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CRIMINAL COPYRIGHT INFRINGEMENT

I. Trotter Hardy*

INTRODUCTION

Copyright law prevents the unauthorized use of copyrighted works in two ways. First, the law affords a civil remedy, including injunctions and damages, to copyright owners whose works have been infringed. Second, the law also defines certain violations of a copyright owner's rights to be criminal wrongs that can be prosecuted by the United States. To date, the bulk of the copyright case law has remained heavily a matter of civil law, with private party copyright owners as plaintiffs. Recent trends in the law, including increased criminal penalties and the addition of newly defined criminal wrongs relating to copyrighted materials suggest, however, that criminal prosecutions are likely to grow substantially in relation to the number of civil cases. Much of the recent trend toward increased penalties and punishment has centered on infringements of electronic ("digital") materials, especially as they are transmitted over the Internet where the opportunities for infringement without detection are greatest today. Is copyright infringement becoming a new "white-collar crime?"

Part I of this Article questions whether "copyright infringement" appropriately falls within the category of "white-collar crime." In the past, it has not. For that matter, past copyright cases have been dominated by private actions brought by private party copyright owners in civil cases. But whether categorized as "white-collar crime" or not, criminal copyright infringement likely will increase sharply in the future. A very simple economic analysis of "punishment" as deterrence helps to provide a theoretical underpinning for that prediction.

Part II offers evidence that criminal enforcement of copyrights is already increasing. This Part traces the history of criminal copyright laws, showing that "criminal copyright infringement" has been a part of our jurisprudence for over a century, but that amendments to the Copyright Act in the past few years have substantially added to this once-narrow provision.¹ These amendments have: (1) increased the criminal penalties for infringement; (2) reclassified some infringements from misdemeanor to felony status; and (3) created entirely new

* Professor of Law and Associate Dean of Technology, College of William & Mary School of Law. The author states right away that he is much more of a copyright scholar than a criminal law scholar and consequently apologizes if any of his discussion of criminal law matters is ill-informed or inaccurate. He apologizes even more, of course, if the same is true of his copyright law discussions; it's just that he expects more of the former than the latter.

¹ See *infra* notes 41-48 and accompanying text.

categories of criminal copyright wrongs.²

Unfortunately, any increase in the application of more serious penalties to copyright infringement — whether civil or criminal — are likely to be accompanied by increasing controversy. Part III argues that copyright law — at least as applied to electronic materials and the Internet — more and more “strikes a raw nerve” in the public. Indeed, today we see increasingly serious arguments in both the popular press and the scholarly literature that copyright infringement proceedings are either a bad idea in and of themselves, or should be defeated as restricting free speech or other paramount rights, or at least that such proceedings should be sharply reduced in scope and number because they are repugnant to freedom and liberty. Most of this body of criticism also focuses on electronic (“digital”) materials, especially as they are transmitted over the Internet.

Part IV offers a theory to explain the ferment in public attitudes. One part of this theory rests on the observation that punishment of some types of infringement coincides with public attitudes. When infringers exhibit “sneaky behavior” in attempting to profit financially, and *also* cause harm to the value of the copyright owner’s copyrights, they offend both tort-like and property-like concepts; the public expects the activity to be punished. Other infringements, however, including many involving digital works and the Internet, exhibit the same scope of harm to the value of copyrights, but do not exhibit the same type of bad behavior and profit motive by the infringer. The public’s acceptance of punishment for these activities depends on its acceptance of a “pure” property-like view of infringements. The second part of the theory goes on to explore reasons that the public might not, in fact, have a strong “property-like” view of intellectual property.

I. COPYRIGHT INFRINGEMENT AS “WHITE-COLLAR CRIME”

Is criminal copyright infringement appropriately classified as a “white-collar crime?” Early definitions of the term from fifty years ago emphasized the status of the perpetrator: “a crime committed by a person of respectability and high social status in the course of his occupation.”³ Copyright infringement can certainly be accomplished by respectable people, although we ordinarily would not associate infringement with a particular social status or occupation.⁴ Current thinking, however, has changed the meaning of “white-collar crime”. Although not converging on a well-accepted alternative definition, contemporary views generally shift the emphasis away from the status of the wrong-doer. One view, for example,

² 17 U.S.C. § 506 (2000); *see supra* notes 41–48 and accompanying text.

³ EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME* 9 (1949).

⁴ Except, perhaps, for the occupation of “college student” and its association with the action of copying MP3 music files.

emphasizes the resources available for use in the commission of a crime.⁵ Not that the presence of resources, such as accounting records and the corporate treasury in an embezzlement scheme, should be taken to *define* "white-collar crime," but rather that the amount of resources that the defendant controls should be understood to correlate closely with the seriousness and scope of white-collar offenses.⁶ If "white-collar crime" therefore means a crime committed by someone using sophisticated resources that are readily available, typically at the place of employment, then copyright infringement seems more easily to fall into that paradigm. Computers and Internet access are, after all, sophisticated resources that often are available in the workplace and these days are quite frequently involved in infringing activity.

Alternatively, other commentators emphasize the scope of the harm done by white-collar criminals, coupled with the absence of physical violence and a corresponding reliance on fraud or deceit as defining characteristics.⁷ The "fraud and deceit" elements, in fact, may be the common thread in modern analysis, as they frequently appear in both the scholarly literature and in law enforcement. The Department of Justice, for example, defines white-collar crime by listing several elements, including deceit.⁸ The Department's definition also refers to the status of the defendant and the defendant's special skills or training, but as one thoughtful commentator has noted, many wrongful acts like mail fraud are thought of as "white-collar" crimes, even though they do not involve a special skill or status of the defendant.⁹ The same commentator also has shown that the United States Chamber of Commerce, for instance, identifies "deceit" as the salient characteristic of such crimes.¹⁰

⁵ Book Note, *White-Collar Criminals Unmasked*, 105 HARV. L. REV. 2098, 2099 (1992) (citing DAVID WEISBURD ET AL., *CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS* 60, 85-86 (1991)).

⁶ See Book Note, *supra* note 5, at 2099 (citing WEISBURD ET AL., *supra* note 5, at 80).

⁷ See AUGUST BEQUAI, *WHITE COLLAR CRIME: A 20TH CENTURY CRISIS* 3 (1978).

⁸ Here is the precise wording of the Department's definition:

Nonviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person's occupation.

J. Kelly Strader, *The Judicial Politics Of White Collar Crime*, 50 HASTINGS L.J. 1199, 1207-08 (1999) (quoting BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, *DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY* 215 (2d ed. 1981)).

⁹ Strader, *supra* note 8, at 1208.

¹⁰ *Id.* The Chamber's definition includes "illegal acts characterized by guile, deceit, and concealment — and are not dependent upon the application of physical force or violence or threats thereof." *Id.* (quoting CHAMBER OF COMMERCE OF THE UNITED STATES, *WHITE COLLAR CRIME* 3 (1974)). Strader does not, incidentally, agree that "deceit" is the appropriate hallmark of white-collar crime, reasoning that the Chamber's "definition also

Copyright infringement activities will rarely include physical harm or violence. To that extent, infringement coincides with that often-mentioned white-collar characteristic. The typical infringer does not use a blackjack, after all, but rather uses technology like computers, photocopiers, web sites, or CD duplicators — just as is true with white-collar defendants who use computer spread sheets for embezzlement, or e-mail to commit wire fraud.

Infringements may have either a broad or narrow scope of harm, however, causing anything from huge volumes of lost sales (as plaintiffs at least claimed in the *Napster* case¹¹) and quite substantial and objectively verifiable losses,¹² to essentially no harm at all (as when a teacher copies a current newspaper article for a class handout).¹³ In light of some commentators' emphasis on the large scale of harm that white-collar crimes imply, infringement seems not to fit the mold so well. But we could separately categorize infringements as having either "big" or "small" harms, thinking of the first as associated with "white-collar crime," but not the second. Many widely accepted "white-collar" wrongs could presumably involve only negligible harm, after all, but commentators would still think of the general category of the wrong as being "white-collar crime." Strengthening that argument in the copyright context is the fact that *criminal* copyright infringement typically *will* entail a large scope of harm, not so much because of the statutory definition of the crime,¹⁴ but rather because the Department of Justice will not lightly mobilize its army of legal talent to undertake criminal prosecution of small scale or "petty" infringers.

Finally, copyright infringement seldom depends on fraud or deceit in the way

seems too narrow, for some quintessential white collar crimes do not necessarily involve deception." Strader, *supra* note 8, at 1208. Nevertheless, my reading of the literature suggests that fraud and deceit, especially as they imply the absence of physical violence, are the best candidates for a "least common denominator" definition.

¹¹ See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 284 F.3d 1091 (9th Cir. 2001).

¹² See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 567 (1985) ("Rarely will a case of copyright infringement present such clear-cut evidence of actual damage.").

¹³ Copying a single newspaper article for a one-time classroom handout is a copyright infringement by definition, but the negligible scope of any "harm" from that activity would give the teacher a near iron-clad defense of "fair use." See 17 U.S.C. § 107 (2000); see also AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS, H.R. REP. NO. 94-1476, at 68-70 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681-83 (delineating the oft-called "Educational Fair Use Guidelines" that discuss copies as class handouts).

¹⁴ The statute only requires proof that the defendant intended commercial advantage or financial gain — with no particular dollar amount being specified — or proof that the defendant reproduced or distributed more than \$1,000 worth of unauthorized copies in a six-month period. See 17 U.S.C. § 506(a) (2000).

that white-collar crimes do, such as by a reliance on consumer fraud or embezzlement. One could imagine, of course, a defendant using deceit to obtain some original work for the purpose of unauthorized copying.

However well or ill the wrong of "copyright infringement" might fit theoretically under the heading of white-collar crime, most writers on the subject do not deal with copyright infringements. In fact, many studies of white-collar crime never mention the subject at all, whereas they are likely to include a quite broad array of other criminal activities, such as "securities law violations, antitrust offenses, bribery, bank embezzlement, mail fraud, tax fraud, credit fraud, and false claims to the government."¹⁵ Even those who urge a broader range of wrongs to be considered as white-collar wrongs may hint at the inclusion of copyright infringement, but typically fall short of expressly declaring "infringement" to be a white-collar crime. One commentator, for example, includes computer "hackers" who erase medical records as white-collar criminals, as well as money launderers, toxic waste dumpers, and sellers of fraudulent HIV-detection kits over the Internet — but does not include "copyright infringers" in this same list.¹⁶ The Cornell University Law School's Legal Information Institute (LII), an online collection of a large array of primary and secondary legal information, likewise includes as "white-collar crimes" a range of activities that come close to including copyright infringement, but without quite doing so. Instead, the LII mentions these wrongs: "antitrust violations, computer/internet fraud, credit card fraud, phone/telemarketing fraud, bankruptcy fraud, healthcare fraud, environmental law violations, insurance fraud, mail fraud, government fraud, tax evasion, financial fraud, securities fraud, insider trading, bribery, kickbacks, counterfeiting, public corruption, money laundering, embezzlement, economic espionage, and trade secret theft"¹⁷

One would be hard pressed to say, in sum, that commentators, observers, scholars, or anybody else actually thinks of criminal copyright infringement as a type of white-collar crime. As one last check on this conclusion, I recently walked along our law school library's shelves where books on white-collar crime are located. At random, I picked a dozen volumes with titles that included the words "White Collar Crime" and looked through their indices for "copyright," "patent," and "intellectual property." Not a single one of the volumes included an entry for any of these terms.

