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Digital Copyright and Confuzzling Rhetoric

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ABSTRACT

For more than a decade, policymakers, industry representatives, consumer advocates, civil libertarians, academic commentators, and user communities have advanced a wide array of arguments for or against online file sharing and restrictive copyright standards. This Article begins by introducing two short stories to illustrate the rhetorical and analytical challenges in the digital copyright debate. It then examines eight unpersuasive arguments advanced by both sides of the debate—four from the industry and four from its opponents. The Article concludes by outlining six different strategies to help the industry develop more convincing proposals for digital copyright reform.

TABLE OF CONTENTS

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The motion picture industry tells people they should not steal movies just as they should not steal cars,[1] but has anybody ever downloaded a car? Music fans praise Napster and other file sharing services for helping to free artists from the stranglehold of the recording industry,[2] but how many of these services actually have shared profits with songwriters and performing artists? Industry representatives claim that people use YouTube primarily to view pirated content,[3] but are they missing a big part of the user-generated-content picture? Artists are encouraged to forget about copyright and hold live concerts instead,[4] but can all artists succeed under this alternative compensation model?

For more than a decade, policymakers, industry representatives, consumer advocates, civil libertarians, academic commentators, and user communities have advanced many different arguments for or against online file sharing and restrictive copyright standards. Some arguments are convincing; others are not. Indeed,

1. *See* discussion *infra* Part II.B.
2. *See* discussion *infra* Part III.B.
3. *See* discussion *infra* Part II.C.
4. *See* discussion *infra* Part III.A.

many of the arguments are quite confuzzling.[5] As the entertainment industry continues to push for stronger copyright protection and enforcement in the digital environment—ranging from the introduction of the graduated response system[6] to the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA)[7]—it is time we revisit some of those unpersuasive arguments.

To help us better understand the rhetorical and analytical challenges in the digital copyright debate, Part I introduces two short stories to illustrate the difficulty in understanding and explaining the complexities in copyright law. Part II examines four unconvincing arguments advanced by the entertainment industry to support reforms for stronger copyright protection and enforcement in the digital environment. To demonstrate that the industry is not the only camp that struggles to persuade in the present debate, Part III evaluates four equally unconvincing arguments supporting the retention of the status quo or reduced copyright protection. Given the continued importance and relevance of copyright law,[8] and the industry's burden of justifying the need for digital copyright reform, Part IV outlines six different strategies to help the industry make its proposals more persuasive.

I. BLACK OR WHITE—OR JUST GRAY?

The digital copyright debate is highly polarized today.[9] Sitting on one side[10] is the entertainment industry, which emphasizes moral

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5. "Confuzzling," which is widely used on the Internet and in social media, is the urban slang that combines the word "confusing" and "puzzling." *See Confuzzling*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=confuzzling (last visited May 15, 2011).

6. *See generally* Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373 (2010) (discussing the graduated response system). The graduated response system provides an alternative enforcement mechanism through which Internet service providers can take a wide variety of actions after giving users two warnings about their potentially illegal online file sharing activities. These actions include suspension and termination of service, capping of bandwidth, and blocking of sites, portals, and protocols. *See id.* at 1374.

7. *See generally* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. (forthcoming 2011) [hereinafter Yu, *Six Secret Fears*] (providing an in-depth analysis of ACTA).

8. As I noted earlier, the digital copyright debate is not so much about whether copyright law is still important and relevant. Rather, it is about whether the *existing* copyright system generates sufficient incentives to promote creativity and whether support for creative works could come from outside the system. *See* Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13, 17 (2006).

9. *See* Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 8–12 [hereinafter Yu, *Information Ecosystem*].

10. Stakeholders in the digital copyright debate are not neatly divided into the industry and its opponents, or the pro-copyright and anti-copyright camps. Instead, they accrue different benefits and incur different costs from the various copyright proposals. *See* Yu,

high grounds while noting the wrongfulness of online file sharing and the resulting economic damage.[11] In its view, unauthorized downloading is theft. On the other side of the debate are the industry's opponents. Music fans, for instance, criticize the industry for its mistreatment of artists and its reluctance to forgo an outdated business model.[12] Consumer advocates, civil libertarians, academic commentators, and user communities also lament the sacrifices the public has to make to protect the industry's revenue streams.[13]

Although both sides have advanced a wide variety of arguments to support their positions, each side has yet to convince the other; oftentimes, they talk past, rather than to, each other.[14] The resulting debate is highly polarized and emotion-laden.[15] To help us understand the rhetorical challenges for both sides, and to underscore the importance of making persuasive arguments, this Part introduces two short stories to illustrate the difficulty in understanding and explaining the complexities in copyright law. The first story was inspired by an exchange between the Author and the participants of this Symposium. The second builds on, and is adapted from, a widely

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Anticircumvention and Anti-anticircumvention, *supra* note 8, at 13. Their positions often change according to the market, technologies, and consumer behavior. As a National Research Council study reminds us:

> The debate over intellectual property includes almost everyone, from authors and publishers, to consumers (e.g., the reading, listening, and viewing public), to libraries and educational institutions, to governmental and standards bodies. Each of the stakeholders has a variety of concerns . . . that are at times aligned with those of other stakeholders, and at other times opposed. An individual stake-holder may also play multiple roles with various concerns. At different times, a single individual may be an author, reader, consumer, teacher, or shareholder in publishing or entertainment companies; a member of an editorial board; or an officer of a scholarly society that relies on publishing for revenue. The dominant concern will depend on the part played at the moment.

COMM. ON INTELLECTUAL PROP. RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, NAT'L RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 51 (2000) [hereinafter DIGITAL DILEMMA].

11. *See* discussion Part II.B.

12. *See* discussion Part III.B.

13. *See* discussion Part II.D.

14. *See, e.g.*, Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium,"* 89 MINN. L. REV. 1318, 1347 (2005) ("[E]ach side [in the copyright debate] tries to convince the other that its position is obvious and natural, whereas the other side's is radical and contrived."); Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 65 (2002) ("[T]he players in the debate over technological means of committing or forestalling copying were all paranoid, each suspecting the other of bottomless malevolence in their respective endeavors to control or to liberate copyrighted material."); David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1, 1 (2004) ("[T]hose who debate copyright often seem to talk past each other."); Yu, *Information Ecosystem*, *supra* note 9, at 8–12 (discussing the bipolar intellectual property debate).

15. *See* Yu, *Information Ecosystem*, *supra* note 9, at 8–12.

covered news story during the recording industry's first wave of lawsuits against individual file sharers in September 2003.[16]

A. "If It's Not Yours, Give It Back!"

Tommy is in kindergarten. One day, his friend brought to school an interesting toy from the movie series *Transformers*.[17] When Tommy came home, he carried the toy with him. So, his dad asked, "Tommy, where did you get the toy?" Tommy responded, "I took it from my friend, Johnny." His dad frowned and questioned further, "Tommy, does this belong to you?" "No," Tommy answered. "If it's not yours, give it back!" implored his dad.

It turns out that Tommy has an unnatural ability to instantaneously make a replica of the toy at school without taking it away from his friend Johnny. As his close friend, Johnny was also eager to share the toy with him. So, when Tommy's dad asked whether the toy belonged to him, Tommy nodded and said, "Yes. Johnny showed it to me, and I made a copy at school. You know what I can do." With that response, Tommy's dad could no longer tell him to give the toy back to Johnny. After all, Tommy made his own copy, and Johnny still had the toy with him.

To come up with an explanation, Tommy's mom suggested, "Why don't you tell Tommy that the toy belongs to Johnny and that he should not make a copy?" His dad replied, "That wouldn't work either. Technically, Johnny doesn't own the toy. His parents, who purchased it, do. Also, the right to copy the toy belongs to Hasbro. Johnny's parents just bought the toy from Toys R Us." Confused and disappointed, his mom asked, "So, what should we tell Tommy?" The two parents looked at each other; neither offered a response.

