allbusiness.com/services/legal-services/4464783-1.html (In a suit for declaratory judgment, the recording company EMI alleged California Labor Code section 2855 applied because the rap singer, Snoop Dogg, was "'not an employee of EMI under the terms of the agreement within the meaning of the California Labor Code but [was] an independent contractor.'").

[324] Jay L. Cooper & Kenneth L. Burry, *The Work for Hire Conundrum, in* TALENT IN THE NEW MILLENNIUM (International Association of Entertainment Lawyers/MIDEM January 2001), *available at* http://www.gtlaw.com/NewsEvents/Publications/PublishedArticles?find=83289.

[325] *Id.*

[326] Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113 app. I-S. 1948, sec. 1011(d), 113 Stat. 1501A-521, 1501A-544 (amending 17 U.S.C. § 101) (repealed 2000).

sound recordings do not fall within the second definition of a work made for hire.[327] Such language is consistent with the determination of most commentators and courts that recording artists are independent contractors.[328]

If the standard commercial sound recording is not a work made for hire, confusion still exists as to who authored the recording.[329] This determination is difficult because there are many contributors to a typical sound recording besides the featured recording artist, including background musicians, sound engineers, and producers.[330] According to the Copyright Office, "[t]he author of a sound recording is the performer(s) whose performance

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[327]Although a number of courts have already held that sound recordings "do not fit within any of the nine enumerated categories," clarifying the statute through legislation resolves the current ambiguity in the law. Ballas v. Tedesco, 41 F. Supp. 2d 531, 541 (D.N.J. 1999); *see also* Staggers v. Real Authentic Sound, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (stating "a sound recording does not fit within any of the nine categories"); Lulirama Ltd. V. Axcess Broad. Servs., Inc., 128 F.3d 878, 878-79 (5th Cir. 1997).

[328]*See, e.g.,* Ulloa v. Universal Music & Video Distib. Corp., 303 F. Supp. 2d 409, 414-16 (S.D.N.Y. 2003); Starshak, *supra* note 319, at 95-105; Jaffe, *Defusing The Time Bomb Once Again, supra* note 319, at 139; Jones, *Get Ready Cause Here They Come, supra* note 60, at 134-35.

[329]The United States Supreme Court defines "author" as "he to whom anything owes its origin; originator; maker." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884) (quoting Worcester Dictionary).

[330]*See generally* Jones, *Get Ready Cause Here They Come, supra* note 60, at 130-31; Jaffe, *Defusing The Time Bomb Once Again, supra* note 319, at 139; David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb,* 49 J. COPYRIGHT SOC'Y USA 387, 387 (2001); Gould, *supra* note 77; Randy S. Frisch & Matthew J. Fortnow, *The Time Bomb in the Record Company Vaults, in* 1993-94 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 111, 115-16; Corey Field, *Their Master's Voice? Recording Artists, Bright Lines, and Bowie Bonds: The Debate Over Sound Recordings as Works Made for Hire,* 48 J. COPYR. SOC'Y 145 (2000); Abbott M. Jones, *Yours, Mine, and Ours: The Joint Authorship Conundrum for Sound Recordings*, 10 VAND. J. ENT. & TECH. L. 525 (2008); Gabriel Jacob Fleet, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235 (2008).

is fixed, or the record producer who processes the sounds and fixes them in the final recording, or both."[331] Congress also expressed multiple authorship in sound recordings stating that "performers, arrangers, and recording experts are needed to produce [a] finished creative work in the form of a distinctive sound recording."[332] To align copyright law with the morals of digital music file-sharers, musicians should be deemed to be the authors of sound recordings. Even with this simplification, however, complications may still arise. Termination of a sound recording copyright authored by a band of musicians would still require consent of a majority of the band members, as under the current law.[333] Moreover, authorship and termination problems could arise when a musician's or band's recording includes background musicians that are not part of the group. However, many musicians claim such a situation is not complicated, however, because artists generally hire the contributors to a sound recording as employees. Therefore, the artist is the work made for hire owner under the first prong of the work made for hire definition.[334] The statute should instead grant the termination right to the featured artist or band, which coincides with

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[331]Copyright Office, Circular 56A, Copyright Registration of Musical Compositions and Sound Recordings, at 1 (rev. May 2009).

[332]H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. at 1569.

[333]17 U.S.C. § 203(a)(1) ("In the case of a grant executed by one author, termination of the grant may be effected by that author. . . . In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it.").