Readers may well say at this point: Of course copyright infringement is not considered a white-collar crime; hardly ever is it a "crime" of any sort, as nearly all

¹⁵ Book Note, *supra* note 5, at 2099 (citing WEISBURD ET AL., *supra* note 5, at 9–11).

¹⁶ See John B. Owens, *Have We No Shame?: Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines*, 49 AM. U. L. REV. 1047, 1051–52 (2000).

¹⁷ LEGAL INFO. INST., CORNELL LAW SCH., WHITE-COLLAR CRIME: AN OVERVIEW, at http://www.law.cornell.edu/topics/white_collar.html (last visited Jan. 20, 2003).

cases are civil cases. And historically, that has been true: When people, whether lawyers or not, speak of “copyright” or “copyright law,” they almost invariably think of civil copyright law.¹⁸ One confirmation of this view of copyright as almost entirely a matter of civil law comes from a review of textbooks in copyright law. Most textbooks cover civil law cases *far more* extensively than criminal law cases, if they cover the latter at all. But we need not rest there: As a rough indicator of the balance of civil cases to criminal cases, I conducted several searches on Lexis, in the “Copyright Cases, Federal” library. The searches were designed to return cases in two groups — those that were likely to be criminal cases, and those that were likely to be non-criminal cases — by specifying the presence or absence of the term “United States” as a named party. This technique obviously does not provide a precise measure, as the “United States” can be a party or intervener in a civil suit. But even with these obvious limitations, as long as *most* of the cases that involve the United States as a party are criminal in nature (and my own informal review suggests very strongly that they are), the results point unambiguously to the conclusion that civil cases have always outnumbered criminal ones by a considerable margin.¹⁹

¹⁸ For example, Party A owns a copyright, and files a civil suit against Party B, who is accused of unauthorized copying.

¹⁹ I first conducted searches by trying to group the cases into decades, but the civil cases (i.e., those without “United States” as a named party) consistently numbered over one thousand, for which Lexis will neither produce any actual results, nor give a number other than “more than one thousand.” Therefore, I confined each search to a specific year, which gave more detailed results.

Here is a summary of the results from the first search, organized by decade, in the “Copyright Cases, Federal” library, on September 15, 2002:

Search terms	Result
date < 1-1-1978 and name(united states)	421 cases
date < 1-1-1978 and not name(united states)	More than 1000
date > 1-1-1978 and date < 1-1-1988 and name(united states)	266 cases
date > 1-1-1978 and date < 1-1-1988 and not name(united states)	More than 1000
date > 1-1-1988 and date < 1-1-1998 and name(united states)	401 cases
date > 1-1-1988 and date < 1-1-1998 and not name(united states)	More than 1000
date > 1-1-1998 and date < 1-1-1999 and name(united states)	407 cases
date > 1-1-1998 and date < 1-1-1999 and not name(united states)	More than 1000

There is good reason to think that this balance may shift in the future.²⁰ (The search results just mentioned offer some present evidence of that shift, though I do not base my conclusions on that evidence.²¹) Distinctions between criminal law and

The following chart illustrates the results from the more revealing second search, conducted in the "Copyright Cases, Federal" library, on September 22, 2002:

Search terms	Result
date = 1980 and name(united states)	22 cases
date = 1980 and not name(united states)	175 cases (8 times as many cases)
date = 1985 and name(united states)	24 cases
date = 1985 and not name(united states)	274 cases (11 times as many cases)
date = 1990 and name(united states)	40 cases
date = 1990 and not name(united states)	429 cases (11 times as many cases)
date = 1995 and name(united states)	39 cases
date = 1995 and not name(united states)	561 cases (14 times as many cases)
date = 1996 and name(united states)	39 cases
date = 1996 and not name(united states)	563 cases (14 times as many cases)
date = 1997 and name(united states)	40 cases
date = 1997 and not name(united states)	483 cases (12 times as many cases)
date = 1998 and name(united states)	407 cases (not sure why so high; perhaps related to the enactment of the DMCA)
date = 1998 and not name(united states)	More than 1000 cases (not sure why so high; perhaps related to the enactment of the DMCA)
date = 1999 and name(united states)	29 cases
date = 1999 and not name(united states)	403 cases (14 times as many cases)
date = 2000 and name(united states)	26 cases
date = 2000 and not name(united states)	496 cases (19 times as many cases)
date = 2001 and name(united states)	182 cases
date = 2001 and not name(united states)	827 cases (5 times as many cases)
date = 2002 and name(united states) [as of 9-22-2002]	207 cases
date = 2002 and not name(united states) [as of 9-22-2002]	995 cases (5 times as many cases)

See also Michael Coblenz, *Intellectual Property Crimes*, 9 ALB. L.J. SCI. & TECH. 235, 241-42 (1999).

²⁰ See P.N. GRABOSKY & RUSSELL G. SMITH, CRIME IN THE DIGITAL AGE: CONTROLLING TELECOMMUNICATIONS AND CYBERSPACE ILLEGALITIES 117 (1998) (writing principally from the perspective of Australian law, the authors noted the "[likelihood] that the future will see an expanded use of [criminal proceedings]").

²¹ See *supra* note 19. The second table shows roughly twenty to forty cases likely to be criminal in nature in each of the years searched between 1980 and 2000, except for the unusual year of 1998, which presented ten times as many cited cases — 407. However, in 2001, we saw 182 cases, approximately six times more than what had been typical. Even more intriguing is the fact that in only the first three quarters of 2002, the number of cases likely to be criminal in nature has already exceeded two hundred. These numbers are interesting and perhaps indicative of a trend. I note, however, that they are not the product of any carefully controlled, statistically rigorous studies, nor are they used to support anything else presented in this Article.

civil law usually emphasize the greater magnitude or scope of the wrongdoing addressed by the former over the latter. In particular, the justification for wrongdoing to be a matter of the state's interest is that the activity is egregious enough to affect or offend the entire community.²² But another reason also supports the imposition of criminal penalties: Criminal conviction is typically a harsher punishment than a civil penalty; as such, it has greater deterrence value²³ and is appropriate for activities that would otherwise be difficult to deter. Greater deterrence of copyright infringements is appropriate when the infringements are largely invisible to copyright owners and consequently difficult to detect. Infringements of electronic materials, especially those infringements made possible by the ubiquitous and decentralized Internet, very much fit this mold. For copyright owners, at least, the situation almost cries out for greater deterrence and consequently for more reliance on criminal punishments.

We can express the concepts of punishment and deterrence in terms of costs, benefits, and probabilities: Potential wrongdoing defendants will, in general, be deterred from wrongdoing if the contemplated wrong "costs" more than it is worth. Suppose, for example, that the legal system ensured a one-hundred percent certainty of immediate detection and conviction for robbery — robbers would be caught promptly and punished, without exception. Suppose further that the penalty for

²² Blackstone defined the difference this way:

Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed *civil injuries*; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of *crimes* and *misdemeanors*.

³ WILLIAM BLACKSTONE, COMMENTARIES 2, cited in *Huntington v. Attrill*, 146 U.S. 657, 668–69 (1892); see also *Bowles v. Farmers Nat'l Bank*, 147 F.2d 425, 428 (6th Cir. 1945) ("The basic test whether a law is penal in the strict and primary sense is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual.").

²³ See David Goldstone, *Deciding Whether to Prosecute an Intellectual Property Case*, 49 UNITED STATES ATTORNEYS' BULL. NO. 2, at 1, 3–4 (Mar. 2001), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4902.pdf (last visited Jan. 20, 2003):

Criminal prosecution of IP crimes is also important for general deterrence. Many individuals may commit intellectual property crimes not only because they can be relatively easy to commit (such as copying music) but also because the subjects believe they will not be prosecuted. Criminal prosecution plays an important role in establishing public expectations of right and wrong. Even relatively small scale violations, if permitted to take place openly and notoriously, can lead other people to believe that such conduct is tolerated in American society. . . . Vigorous prosecutions can change the counterfeiter's calculus. If individuals believe that counterfeiters will be investigated and prosecuted, they will be deterred.

robbery was that the robber had to pay back one dollar for every dollar stolen — that is, completely disgorge all ill-gotten gains. Under such a regime, would-be robbers who knew that they had *no chance at all* of “getting away with it,” would not likely steal, say, \$100. The result would not be worth the undertaking, given that the robber would immediately be required to give back the \$100 and, hence, end up — especially after going through the trouble, time, and effort to engage in the robbery — no better off financially than before.

Now suppose that detection and punishment are not certain. Instead, suppose that the chance of “getting caught” is only fifty percent. In probability terms, the would-be robber’s potential benefit from a robbery is the robber’s “expected value” from the robbery. The “expected value” is the actual value, discounted by the likelihood that the value will be obtained. Here, if the robber were to steal \$100, the expected benefit would be \$50: the full value of \$100, multiplied by the chance that the benefit can be kept — that is, of not being caught — of fifty percent. The resulting “expected value” of the robbery, the \$50, is now greater than nothing. Hence, the robber would find it much more worthwhile to undertake the robbery than before.²⁴

But now suppose that in this situation we were to increase the punishment. If we doubled it, then for every dollar stolen, the robber would be forced to pay back two dollars. Even if the chance of getting caught remained fifty percent, the doubling of the punishment would bring the expected gain from the robbery back down to zero: \$100 gained from the robbery initially, minus a \$200 pay-back punishment, discounted by a fifty percent likelihood of having to endure the punishment. That is: $\$100 - .50(\$200) = \$100 - \$100 = \$0$ gained. In other words, if the chance of detecting and punishing a wrongdoer cannot be one-hundred percent, then increasing the amount of the punishment can help to preserve any given level of deterrence.

In many cases of copyright infringement today, the chance that an infringer will be caught is substantially less than fifty percent. For many individuals using the Internet, for example, the chance of being caught for occasionally downloading a copyrighted song, or uploading a copyrighted piece of software, is almost zero. Yet (or perhaps, “therefore”) the frequency of copying of such materials seems to be going up exponentially.²⁵

²⁴ This simple example omits consideration of much, such as the fact that some people are more risk-averse than others and that some people may rob partly from a taste for wrongdoing in and of itself. But the addition of these factors could be accommodated by changing the numbers to reflect higher or lower expected gains. There would still be a set of values for those numbers, once adjusted, that characterized deterrence from punishment as I have described it. Consequently, taking account of such complexities would only make my example harder to follow without changing any of the conclusions so I have not done that.

²⁵ See David Goldstone & Michael O’Leary, *Novel Criminal Copyright Infringement Issues Related to the Internet*, 49 UNITED STATES ATTORNEYS’ BULL., No. 5, at 33 (May

This tiny chance of punishment has led a number of commentators to argue that copyright laws should be abandoned, at least for digital copying on the Internet if not everywhere else. These individuals have contended that if the rules against copying are unenforceable, then preserving those rules only reduces respect for the law on the Internet, and perhaps even in other contexts. But these arguments overlook the proposition just explained. If the likelihood of catching unauthorized copying on the Internet is small — even *very* small — the deterrence of such activity can nevertheless be brought up to almost any desired level by increasing the punishment for those who *do* get caught.²⁶

Applying criminal punishments — and perhaps labeling the activity as “white-collar crime” — is one way to do that. We should not be surprised to find that the last decade or so has brought generally heightened punishments — including a greater range of activity subject to criminal prosecution — to copyright law. Nowhere is this trend more visible than with the infringement of electronic materials, by now the conventional example of an activity with a very low likelihood of detection.