B. "Pay for Everything You Own!"

Samantha lived in public housing. Her dad passed away after a tragic traffic accident five years ago, and her mom worked two shifts

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16. The story involved Brianna LaHara, a twelve-year-old honors student living in public housing whose parent had paid $29.99 for the KaZaA services and who might not have been able to distinguish between KaZaA and PressPlay or other legal music subscription services. *See* Tim Arango et al., *Music-Thief Kid Sings Sorry Song*, N.Y. POST, Sept. 10, 2003, at 21. The RIAA eventually settled with the student for $2,000. John Borland, *RIAA Settles with 12-year-old Girl*, CNET NEWS (Sept. 9, 2003, 4:05 PM), http://news.cnet.com/2100-1027-5073717.html.

17. Toys from the TV series *Transformers* were actually the subject of an interesting case concerning copyright formalities. *See* Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189 (2d Cir. 1985) (finding the omission of notice from the toys subject to cure under § 405 of the Copyright Act).

to take care of the family. To encourage Samantha to study, her mom offered to buy her some online music if she received an "A" in at least half of her classes this semester. Samantha had always wanted to listen to music online like her friends, but she had no pocket money. With this promise, she studied hard and eventually earned an "A" in all classes except mathematics.

To reward Samantha, her mom gave her the credit card. Happily, Samantha went online, punched in the credit card number, and purchased the music-downloading software for $30. Her mom found the purchase very expensive, but she did not understand computers at all. Nor did she want to break her promise with her daughter. After all, she could work harder to earn back the $30. So, she told Samantha instead, "You get interweb music because you worked hard to earn it. We don't have much, but we don't steal. We pay for everything we own." She felt so proud after she finished the sentence.

For the next two weeks, Samantha could not have been happier. Naturally, her mom was happy, too. In the third week, however, a letter arrived from the Recording Industry Association of America (RIAA), threatening to sue the family for copyright infringement. The letter mentioned specifically that the family might be liable for statutory damages of up to $150,000 per downloaded song for willful copyright infringement.

Samantha's mom was in shock. She had never seen that much money before. Nor did she have much savings to pay for the damages. So, she contacted her neighbor, who had a teenage son surfing the Web every night and knew a little about computers. After much explanation, she learned that the $30 she doled out was for purchasing the file sharing software, but not the music distributed through the software. Helpless and almost in tears, she asked her neighbor, "So, what should I do now?" Her neighbor looked back at her in sorrow, without a response.

C. Summary: "Aiya!"

Although the entertainment industry has widely used theft as a rhetorical tool and framing device,[18] "Thou shalt not steal" cannot be more inapposite in the online file sharing context.[19] As Geraldine

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18. *See infra* Part II.A.

19. *But see* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) ("'Thou shalt not steal' has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here

Moohr explains, "Criminal laws are most effective in educating the public when the prohibition is 'Thou Shalt Not,' and are less so when the prohibition is 'Thou shalt not copy under certain circumstances and certain conditions.'"[20]

The two stories in this Part involve some complications that illustrate the rhetorical and analytical challenges in the digital copyright debate. If we expect Tommy, Samantha, and their parents to be able to quickly understand and explain the nuances and intricacies of copyright law, we may have assumed too much. In both stories, the parents had a very tough time explaining to their child what was wrong. While the second example involves technologies that complicate the analysis, the first example shows how difficult things can be even without such complications.[21]

II. FOR STRONGER PROTECTION AND ENFORCEMENT

Over the years, the entertainment industry has advanced a wide array of arguments in the digital copyright debate. Many of these arguments, unfortunately, are rather unconvincing. Their lack of persuasiveness has greatly hampered the industry's ability to effectively debate with consumer advocates, civil libertarians, academic commentators, and user communities. It has also slowed down the industry's push for greater digital copyright reform. To help us understand the rhetorical challenges confronting the industry, this Part explores four unconvincing arguments for stronger copyright protection and enforcement in the digital environment.

A. "Oh, My, the Sky Is Falling!"

The textbook example of an unconvincing industry argument is a variant of the "sky is falling" argument. Historically, intellectual property rights holders had a tendency to initially complain about the adverse impact of new technologies only to find them later opening up new markets for their products and services.[22] For example, well-

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should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country." (footnote omitted)).

20. Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 797–98 (2005) (footnote omitted).

21. These examples can be even more complicated if one takes into consideration those lessons children learn at school about sharing things with others. The more mixed messages they receive, the more difficult it is for them to make clear-cut distinctions between right and wrong.

22. As a National Research Council study points out, copyright holders tend to have short-sighted goals and often fail to recognize the benefits brought about by new technologies:

known American composer John Philip Sousa testified before Congress about the challenge created by the manufacture and sale of phonograph records:

> When I was a boy . . . in front of every house in the summer evenings you would find young people together singing the songs of the day or the old songs. Today you hear these infernal machines going night and day. We will not have a vocal cord left. The vocal cords will be eliminated by a process of evolution, as was the tail of man when he came from the ape.[23]

Notwithstanding his many memorable marches, Sousa could not be more wrong about the impact of these "infernal machines": Evolution has not eliminated our vocal cords. In fact, despite the arrival of phonographs, cassette tapes, jukeboxes, compact discs, mini-discs, and MP3 files, we still have a great many beautiful vocalists.[24] A case in point is the Metropolitan Opera, which now features its finest artists

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> In 17th century England, the emergence of lending libraries was seen as the death knell of book stores; in the 20th century, photocopying was seen as the end of the publishing business, and videotape the end of the movie business. Yet in each case, the new development produced a new market far larger than the impact it had on the existing market. Lending libraries gave inexpensive access to books that were too expensive to purchase, thereby helping to make literacy widespread and vastly increasing the sale of books. Similarly, the ability to photocopy makes the printed material in a library more valuable to consumers, while videotapes have significantly increased viewing of movies.

DIGITAL DILEMMA, *supra* note 10, at 78–79 (citations omitted). Likewise, the U.S. Court of Appeals for the Ninth Circuit acknowledged in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*:

> The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude.

380 F.3d 1154, 1167 (9th Cir. 2004), *vacated*, 545 U.S. 913 (2005); *see also* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 69 (2004) [hereinafter LESSIG, FREE CULTURE] ("Just as Edison complained about Hollywood, composers complained about piano rolls, recording artists complained about radio, and broadcasters complained about cable TV, the music industry complains that [file] sharing is a kind of 'theft' that is 'devastating' the industry.").

23. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 24–25 (2008) [hereinafter LESSIG, REMIX] (quoting John Philip Sousa, *The Menace of Mechanical Music*, 8 APPLETON'S MAG. 278, 280 (1906)). Sousa's theme was later picked up by ASCAP (the American Society of Composers, Authors and Publishers) in "a pamphlet decrying the phonograph record as 'the murderer of music.'" WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS xxii (2009).