[334]Cooper & Burry, *The Work for Hire Conundrum, supra* note 324. Additionally, union contracts require those individuals, at least the musicians and background singers, to forgo any claim of copyright interest in the recording as a condition of participating in the project. *Id*.

consumer perceptions that the featured artist is the author.[335]

2. Codifying a Federal Time-Limit for Personal Service Contracts in the Music Industry Could Grant Recording Artists the Necessary Leverage to Negotiate Contracts Perceived as Fair by File-Sharers

Limiting personal service contracts in the music industry to a number of years or albums may also reduce digital piracy. This change in the law could be used separately or in conjunction with an early copyright transfer termination right. A sample statute could read as follows:

> A contract to render personal service in the production of phonorecords in which sounds are first fixed, as defined in Section 101 of Title 17 of the United States Code, may not be enforced against an employee or independent contractor beyond five years from the commencement of service under it or beyond the production of five full-length albums, whichever arrives first. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed the earlier of five years or completion of five full-length albums from the commencement of service under it. If the employee voluntarily continues to serve under it beyond that time or in excess of five full-length albums, the contract may be referred to as affording a presumptive measure of the compensation.

In California, where the majority of artists enter into recording contracts,[336] most

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[335]Congress essentially made the same determination when it decided to grant 45% of royalty rates for the digital performance of sound recordings to the featured artists and only 2.5% to background musicians and 2.5% to background vocalists (the remaining 50% goes to the copyright owner). 17 U.S.C. § 114(g)(2).

[336]M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 14 (8th ed. 2000) ("Most recording contacts are

entertainment service contracts are already limited to seven years[337] based on a statute enacted to prohibit involuntary servitude.[338] For example, film studios used to lock actors into long term contracts. But in 1944, the famous Hollywood actress, Olivia de Haviland, successfully terminated her contract with Warner Brothers Pictures, Inc., when it attempted to extend her contract beyond California's seven-year limit.[339] This ruling enabled actors "to negotiate new contracts based on their fair market value"[340] and secured an era of free agency

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signed in or otherwise made subject to the laws of New York State or California.").

[337]CAL. LABOR CODE §2855(a) ("a contract to render personal service . . . may not be enforced against the employee beyond seven years from the commencement of service under it").

[338]"As enacted in 1872, section 1980 of the [California] Civil Code [now section 2855 of the California Labor Code] read as follows: 'A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, cannot be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.'" De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983, 985, 67 Cal. App. 2d 225, 229 (Cal. App. 1944). *See also* Tracy C. Gardner, Note: *Expanding the Rights of Recording Artists: An Argument to Repeal Section 2855(b) of the California Labor Code*, 72 BROOKLYN L. REV. 721, 731 (2007) (citing Bill Holland, *Performers Give Testimony Before Judges and Lawmakers – Record Labels, Artists at Loggerheads Over Contracts*, BILLBOARD, Sept. 22, 2001, *available at* 2001 WLNR 8736669).

[339]De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983 (Cal. 1944) (holding that extension of the personal service contract between Warner Brothers and the Hollywood actress Olivia de Haviland beyond seven years violated California Labor Code section 2855); CAL. LABOR CODE §2855(a); *see also* T. Gardner, *Expanding the Rights of Recording Artists, supra* note 338, at 731 (citing Holland, *Performers Give Testimony Before Judges and Lawmakers, supra* note 338).

[340]Holland, *Performers Give Testimony Before Judges and Lawmakers, supra* note 338 at 94; *see also* Bart Day, *Some Background on the "Seven-Year Law,"* TWO LOUIES MAGAZINE (Jan. 2003) at 5, *available at* http://www.twolouiesmagazine.com/pdfs/2003/2L_1_2003.pdf; Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 40, at 2635; Connie Chang,

for Hollywood actors.[341]

The recording industry, however, has evaded this statute under several arguments. First, the recording industry claims that California's "Seven Year Statute" does not apply to recording contracts because the recording contracts require production of a quantity of albums, rather than service for a number of years.[342] For example, the standard recording contract requires an artist to deliver approximately seven full-length albums, which most recording artists simply cannot complete within the seven year time period, and modern recording contracts require approximately eighteen months between albums.[343] As a result,

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Can't Record Labels and Recording Artists All Just Get Along? The Debate Over California Labor Code 2855 and Its Impact on the Music Industry, 12 DEPAUL-LCA J. ART & ENT. L. & POL'Y 13, 18 (2002) (hereinafter *Can't Record Labels and Recording Artists All Just Get Along?*).

[341]Day, *Some Background on the "Seven-Year Law"*, *supra* note 340, at 5; *see also* Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 40, at 2635; Chang, *Can't Record Labels and Recording Artists All Just Get Along, supra* note 340, at 18.