Unhappily, though, the trend toward greater deterrence through greater punishment of infringement, especially criminal punishment, seems increasingly at odds with the public’s perception of what is fair and what is consistent with the American tradition of individual liberty. As the Apple Computer corporation used to advertise in regard to a device that copies music CDs: “Rip, mix, burn. After all, it’s *your* music.”²⁷

Part II of this Article argues that criminal penalties for copyright infringement are indeed on the upswing. Although some sort of criminal sanctions have been a part of copyright law for over a hundred years, the last few decades have seen a marked increase in amendments that involve criminal penalties or that define new criminal wrongs in the context of copyright infringement.

Part III attempts to explain some of the reasons that so many people are receptive to the idea that “it’s *their* music.” The sense of ownership over whatever is in hand leads many people to assume that they are able to do whatever they want with “their music,” including, of course, copying and further distributing it. In turn, that sense of ownership helps to demonstrate why so many people are not receptive

2001), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4903.pdf (last visited Jan. 20, 2003).

²⁶ See generally TROTTER HARDY, PROJECT LOOKING FORWARD: SKETCHING THE FUTURE OF COPYRIGHT IN A NETWORKED WORLD 265 & n.372 (1998) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 230 (1992) (describing two particularly harsh examples of punishment: death by boiling in oil for poisoning during the Middle Ages, and the nineteenth-century American practice of hanging those convicted of horse thievery), and Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968)), available at <http://www.copyright.gov/reports/thardy.pdf> (last visited Jan. 20, 2003).

²⁷ LAWRENCE LESSIG, THE FUTURE OF IDEAS 9 (2001).

to increased penalties for infringement.

II. COPYRIGHT INFRINGEMENT INCREASINGLY BEING CRIMINALIZED

Criminal punishments for copyright infringement have been with us for a long time. Congress adopted the first criminal provision in 1897.²⁸ Interestingly, the 1897 provision applied only to unauthorized performances of plays and music, not to the reproduction of books or maps, which have the oldest pedigree in our copyright law.²⁹ The narrowness of the criminal provision likely sprang from a rise in the late nineteenth century of a phenomenon not previously associated with copyright infringement — what we might today call “hit and run” performing groups. As described in later hearings before Congress, the owners of copyrighted plays had complained about the futility of trying to enforce their copyright rights when “the performances are usually given at points remote from the location or headquarters of the dramatic author or producer, and by irresponsible persons, who jump their companies nightly from town to town.”³⁰ Given the difficulty of detecting and punishing these very localized and very mobile infringements, Congress acted in 1897 to increase the applicable penalties.³¹

Congress broadened the range of infringements that qualified as criminal violations in 1909, including within the criminally prohibited reach all types of infringements, not just performances.³² But the requirements for conviction included the defendant’s undertaking of infringements that were “willful” and “for profit,” largely confining the application of the criminal provisions to fairly extensive commercial activities. The statute at that time, Section 104(b), provided that: “Any person who willfully and for profit shall infringe any copyright . . . , or . . . knowingly and willfully aid or abet such infringement, shall be fined not more

²⁸ See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (appearing in the 1909 Copyright Act as Section 104) (“[A]ny person who willfully and for profit shall infringe any copyright . . . shall be deemed guilty of a misdemeanor . . .”).

²⁹ The very first copyright statute was enacted in 1790 and applied to a short list of copyrightable subject matter: “books, maps, and charts.” Act of May 31, 1790, ch. 15, 1 Stat. 124. Music as such was not added until 1831. Act of Feb. 3, 1831, ch. 15, 4 Stat. 436. Note, incidentally, that protection was available from the very first Copyright Act for “books.” Composers who sought protection for sheet music could therefore register their music as a “book” before 1831. “Dramatic compositions” were not added explicitly until 1856. See Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.

³⁰ *Revision of Copyright Laws: Hearings Before the Joint Comm. on Patents*, 60th Cong. 24 (1908) (statement of Ligon Johnson, representing the National Association of Theatrical Managers), reprinted in 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. K, at 24 (E. Fulton Brylawski & Abe Goldman eds., 1976); see also H.R. REP. NO. 91-53, at 2 (1894) (making similar comments some years earlier).

³¹ See H.R. REP. NO. 91-53, at 2 (1894); accord Coblenz, *supra* note 19, at 238–39.

³² See Copyright Act of 1909, ch. 320, 35 Stat. 1075.

than \$25,000 or imprisoned not more than one year, or both, for the first offense and [be punished even more for later offenses]."³³

A later rewording of the "for profit" language so that it read "for purposes of commercial advantage or private financial gain" seems not to have entailed any Congressional thought or expectation of substantive change, and has remained the core of criminal infringement as defined in Section 506 of the current Act.³⁴

Despite the early narrowness of the statutory definitions of criminal infringement, however, judicial interpretations of the provision tended to be generous toward the government. The requirement for proof of "profit," for example, acquired a gloss that the defendant's activities need only be for "the purpose" of profit. No actual profit need have been attained. This rule continues today under Section 506³⁵ and is explicit: "Any person who infringes a copyright willfully . . . for purposes of commercial advantage or private financial gain, [shall be punished under the Criminal Code, 18 U.S.C. § 2319]."³⁶

In fact, if anything were to have changed under the current provisions of Section 506 compared to prior wording, it would be a lessening of the burden on the government (although the case law does not typically make much of that possibility³⁷). Section 506 attenuated the express requirement of proving that the defendant had the purpose of "profit," down to a less specific requirement of proving that the defendant had the purpose of "commercial advantage or private financial gain."

Moreover, the requirement of "purpose" has come to connote no more than a rather low threshold: that the defendant had "the hope of some pecuniary gain."³⁸ That gain need not even be something the defendant sought directly for herself. For example, when an employee infringes for the purpose of her employer's advantage or gain, the employee herself can be guilty of the violation.³⁹

³³ *Id.* at § 104(b).

³⁴ See *United States v. Moran*, 757 F. Supp. 1046, 1050 (D. Neb. 1991) ("With the exception of inserting the phrase 'for purposes of commercial advantage or private financial gain' for the word 'profit,' a change thought not to be material, . . . the present statute [i.e., the 1976 Act, 17 U.S.C. Section 506] is nearly identical to the 1909 statute.") (citing MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 15.01, at 15-1 n.1).

³⁵ *United States v. Cross*, 816 F.2d 297, 301 (7th Cir. 1987) ("A conviction under 17 U.S.C. § 506(a) does not require that a defendant actually realize either a commercial advantage or private financial gain. It is only necessary that the activity be for the purpose of financial gain or benefit.") (citing *United States v. Moore*, 757 F.2d 1228 (9th Cir. 1979)).

³⁶ 17 U.S.C. § 506(a)(1) (2000) (emphasis added).

³⁷ See, e.g., *Moran*, 757 F. Supp. at 1050-51; see also *supra* note 34.

³⁸ See *Moore*, 604 F.2d at 1235 ("[T]he defendants argue that there was no proof that the tape was distributed for profit . . . because the tape was not sold for money. Under § 104(b), it is irrelevant whether there was an exchange for value so long as there existed the hope of some pecuniary gain.") (emphasis added) (citations omitted).

³⁹ See *Cross*, 816 F.2d at 301.

Recent years have seen Congress resort more frequently to criminalization, or to increased criminal penalties, for copyright infringement. In 1974, for instance, Congress stiffened criminal penalties, though with the exception of repeat offenders; criminal infringement remained classified as a misdemeanor.⁴⁰ In 1982, Congress for the first time defined certain infringements to be felonies and also — not coincidentally — removed the specification of criminal penalties from the Copyright Act, placing them in the criminal code.⁴¹ At the same time, Congress raised the ceiling on monetary penalties from \$10,000 to \$250,000 — a twenty-five-fold increase — for infringements of motion picture and sound recording copyrights.⁴²

In that same year, 1982, prison sentences for criminal infringement were limited to two years, and the statute required a finding that the defendant had made more than one hundred copies over a six-month period before punishment could be imposed.⁴³ Two years later, in 1984, Congress raised the maximum prison sentence for large-scale infringement activities from two years to five years.⁴⁴ Congress also lessened the requirement for the imposition of monetary penalties by changing the number of infringing copies necessary for that imposition from *one hundred* to only “*one or more sound recordings*” or “*more than seven but less than sixty-five copies [of] one or more motion pictures.*”⁴⁵

During the decade or so after 1984, computers and computer software exploded in growth with the development and rapid adoption of desktop “personal computers.” That same decade saw comparable growth in consumer digital audio equipment from the development of the “compact digital” or “CD” recording format. Both developments, incidentally, in some ways paralleled the similar explosion of home video and home analog music recording equipment — with VCRs and cassette tape recorders — that had happened a decade earlier.⁴⁶ That rapid growth, especially of computer software, caused Congress once again to turn its attention to criminal copyright infringement. This time, the previously different treatments of infringements according to the different types of copyrighted works at issue were made consistent.⁴⁷ The maximum prison sentence for certain

⁴⁰ See H.R. REP. NO. 93-1581 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6849, 6852.

⁴¹ Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (current version at 18 U.S.C. § 2319 (2000)).

⁴² See Karen J. Bernstein, *The No Electronic Theft Act: The Music Industry's New Instrument In The Fight Against Internet Piracy*, 7 UCLA ENT. L. REV. 325, 328–29 & nn.15–18 (2000).

⁴³ 17 U.S.C. § 506(a) (1976).

⁴⁴ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (current version at 18 U.S.C. § 3571 (2000)), *reviewed in* Bernstein, *supra* note 42, at 328–29 & nn.15–18.

⁴⁵ 18 U.S.C. § 2319 (2000) (emphasis added).

⁴⁶ *United States v. LaMacchia*, 871 F. Supp. 535, 540 (D. Mass. 1994) (“[T]he home computing and software industry underwent a period of explosive growth paralleling the expansion in the 1960s and 1970s of the recording and motion picture industries.”).

⁴⁷ Copyright Felony Act of 1992, Pub. L. No. 102-561, 106 Stat. 4233 (codified as

infringements — excluding that of motion pictures and sound recordings that had required proof that the defendant had made at least one hundred copies — was increased to five years on a required showing of only ten copies (with a value of more than \$2,500).⁴⁸

By the mid-1990s, the “new breed” of copyright infringers, whom we might characterize as falling between the “good” and “bad” ones, had clearly appeared on the scene. University student Brian LaMacchia heralded their arrival. LaMacchia started an online computer service with commonly available file uploading and downloading facilities. Not so commonly, however, he encouraged his users to upload commercial software packages for the privilege of being able to download still other commercial software packages that other users had uploaded. He did not, however, charge any fee or receive monetary compensation for this entirely unauthorized service. The lack of any purpose of “commercial advantage or private financial gain” meant that LaMacchia, although responsible for the production of perhaps thousands of infringing copies of commercial software, could not be charged with criminal copyright infringement.⁴⁹

The government charged him instead with what must have looked to be the closest applicable criminal offense — wire fraud. The trial court found that the government could not establish the elements of that offense, however, and so the trial court exonerated him. In reaching that conclusion, the court essentially invited Congress to correct the problem of the inapplicability of criminal copyright infringement statutes to activities like those undertaken by LaMacchia.⁵⁰

Congress accepted the court’s suggestion for additional penalties applicable to the type of conduct evidenced in the *LaMacchia* case by adopting the “No Electronic Theft Act” (the “N.E.T.” Act) in 1997.⁵¹ Under the N.E.T. Act, conviction is still possible for violations of the original provision — infringement committed for the purpose of advantage or gain. But conviction is now also possible, without a showing of such purpose, when a defendant commits an

amended at 18 U.S.C. § 2319 (2000)).