24. *See, e.g.*, JAMES LARDNER, FAST FORWARD: HOLLYWOOD, THE JAPANESE & THE VCR WARS (1988) (discussing the challenge posed by Betamax videotape recorders); PETER MANUEL, CASSETTE CULTURE: POPULAR MUSIC AND TECHNOLOGY IN NORTH INDIA (1993) (discussing how the advent of cassette technology in the 1980s transformed the popular music industry in India).

and well-staged productions through live, worldwide, high-definition broadcasts.[25]

Decades after Sousa's testimony, the late Jack Valenti, the long-time lobbyist for the U.S. movie industry, made the same mistake. In his effort to lobby against the manufacture and distribution of videocassette recorders, he declared that the new device was "to the American film producer and the American public as the Boston strangler [was] to the woman home alone."[26] This "Boston strangler," however, never arrived to threaten the movie industry. Rather, it became the industry's new best friend, bringing new revenue and opportunities. Jim Griffin, the former head of the technology department at Geffen Records, put it well: "In the history of intellectual property, the things we thought would kill us are the things that fed us."[27]

Thus far, there is no evidence that the sky is falling, as far as the negative impact of the Internet and online file sharing is concerned.[28] If anything is falling, it is the outdated business model that the industry developed before the arrival of the World Wide Web.[29] To some extent, the industry's experience in the past decade resembled what noted economist Joseph Schumpeter described as "creative destruction"—a revolutionary process through which the old economic structure is demolished as the foundations of a new

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25. *See* Press Release, Metro. Opera, "Metropolitan Opera: Live in HD" Now Playing at a Theater Near You (Nov. 15, 2006), *available at* http://www.metoperafamily.org/metopera/news/press/detail.aspx?id=2719.

26. *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. (1982) (statement of Jack Valenti, President, Motion Picture Association of America).

27. J.D. LASICA, DARKNET: HOLLYWOOD'S WAR AGAINST THE DIGITAL GENERATION 109 (2005).

28. *See* Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. ON TELECOMM. & HIGH TECH. L. 125 (2011) [hereinafter Lemley, *Is the Sky Falling*].

29. *See, e.g.*, STEVE KNOPPER, APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE 250 (2009) ("[U]nless [the major labels] stop fiercely protecting the old model of selling pieces of vinyl or plastic to as many consumers as possible and start hiring digital music executives trained to build the next Napster or the next iTunes or the next *Long Tail* service or the next music-equipped cell phone or whatever particular shape the future might take, the labels will become an anachronism." (footnote omitted)); GREG KOT, RIPPED: HOW THE WIRED GENERATION REVOLUTIONIZED MUSIC 1 (2009) (quoting Peter Jenner, Pink Floyd's first manager, as saying, "We're trying to force a nineteenth- and twentieth-century business model into twenty-first-century technology . . . I'm not surprised we're in chaos."); PATRY, *supra* note 23, at 26–30 (criticizing the copyright holders' use of control as a business model); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 746–50 (2005) [hereinafter Yu, *P2P and the Future*] (discussing how the new technology has challenged the existing business model).

structure are built.[30] Although the industry initially opposed making adjustments to its business model, it eventually and reluctantly adapted its products and services to the new digital environment—through the sale of iTunes[31] and the release of copyrighted content on YouTube, Hulu, and other similar platforms.[32]

While the industry and its representatives are understandably disappointed that its once-successful business model has become obsolete, technology has caused major changes in many other equally important and still-existing industries.[33] At the turn of the twentieth century, the Dow Jones Industrial Average included Amalgamated Copper, American Sugar, Tennessee Coal & Iron, U.S. Rubber, and U.S. Steel.[34] Today, the index features many high-technology or intellectual-property-driven firms, such as 3M, Boeing, Hewlett-Packard, IBM, Intel, Merck, Microsoft, Pfizer, and Walt Disney.[35] Given the continuous evolution of our economy, the industry has yet to convince us why its business model deserves to be singled out for protection while other equally important industries had to adapt to technological change.

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30. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81 (Harper Perennial, 3d ed. 1976). As Raymond Ku explains:

> [Creative destruction] "strikes not at the margins of the profits and the outputs of existing firms but at their foundations and their lives." In this process of creative destruction, digital technology and the Internet strike at the foundation of copyright and the industries built upon copyright by eliminating the need for firms to distribute copyrighted works and for exclusive property rights to support creation.

Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 269 (2002) (quoting Schumpeter, *supra*, at 84).

31. *See* Yu, *P2P and the Future*, *supra* note 29, at 698–703 (discussing the sale of iTunes and the recording industry's mass licensing model).

32. *See, e.g.*, Dawn C. Chmielewski, *EMI Agrees to Distribute Music Videos on Hulu*, L.A. TIMES, Nov. 19, 2009, at B3; Peter Lauria, *YouTube Sets Business Model to Music*, N.Y. POST, Apr. 10, 2009, at 25; David Lieberman, *Vevo Aims to Be Hulu of Music Videos*, USA TODAY, Nov. 27, 2009, at 3B; *Warner Will Offer Videos on Hulu.com*, L.A. TIMES, Dec. 23, 2009, at B2.

33. As I noted earlier:

> The steel industry, for example, has faced serious competition from manufacturers in Europe, Asia, and South America. Cost-saving technology and the acquisition of new blast furnaces have also reduced the demand for steelworkers. With less than an eighth of the original workforce, steel manufacturers can now produce almost as much steel as they did thirty years ago. As a result, many of them have restructured their companies with massive layoffs, tearing apart families and communities and forcing workers to relocate to other job markets or acquire skills in a different trade.

Yu, *P2P and the Future*, *supra* note 29, at 748 (footnotes omitted).

34. *Dow Jones Industrial Average History*, DOW JONES INDEXES, 3 http://www.djindexes.com/mdsidx/downloads/brochure_info/Dow_Jones_Industrial_Average_Historical_Components.pdf (last visited Jan. 11, 2011); *see also* Bob Greene, *A Mouse Replaces Men of Steel*, CHI. TRIB., May 20, 1991, at 1C (observing the change in the Dow Jones Industrial Average); J. Thomas McCarthy, *Intellectual Property—America's Overlooked Export*, 20 U. DAYTON L. REV. 809, 809–10 (1995) (discussing Greene's observation).

35. *Dow Jones Industrial Average History*, *supra* note 34, at 18.

B. "If You Don't Steal Cars, Why Steal Movies?"

In 2004, the Motion Picture Association of America (MPAA) launched a major educational campaign in response to challenges posed by online file sharing.[36] As stated in a widely parodied[37] anti-piracy commercial, "You wouldn't steal a car / You wouldn't steal a handbag / You wouldn't steal a television / You wouldn't steal a movie / Downloading / Pirated / Films / Is stealing / Stealing / Is against / The law / Piracy. It's a crime."[38] With vivid images of thefts and background music mixed with police sirens, the commercial strived hard to link film piracy to theft.[39]

Like the MPAA, the recording industry has made similar comparisons over the years.[40] As Frances Preston, the former president and CEO of Broadcast Music, Inc., emphatically declared: "Illegal downloading of music is theft, pure and simple. It robs songwriters, artists and the industry that supports them of their property and their livelihood. Ironically, those who steal music are stealing the future creativity they so passionately crave. We must end this destructive cycle now."[41]

On the surface, the syllogisms put forth by the MPAA commercial are valid. After all, both cars and DVDs are personal property. In reality, however, the advertisement conflated intangible property with tangible property. While linking intellectual property to tangible property has its rhetorical advantages,[42] especially on the

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36. *See* Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 920–21 (2004) (discussing the industry's education efforts). *But see* David Lange, *Reimagining the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 463, 471 ("[It is] fundamentally wrong to insist that children internalize the proprietary and moral values of the copyright system.").

37. The parodies are widely available on YouTube. *See* YOUTUBE, http://www.yotube.com (last visited May 18, 2011) (accessed by searching for "MPAA Anti Piracy Ad").

38. *See* Patricia Loughlan, *"You Wouldn't Steal a Car . . .": Intellectual Property and the Language of Theft*, 29 EUR. INTELL. PROP. REV. 401, 401 (2007) [hereinafter Loughlan, *You Wouldn't Steal a Car*] (transcribing the text of the MPAA commercial and discussing the rhetoric deployed in the industry's commercial).

39. The MPAA commercial is widely available on YouTube. *See* YOUTUBE, http://www.yotube.com (last visited May 18, 2011) (accessed by searching for "MPAA Anti Piracy Ad").