[342]Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 40, at 2633 (citing KRASILOVSKY & SHEMEL, THIS BUSINESS OF MUSIC (2000), *supra* note 336, at 14 (stating "The standard contract runs for a term based on the delivery of a minimum number of recordings ... plus a period of time thereafter ... . Even when the contract period is stated in years, a contract year is invariably connected with the delivery of a product . . . .").

[343]Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 40, at 2634; Teri van Horn, *Courtney Love, Don Henley, LeAnn Rimes Testify On Artists' Rights: Singers Tell California Senators that Music Business Should Be Governed by Seven-Year Statute*, MTV NEWS, Sept. 6, 2001, *available at* http://www.mtv.com/news/articles/1448678/20010906/henley_don.jhtml (quoting singer LeAnn Rimes as saying, "'At 12, I was thrilled to sign my record contract with Curb Records, and at that age I didn't understand everything that was in my contract,' Rimes told state senators. 'I just turned 19 last month, and if I record at a rate of one album every two years, which is the industry average, I will be 35 before the contract is over.'"); Cal. Sen. Judiciary Committee, 2001-2002 Reg. Sess., SB 1246 (June 18, 2002) at 3-4; Day, *Some*

the average recording contract for a successful artist lasts roughly fourteen years.[344] Second, the recording industry further claims each renegotiation of a contract restarts the seven year term.[345] Third, the recording industry, in an abrupt about face from their work made for hire arguments, often claims recording artists are independent contractors rather than employees.[346] Fourth, recording contracts generally include choice of forum and choice of law clauses indicating the law of a state other than California (often New York) rules and, therefore, the recording labels can argue that California's Seven-Year Statute is inapplicable.[347] Finally, in 1987, the recording industry essentially secured the long-term

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Background on the "Seven-Year Law", *supra* note 340, at 26.

[344]Chang, *Can't Record Labels and Recording Artists All Just Get Along, supra* note 340, at 17 (citing Chuck Philips, *Company Town Lawmakers Take Aim at Music Industry Contracts Recording*, L.A. TIMES, Aug. 8, 2001, at C1). Some artists continued to search for other methods of early contract termination. For example, "[Frank] Zappa showed up one day with four albums under his arm. He said he was delivering all the remaining product required under his deal, and thus was free to sign elsewhere." PASSMAN (2009), *supra* note 260, at 108 (noting that record contracts now require delivery of one album before recording can begin on a subsequent album).

[345]Cooke, *supra* note 163, at 43 (citing Kia Kamran, *California "Seven Year Law" Affects Bargaining Power, Little Else, in* ENTERTAINMENT, PUBLISHING, & THE ARTS HANDBOOK 357, 366-67 (John David Viera and Robert Thorne eds., 1999)).

[346]*Compare* Ketcham v. Hall Syndicate, Inc., 37 Misc. 2d 693, 698 (N.Y. Sup. Ct. 1962) (finding cartoonist to be an independent contractor) *with* Foxx v. Williams, 244 Cal. App. 2d 223, 240 (Cal. App. 2d Dist. 1966) (finding the entertainer Redd Foxx to be a personal services employee under a recording contract with Dootone Record Manufacturing, Inc.). *See also* E. Gardner, *Snoop Dogg Fights East-West Labor Battle, supra* note 323 (noting that the record company EMI claimed the rap singer, Snoop Dogg, was "'not an employee of EMI'").

[347]Cooke, *supra* note 163, at 43 (citing Kamran, *California "Seven Year Law" Affects Bargaining Power, Little Else, supra* note 345, at 366-67; *see also* Manchester v. Arista Records, Inc., 1981 U.S. Dist. LEXIS 18642 (C.D. Cal. Sept. 15, 1981) (upholding a choice of forum clause in a recording contract between the popular singer Melissa Manchester and

recording contract when it successfully lobbied the California legislature to amend the statute with a damages clause specific to the sound recording industry.[348] The amendment, California Labor Code section 2855(b),[349] allows the recording industry to pursue damages for any undelivered albums.[350] As a result, California's Seven Year Statute fails to protect recording

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Arista Records); Radioactive, J.V. v. Manson, 153 F. Supp. 2d 462, 472 (S.D.N.Y. 2001) (finding the choice of law clause in recording contracts with singer Shirley Manson and her band Garbarge removed application of California laws and Cal. Labor Code section 2855 does not apply to non-California employees of California employers); E. Gardner, *Snoop Dogg Fights East-West Labor Battle, supra* note 323 (noting that the recording company EMI claimed the rap singer, Snoop Dogg, could not terminate his contract under California's 7-Year-Statute because New York law controlled the contract).