⁴⁸ *Id.*

⁴⁹ See *LaMacchia*, 871 F. Supp. at 545 (analyzing a case brought on charges of wire fraud).

⁵⁰ Criminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer. One can envision ways that the copyright law could be modified to permit such prosecution. But, “[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment.”

United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994) (quoting *Dowling v. United States*, 473 U.S. 207, 214 (1985) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820))).

⁵¹ The No Electronic Theft (NET) Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678-80 (codified as amended at 17 U.S.C. § 506 (2000), 18 U.S.C. § 2319 (2000), and 28 U.S.C. § 994 (2000)).

infringement “by the reproduction or distribution, including by electronic means, during any 180-day period, of one or more copies or phonorecords of one or more copyrighted works, which have a total retail value of more than \$ 1,000.”⁵² For the first time, Congress had fundamentally changed the criminal copyright provisions by adding a new section that did not focus at all on the *defendant’s gains*, but rather focused on the potential consequences of the defendant’s actions on the *plaintiff’s losses*.⁵³

The usual criminal requirement of some sort of *mens rea* was left in the statute as a requirement that the defendant exhibit “willfulness” in regard to the infringement. The concept of “willfulness” has proved troublesome for courts, presenting the same sort of interpretative difficulty that an “intent” requirement often can in other areas of the law,⁵⁴ namely whether the requirement is “general” or “specific.” In the context of the N.E.T. Act, the question becomes whether the willfulness must be in regard to the legal consequences of one’s actions, or whether it is enough that the willfulness is in regard to the facts of the matter. If it is the former, the government must prove that a defendant like LaMacchia sought intentionally to commit the legal offense of *copyright infringement*. If it is the latter, then the government need only prove that the defendant sought to *engage in the reproductions* or other activities at issue, regardless of her understanding that those acts constituted infringement.

Courts have taken both approaches, though the majority seems to have adopted the “specific intent” interpretation of the requirement.⁵⁵ In a 1991 case, for example,

⁵² 17 U.S.C. § 506(a)(2) (2000).

⁵³ The statute does not directly deal with “plaintiff’s losses;” rather, it speaks in terms of the “retail value” of the infringing works. That value is not the same thing as the plaintiff’s lost sales, for not every unauthorized sale would have been an authorized one had the unauthorized sales been prevented ahead of time. Generally speaking, the lower the price of the unauthorized copies, the less likely that their buyers would have bought the higher priced authorized copies. But even so, after *LaMacchia*, Congress clearly wanted to deter copying without regard to the defendant’s “profits” or “gains.” In so doing, Congress necessarily shifted its focus to the plaintiff’s losses, however crudely measured they might be by the “retail value” metric. Otherwise — if neither defendants’ gains nor plaintiffs’ losses were relevant — very little “harm” would be left to justify the statute in the first place.

⁵⁴ Tort cases often exhibit this same question. For example, is it enough to constitute the tort of battery if the defendant intended to do what she did — that is, that the defendant’s conduct was voluntary? Or must the plaintiff prove that the defendant intended to cause the specific harm that ensued? *Compare* *Vosburg v. Putney*, 50 N.W. 403 (Wisc. 1891) (finding a boy who kicked a schoolmate under a table liable for other boy’s subsequent leg amputation, even though he had no intent at all to cause that outcome), *with* *Spivey v. Battaglia*, 258 So. 2d 815 (Fla. 1972) (holding a worker who playfully put his arm around co-worker’s neck to be not liable for the co-worker’s resulting neck fracture on the grounds that the defendant worker had not intended that outcome).

⁵⁵ See generally Mary Jane Saunders, *Criminal Copyright Infringement And The Copyright Felony Act*, 71 DENV. U. L. REV. 671, 688 (1994) (footnotes omitted):

an appealing defendant (a police officer with a reputation for honesty who also ran a video tape rental business) was found not guilty of criminal copyright infringement because he lacked the necessary "willfulness."⁵⁶ The court concluded that:

"[W]illfully" means that in order to be criminal the infringement must have been a "voluntary, intentional violation of a known legal duty." I am so persuaded because I believe that in using the word "willful" Congress intended to soften the impact of the common-law presumption that ignorance of the law or mistake of the law is no defense to a criminal prosecution by making specific intent to violate the law an element of federal criminal copyright offenses.⁵⁷

Congress added a number of amendments to the Copyright Act in 1998 under the umbrella title of the "Digital Millennium Copyright Act" ("DMCA").⁵⁸ Among other changes, the DMCA defined three new areas of criminal wrongdoing. One amendment prohibits the act of bypassing a technology used to limit access to copyrighted works.⁵⁹ A second prohibits trafficking in devices that are used for that same purpose,⁶⁰ and the third prohibits trafficking in devices used to bypass a

In the context of criminal copyright infringement, courts have interpreted the term "willfully" in two ways. The majority of courts have said that the language of the Copyright Act makes criminal copyright infringement a "specific" intent crime; in other words, a prosecutor must show that the accused specifically intended to violate the copyright law.

The minority view, endorsed by the Second and Ninth Circuits, holds that in the context of a criminal copyright infringement proceeding, "willful" means only intent to copy, not intent to infringe. For example, the Second Circuit found liability where the defendant, although without actual notice from the copyright owner, unlawfully issued instructions to make copies resembling the copyrighted work "as closely as they might without 'copyright trouble,'" indicating the defendant was aware of the legal prohibition against infringement.

⁵⁶ United States v. Moran, 757 F. Supp. 1046 (D. Neb. 1991).

⁵⁷ *Id.* at 1049 (citations omitted).

⁵⁸ 105 Pub. L. No. 105-304, 112 Stat. 2860 (1998).

⁵⁹ See 17 U.S.C. § 1201(a)(1)(A) (2000) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title.").

⁶⁰ See *id.* § 1201(a)(2):

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that —

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to

technology that protects a copyright owner's normal copyright rights.⁶¹

The first two provisions may appear to be similar to the third, but they are designed for different circumstances. The normal rules of copyright law give the copyright owner the exclusive right to permit or deny reproduction, distribution, performances, displays, and the preparation of other works based on or derived from the copyrighted work.⁶² When a defendant bypasses a technology that is used, for example, to limit unauthorized copying, the third DMCA provision comes into play. Many modern-day technologies, however, involve collections of information that

circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

⁶¹ *Id.* § 1201(b)(1):

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that —

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

⁶² The text gives only a simplified characterization of the actual rights as they are defined in the Copyright Act. The full language defining copyright rights appears in 17 U.S.C. § 106 (2000):

[T]he owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

are never really “reproduced” or “distributed,” let alone “performed” or “displayed”; rather they are “accessed” remotely. The Lexis and Westlaw online databases of legal materials are good examples. In terms, “accessing” Lexis or Westlaw does not involve “reproducing” the Lexis or Westlaw databases, or “distributing” them, or making derivative works from them, and so on. Although contracts can often operate to accomplish the desired control over such access, contracts are of no help against the unauthorized (and non-contracting) “hacker” who breaks into an online service and thereby obtains access to the online materials. The DMCA’s first and second provisions that specifically prohibit “access” apply directly to that type of conduct.⁶³

None of these three new wrongs, incidentally, is defined to be a “copyright infringement”; all are independent of infringement.⁶⁴ At least technically, then, the various precedents, limitations, and interpretations of criminal copyright infringement under the 1909 Act’s Section 104 and the current Act’s Section 506 may not be relevant to DMCA prosecutions.⁶⁵

In the last decade, Congress also has defined as a criminal wrong an activity that is closely associated with copyright infringement, but does not actually constitute copyright infringement: the recording of a live performance without the performer’s consent when done for commercial advantage or private gain. This activity is now punishable by up to five years of imprisonment. Though not a copyright statute, since copyright law only applies to creative works that are recorded *with* the performer’s consent, the provision closely tracks the wording of criminal copyright infringement. The short definitional section confirms the statute’s close association with copyright law by stating that the terms used in the criminal statute are defined as defined in the Copyright Act.⁶⁶ For purposes of this Article, then, the provision can be considered as yet another, recently added, type of criminal copyright

⁶³ To be sure, courts might have *stretched* the definition of “reproduction” to encompass “access,” inasmuch as viewing materials on one’s own computer necessarily entails the computer’s having made a copy of the materials. Be that as it may, the language of the DMCA in this regard now makes that sort of interpretative stretching unnecessary.

⁶⁴ See *United States v. Elcom Ltd.*, 203 F. Supp. 1111 (N.D. Cal. 2002) (discussing the district court’s analysis of the DMCA as having been enacted under the Commerce Clause power, not the “Intellectual Property” clause that authorizes Congress to create copyrights and patents, and concluding that “Congress plainly has the power to enact the DMCA under the Commerce Clause”).

⁶⁵ The DMCA itself provides that “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.” 17 U.S.C. § 1201(c)(1) (2000).

⁶⁶ See 18 U.S.C. § 2319A (2000). The statutory requirements of “commercial advantage” and “private financial gain” mirror the language in the Copyright Act’s Section 506(a)(1). The definition section provides: “(1) the terms ‘copy’, ‘fixed’, ‘musical work’, ‘phonorecord’, ‘reproduce’, ‘sound recordings’, and ‘transmit’ mean those terms within the meaning of title 17 [i.e., the Copyright Act].” 18 U.S.C. § 2319A(e)(1) (2000).

infringement.

Greater reliance on criminal law to deter copyright (or copyright-like) infringements means more than just the adoption of increased penalties and new criminal violations. Whatever penalties and punishments are legislated must be enforced, or they will amount to little. Part of the move to more criminal law enforcement of copyright rights, not surprisingly, appears in the growth of new programs in executive branch law enforcement agencies. Chief among these agencies, the Department of Justice ("DoJ") has recognized the need for its own education about, and greater participation in, curbing infringements. It has also recognized Congress's elevation of some infringements from misdemeanor to felony status, the latter almost automatically getting a higher priority within the agency than the former.⁶⁷ In 1991, the DoJ formed a "Computer Crime Unit" for computer crimes broadly (i.e., not just copyright infringements). In 1996, the "unit" was shifted to the organizationally elevated category of "section" and, significantly, was renamed the "Computer Crime and Intellectual Property Section."⁶⁸ Just three years later, the agency announced the "Intellectual Property Rights Initiative," a joint project among DoJ, the Federal Bureau of Investigation, and the U.S. Customs Service. The three organizations have described the initiative as intended to decrease the amount of intellectual property crime, in part through the provision of more staff training courses devoted to the detection of criminal copyright infringements.⁶⁹

In sum, the past ten to twenty years have shown that both the Executive and the Legislative branches appear agreeable to increasing the level of detection and prosecution of copyright infringement.⁷⁰ Both seem to be "on board" with the idea that intellectual property is valuable and vulnerable, and that undeterred infringements — particularly in the digital age — are likely to prove destructive to the country's production of intellectual output.