40. *See* Press Release, Recording Indus. Ass'n of Am., Recording Industry to Begin Collecting Evidence and Preparing Lawsuits Against File "Sharers" Who Illegally Offer Music Online (June 25, 2003), *available at* http://www.riaa.com/newsitem.php?id=2B9DA905-4A0D-8439-7EE1-EC9953A22DB9 (including quotes that described unauthorized use of copyrighted materials as "theft" and illegal file sharers as "shoplifters").

41. *Id.*

42. *See, e.g.*, Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 273–77 (2003) (discussing why copyright rhetoric matters); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 22 (2003) [hereinafter Netanel, *Impose a Noncommercial Use Levy*] ("The copyright industries regularly employ the rhetoric of private property to support

Capitol Hill, making well-reasoned arguments for stronger copyright protection and enforcement is not one of them. In fact, one of the primary reasons why intellectual property protection demands special theoretical justifications concerns the differences between tangible and intangible property—for example, the differences between a DVD and the movie recorded on a DVD.

Unlike tangible property, copyright is both nonexcludable and nonrivalrous.[43] Without physical, legal, or technological protections, movie producers cannot effectively prevent others from gaining access to their creations once the works are made generally available. When a movie is seen, an individual's viewing also does not interfere with others' enjoyment of the same work. Multiple individuals can enjoy the movie at the same time, even though they may have to go to a cinema or do so through different DVD or VHS copies.

Given these significant differences between tangible and intangible property, it is no surprise that nobody has ever downloaded a car.[44] After all, if you take a car for a joyride, the car owner will not have the same car to drive.[45] But if you download a movie, others can still enjoy the same movie.

To be certain, online file sharing could hurt the entertainment industry. For example, when one downloads a piece of music without authorization, that individual may be reluctant to pay for the same song after listening to it—especially when the song is easily forgettable or the user has no interest in listening to it again. Downloads, therefore, could translate into lost sales; in the aggregate, they could pose a serious economic threat to the recording industry.

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their lobbying efforts and litigation."); Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 420 (2005) ("One might surmise . . . that introduction of the property label into copyright and patent was not accidental."); Richard M. Stallman, *Did You Say "Intellectual Property"? It's a Seductive Mirage*, GNU.ORG, http://www.gnu.org/philosophy/not-ipr.xhtml (last updated Dec. 30, 2010) ("The distorting and confusing term did not become common by accident. Companies that gain from the confusion promoted it."). For discussions of the uneasy tension between real property and intellectual property, see Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033–46 (2005) [hereinafter Lemley, *Property, Intellectual Property*]; Sterk, *supra*; Yu, *Information Ecosystem*, *supra* note 9, at 1–6.

43. *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 344–61 (1989) (discussing the nonexcludable and nonrivalrous nature of intellectual property); Lemley, *Property, Intellectual Property*, *supra* note 42, at 1050–51 (same).

44. Industry representatives, no doubt, will retort, "These people *will* download a car if they can!"

45. An interesting question arises concerning whether joyriding constitutes theft. An equally intriguing question concerns what one means by "theft." For example, is music theft closer to garden-variety theft or time theft? *See* Laureen Snider, *Theft of Time: Disciplining Through Science and Law*, 40 OSGOODE HALL L.J. 89 (2002) (discussing time theft).

However, without empirical proof, it is hard to know whether downloads actually lead to lost sales. In fact, some evidence seems to suggest otherwise.[46] For example, while those who have downloaded music without authorization may not buy the product, or could not afford it, some downloaders may purchase the song, or even the entire album, after sampling. Even if they do not purchase the product, they may purchase prior or future works created, performed, or produced by the same artist. They may even recommend the work to their friends, thus enlarging the market for the sampled work. Without sampling, many downloaders (and their friends) might not even know about the product. In short, it is far from settled that online file sharing will *always* harm artists.

C. "YouTube Is Crap!"

YouTube provides ample and exciting opportunities for disseminating both traditional and user-generated content,[47] thereby shaping the development of both copyright laws and user norms.[48] Yet, the entertainment industry continues to dismiss or downplay these opportunities, even though a growing number of firms are now disseminating copyrighted content through YouTube.[49] As industry representatives love to ask rhetorically, "How many cat videos can you

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46. *See, e.g.*, SIVA VAIDHYANATHAN, THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM 47–48 (2004) (observing that Eminem, Limp Bizkit, Britney Spears and *NSYNC had all sold more than 1 million albums in the first week after release in the height of online file sharing through Napster); Felix Oberholzer-Gee & Koleman S. Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007) (showing that file sharing has only had a limited effect on record sales).

47. Commentators and industry representatives have questioned the term "user-generated content." *Compare* Alan N. Braverman & Terri Southwick, *The User-Generated Content Principles: The Motivation, Process, Results and Lessons Learned*, 32 COLUM. J.L. & ARTS 471, 471 (2009) ("[User Generated Content] is not always user-generated; it would more accurately be called user-posted content."), *and* Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 842 (2009) ("Let me be perfectly clear: there is no such thing as 'user-generated content.'"), *with* Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863, 870–74 (2008) (providing a definition of the user-generated content).

48. *See generally* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1633–42 (2004) (advancing a pattern-oriented approach to fair use that takes social and cultural patterns into account); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) (challenging the preference for incorporating custom into intellectual property law); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006) [hereinafter Schultz, *Fear and Norms*] (examining the norms of the jamband community).

49. See sources cited *supra* note 32.

watch a day?"[50] Some even observe matter-of-factly that people go to YouTube just to listen to bootleg recordings or watch pirated movies. Underlying these observations are the perception of superiority in products produced by traditional entertainment firms and the troubling view that media platforms developed without industry collaboration (or blessing) are illegal. It is, therefore, no surprise that Viacom, which considered YouTube a free-rider, sued Google over the unauthorized distribution of its copyrighted content online.[51]

While it remains contentious whether, and to what extent, distribution via YouTube or other social networking platforms is permissible under current copyright law, the entertainment industry should not ignore the potential these new platforms have for enabling artists to reach out to their fans. As Mark Lemley recently observed:

> Business models can build on the experiential relationships that people have with content. People don't go see movies—at least good movies—and then stop thinking about them. People want to be engaged with their content. They want to have connections with the musicians they like. They want to go to concerts and experience music live. They want to engage in an ongoing relationship, and there's revenue there to be had by meeting that demand—providing that collaborative experience can be lucrative.[52]

YouTube also helps "promot[e] the Progress of Science"[53]—the constitutional goal of copyright—by providing an exciting environment in which users mix their content with preexisting works—copyrighted or otherwise.[54] Some of these end products, such as verbatim copies of music videos or comedy clips reposted online without authorization, are mostly infringing; others, such as originally created home videos with mere incidental use of copyrighted content, are very likely legal. Even more complicated, in between these two ends of the spectrum is a gray area where the copyright status of the use remains unclear, thanks to the many limitations and exceptions in the copyright system. These limitations and exceptions include the fair use

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50. *Cf.* MICHAEL STRANGELOVE, WATCHING YOUTUBE: EXTRAORDINARY VIDEOS BY ORDINARY PEOPLE 12 (2010) (noting the "tendency among commentators to dismiss YouTube and online amateur video as little more than the digital trash of a generation armed with too much technology, too much spare time, and too little talent").

51. Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010). The litigation is currently under appeal before the U.S. Court of Appeal for the Second Circuit. In the interest of full disclosure, the Author has signed on to an amicus brief in support of YouTube. Brief for Intellectual Property and Internet Law Professors as Amici Curiae Supporting Respondent, Viacom Int'l, Inc. v. YouTube, Inc., No. 10–3270 (2d Cir. Apr. 7, 2011).