[348]Stats. 1987 ch. 591 § 1, S. 1049. "From the time of the 1947 DeHavilland lawsuit, until 1987, there were no new major changes in the "Seven-Year Law". Then, in 1987, the RIAA (on behalf of the major labels) sought to amend the statute to, in effect, change the seven-year period to a fourteen-year period under certain circumstances. Although the RIAA was not able to accomplish that change in the statute, they instead were able to get Paragraph B added to the statute, which . . . allows record labels to sue recording artists for damages." Day, *Some Background on the "Seven-Year Law"*, *supra* note 340, at 5.

[349]CAL. LABOR CODE § 2858(b) ("Notwithstanding subdivision (a): (1) Any employee who is a party to a contract to render personal service in the production of phonorecords in which sounds are first fixed, as defined in Section 101 of Title 17 of the United States Code, may not invoke the provisions of subdivision (a) without first giving written notice to the employer in accordance with Section 1020 of the Code of Civil Procedure, specifying that the employee from and after a future date certain specified in the notice will no longer render service under the contract by reason of subdivision (a). (2) Any party to a contract described in paragraph (1) shall have the right to recover damages for a breach of the contract occurring during its term in an action commenced during or after its term, but within the applicable period prescribed by law. (3) If a party to a contract described in paragraph (1) is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice provided in paragraph (1), the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in an action that, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.").

[350]*Id.*; *see also* Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 40, at 2633 (citing A. Barry Cappello & Troy A. Thielemann,

artists.[351] One method of empowering recording artists, and hopefully swaying digital music file-sharers to comply with copyright law, is to codify an amended version of this statute as federal law with the damages provision removed. Federal codification could clarify that the statute applies to recording artists, shorten the recording contract's duration to reflect the nature of the sound recording industry, and specifically pre-empt state laws to the contrary.

A proposed amendment based on the four to five album profit model espoused by the recording industry,[352] such as the one above, should allow the recording industry to achieve

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Challenging the Practices of the Recording Industry: Recent Lawsuits by Recording Artists Question the Legality of Their Contracts, L.A. LAW., May 2002, at 14, 15) (noting that the term "damages" is undefined in the statute and the recording industry claims it should include "lost profits, which are calculated based on the speculative profitability of undelivered albums"); T. Gardner, *Expanding the Rights of Recording Artists, supra* note 324, at 725 (citing Cappello & Thielemann, *supra* note 350, at 14, 16).

[351]Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 40, at 2634 ("The seven-album requirement, combined with potential section 2855(b) damages, effectively deters artists' invocation of section 2855(a)."); Chang, *Can't Record Labels and Recording Artists All Just Get Along, supra* note 340, at 18; T. Gardner, *Expanding the Rights of Recording Artists, supra* note 338, at 725; Cooke, *supra* note 163, at 42 ("While a literal interpretation of the statute does not prohibit artists from breaking a recording contract, because section 2855 permits damages, its language is tantamount to an explicit prohibition."); Day, *Some Background on the "Seven-Year Law"*, *supra* note 340, at 26 ("[T]he fact that the labels can sue artists for damages for yet unrecorded albums makes it too risky for artists to exit recording contracts after seven years, and as a result, Paragraph B defeats the purpose of the Seven-Year Law."). In 2001-2002, the California Senate proposed a bill that would have repealed the recording industry's damages amendment. S. 1246, 2002 Leg., Reg. Sess. (Cal. 2002).

[352]Five years seems appropriate because the recording industry has previously indicated that it begins earning profits after the fourth album and other sources have indicated that most musicians only have a three album life span. *See* Samuel J. Fox, *Record Companies and Their Search for New Artists--And Artists and the Pursuit of Recording Agreements, in* ENTERTAINMENT INDUSTRY CONTRACTS: NEGOTIATION AND DRAFTING GUIDE 159 (Donald C. Farber ed., 2002)); Philips, *Company Town Lawmakers Take Aim at Music Industry Contracts*, *supra* note 344); Chuck Philips, *Record Label Chorus: High Risk, Low Margin*, L.A. TIMES, May 31, 2001, at A1 ("almost nobody has more than a three-album

its goal of profit making and still provide successful artists greater leverage in negotiating future recording contracts. This amendment is perhaps less drastic than a copyright transfer termination, because under a service contract limited in time and album production the recording industry owns the copyrights to any sound recordings until the current thirty-five year termination right arises. The termination right provides for greater future profits on successful acts and the chance to recoup any lost money on unsuccessful acts.