III. PUBLIC NOT ON BOARD

Substantial sectors of the public, however, seem not to be on board with this greater attention to deterring copyright infringement. A voluble group of critics, including law school professors, computer scientists, programmers, many members of the Internet press, as well as students and Internet aficionados generally, argue

⁶⁷ See Saunders, *supra* note 55, at 675 ("U.S. Attorneys confronted with a wide range of possible prosecutions clearly prefer[] the prospect of almost any felony conviction to a misdemeanor conviction for copyright infringement.").

⁶⁸ Scott Charney & Kent Alexander, *Computer Crime*, 45 EMORY L.J. 931, 934 (1996).

⁶⁹ Bernstein, *supra* note 42, at 338–39.

⁷⁰ See also Charney & Alexander, *supra* note 68, at 941 ("The other major impact caused by the shift to intangibles is that many of the existing theft, damage, and extortion laws protect physical property. Thus, *new crimes may need to be defined.*") (emphasis added).

vigorously against what they see as increasingly unjustified copyright restrictions. Although not opposed to the basic principles of copyright, such as the need to compensate authors, these critics rest their arguments largely on a sense that copyright law has “gone too far.” That law, they argue, either now encompasses or soon will encompass — and prohibit — activities that neither the Founders nor earlier Congresses ever intended to prohibit, nor that wise public policy would prohibit.⁷¹ Further, this unwarranted extension of copyright owners’ rights results from the lobbying power of copyright-owning corporate interests; their political influence continues the argument, only ineffectually offset by resource-poor and dispersed interests like libraries, universities, and consumers, has too easily diverted Congress’s attention from any larger sense of public purpose.

Articles regularly fill the popular — not to say, the computer and Internet — press with sharp criticism of businesses who would enforce copyright rights, especially on the Internet. Users (or former users) of Napster-like online music copying services may be the most vociferous. As noted by one article: “[T]he extraordinary Napster phenomenon has been fueled only in part by the technology that made it possible. It is also based in the antipathy many users express toward the music industry”⁷² With regard to the *Napster* case and its plaintiff, the Recording Industry Association of America (R.I.A.A.), the *New York Times*, for example, reported law professor Lawrence Lessig’s belief: “My view is that the R.I.A.A. loses the battle and loses the war, because they become the bad guys. . . . With every song they tell Napster to remove, the political resistance to this extreme view of copyright law will grow stronger.”⁷³ Given that the music industry was trying to prevent the unauthorized reproduction of *millions* of near-perfect copies of its copyrighted recordings, a respected academic with impressive credentials calling such an attempt “extreme” strikes one as bizarre, but portentous.

The examples multiply. *The Washington Post* reported one defense attorney on the losing side of an action brought under the DMCA as saying: “I presume what this [court decision] is going to do immediately is lead to a massive protest’ You can’t put the genie back in the bottle.”⁷⁴ Respected legal authority Stuart

⁷¹ See, e.g., LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 141 (1999). Although not directly challenging intellectual property laws, Lessig worried that the technological architecture of the Internet — the programming “code” that enables or prevents different types of information to flow — may soon swallow up freedoms that users of intellectual property once easily exercised. He urged us to restrict this development by legislating the preservation and growth of an unrestricted “intellectual property commons,” a kind of public domain. He concluded: “We can architect cyberspace to preserve [such] a commons or not. . . . We should choose to architect it with a commons.” *Id.*

⁷² Amy Harmon, *The Napster Decision: The Reaction*, N.Y. TIMES, Feb. 13, 2001, at C1 (emphasis added).

⁷³ *Id.* (quoting Lawrence Lessig).

⁷⁴ David Streitfeld, *Judge Backs Hollywood In DVD Movie Case; Code Posting Called*

Biegel described the copyright issue as “perhaps the most contentious of all the alleged Internet-related problems,” observing that “[m]ost online users are copying digital files allegedly belonging to others all the time, and the controversy . . . has continued unabated.”⁷⁵ Other articles quote civil libertarians and computer scientists who raise strong First Amendment concerns over copyright and similar restrictions,⁷⁶ or argue that teachers and scholars will soon not be able to afford to do their jobs.⁷⁷

In one astonishing illustration of copyright’s contentiousness, a computer programmer under indictment in one country, and a named defendant in a separate U.S. case, was *honored* for his pioneering computer work by an Internet civil liberties group.⁷⁸ All three actions — criminal indictment, civil suit, and honorary award — were for the same activity. He had devised and disclosed a method for defeating the technology that prevents the copying of movies recorded on DVDs.

To say that these examples reflect a measure of hostility, even to increased *civil* liability under copyright law, significantly understates matters. If critics’ attention turns more sharply to copyright infringement as the “new white-collar crime,” with

Copyright Violation, WASH. POST, Aug. 18, 2000, at E01.

⁷⁵ STUART BIEGEL, *BEYOND OUR CONTROL? CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE* 280–81 (2001).

⁷⁶ See, e.g., David Glovin, *DVD Copyright Fight: Movie Studios, U.S. vs Media, Programmers*, BLOOMBERG NEWS, May 1, 2001 (“Groups representing journalists and civil libertarians say [a judge’s order restricting web linking to software that “hacks” the copy protection on DVDs] . . . violates the First Amendment because it’s a restraint on speech. Computer scientists, meanwhile, say computer code . . . deserves the same First Amendment protections as political speech.”).

⁷⁷ See Siva Vaidhyanathan, *Copyright as Cudgel*, CHRON. OF HIGHER EDUC., Aug. 2, 2002, at 7:

[F]air use, while not quite dead, is dying. And everyone who reads, writes, sings, does research, or teaches should be up in arms. . . . Back in the 20th century, if someone had accused you of copyright infringement, you enjoyed that quaint and now seemingly archaic guarantee of due process. Today, due process is a lot harder to pursue . . . [T]he Digital Millennium Copyright Act [is] reckless, poorly thought out, and with gravely censorious consequences[, and] course packets that used to be easy to assemble and affordable to students are now a hassle and a big expense. Professors are abandoning them in favor of prefabricated published readers or less-convenient library reserves.

⁷⁸ See Press Release, Electronic Frontier Foundation, Electronic Frontier Foundation Honors Pioneer Award Winners (Apr. 11, 2002) *available at* http://www EFF.org/awards/20020411_eff_pioneer_pr.html (last visited Jan. 20, 2003). The Electronic Frontier Foundation annually gives awards and recognition to those “who have made significant and influential contributions to the development of computer-mediated communications or to the empowerment of individuals in using computers and the Internet.” *Id.* In giving the award to the Norwegian programmer Jon Johansen, EFF executive Shari Steele lauded him as a “shining example[] of the spirit and energy that make the Internet great.” *Id.*

the invocation of all the investigative and prosecutorial resources that that term implies, we will feel even more keenly the disturbing disconnect between copyright owners who see the Internet as an unprecedented threat to intellectual property, and copyright consumers who see copyright *owners* as an unprecedented threat to liberty.⁷⁹

We are witnessing, then, a growing split between the government and various copyright-dependent industries, like music, computer software, and motion pictures, on the one hand, and highly critical copyright consumers and Internet users on the other. To better understand this split, we need to explore the way that today's most troublesome copyright infringements differ from those in the past, and to focus more sharply on the ambivalence in the public's view of copyrights as a kind of "property."

First, if readers will accept for a moment this obviously overbroad generalization: Copyright infringements have tended in the past to fall into two different categories, the "good" and the "bad." We still have these two categories. The "bad" infringers are those who deliberately enter the business of infringing for profit — audio tape bootleggers selling from the trunk of a car, for instance. The "good" infringers are those who, at worst, act inadvertently, and at best, act in a kind of naïve good faith that they are promoting the public good — the university professor who assembles a course packet for students, for example. The defining characteristics of these two opposites are that "bad" infringements are motivated by financial gain and consequently are done on a significantly large scale to help achieve that aim. "Good" infringements are the opposite; they are not undertaken for immediate financial gain, nor are they undertaken on a large scale. Bad infringements exhibit a congruence: harm to the victim, and gain to the perpetrator.

Today, though, we have begun to see a third category of infringer: individuals who have no particular profit motive, but who use the Internet to cause, or to avail themselves of, infringements multiplied on a huge scale. Napster and similar file copying services are one example of this new wave of infringer, described by one court as "heedlessly irresponsible, and at worst . . . nihilistic, self-indulgent, and lacking in any fundamental sense of values."⁸⁰ These infringement activities challenge our easy categorization of "good" and "bad" because they fall squarely in the middle. The actors involved have no overt or immediate commercial motive,⁸¹

⁷⁹ Two commentators observed, for example, that tensions between copyright producers and copyright consumers have always featured "incessant bickering," but that today "these ongoing tensions have seemingly reached a boiling point." WAYNE CREWS & ADAM THIERER, *THE GREAT INTELLECTUAL PROPERTY DEBATE TO COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE* xv (2002).

⁸⁰ *United States v. LaMacchia*, 871 F. Supp. 535, 545 (D. Mass. 1994).

⁸¹ The creator of the Napster software, Shawn Fanning, apparently did not have a profitable business in mind when he wrote the Napster program. Other relatives joined in and clearly were thinking of the file sharing system as a major business opportunity. But to end

but they do operate on a large scale. Congruence is absent: there is harm to the copyright owner, but there is no obvious matching gain to the infringer.

Second, and more subtly, we need to have an appreciation for the different instinctive responses that many people exhibit toward basic notions of “property” and “theft” generally. A major principle justifying the punishment of copyright infringement, and certainly criminal punishment, is that “you shouldn’t take what doesn’t belong to you.” The notion that things can “belong to you” is a property notion. If, as I believe is true, the public views tangible property theft and unauthorized copying as fundamentally different, then the difference may well have something to do with the public’s underlying sense of what “property” means.

Part IV will explore these two concepts — the distinctions between the good, the bad, and the in-between infringer, and the instincts that the public brings to its thinking about “property.”

IV. WHY IS COPYRIGHT CONTROVERSIAL?

Categorizing infringers as “good” or “bad” obviously condenses what is in fact a continuous spectrum of normatively arrayed behaviors. But as long as readers remember that that is what we are doing, condensing the spectrum can help to crystallize important distinctions.

When I discuss “bad” infringers, I mean those defendants who are by almost anyone’s standards “bad guys” — wrongdoers, shady characters, fly-by-night con men, and so on. These are people who operate warehouses and factories where they undertake mass reproduction of obviously copyrighted, high-value materials in a systematic way. The resulting copies may carry muddily photocopied black and white labels, or no labels, but in any case they are sold or intended to be sold on a commercially significant scale. Motion pictures, audio CDs, computer software, and the like are typically involved. Frequently, blank recording media like tapes or CDs have been purchased in large bulk quantities; duplicating machinery appears on floors and tables in dusty warehouses; and so on.⁸²

users, no profit motive appeared, as all downloads were free.