52. Lemley, *Is the Sky Falling*, *supra* note 28, at 134.

53. U.S. CONST. art. I, § 8, cl. 8.

54. *See generally* LAWRENCE LESSIG, REMIX, *supra* note 23, at 51–83 (discussing the importance of remixes).

privilege,[55] the *de minimis* use exception,[56] and the limited scope of derivative work rights.[57]

The arrival of new digital technologies and social networking platforms has opened the door for the public to actively participate in cultural production. Such participation is one of the primary reasons why consumer advocates, civil libertarians, academic commentators, and user communities have advanced their own proposals for digital copyright reform.

For example, William Fisher advocates reforms that allow for greater reuse and modification of digital works to promote semiotic democracy,[58] which he defined as "the ability of 'consumers' to re-shape cultural artifacts and thus to participate more actively in the creation of the cloud of cultural meanings through which they move."[59] The need to develop a semiotic democracy is particularly acute today, when media ownership has become highly concentrated in a few corporate oligopolies.[60]

Likewise, Lawrence Lessig argues passionately for rights to remix preexisting works.[61] As he, Henry Jenkins, and others aptly point out, digital literacy now goes beyond texts to include other forms of creative media.[62] Materials that can be used for re-creation, therefore, need to include not only texts, but also images, audio files, and video clips—including even preexisting copyrighted content produced by the entertainment industry. The re-creations can take

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55. *See* 17 U.S.C. § 107 (2006).

56. *See* Newton v. Diamond, 388 F.3d 1189, 1192–96 (9th Cir. 2004) (discussing the *de minimis* use exception).

57. *See* Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 538–39 (S.D.N.Y. 2008) (delineating the limited scope of the derivative work right).

58. *See* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 28–31 (2004).

59. *Id.* at 184. The term "semiotic democracy" was coined in JOHN FISKE, TELEVISION CULTURE 76 (1987). As Professor Fisher explained, there are many benefits when individuals can freely recode preexisting works:

> People would be more engaged, less alienated, if they had more voice in the construction of their cultural environment. And the environment itself . . . would be more variegated and stimulating. . . . In the future, sharing could encompass more creativity. The circulation of artifacts would include their modification, improvement, or adaptation. To some degree, at least, such habits could help ameliorate the oft-lamented disease of modern culture: anomie, isolation, hyper-individualism. Collective creativity could help us become more collective beings.

FISHER, *supra* note 58, at 31.

60. *See generally* BEN H. BAGDIKIAN, THE MEDIA MONOPOLY (6th ed. 2000) (discussing growing media concentration); ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES (1999) (same).

61. *See* LESSIG, REMIX, *supra* note 23, at 76–82.

62. *See* HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 186 (2006); LESSIG, REMIX, *supra* note 23, at 68–76.

the form of remixes, mash-ups, cut-ups, spoofs, parodies, or machinimas.[63] As Professor Lessig reminds us eloquently:

> Text is today's Latin. It is through text that we elites communicate .... For the masses, however, most information is gathered through other forms of media: TV, film, music, and music video. These forms of "writing" are the vernacular of today. They are the kinds of "writing" that matters most to most.[64]

Locating support for reforms in our longstanding free-speech tradition, Jack Balkin further argued that the creative reuse and modification of preexisting materials can help promote the development of a vibrant democratic culture, which in turn affects a country's political future.[65] As he observes with respect to digital speech:

> A democratic culture is the culture of widespread "ripping, mixing, and burning," of nonexclusive appropriation, innovation, and combination. It is the culture of routing around and glomming on, the culture of annotation, innovation, and bricolage. Democratic culture ... makes use of the instrumentalities of mass culture, but transforms them, individualizes them, and sends what it produces back into the cultural stream. In democratic culture, individuals are not mere consumers and recipients of mass culture but active appropriators.[66]

Creative reuse and modification of preexisting materials, therefore, are highly valuable to society. They ensure that "everyone—not just political, economic, or cultural elites—has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong."[67]

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63. *See* JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES (2008) 116–17 (describing the different forms of digital expression that draw on the remixing of preexisting contents).

64. LESSIG, REMIX, *supra* note 23, at 68.

65. *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

66. *Id.* at 45.

67. *Id.* at 4. While the need to realize this democratic culture is not new, and such realization draws on the socio-political foundations free speech has helped build, digital technologies "change the social conditions in which people speak ... [and therefore] bring to light features of freedom of speech that have always existed in the background but now become foregrounded." *Id.* at 2. As Professor Balkin forcefully argued, democratic cultural participation is important for two reasons:

> First, culture is a source of the self. Human beings are made out of culture. A democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of meaning-making that shape them and become part of them; a democratic culture is valuable because it gives ordinary people a say in the progress and development of the cultural forces that in turn produce them.
>
> Second, participation in culture has a constitutive or performative value: When people are creative, when they make new things out of old things, when they become producers of their culture, they exercise and perform their freedom and become the sort of people who are free. That freedom is something more than just choosing which

As netizens learn to reuse and modify preexisting works, there inevitably will be *good* remixes and *bad* remixes.[68] While we understandably want to discourage, or even outlaw, bad remixes, it is easier said than done. Users are unlikely to come up with good remixes if they cannot experiment with all forms of remixes.[69] Making mistakes is part of the learning process, and it is very rare for people to get everything correct the first time. Thus, if society wants to encourage this new form of cultural production, it is important that the copyright system does not focus so much on eliminating bad remixes that it overlooks the need to provide opportunities for users to learn how to create remixes.

Finally, despite the industry's frequent disparagement of YouTube videos as cheap, crappy entertainment, these videos have significant social value that has to be balanced against copyright interests. First, as shown in relation to the recent Japanese earthquake and political protests in the Middle East and North Africa, home videos shot by citizen journalists provide real-time audio and visual reports without the filtering of the mainstream press.[70] The ability to publicly disseminate these videos has also empowered citizens against oppressive governments.[71] In addition, YouTube has

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cultural products to purchase and consume; the freedom to create is an active engagement with the world.

Id. at 35.

68. As Professor Lessig writes:

> There's no comparing ten minutes produced by J. J. Abrams and ten minutes from any of the stuff that passes for video production on YouTube. . . . The vast majority of remix, like the vast majority of home movies, or consumer photographs, or singing in the shower, or blogs, is just crap. Most of these products are silly or derivative, a waste of even the creator's time, let alone the consumer's.

LESSIG, REMIX, *supra* note 23, at 92.

69. *See id.*

70. *See, e.g.*, Jennifer Preston, *Volunteer Site with Harvard Roots Spreads Citizen Journalism's Voice*, BOSTON GLOBE, Mar. 14, 2011, at 9 (describing the work of Global Voices, which "turned to Facebook, YouTube, and Twitter, where other bloggers and hundreds of ordinary people stepped into the role of citizen journalist and shared their experiences, cellphone photos, and videos online"); Steve Sternberg, *The World to the Rescue*, USA TODAY, Apr. 12, 2011, at 1A ("Japan's disaster has spotlighted the critical role that social media websites such as Twitter, Facebook, Google, YouTube and Skype increasingly are playing in responses to crises around the world. They may have been designed largely for online socializing and fun, but such sites and others have empowered people caught up in crises and others wanting to help to share vivid, unfiltered images, audio and text reports before governments or more traditional media can do so."). Nevertheless, "authenticating [these images and videos] remains a challenge, since photos can be easily altered by computers and old videos can resurface again, purporting to be new." Jennifer Preston & Brian Stelter, *Cellphone Cameras Become World's Eyes and Ears on Protests Across the Middle East*, N.Y. TIMES, Feb. 19, 2011, at A11.