D. Why These Proposals Might Decrease Digital Music Piracy

Under Professor Tyler's theory of social norms, people voluntarily comply with laws that conform to their morals.[353] When a law falls outside the public's moral values, people will still voluntarily comply with a legitimate law created in a fair manner and enforced by a trusted authority.[354] Currently, digital music file-sharers do not perceive copyright law as falling within their moral values or as legitimate. First, digital music file-sharers do not find their acts innately immoral and even if corporate publishers come within their moral scope of concern, they give the publishers little weight. Similarly, digital music file-sharers (and artists) do not perceive the copyright law adequately benefits sound recording artists,

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shelf life")). *See also* Note*, California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 40, at 2650-52 (arguing to reduce the number of contractually required albums to three or four because it "would give artists ample time to create the albums and would provide record companies sufficient time for the required marketing and promotion periods.")

[353]TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 24; Tyler, *Compliance with Intellectual Property Laws, supra* note 34, at 224. *See also* Cronan & Al-Rafee, *Factors that Influence the Intention to Pirate Software and Media*, *supra* note 245, at 537 ("Moral obligation also had a large effect on the intention to pirate digital material. . . .").

[354]TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 34, at 24; Tyler, *Compliance with IP, supra* note 34, at 224.

weakening the law's legislative legitimacy. Third, enforcement seems unfair as many suits have resulted in absurd damage awards. Finally, digital music file-sharers distrust the corporate publishers currently enforcing the law. The above proposals address these issues.

An early termination right exploitable by recording artists may change digital music file-sharers' behavior because it will comply with their moral understanding that copyright law protects artists and ensures that artists will receive the benefits from a consumer's music purchase.[355] This would bring the beneficiary of the sound recording copyright within digital file-sharers' moral scope of concern. Even if artists decide to remain in contracts with the recording industry, the changes will allow artists to enter into fairer contracts, which consumers may give more moral weight.[356] Similarly, applying a time or album limit to recording contracts would effectively empower artists to bargain for fairer recording contracts.[357] If consumers perceive these contracts as fair and believe music purchases will benefit artists, many file-sharers may decide to purchase music due to a moral belief that

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[355]"It comes down to a basic American sense of fairness. People want a fair deal when they buy music and they want to know that they're supporting artists, not executive salaries. That's what makes copying music a principled decision, not a selfish one." Downhill Battle, *Civil Disobedience, p2p, supra* note 274.

[356]"Americans genuinely care about musicians and want them to get a fair deal too." *Id*.

[357]Wu, *On Copyright's Authorship Policy*, *supra* note 43, at 340 ("While [the Copyright Act] insists on the symbolic act of giving authors rights in the first place, it does not do that much to keep them there."). "That notion seems wholly contrary to the original goals of American copyright law of providing an incentive for artists to create and granting those artists rights and protections from companies that own the presses or studios." Jones, *Get Ready Cause Here They Come, supra* note 60, at 131.

artists deserve payment for their contributions.[358] The proposed amendments may also create a closer relationship between creators and consumers, thus increasing file-sharers' moral obligations.[359]

Additionally, the changes could increase the perceived legitimacy of copyright law in the eyes of file-sharers. First, the proposed amendments may force artists to replace corporations in enforcement of the law.[360] Consumers tend to trust, even idolize, musicians.[361] Therefore, enforcement would come from a trusted authority. Such a change could also create the perception that artists, if not consumers, had a stronger voice in legislation. Further, the second proposal could instill a fairer perception of the recording industry, which may affect the law's legitimacy by creating a more trusted enforcer and fairer enforcement.

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[358] *See, e.g.,* Manesh, *supra* note 207; Vincent J. Calluzzo & Charles J. Cante, *Ethics in Information Technology and Software Use*, 51:3 J. BUS. ETHICS 301, 311 (2004) (finding college students to be "quite ethical in those behaviors associated with personal privacy, personal property or outright theft. . . . However, the study also found that the same students were neutral, neither ethical nor unethical, with respect to behaviors associated with enterprise property."). *But see* Lysonski & Durvasula, *Digital Piracy of MP3s, supra* note 150, at 175 ("finding . . . the intention of downloading was not highly associated with [the statement] 'not paying recording artists their rightful profits is unethical.'").

[359] Manesh, *supra* note 207, at ¶ 104. Several academics note that consumers see no reason to comply with copyright law because the history of U.S copyright law is one of positive law rather than common law or natural law. Jensen, *The More Things Change, supra* note 125, at 541-43; Ng, *supra* note 25, at 414; Seshadri, *Bridging the Digital Divide, supra* note 214, at ¶ 31.