⁸² See, e.g., Press Release, United States Dep’t of Justice, Two Brooklyn Men Indicted in Connection with Largest Seizure of Counterfeit DVDs in United States History (Jan. 11, 2002), available at <http://www.usdoj.gov/criminal/cybercrime/qazaindict.htm> (last visited Jan. 20, 2003):

[T]he defendants operated a distribution center out of a storefront on Myrtle Avenue in Brooklyn. The operation, which law enforcement officials estimate distributed thousands of counterfeit newly released CDs and DVDs weekly, was a principal source of supply for a network of outdoor flea market vendors in the metropolitan area. On December 13, 2001, agents of the United States Secret Service executed search warrants at the factory and a nearby storage facility where the defendants warehoused the counterfeit goods, effectively shutting

Cases like these dot the reporter volumes, but seldom make the national news. When they do surface, even the most ardent defenders of the most extreme claims for fair use, first sale, free speech, and other copyright defenses, raise no objection to the resulting civil judgments or criminal convictions. The rawness of the "bad guys' profit motive, coupled with their often blatantly large-scale operations, seem to leave no doubt about the rightness of the proceedings brought against them, whether civil or criminal.

The second category of "good guy" cases is different. In these cases, individuals with typically no direct commercial motivation reproduce copyrighted works on a small scale, for their own use or the use of friends or students. The most controversial thing about non-profit, small-scale infringements is whether we should even call them "infringements" at all. Indeed, courts facing this sort of "good guy" case may well decide that the "infringer's" actions amounted to a fair use, or at worst, that they deserve no more than an injunction against repetition. No doubt countless numbers of such small-scale activities take place every day, but from which no litigation ever results. Perhaps an infringement that falls deep in the forest makes no noise.

Part of the public's and the courts' vexation with copyright law today stems from a new category of infringer, one that seems to fall half way between the good and the bad. Examples these days are legion: the teenagers who make a sport of finding and publicizing ways to defeat copy-protection technologies;⁸³ or the computer scientists who believe that the research ethic requires them to publish their findings of vulnerabilities in a commercial encryption technology;⁸⁴ or the college students who accumulate a collection of MP3 music files for their own enjoyment.⁸⁵

down their enterprise. Law enforcement's mid-December operation resulted in the largest seizure of counterfeit DVDs in United States history, with over 30,000 counterfeit movies and an equal number of counterfeit musical recordings with a total retail value of approximately \$1 million.

In addition to mass-producing a wide variety of popular musical recordings from rock to rap, including popular recording artists like Santana, Jennifer Lopez and R. Kelly, the defendants distributed movies that were either newly released or soon to be released on DVD, including the *Godfather* Trilogy, *Cats and Dogs*, and the *Grinch*.

⁸³ See *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001) (dealing with the aftermath of teenager Jon Johansen's defeating DVD encryption); see also *supra* note 78. Albeit not directly involving copyright law, a comparable episode of teenage "hackers" causing a massive outage of telephone service is described in MICHELLE SLATALLA & JOSHUA QUITTNER, *MASTERS OF DECEPTION* (1995), in which the authors chronicle the activity of the self-identified "Legion of Doom."

⁸⁴ See, e.g., Glovin, *supra* note 76.

⁸⁵ I believe it to be a commonly-accepted fact that college students still download MP3 music files, even after Napster was enjoined out of business. For support of this position, see Lisa Guernsey, *Very Big Pipes*, N.Y. TIMES, Jan. 13, 2002, § 4A, at 24.

Two hallmarks of this third category distinguish it from the other two: First, like the activities of the “good guy” infringers, the activities of the new “gray area” infringers are not for profit or personal financial gain. But second, like the activities of the “bad guy” infringers, the activities of the “gray area” infringers involve a large-scale distribution that poses potentially significant harm to copyright owners. In most cases, we can point to the ubiquitous and near-instantaneous Internet as the reason for this latter characteristic.

The activities of the first group, the unabashedly commercially motivated, fit without controversy under the labels of “pirates” and “thieves.” DoJ press releases, for example, often characterize such defendants with such words. One typical press release read this way:

“Star Wars Episode 2 opened in theaters only yesterday. But because of software *pirates* . . . , it likely opened on the Internet weeks ago,” said U.S. Customs Commissioner Robert C. Bonner. “This is *stealing*, plain and simple, and those engaged in the *theft* of intellectual property deserve to be prosecuted and punished. The unprecedented penalty issued today should serve as a wake-up call to other cyber *thieves*.”⁸⁶

Members of Congress showed no hesitation in using similar terminology for this same group:

Notwithstanding [the existing] penalties [for copyright infringement] copyright *piracy* of intellectual property flourishes, assisted in large part by today’s world of advanced technologies. . . . In some countries, software *piracy* rates are as high as 97% of all sales. . . . The effect of this volume of *theft* is substantial: lost U.S. jobs, lost wages, lower tax revenue, and higher prices for honest purchasers of copyrighted software.⁸⁷

And of course, the “No Electronic Theft Act,”⁸⁸ which lowered the threshold for proving criminal copyright infringement, dealt with “theft” by its very terms.

With some notable exceptions, courts often apply similar characterizations of wrongdoing to “bad guy” infringers, referring to their actions as “theft,” “stealing” or “piracy” and the like.⁸⁹ Private organizations like trade associations active in

⁸⁶ Press Release, United States Dep’t of Justice, WareZ Leader Sentenced to 46 Months, (May 17, 2002), available at <http://www.usdoj.gov/criminal/cybercrime/sankusSent.htm> (last visited Jan. 20, 2003) (emphases added).

⁸⁷ H.R. REP. NO. 106-216 (1999), cited in *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 335 n.230 (emphases added).

⁸⁸ See *supra* note 51 and accompanying text.

⁸⁹ See, e.g., *Universal City Studios v. Corley*, 273 F.3d 429, 442 (2d Cir. 2001)

trying to stop copyright infringements also (predictably) make use of such characterizations.

The private organizations differ from the government entities perhaps only in their willingness to suggest that the same sort of terminology should apply to *all* groups of infringers. The R.I.A.A., for example, tries to educate college students into greater respect for copyrights, running a campaign of sorts and a web site for this purpose, both under the name "SoundByting." The web site distinctly *associates* all types of copyright infringement with "theft," although it falls just short of saying that infringement *is* theft: "The RIAA's [SoundByting] Campaign [has as its purpose] to raise awareness that reproducing and distributing music illegally is *akin to stealing*, and such actions have serious ethical and legal consequences."⁹⁰

But by and large, notwithstanding the R.I.A.A. and other trade associations, far

(emphases added):

The [trial] Court observed that DeCSS was harming the Plaintiffs, not only because they were now exposed to the possibility of *piracy* and therefore were obliged to develop costly new safeguards for DVDs, but also because, even if there was only indirect evidence that DeCSS availability actually facilitated DVD piracy, the threat of *piracy* was very real, particularly as Internet transmission speeds continue to increase.

The trial court in the same case had asserted that:

[T]his decision will serve notice on others that "the strong right arm of equity" may be brought to bear against them absent a change in their conduct and thus contribute to a climate of appropriate respect for intellectual property rights in an age in which the excitement of ready access to untold quantities of information has blurred in some minds the fact that taking what is not yours and not freely offered to you is *stealing*.

Id. (emphasis added). Other courts are not so sure. In the *LaMacchia* case, the court concluded that "interference with copyright does not easily equate with theft, conversion or fraud." *United States v. LaMacchia*, 871 F. Supp. 535, 538 (D. Mass. 1994). And further, that court asserted that:

While one may colloquially like[n] infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud. As a result, it fits but awkwardly with the language Congress chose — "stolen, converted or taken by fraud" — to describe the sorts of goods whose interstate shipment § 2314 makes criminal.

Id.

⁹⁰ RIAA, SOUNDBYTING web page, at <http://www.soundbyting.com> (last visited Sept. 15, 2002). RIAA does state directly that unauthorized copying is a "rip-off," which one supposes is a sufficiently ill-defined term to imply "theft" without requiring the explicit use of the latter word. See RIAA, SOUNDBYTING web page, at http://www.soundbyting.com/html/who_we_are/are_index.html (last visited Sept. 15, 2002) ("Because uploading and downloading somebody else's music without their permission isn't just against the law. It's a rip-off. Simple as that.")

fewer people seem likely to characterize the “good infringers” as “thieves” or “pirates,” or their conduct as “stealing,” than are likely to so characterize the first group. With “good” infringements, the congruence of low or non-existent harm to copyright owners, with no obvious profit motive by the infringer, produces a situation that simply does not resemble what people think of as “theft.”

The third group in the middle — those who engage in the wide distribution of infringed works, but without a profit motive — obviously poses problems for how we conceptualize matters in relation to those of the other groups. This third group’s activities, in short, do not lend themselves to easy classification, nor do I have a ready alternative classification for them (other than “third group in the middle”). But I can offer one way to think about this group, and the inconsistency that it exemplifies between “harm to victim, no gain to perpetrator.” We can look at infringing activity as a combination (or confusion) of “tort” and “property” aspects. “Bad infringements” involve both tort-related wrongdoing and property-related wrongdoing. The property rationale is easy to see: Copyrighted property that “belongs” to someone else is being converted to the defendant’s own use. Slightly less obvious, though, is the fact that the circumstances of the infringement — the general furtiveness, the perpetrator’s awareness of the impropriety (we can easily imagine shifty-eyed characters on the lookout for the cops) — all feel very “tort-like” in the sense of being “wrongful,” of being “bad conduct,” and so on. When both tort and property aspects combine, no wonder that the public widely agrees with the use of serious deterrence of such offenses through imposition of significant, even criminal, punishments.

The middle group loses this dual aspect. Without shady characters operating out of car trunks and hidden warehouses, but rather with wholesome college kids and “computer geniuses,” we cannot easily see the activity as tort-like. It does not have the shady feel of “wrongfulness,” of something underground or underhanded. Consequently, public acceptance of criminal punishments for this group depends almost solely on acceptance of the activity as a property-based wrong. And that leads us to an inquiry into how the public views “intellectual property,” as compared to the way it views tangible property, and how we might account for any differences in these views.

Let us start by noting that the difference between “good” and “bad” infringement seems easy to understand, as I have already suggested. Shady characters looking for a quick buck do not resemble college kids and “computer geniuses,” let alone something like a church choir that makes a hundred photocopies of a contemporary religious hymn. But on closer examination, the public’s differing views of these two groups are not so easily explained after all. For when it comes to tangible property, most people associate the word “theft” with an enormous range of conduct — from the executive who embezzles millions of dollars, to the kid down the street who “swipes” somebody’s baseball glove. Setting aside any tort

implications for a moment, we might say that the essence of "theft" of tangible property seems to be an "unauthorized taking" on almost any scale. Whereas with intangible property, the essence seems closer to something like a "large-scale taking for blatantly commercial purposes."

Legend has it that well-known copyright law professor Paul Goldstein of Stanford once posed a question to his Stanford law students. Would they, he asked, take a book from a bookstore if they were certain that they would not be caught? Overwhelmingly, the students said that they would not. But would they, Goldstein continued, make a copy of an electronic book if they were certain that they would not be caught? A great many students, including those who had answered the first question in the negative, admitted that they probably would make such a copy. They supported this behavior by noting that copying an electronic book did not seem to cause anyone any harm (it left the original copy untouched), whereas taking a tangible book did seem to cause harm (it reduced the bookstore's inventory).

Why would law students or the public readily regard the small-scale taking of tangible objects as "theft," but only reluctantly, if at all, regard the small-scale taking of intellectual property in the same way? *A fortiori*, why would the public manifest even "ambivalence" toward the middle category of massive, but not obviously commercial, reproduction as seen with Napster?