71. *See* Preston & Stelter, *supra* note 70 ("For some of the protesters facing Bahrain's heavily armed security forces in and around Pearl Square in Manama, the most powerful weapon against shotguns and tear gas has been the tiny camera inside their cellphones. By uploading images of . . . violence in Manama, the capital, to Web sites like YouTube and yFrog, and then

been widely used as a political or fund-raising tool, as evident in the 2008 U.S. presidential election and other electoral campaigns.[72] In April 2011, President Obama launched its re-election campaign bid in part through a YouTube video, "It Begins with Us."[73]

Second, like home videos, YouTube videos have substantial entertainment value. Unlike movies and television programs, they contain surprise elements that are often absent from mass-market entertainment products. As J.D. Lasica aptly observes, "Where big media will continue to offer polished, mass market shows with linear narrative, high production values, and orchestrated story lines, the video of participatory culture will be marked by the quirky, personal, edgy, raw, unpolished, unscripted, unconventional, hyper-realistic, and genuinely surprising."[74] In fact, home videos are so entertaining that the show *America's Funniest Home Videos* has been broadcasted on television for more than two decades, making it one of the longest-running comedy shows ever.[75]

Third, YouTube brings an important social element often missing from passive media, such as movies, television, music, and books. Socialization is one of the reasons why YouTube, Facebook, Twitter, and Tumblr have become wildly popular today.[76] Given the choice between watching an unfamiliar program put together professionally by an entertainment firm and a few short videos involving the user's friends goofing around, some users undoubtedly will select the latter. Even if the homemade videos are of lower quality, the users' familiarity with the subject and their interest in what happens to their friends will make up for the difference.[77] Moreover, users need not pick between YouTube videos and

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sharing them on Facebook and Twitter, the protesters upstaged government accounts and drew worldwide attention to their demands.").

72. *See* STRANGELOVE, *supra* note 50, at 137–57 (discussing the participation of YouTube in political, religious, and armed conflicts).

73. *Barack Obama 2012 Campaign Launch Video—"It Begins With Us,"* YOUTUBE (Apr. 3, 2011), http://www.youtube.com/watch?v=f-VZLvVF1FQ.

74. LASICA, *supra* note 27, at 95; *see also* SIVA VAIDHYANATHAN, THE GOOGLIZATION OF EVERYTHING (AND WHY WE SHOULD WORRY) 37 (2011) ("[YouTube is] where serious academic lectures and goofy home videos intermingle. It's where dogs ride skateboards.").

75. *See* Diane Toroian Keaggy, *Funniest Videos Still Rolling After 20 Seasons*, CHI. TRIB., Nov. 26, 2010, at C9 (reporting that ABC recently renewed the show, which debuted in November 1989, for a mind-boggling twenty-first season).

76. *See* JEAN BURGESS & JOSHUA GREEN, YOUTUBE: ONLINE VIDEO AND PARTICIPATORY CULTURE 58–74 (2009) (discussing YouTube as a social network); STRANGELOVE, *supra* note 50, at 103–36 (discussing the YouTube community).

77. *See* STRANGELOVE, *supra* note 50, at 3 ("Frankly, you would have to be dead inside not to find something emotionally or intellectually compelling on YouTube. After all, it is you, it is me, it is our neighbours, our families, our friends (and, all too often, our darn kids) who can be seen on YouTube.").

traditional entertainment products; they can do both, although these products at times may compete with each other for time and attention.[78]

D. "There Is No Human Right to Steal!"

In strengthening copyright protection and enforcement, the industry sometimes has pushed for draconian measures that erode the protections of free speech, free press, privacy, due process, and other civil liberties.[79] When consumer advocates, civil libertarians, academic commentators, and user communities register their human rights concerns, the industry often responds by quickly pointing out that there is no human right to steal.[80]

The industry's response is factually correct; many commentators, in fact, consider protection of private property an

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78. *See* J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1148 (1996) ("All communications media produce too much information. So in that sense, all media have a problem of scarcity. But the scarcity is not a scarcity of bandwidth. It is a scarcity of audience."); Monroe E. Price, *The Newness of New Technology*, 22 CARDOZO L. REV. 1885, 1911 (2001) ("Information overproduction creates a problem not merely of unwanted offensiveness greeting an Internet user, but also of unwanted irrelevance."); Herbert A. Simon, *Designing Organizations for an Information-Rich World*, *in* COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 40–41 (Martin Greenberger ed., 1971) ("[I]n an information-rich world, the wealth of information means a dearth of something else: a scarcity of whatever it is that information consumes. What information consumes is rather obvious: it consumes the attention of its recipients. Hence a wealth of information creates a poverty of attention and a need to allocate that attention efficiently among the overabundance of information sources that might consume it.").

79. *See* Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 715 (2010) [hereinafter Yu, *Digital Copyright Reform*] (discussing how the proposed disclosure and retention mechanism would chill speech); Yu, *The Graduated Response*, *supra* note 6, at 1401–02 (discussing how the graduated response system would undermine the protection of free speech, free press, and privacy).

80. *See* Mitch Glazier, Senior Vice President, Gov't Relations & Indus. Relations, Recording Indus. Ass'n of Am., Remarks at the *Vanderbilt Journal of Entertainment and Technology Law* Symposium: Where Do We Go from Here? The Evolution of Entertainment Law and Industry in the New World (Sept. 28, 2010). Likewise, two advocates of strong property rights state:

> IP protection has long been recognized as a basic human right, and the tension between the rights of the creators and the rights of consumers has been successfully resolved by the development and modification of intellectual property protections over the years.
>
> Those who want to weaken IP protections are really tapping into a failed and discredited economic theory that the public doesn't benefit from privately owned goods. However, expropriation of others' property not only undermines creation and invention, it also undermines economies and societies. It is, ironically, one of the most "anti-human rights" actions governments could take.

Tom Giovanetti & Merrill Matthews, *Intellectual Property Rights and Human Rights*, INST. FOR POL'Y INNOVATION (Sept. 2005), http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/00393D8B1791936F862570EE00779CFC/$File/IPandHumanRights.pdf?OpenElement.

important human right. Article 27 of the Universal Declaration of Human Rights states specifically: "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property."[81] In *Anheuser-Busch, Inc. v. Portugal*, the Grand Chamber of the European Court of Human Rights went further to extend the coverage of Article 1 of the Protocol No. 1 to the European Convention of Human Rights to both registered marks and trademark applications of a multinational corporation.[82] In Europe today, even a faceless corporation may receive human-rights-like protection for its intellectual property.

Notwithstanding the close relationship between private property and human rights, the rhetorical power of the industry's argument has been greatly weakened by the courts' repeated failure to equate copyright infringement with theft. As the U.S. Supreme Court observed in *Dowling v. United States*,[83] which involved the manufacture and distribution of bootleg Elvis Presley recordings:

> [I]nterference with copyright does not easily equate with theft, conversion, or fraud . . . . The infringer . . . does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially link 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.[84]

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81. Universal Declaration of Human Rights art. 27, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948). It is worth noting that neither the legally binding International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights includes any provision on the right to own property. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. Indeed, despite the modern-day tendency to consider intellectual property as private property, the international or regional human rights instruments neither endorse nor reject the use of property rights to protect interests in intellectual creations. *See* Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1084–87 (2007) [hereinafter Yu, *Reconceptualizing Intellectual Property Interests*] (discussing the right to property at the intersection of intellectual property and human rights); Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709, 731–36 (2007) [hereinafter Yu, *Ten Common Questions*] (same).

82. Anheuser-Busch, Inc. v. Portugal, 45 Eur. Ct. H.R. 36 (2007) (Grand Chamber). *But see* Yu, *Ten Common Questions*, *supra* note 81, at 729–30 (questioning the approach taken by the European Court of Human Rights in *Anheuser-Busch*). *See generally* Christophe Geiger, *"Constitutionalizing" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT'L REV. INTELL. PROP. & COMPETITION L. 371 (2006) (discussing the emerging fundamental rights discourse on intellectual property in Europe); Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1 (2008) (discussing the increasing role of the European Court of Human Rights in innovation and creativity policies in Europe).