[360] This may result in fewer lawsuits because artists may not have the desire to enforce their rights against their consumers or have the financial wherewithal to find infringers and fund a lawsuit.

[361] *See, e.g.,* Wang et al, *Pirate or Buy? supra* note 217.

Moreover, many artists do not believe the recording industry currently markets their works adequately – given the ninety-seven percent "failure" rate of sound recordings, this is probably true.[362] As such, an early copyright transfer termination right would provide less successful acts the ability to market their own material at a later date. Furthermore, an early copyright transfer termination right could provide artists the ability to decide how their works are marketed, used, and by whom. Finally, providing a means for artists to control their music may result in reduced prices should artists choose to go it alone.

Also, there is evidence that consumers will voluntarily pay for music, at least, when the consumer perceives the purchase as benefitting the artist. For example, the popular band Radiohead self-released an album for download on a donation payment platform from its own website.[363] The album outsold its previous releases with over three million copies (digital and physical combined).[364] Although the average donation was between two to eight dollars with a third of downloaders paying nothing, the point is that people chose to pay when offered an authorized copy for free.[365] Another popular band, Nine Inch Nails, created

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[362]Jaffe, *Defusing the Time Bomb Once Again, supra* note 319, at 148 (citing Sen. Kevin Murray, Recording Industry Practices, http://www.recordingartistscoalition.com/industrypractices.php).

[363]Madden, *The State of Music Online: Ten Years After Napster, supra* note 12, at 13 (citing Greg Kot, *What Grammy Can Learn from Radiohead, Lil Wayne and Paul McCartney: Awards Show, Music Industry in Need of a Makeover*, THE CHICAGO TRIBUNE, February 1, 2009).

[364]*Id.* (citing Kot, *What Grammy Can Learn from Radiohead, Lil Wayne and Paul McCartney, supra* note 363).

[365]Andrew deWaard, *It's Up To You… No Really, It's Up to You: Radiohead, Big Music, and the Future of the Record Industry*, *in* THE BUSINESS OF ENTERTAINMENT: POPULAR MUSIC (Robert C. Sickels ed. 2008) (citing Adam Sherwin, *How Much Is*

a sensation by uploading their self-released album "Ghosts I-IV" to file-sharing networks for free downloading under a Creative Commons license and also offering a $5.00 digital download of the album from the band's website with more expensive packages that included limited-edition merchandise.[366] The album generated "$1.6 million in just over a week's time,"[367] and became the top selling album of 2008 on Amazon.com. All despite the legal offer to download the album for free over peer-to-peer networks.[368] Perhaps this simply means consumers are willing to pay at a certain price point or for proven artists that they already know and enjoy.[369] But, the fact that these albums were legally available for free and

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Radiohead's Online Album Worth? Nothing at All, Say a Third of Fans, THE TIMES, October 11, 2007, *available at* http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article2633798.ece; Press Release, *For Radiohead Fans, Does 'Free' + 'Download' = 'Freeload'?*, COMSCORE (November 5, 2007), *available at* http://www.comscore.com/press/release.asp?press=1883). The ComScore survey revealed that consumers in the United States paid above $8.00 per download on average, roughly double that of their international counterparts.

[366]Madden, *The State of Music Online: Ten Years After Napster, supra* note 12, at 13 (citing Kot, *What Grammy Can Learn from Radiohead, Lil Wayne and Paul McCartney, supra* note 363.). "Ghosts I-IV part I is available as a free download on the NIN site, as well as on BitTorrent. The entire album is available as a $5 download, a $10 double CD, a $75 'deluxe' package with CD, DVD, and Blu-Ray copies, and a $300 "ultra-deluxe" edition that also includes vinyl copies and signed giclee art prints." Josh Catone, *Another Free Album from NIN - Is Free the New Price of Music?,* READ, WRITE, WEB, May 5, 2008, *available at* http://www.readwriteweb.com/archives/another_free_album_from_nin.php.

[367]Madden, *The State of Music Online: Ten Years After Napster, supra* note 12, at 13 (citing Kot, *What Grammy Can Learn from Radiohead, Lil Wayne and Paul McCartney, supra* note 363.).

[368]*Id.* (citing Chris Anderson, *The Best Selling MP3 Album of the Year Was Free*, *available at* http://www.longtail.com/the_long_tail/2009/01/the-best-sellin.html).