The concept of copyright cannot be beyond understanding. The Stanford students presumably were bright and well-educated, and in any event, they were taking a copyright class at the time. And the wrong associated with large-scale commercial reproduction — precisely what the public does tend to equate with "theft" — is the wrong of copyright infringement. All that is necessary for the students to perceive small-scale copying as equally wrongful is to multiply: one unauthorized copy, multiplied by the number of other people and occasions on which the same activity can be expected to take place, equals a large harm to the copyright owner. But the public seems not eager to do the calculation. Why not?

I suggest that the answer has to do with our instincts about "property." By "instincts," I mean a quasi-conscious, initial response to circumstances, a response largely molded by daily experiences starting at birth, rehearsed and reemphasized over the years. I contrast an "instinctive" response to one based on conscious thought and logical reasoning, especially as the latter results from formal education and deliberation. Granted, I am not a psychologist or sociologist; I offer the definition just given only because it has proved useful to me, and I hope that it will prove useful to readers trying to understand public perceptions of "property," "theft," and "copyright."

People start life as children; childhood experiences exhibit two inevitable qualities. First, we all grow up with daily exposure to tangible objects and the rights of ownership associated with them. Second, we all grow up dealing solely with small-scale transactions, typically on a very personal, face-to-face basis. Copyright

rules have almost nothing in common with either of these experiences, whereas tangible property ownership rules have everything in common with them.

When quite young, nearly everyone has the experience of being told something like this: “That’s Susie’s truck; you can’t take it. That truck belongs to Susie.” How many of us, though, ever heard this: “That’s Susie’s copyright; you can’t exercise her rights without her permission. That copyright belongs to Susie.” Not many of us ever heard such statements, I suspect (nor could we or should we have). In every day of our lives as children, though, references recur to tangible objects and to the ownership of those objects. We acquire tangible objects; we covet those we cannot acquire; we give objects as presents and receive objects; we watch intently to ensure that desserts are equally divided among ourselves and our siblings. All along the way we are learning that one can own, or not own, or own and give away, or receive and own, or cut into pieces and distribute ownership of, or otherwise grab and guard and give, tangible things. And we learn about taking care of tangible things as well. Most of us were at least cautioned at one time or another — if not scolded for failing to heed a caution — to be careful with some object: not to spill or break or drop it. Doubtless some parents make more of this than others, but assuredly it would be the rare parent who even once cautioned a child not to break, damage, or devalue a copyright.

The association between “tangible objects” and “property” that forms in this familiar way eventually becomes a near inseverable bond. The association is so strong that even law students often feel perplexed when their Property law professor claims that the term “property” does *not* mean a tangible object. Rather, it means a set of rights, a bundle of sticks. The notion that property is not a thing, but just a set of rights in a thing, is far from intuitive. One suspects that even those very law students, at least those who do not end up dealing directly with property law issues, quickly forget the concept that “rights” and “objects” are different.⁹¹ For them, and certainly for most people who are never exposed to formal legal notions or definitions, “property” *means* tangible objects; tangible objects are what one owns; what one owns is one’s property. The circle is complete.

But intangible property lacks this familiar and intuitive character. For evidence of this point, readers might think of statements that they have read and that assume that rights in tangible property differ fundamentally from rights in intangible property. Statements that seem to make perfect sense to us in the context of the one can seem utterly nonsensical in the context of the other, even though — and this is a crucial point — the legal system is quite capable of treating the two property interests identically.⁹² Here is one example from a *New York Times* article: “[T]he

⁹¹ “One suspects it” because the author himself forgot all about it until years later, when he began thinking about intellectual property as “property” and what “property” means in the first place.

⁹² See Trotter Hardy, *Not So Different: Tangible, Intangible, Digital, and Analog Works*

music industry has not come forward with their own version of Napster to allow people to swap files on line, which is something they obviously want to do," stated the developer of a file copying service called *Gnutella*, interviewed for the article.⁹³ That statement sounds reasonable. Would it sound equally reasonable, though, to say instead: "The fast-food industry has not come forward with their own system for letting consumers get cheeseburgers for free, which is something they obviously want to do." With the former statement about file swapping, one's instincts are likely to bring about a favorable response: "If consumers really want to swap music files, then why *hasn't* the music industry tried to satisfy the demand, instead of resisting it?" With the second statement about cheeseburgers, one's instincts are more likely to bring about the response that "just because people want to have their cheeseburgers for free doesn't mean that the industry is obliged to provide them for free." And yet the two situations are legally equivalent.

On that very point, I have shown elsewhere⁹⁴ that the two contexts — intangible creations and tangible ones — exhibit no inherent, and no logical, differences for purposes of the legal regime of property ownership. I argue here that the reason for the different responses to the two statements is "not . . . logic [but] experience,"⁹⁵ specifically, the experience of growing up in a tangible world that forms our instincts about what is and is not "property."

In addition to this intimate familiarity with tangible property and its ownership, and a concomitant lack of familiarity with intangible property or its ownership, we grow up with a second and equally inevitable experience. We make decisions and take actions of only the most limited reach. For example, we may decide to read and not watch television, or vice versa. We may decide to spend our allowance money or save it. We may remember or forget to undertake prescribed duties or chores. But we do not decide that our entire neighborhood will watch television; we do not decide whether all residents of our community must spend their allowance or save it; we do not have an opportunity to remember or forget to turn on the electricity or turn off the water supply for our whole town. To be sure, one of the hallmarks of growing up is that one's decisions and actions gradually attain a broader reach. But even as adults, most of us live under circumstances — jobs, families, churches, schools, clubs, relationships, teams — in which our routine decisions affect perhaps a few dozen other people, rarely more.

and Their Comparison for Copyright Purposes, 26 U. DAYTON L. REV. 211 (2001) [hereinafter Hardy, *Not So Different*]; Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217.

⁹³ Harmon, *supra* note 72 (quoting Gene Kan).

⁹⁴ Hardy, *Not So Different*, *supra* note 92. And yes, I do discuss there the issue of information as a "public good" that is infinitely shareable, as contrasted with tangible objects that are consumed with use. But I nevertheless conclude that no inherent differences justify different legal treatment of tangible and intangible properties.

⁹⁵ OLIVER W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

I do not mean, incidentally, that decision-making of the former, limited type is unimportant; “importance” has nothing to do with my point. My point is rather about the *number of people and transactions* that we personally affect. By saying that most people usually make decisions of “limited scope,” even as adults, I mean only that they do not regularly experience making decisions with significant consequences for large numbers of people, over a great many transactions, over long periods of time — certainly not compared to, say, the decision of a state legislature to raise or lower a tax, or to fund Program X but not Program Y; or the decision of a company president to sell a division or to expand operations in China; let alone the decision of Congress to require regulatory approval of new drugs or to declare war. Most of us, in short, are not at the top of the organizational pyramid — else the pyramid would not have the shape of a pyramid.

Now, what do all of these seemingly obvious and humdrum examples of allowance money and childhood chores have to do with copyright and our views of what is, and is not, “property?” They have a great deal to do with them. Rights in “copyrighted property” are quite abstract. Congress even determined that the definition of a “work of authorship” in the current Act, probably the most fundamental definition in all of our copyright law, would be the definition of an intangible abstraction — specifically *not* a tangible object.⁹⁶ Of course, any reasonably intelligent person capable of abstract thinking can learn the idea that a “work of authorship” is an abstract creation, whereas a “copy” is the tangible embodiment of such a creation.⁹⁷ But that idea must *be learned*, which implies a deliberate and conscious process, and one without prior familiarity. Such a process can be expected to leave the idea perpetually at odds with one’s instincts — the concept of “owning” an “abstraction” remains strongly counterintuitive because we do not have the occasion while growing up to shape our intuitions around such a concept.⁹⁸

⁹⁶ The phrase “work of authorship” (or “original work of authorship”) is not specifically defined in the statute. The legislative history says that the phrase was deliberately left undefined with the intention that courts continue to apply the general understanding of that term as it has developed in the caselaw. See H.R. REP. NO. 94-1476 (discussing Copyright Act § 102).

⁹⁷ Although “work of authorship” is left undefined in the statute, the term “copies” is defined: “‘copies’ are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘copies’ includes the material object, other than a phonorecord, in which the work is first fixed.” Copyright Act, 17 U.S.C. § 101 (2000).

⁹⁸ Again, I stress the point that lots of people can and do learn about “works of authorship” and their differences from tangible objects. I am not saying that these fundamental propositions of copyright law are “hard to understand.” I am saying that they are hard to summon forth as a reflex action: hard to apply instinctively. “Learning about rights in abstract works of authorship in adulthood,” and “learning about rights in tangible

In addition to our life experiences' conditioning us that the "ownership" of "abstractions" is counter-intuitive, that same experience ensures a highly limited opportunity to see that our decisions have widespread effects on the lives of others. This second factor also helps to explain our responses to copyright rights. The small scope of decision-making that most of us experience — again, I refer only to the number of people and transactions that we affect by our decisions, not to the importance of those decisions — makes it hard to see why copying copyrighted works can be harmful.

Let's start this second analysis with a familiar example, albeit one not usually associated with copyright law. During every national political campaign, various organizations urge voters to vote. Many of these organizations make use of public service announcements or paid commercial time on television. I suspect that all of us have heard and seen a representative of such an organization beamed into our living rooms, urgently pleading with us to get out and vote, specifically because "YOUR VOTE COUNTS!"

Why are these organizations not sued for common law fraud? "Fraud" is defined as the making of a false or misleading statement, with the intention that the listener rely on the statement, where the listener does in fact rely on it to his or her detriment.⁹⁹ Let's step through the elements. Does your vote count? To "count" in this context means to matter — to make a difference. The speaker on the commercial is assuring you that your vote — your individual vote — makes a difference. This is not the same thing as saying that "your vote will be counted."¹⁰⁰ The statement is that your vote "counts" — that it makes a difference.

But it doesn't. No national election has ever been decided by a single popular vote; only one ever split the votes in the Electoral College evenly, the election of 1800 — and that outcome prompted the adoption of a Constitutional amendment to prevent it from happening again.¹⁰¹ I doubt that any state or many local elections have been decided by a single vote either, short of perhaps local elections in very small towns.¹⁰² Certainly no national election has been decided by one individual's

property," are quite different. The latter learning can rest on top of a sturdy foundation of lifelong experience with tangible objects and the ownership of such objects. The former learning has no such framework on which to rest.

⁹⁹ RESTATEMENT (SECOND) OF TORTS § 525 (1977).

¹⁰⁰ After the scandal of uncounted and miscounted votes in the 2000 presidential election, perhaps even an assertion that your vote "will be counted" would constitute fraud.

¹⁰¹ WILLIAM C. KIMBERLING, *THE ELECTORAL COLLEGE* (n.d.), available at http://www.fec.gov/pdf/elec_coll.pdf (last visited September 21, 2002). The document lists author Kimberling as Deputy Director of the FEC Office of Election Administration, but emphasizes that "The views expressed here are solely those of the author and are not necessarily shared by the Federal Election Commission or any division thereof."