83. 473 U.S. 207 (1985).

84. *Id.* at 217–18; *see also* Louis Feraud Int'l S.A.R.L. v. Viewfinder Inc., 406 F. Supp. 2d 274, 281 (S.D.N.Y. 2005) ("Copyright and trademark law are not matters of strong moral principle. Intellectual property regimes are economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good

Thus, if distribution of bootleg recordings does not constitute stealing, the industry's response concerning the lack of a human right to steal seems intended more to deflect criticism than to directly address serious human rights concerns.

Moreover, as important as the copyright system is, erosion of the protections of free speech, free press, privacy, due process, and other civil liberties is just too high a price for society to pay.[85] If the existing copyright system cannot provide the needed incentives for authors to create without eroding these important safeguards, a complete revamp of the system may be in order. After all, copyright protection is only one of the many possible systems to generate incentives for authors to create.[86]

III. FOR WEAKER PROTECTION AND ENFORCEMENT

While consumer advocates, civil libertarians, academic commentators, and user communities have largely criticized the industry's rhetoric, the arguments they advanced to retain the status quo or to reduce copyright protection are not necessarily stronger. This Part closely scrutinizes four equally unconvincing arguments from the other side of the digital copyright debate. Taken together, this and the previous Parts seek to underscore the rhetorical challenges confronting *both* sides of the debate.

A. "Artists Should Hold Concerts and Sell T-Shirts!"

With the popularization of the Internet and proliferation of new communications technologies, some commentators have

for society as a whole."), *vacated*, 489 F.3d 474 (2d Cir. 2007); Loughlan, *You Wouldn't Steal a Car*, *supra* note 38, at 402 ("[T]he use of the language of theft in the discourse of intellectual property ought at least to be constantly noted for what it is, that is, an inaccurate and manipulative distortion of legal and moral reality.").

85. *Cf.* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 426 (1999) ("Life, limb, and the public peace were considered by courts too important to sacrifice in the name of effective self-help. The claimed inefficiency of courts at enforcing copyrights hardly seems an adequate reason to prevent individuals from reading, criticizing, or mocking the words of others in ways that the law of copyright privileges them to do."); Julie E. Cohen, *Overcoming Property: Does Copyright Trump Privacy?*, 2002 U. ILL. J.L. TECH. & POL'Y 375 (questioning whether copyright protection should trump the protection of the right to privacy); Yu, *Anticircumvention and Anti-anticircumvention*, *supra* note 8, at 27 (noting that the argument that "property is so important that we have to give up our other important rights simply does not withstand constitutional scrutiny").

86. Other incentive models include patronage, prizes, liability rules, altruism, and ultimately necessity. *See, e.g.*, Yu, *P2P and the Future*, *supra* note 29, at 732–39 (discussing alternative compensation models); Yu, *Reconceptualizing Intellectual Property Interests*, *supra* note 81, at 1089–92 (discussing such alternative systems as liability rules, prize funds, and non-property-based authorship protection).

suggested that artists should switch to a new business model that relies solely or primarily on alternative compensation, such as live performances, broadcasts, webcasts, movies, merchandise sales, commercials, or endorsements.[87] In the mid-1990s, for example, John Perry Barlow likened the existing intellectual property model to an old freighter ill fitted to carry the "vaporous cargo" of digital content.[88] That old ship, he wrote, cannot "be patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum."[89] Likewise, industry veteran Esther Dyson observed in *Wired*:

> Chief among the new rules is that "content is free." While not all content will be free, the new economic dynamic will operate as if it were. In the world of the Net, content (including software) will serve as advertising for services such as support, aggregation, filtering, assembly and integration of content modules, or training of customers in their use. Intellectual property that can be copied easily likely will be copied. It will be copied so easily and efficiently that much of it will be distributed free in order to attract attention or create desire for follow-up services that can be charged for.[90]

In a recent book, economists Michele Boldrin and David Levine echoed these observations. As they point out, because successful professional musicians earn only about $45,000 per year from their CD sales, they most likely will earn the same or more from live concerts.[91]

Using live performance to support artists is nothing new; this model arguably predates the development of copyright law.[92] This model was also used famously by the Grateful Dead, which gave away

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87. *See* Yu, *P2P and the Future*, *supra* note 29, at 736–37 (discussing the ancillary service model).

88. John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 84, *available at* http://www.wired.com/wired/archive/2.03/economy.ideas.html.

89. *Id.*

90. Esther Dyson, *Intellectual Value*, WIRED, July 1995, at 136, *available at* http://www.wired.com/wired/archive/3.07/dyson.html.

91. *See* MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 106 (2008). Earlier, Raymond Ku also makes a similar point:

> The vast majority of artists do not earn their income from the sale and distribution of music. Rather, they earn their income from the fame and publicity that go with the distribution of music. Ticket sales, T-shirt sales, and commercial endorsements are all a function of an artist's popularity. By facilitating the distribution of music, [peer-to-peer networks] and the Internet in general can be useful tools for increasing an artist's ability to earn revenue as a result of fame. This is especially beneficial to new or non-mainstream artists who are otherwise unable to capture the public's attention through more traditional media.

Ku, *supra* note 30, at 311; *see also* FISHER, *supra* note 58, at 20 ("[I]t's sufficient to recognize that the recording artists' 12 percent share substantially overstates the amount that actually ends up in their pockets.").

92. *Cf.* F.M. SCHERER, QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES 38–39 (2004) (noting the employment of musicians by the Church, the State, and the nobility in the Middle Age).

music by letting audiences tape their concert performances. As the band's former lyricist wrote:

> [T]here is no question that the band I write [songs] for . . . has increased its popularity enormously by giving them away. We have been letting people tape our concerts since the early seventies, but instead of reducing the demand for our product, we are now the largest concert draw in America, a fact that is at least in part attributable to the popularity generated by those tapes.
>
> True, I don't get any royalties on the millions of copies of my songs which have been extracted from concerts, but I see no reason to complain. The fact is, no one but the Grateful Dead can perform a Grateful Dead song, so if you want the experience and not its thin projection, you have to buy a ticket from us. In other words, our intellectual property protection derives from our being the only real-time source of it.[93]

Most recently, the recording industry has begun to embrace the development of 360 deals, which allow entertainment firms, most notably Live Nation,[94] to earn revenue through a combination of sound recordings, concerts, DVD sales, merchandises, official websites, and fan clubs. To some extent, these deals represented the industry's innovative attempts to take advantage of alternative compensation models without abandoning its longstanding business practice.[95] It is too soon to tell whether 360 deals will benefit or hurt artists.[96] The

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93. Barlow, *supra* note 88, at 84.

94. As Patrik Wikström describes:

> Live Nation is a global live music giant which is more than twice as big as AEG Live, the second-largest player of the segment. Live Nation produces, markets and sells live concerts for artists across the world. It was incorporated in 2005 through a spin-off of Clear Channel's live entertainment and sports representation businesses, and the subsequent distribution by Clear Channel of all the Live Nation common stock to its shareholders.
>
> In 2007, Live Nation produced over 16,000 concerts for 1500 artists in fifty-seven countries, with total attendance exceeding 45 million. As of 31 December 2007, Live Nation owned, leased or operated 120 venues including 41 amphitheatres, 3 arenas, and 2 festival sites [including the Fillmore in San Francisco and the Wembley arena in London]. In addition, through equity, booking, or similar arrangements, Live Nation has the right to book events at 27 additional venues.