[369]The unanswered question is whether that group includes file-sharers who chose to download the album for free when confronted with no legally free alternative.

still became top selling albums, suggests some file-sharers will pay for music even when it is legally available for free and even if the artist is already successful and rich.[370]

However, limiting the duration of sound recording contracts without including the early copyright transfer termination right may not markedly decrease digital music piracy because it would maintain the status quo of publishing companies controlling sound recording copyrights. As a result, corporate publishers would remain the enforcers and the beneficiaries of any enforcement. Similarly, artists or Congress would need to make the public aware of the changes, much as the recording industry has done with the problem of unauthorized downloading of music. Just as modern technology allows for massive distribution of digital music, it also allows for easy dissemination educational materials to

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[370]Fred Benenson, *NIN's CC-Licensed Best-Selling MP3 Album,* CREATIVE COMMONS WEBLOG, Jan. 5, 2009, *available at* http://creativecommons.org/weblog/entry/11947 ("NIN fans could have gone to any file sharing network to download the entire CC-BY-NC-SA album legally. Many did, and thousands will continue to do so. So why would fans bother buying files that were identical to the ones on the file sharing networks? One explanation is the convenience and ease of use of NIN and Amazon's MP3 stores. But another is that fans understood that purchasing MP3s would directly support the music and career of a musician they liked."). *But see* Press Release, *For Radiohead Fans, Does 'Free' + 'Download' = 'Freeload'?*, *supra* note 349 (quoting "Michael Laskow, CEO of TAXI, the world's leading independent A&R (Artist and Repertoire) company [as stating] "Radiohead has been bankrolled by their former label for the last 15 years. They've built a fan base in the millions with their label, and now they're able to cash in on that fan base with none of the income or profit going to the label this time around. That's great for the band and for fans who paid less than they would under the old school model. But at some point in the not too distant future, the music industry will run out of artists who have had major label support in helping them build a huge fan base. The question is: how will new artists be able to use this model in the future if they haven't built a fan base in the millions in the years leading up to the release of their album under the pay what you'd like model?").

support a change in social norms under an amended law.[371] Additionally, music consumers would likely follow their favorite artists' pleas as they did when the artists rose against the recording industry's trade practices.[372] Although modern media allows for quicker dissemination, the proposed amendments would still require a time delay for real world effect because it would be approximately five years under the proposals before artists of new music would have the ability to regain control of their sound recording copyrights. Therefore, file-sharers could still justify their actions in the short-term. Further, digital music file-sharers may still be able to justify their actions because most unauthorized music file-sharing involves new releases,[373] which would result in no change for new artists that have not terminated their contracts as opposed to older artists that had. Yet, a fairer perception of the recording industry's contracts could still increase consumer trust in the recording industry over time, thus increasing the law's legitimacy.

As artists regain control of their copyrighted creations, licensing issues will arise too.[374] However, there is no reason to doubt that a licensing agency could not handle

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[371]SVENSSON & LARSSON, *supra* note 69, at 24 ("Norms can be communicated and preserved through all the assorted methods of communication and information storage available to humans.").

[372]*See, e.g.,* Wang et al, *Pirate or Buy? supra* note 217.

[373]Will Page & Eric Garland, *The Long Tail of P2P*, 14 ECONOMIC INSIGHT 1, 2-3 (May 14, 2009), *available at* http://www.prsformusic.com/creators/news/research/Documents/The%20long%20tail%20of%20P2P%20v9.pdf. Of course, big hit bands still garner a substantial amount of file-sharing, such as The Beatles. *Id*.

[374]M. WILLIAM KRASILOVSKY ET AL., THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE BUSINESS AND LEGAL ISSUES OF THE MUSIC INDUSTRY 144 (10th ed. 2007) ("A central licensing agency such as ASCAP is the only practical way that copyright

individual artist ownership as compared to bulk corporate ownership.[375] The performance right licensing for musical works has largely operated this way for many years under organizations such as American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Incorporated (BMI), Society for European Stage Authors and Composers (SESAC), and the Harry Fox Agency.[376] In fact, SoundExchange practically already accomplishes this task for digital performance rights.[377]

Of course, the proposed changes would also profoundly affect the recording industry.

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proprietors may enjoy their rights under the federal copyright laws ... . [S] ingle copyright owners cannot deal individually with all users or individually police the use of their songs ... .") (quoting a Solicitor General's brief submitted to the United States Supreme Court in 1967).

[375] *See generally* Spektor, *supra* note 103; Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations 15, 26-27 (Univ. of Cal., Berkeley Sch. of Law*, PUB. LAW & LEGAL THEORY RESEARCH PAPER SERIES, Paper No. 1266870, 2008), *available at* http://ssrn.com/abstract=1266870; *Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 109th Cong. 17 (2005).