¹⁰² I know first-hand of one election decided by four votes out of about 1400 ballots cast in my own town of Williamsburg, Virginia. Perhaps even some past elections have been decided by a single vote. But 1400 votes is not the scale on which national elections are

vote. Even the exceedingly close Presidential election of 2000 — no matter whose votes you add in or whose hanging chads you exclude — did not exhibit a difference in the popular vote of “one.” The entirety of our election history, in other words, not to mention probability and statistics, argues that one individual citizen’s vote, in a national election, will *not* make a difference. Consequently, accuracy and truthfulness demand that the get-out-the-vote commercials conclude with this line: “REMEMBER: YOUR VOTE DOESN’T COUNT!” — not precisely its opposite.

We can move through the remaining elements of fraud quickly. The sponsoring organization of the commercial appears to intend that listeners will rely on the false statement about their votes counting by going out to vote when they might not have done so otherwise. Many people surely will do so; or at least, we should be able to find one test-case plaintiff who did so. Finally, the act of voting is a detriment of sorts, inasmuch as it requires time and effort, and perhaps gasoline, wear-and-tear, etc. At conventional reimbursement rates for automobile travel, which hover around \$0.30 per mile, some voters will surely have driven a few miles in reliance on the belief that their vote will count. There we have it: a false or misleading statement made to induce reliance, where that very reliance is in fact induced, to the relying party’s detriment — a perfectly garden-variety case of fraud.

The voting example is, of course, facetious. For one thing, maybe citizens do not believe that their vote counts, commercials notwithstanding, but they are committed to voting as a “good thing to do” anyway. But the harder question is this: If “your vote really doesn’t count,” why do the organizations who sponsor these commercials do so? The answer must be that they are not speaking to individuals as such. They are speaking to thousands or hundreds of thousands of individuals — to large groups. They do not seriously think — they cannot seriously think — that one single voter will make a difference. They hope rather that by saying “your vote counts,” they will persuade a substantial number of otherwise reluctant voters to vote, thereby increasing the overall voter turnout by some measurable percentage. In short, they do not literally believe that “your vote” in the singular will make a difference; they believe that *saying so* in a commercial shown to *hundreds of thousands of people* will make a difference. They are analyzing things from a much larger scale and perspective than is experienced by each individual television viewer.

Suppose that, instead of seeing a get-out-the-vote commercial on television, we were to see a commercial from a copyright owner. The owner might say “Don’t Copy That Floppy,” as a now obviously dated television spot once did some years ago. Or perhaps the owner would say “YOUR COPYING COUNTS!” (in a negative way, of course). These copyright messages are as fraudulent as the voting ones. As addressed to any one individual, the message is simply not true: If one person, on one occasion, copies one copyrighted work without authorization, the

decided.

copyright owner is not harmed. Harm to the owner usually comes only from widespread, frequent copying — from the aggregate effect of a great many small decisions and actions by many people over periods of time. No one decision or single action does any significant damage.

Appreciating the “aggregate effect” of one’s actions cumulated with others’ does not, however, come naturally — large-scale outcomes, the results of the “law of large numbers,” are very much *not* instinctive. Remember that the great bulk of experiences for most people, whether as children or adults, involves decisions and actions that directly affect a very limited number of other people. None of us grows up having to face the consequences of decisions that alter the lives, incomes, relationships, or careers of even hundreds of other people, let alone hundreds of thousands or millions. Few enough of us ever have to face those consequences at any age, inasmuch as most of us — except perhaps those from Lake Woebegone — cannot by definition *all* be at the “top of the pyramid,” where seeing large-scale results from one’s decisions is much more likely.

Let’s use these insights to revisit the story of the law students who admitted that they would “steal” (i.e., copy) an electronic book, even though they would not steal a tangible, paper copy of the same book. The first question we might ask is not the one that copyright proponents are wont to ask, namely, why don’t students (or hackers or teenagers or whoever it is) respect the copyright to electronic books? Instead, let’s ask the reverse: Why would the students *not* steal a physical, paper copy of a book? After all, one copy, of one book, taken from one store, one time, would almost certainly do only negligible harm to the bookstore owner and to the copyright owner as well — not much more harm, if at all, than would be done to an electronic bookstore or electronic book author operating on the same scale of operation (producing and selling comparable numbers of electronic books).

And yet, the students said they distinguished the two situations. I suspect, in fact, that many other people would say the same thing and that far, far more people would resist the theft of tangible objects than would do so in the case of intangible “objects” like electronic books. Why is that?

Here is where I think the discussion of our “instincts” in regard to tangible objects comes to the fore and helps to explain matters. If I am right that our instincts are formed in, and strongly reflect, the context of small-scale transactions and effects — and correspondingly that appreciating large-scale effects is counter-intuitive for most of us — then Goldstein’s bookstore example makes good sense. To the individual, a single copy of a single paper book *is* significant; obtaining the book (whether by paying or by stealing) is a significant transaction, albeit that it is only one transaction. A book that one can hold and touch is “personal”; although we would not mean it literally, we could say that a book is something one deals with on a “face-to-face” basis. Quite naturally, to the individual, that single copy of a single book, obtained in a single transaction, therefore has value and importance.

As the voting commercials try to convince us, the student in the bookstore is already predisposed to be convinced that that one book and its possible theft "count." The book and its theft seem to matter, and that largely explains why the students would not take a physical book without payment.

To the bookstore owner, however, the picture is different, at least if we confine ourselves to large bookstores like Barnes & Noble or Borders. A single copy of a single book, obtained by a single customer on a single occasion from a single store — *even without payment* — is utterly insignificant. In the scheme of things, in the context of hundreds of thousands of books, customers, stores, and transactions, one copy of one book is likely to be worth less to the company than the cost of a couple of bar-code scanning errors or an employee who takes fifteen minutes too long for lunch.

What about the electronic book? Isn't the same thing true, namely, that one copy of one electronic book, taken without authorization on one occasion, means essentially nothing to a large-scale electronic book seller? Yes, it is true. The harm only comes — just as it does with the paper book seller like Barnes & Noble — from individual incidents like this one incident being repeated countless times. The individual students (and I use "students" here only as an example of what I think most people would do in the same circumstances) do not easily feel the aggregate, large-scale effects of actions like their own being repeated thousands of times — with either the electronic *or* the paper book. But the difference is this: With paper book copies, all of our human instincts about, and familiarity with, small scale transactions, and face-to-face settings, and "property" as something you can touch, come to the fore to impress upon us that taking this one book "counts." Abstract rights of distant copyright owners, only conceptually embodied in invisible electrons, by contrast, necessarily carry much less weight. We cannot see them, or touch them — neither the "rights" nor the "electrons." No wonder that the "harm" from copying an electronic book, a harm that flows solely from large-scale effects and aggregations and repetitions, remains equally "untouchable" — and apparently unimportant.

CONCLUSION

Criminal penalties do not attach to "white-collar crime" as such; rather, the term covers an array of different types of particular offenses, such as securities fraud or embezzlement. Historically, few — if any — commentators or members of the law enforcement community have considered criminal copyright infringement to be one of those types. One reason infringement may not have been so considered in the past is essentially definitional. Infringement does not correlate well with some of the characteristics most-often identified with white-collar crime, such as the high social status of the defendant (so identified at least in an earlier day), the ample

corporate resources available to the defendant, or the defendant's reliance on fraud or deceit. On the other hand, infringement may correlate better with other white-collar characteristics, such as the use of special skills or professional training, as when an employee of a software company knows how to "hack" around a software encryption scheme intended to prevent copying.

More to the point, several factors suggest that criminal prosecution of copyright infringement will increase in the near future, an increase that may result in a greater tendency for law enforcement personnel to include infringement as another of many other long-identified "white-collar crimes." First, the number and severity of criminal violations defined in the statutes, either for copyright infringement or for closely related activities, have increased in the last few decades. The earliest and quite narrow criminal prohibition appeared in the Copyright Act in 1897, but today about half a dozen provisions — several added quite recently — now greatly expand both the original range of activities subject to prosecution and also the sanctions potentially applicable to violators. Law enforcement agencies also are paying much closer attention to intellectual property related crimes. The DoJ in particular has begun emphasizing the need to take such crimes more seriously, having in recent years announced policies of engaging in more vigorous prosecution of these offenses.

Second, some wrongs by their very nature are easier to detect than others. Crimes that require the face-to-face application of force, for example, will more likely result in witnesses, police reports, medical records, and other evidence than will crimes that are accomplished by "cooking the company books" behind closed doors. Copyright infringement, at least infringement that does not involve large-scale distribution of the resulting copies, has always tended to be more like the latter. Today, though, the prevalence of digital works of authorship and their easy replication on the Internet can make even large-scale distribution of unauthorized copies difficult to tie back to an identifiable infringer. When wrongful activities have a very low likelihood of detection, one way the legal system can respond is by substantially increasing the penalties for the activity. The utility of this approach can be demonstrated with a brief analysis based on probability theory. This analysis predicates that an uncertain punishment is like a certain punishment that has been reduced or "discounted" by the probability that the punishment will, in fact, be imposed. By invoking this "discounting" to produce a value for an "expected punishment," we can easily see the social attractiveness of more stringent penalties for copyright infringement, such as more frequent reliance on high-penalty criminal conviction. To the extent that computers and the Internet are making copyright infringements both more numerous and more difficult to detect than before, we will likely see a continued increase in the number and application of such criminal copyright provisions.

Unfortunately, though, the "social attractiveness" of greater criminalization may

only be apparent to legislators, law enforcement agencies, and those industries that depend on owning and protecting copyrights. Many others in the public generally will not see the issue the same way and will not expect or demand — perhaps will not even tolerate — increasing criminalization. Two factors help to explain this public reaction to stronger enforcement of copyright protections — a reaction that is, at best, one of ambivalence, and at worst, one of outright hostility.

First, copyright law creates a kind of property — intellectual property. The legal system could easily treat both tangible and intellectual property interests in near identical ways, and to a great extent does so already. Nearly all of us, though, grow up from childhood with a heavy and inevitable exposure to the concept of tangible property, but an inevitably light exposure to concepts of intangible property like copyrights. We are thus predisposed to find the rules of tangible property ownership to be appropriate and sensible, but not equivalently predisposed to find those of intangible property ownership the same.

Second, even as adults, few of us routinely experience making decisions that affect large numbers of people or transactions, or that continue to operate over long periods of time. We are far more likely to experience short-term consequences in face-to-face settings. We are thus predisposed to give greater weight and significance to small-scale experiences — those that involve precisely such short-term consequences and face-to-face settings. We are correspondingly less likely to appreciate large-scale effects that result only from the aggregation of our own, and many strangers', actions over periods of time. Copyright infringements often exhibit the latter characteristic, namely, that "harm" to the copyright owner only arises from the aggregate effect of many individually small and harmless infringements. We should not be surprised to find, therefore, that public attitudes toward copyright infringement as a kind of theft or stealing differ sharply from the same attitudes toward tangible property theft or stealing.

In sum, the push by Congress and copyright-dependent industries toward the increasing criminalization of infringement makes sense. Computerized, digital works, along with the Internet, combine to facilitate both extremely large-scale reproduction and distribution, while preserving relative anonymity for the responsible infringer. In such circumstances of great potential harm and equally great difficulty of detection and identification of those responsible, sharply increased penalties become one of the legal system's few effective responses.

But increasing the criminalization of infringement also makes no sense. In circumstances where tangible property rights are intimately familiar, and intangible property rights exotic — where immediate harm to people or objects at hand counts for much, but harm from a large-scale aggregation of individually small actions counts for very little — the public will not easily understand why today's new infringers are now to be considered "white-collar criminals."