[376] *See generally* KRASILOVSKY ET AL., THIS BUSINESS OF MUSIC (2007), *supra* note 374, at 145-47, 165; Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, 400 F. Supp. 737, 741 (S.D.N.Y. 1975) ("Prior to ASCAP's formation in 1914 there was no effective method by which composers and publishers of music could secure payment for the performance for profit of their copyrighted works. The users of music, such as theaters, dance halls and bars, were so numerous and widespread, and each performance so fleeting an occurrence, that no individual copyright owner could negotiate licenses with users of his music, or detect unauthorized uses.").

[377] SoundExchange is a nonprofit entity created by the Recording Industry Association of America (RIAA) that collects and makes distributions to sound recording copyright holders, artists, the American Federation of Musicians (non-featured musicians), and the American Federation of Television and Radio Artists (non-featured vocalists). *See* www.soundexchange.com. *See also generally* Brian R. Day, Article: *Collective Management of Music Copyright in the Digital Age: The Online Clearinghouse*, 18 TEX. INTELL. PROP. L.J. 195 (2010) (advocating for an online music copyright licensing clearinghouse).

The recording industry claims long-term recording contracts are necessary to recoup investments in untested talent and that it is unfair to allow years of investment to terminate at an early time.[378] The recording industry further alleges it often does not make a profit until after release of an artist's third or fourth album.[379] These proposals, however, do not prevent the record industry from resigning acts under more artist friendly contracts, after having recouped most expenses (and potential profits) through roughly five albums.

V. Conclusion

The evidence of the ineffectiveness of deterrence strategies against digital music piracy is overwhelming.[380] If people tend to conform "more closely with social norms

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[378] *Recording Artist Contracts and the Seven-Year Rule: Hearings on S.B. 1246 Before the Cal. S. Select Comm. on the Entm't Indus.* 2001-02 Sess. 96, at 81 (2001) (testimony of Jeff Ayeroff) ("It's like a tournament for a basketball game and we will pay the money to get it, making the risks higher. And if we succeed, we're entitled to having a long term relationship to be able to recoup those kinds of investments."); *see also* Day, *Some Background on the "Seven-Year Law"*, *supra* note 340, at 26. The recording industry also claimed repeal of the damages clause in Cal. Labor Code section 2855 would drive many recording companies out of California or to invest in fewer California artists. *See* Day, *Some Background on the "Seven-Year Law"*, *supra* note 340, at 26. Of course, none of these effects came to fruition in the film or television industry, which has been held to the seven year limit for over fifty years now. *See* Holland, *Performers Give Testimony Before Judges and Lawmakers, supra* note 338. Moreover, federal codification would remove this fear. Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 40, at 2645 (quoting Kot, *You Say You Want a Revolution, supra* note 40).

[379] Cooke, *supra* note 163, at 43 (citing Fox, *Record Companies and Their Search for New Artists--And Artists and the Pursuit of Recording Agreements, supra* note 352, at 159; Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 40, at 2636, 2645 (citing Philips, *Company Town Lawmakers Take Aim at Music Industry Contracts*, *supra* note 344). *But see*, *id.* (citing Philips, *Record Label Chorus: High Risk, Low Margin*, *supra* note 352 ("almost nobody has more than a three-album shelf life")).

[380] *See, e.g.,* SVENSSON & LARSSON, *supra* note 69, at 55-56.

regarding how people should behave than with laws that instruct people how to behave[,]"[381] then the suggested copyright law amendments may promote voluntary compliance with copyright law in sound recordings by appealing to the moral reasoning of music lovers and legitimizing the law's enforcement.[382] By adjusting the law to comply with the public's romantic notion of authorship, the law will be consistent with music consumers' moral views. The changes would also increase the law's legitimacy by creating a trusted enforcement authority, as opposed to enforcement by the currently distrusted corporate music publishers. In conclusion, if digital music file-sharers perceive their trusted artists as the enforcers of a moral copyright law, they may choose to comply with the law voluntarily, thereby reducing the harmful effects of digital piracy.

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[381] Strahilevitz, *Charismatic Code, supra* note 6, at 537-38 (citing Neal Kumar Katyal, *Criminal Law in Cyberspace,* 149 U. PA. L. REV. 1003, 1009 (2001); Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation, supra* note 125, at 398-99. "Where the legality and social acceptability of behavior converge, legal institutions function well. Where they diverge, it is ultimately the law, rather than the behavior, that changes." Edwards, *supra* note 197, at 459.

[382] *See, e.g,* IFPI, RIN 2009, *supra* note 1, at 15 (noting several studies supporting that consumers believe artists should be paid for their work and copyright laws should protect creators).