PATRIK WIKSTRÖM, THE MUSIC INDUSTRY: MUSIC IN THE CLOUD 60, 83 (2009).

95. *See* David Segal, *They're Calling Almost Everyone's Tune*, N.Y. TIMES, Apr. 25, 2010, at BU1 ("[Live Nation's] biggest outlays include '360 deals' with Jay-Z, Madonna, U2 and others, giving the company a stake in tours, recording and merchandise profits in exchange for nine-figure paydays."). *See generally* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 95–100 (7th ed. 2009) (discussing 360 deals). It is worth noting that 360 deals, though innovative under the current legal and business environment, are not exactly new. As Steve Knopper, a *Rolling Stone* contributing editor, points out, "indies from Motown to Zomba to Wind-Up have participated in a range of revenue streams beyond records for decades. But they've never been standard practice at the biggest record labels, which until recently didn't really need new revenue streams, given the strength of CD and LP sales." KNOPPER, *supra* note 29, at 241 n.*.

96. As a band manager noted, "A lot of bands, aside from an advance from a record deal, might not see money for a very, very long time, even if things go well—aside from touring and merchandise." KNOPPER, *supra* note 29, at 243.

answer to this question ultimately will depend on price points, deal terms, and bargaining power.[97]

Unfortunately, not all artists can, or want to, rely on live performances to earn a living. Many artists are not performers; they are songwriters, producers, and sound engineers. Even among the performing artists, some prefer to be studio artists doing the majority of their work in recording sessions.[98] Who are we to tell artists that they should perform live to survive? Some prefer not to be on the road—at least, not on the road most of the time.[99] As songwriter Eddie Schwartz noted half-jokingly at this Symposium, artists who go on the road often return with less money than before they left.[100] In addition, some artists have stage fright—a more frequent phenomenon than one expects[101]—while a few others suffer from disabilities that make traveling especially challenging.

If these variations are not complicated enough, some artists are just not good enough to earn a living through live performances. The type and remunerability of live performances vary greatly: from

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97. For example, the benefits derived from 360 deals with Jay-Z, Madonna, or U2 could differ significantly from similar deals with lesser-known artists.

98. Some artists may also prefer to be in the studio for certain projects or at a certain stage of their career. An oft-cited example concerns The Beatles' August 1966 decision to stop touring to focus on its recorded music. *See, e.g.*, Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 753–54 (2009) [hereinafter Schultz, *Live Performance*]. The outcome of its decision—the album *Sgt. Pepper's Lonely Hearts Club Band*, which *Rolling Stone* called the greatest rock album of all time—speaks for itself. *See id.* at 754.

99. *See* TREVOR MERRIDEN, IRRESISTIBLE FORCES: THE BUSINESS LEGACY OF NAPSTER & THE GROWTH OF THE UNDERGROUND INTERNET 43 (2001) (quoting Hilary Rosen, the former chairman of the RIAA, as observing that artists like the recording-based model "when they have a record that's so successful that they get to stay home for a few months rather than go on tour").

100. *See* Eddie Schwartz, President & CEO, Nat'l Music Publishers' Ass'n, Remarks at the *Vanderbilt Journal of Entertainment and Technology Law* Symposium: Where Do We Go from Here? The Evolution of Entertainment Law and Industry in the New World (Sept. 28, 2010).

101. As the *Evening Chronicle* wrote in response to a reader's question of whether the newspaper knew of any famous performers who suffered stage fright:

> Sir Derek Jacobi avoided theatre work for two years after crying as Hamlet in 1980. Laurence Olivier experienced a similar bout of stage fright when he was running the National Theatre and playing Othello. The first time Irish singer Enya appeared on stage she took fright and had to be coaxed back by a psychologist. In 2001 Robbie Williams announced he was going to take time off because he was suffering from stress and stage fright. Barbara Streisand claimed it took nearly 3,000 hours and $360,000 of psychotherapy to be able to sing. She puts her nerves partly down to a PLO death threat in 1967 which caused her to forget her lines onstage. Dawn French said she was sick every night when she starred in *Then Again* in the West End. She said: "Every night I go on I'm knocking a couple of weeks off my life because of the stress." And the brilliant, but tragic Judy Garland, tried hypnosis for her nerves. But, unsurprisingly found that Irish whisky worked better.

Your Questions Answered?, EVENING CHRON. (Newcastle), May 24, 2004, at 30.

busking in the street to major gigs in sports arenas.[102] As Donald Passman, a highly influential music business lawyer, reminds us:

> It's difficult to make much money touring until you're a major star. In the traditional music biz, you didn't put a lot of tushies into concert seats until you'd sold a lot of records. Until then, you were touring to create a buzz, get a deal, and sell records, so you could tour profitably. . . .
>
> There's also the phenomenon that some bands can tour locally and regionally, build a base of 500 to 1,000 people per night, sometimes even filling 3,500-seat theaters, all without a record deal. This seems to work best for rockers and jam bands . . . .
>
> In the beginning, unless you're one of these phenoms, you will most likely lose money on touring. You'll also get stuck in uncomfortable dressing rooms, with food left over from last night's headliner. And you'll be regularly humiliated, playing to half-empty concert halls, since the audience is coming later to see someone else. Also, the people who show up early will be buying beer, talking loudly during your ballads, and chanting the headliner's name if they don't like your show.[103]

For some artists, although they have a strong and wide fan base, their fans may be so geographically dispersed that it is hard to attract them in concerts.[104] Some music genres—for example, electronic music—also do not lend themselves to live performances.[105]

Moreover, performance takes time to rehearse. As Liu Jiarui correctly points out, "[I]t is not inconceivable that 'day jobs' in alternative markets (e.g., paid appearances, acting in television or film, and touring) would compete with music production for artists' time and energy."[106] Live performances and road trips can also lead to artist burnout. In a world where time, resources, and human capacity are scarce, there can be serious tradeoffs between studio production and live performances.

In addition, an alternative compensation model based on live performances, merchandise sales, commercials, or endorsements may privilege certain types of artists over the others. As I noted earlier:

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102. *See* WIKSTRÖM, *supra* note 94, at 59 ("The live music segment of the music industry is a multifaceted and complex system. Live music is performed in busy streets and subway stations, at private parties, at local pubs, rock festivals, at clubs, at sports arenas and amphitheatres. The concerts can be one-off shows, tours or a series of shows at a single venue.").

103. PASSMAN, *supra* note 95, at 357.

104. *See* Schultz, *Live Performance*, *supra* note 98, at 729 ("Fans can find almost anything they like online, and artists can potentially find their '1000 true fans' in that environment. The same is not likely to be true in the concert market. Unless your 1000 true fans, or even 10,000 true fans, all happen to live in the same city, then mounting a tour to reach them is an expensive proposition." (footnote omitted)).

105. *See id.* at 760 ("Certain types of music would also not be supported well by live performance, as they do not draw live crowds. While media spectacles like American Idol do well, conversely, music that is not visually compelling falls flat on the stage. Electronic music is a difficult sell to live audiences. Similarly, rap music is rarely a top seller on the touring circuit." (footnote omitted)).

106. Liu Jiarui, *The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China*, 27 CARDOZO ARTS & ENT. L.J. 621, 646 (2010) (footnote omitted).

> [T]he ancillary service model favors those artists and musicians who can sell performances and products. Good-looking artists with limited musical talent may prosper at the expense of highly talented musicians with mediocre looks. In this era of blockbuster shows, the pop music audience may prefer perfection and entertainment to authenticity. The ancillary service model may therefore overreward lip-synched performances, pre-recorded sound, and high-tech tricks that correct artists' vocal errors.[107]

People tend to assume musical talent will always prevail in the market, but that is not often the case. For instance, when interviewed about Beyoncé's partially lip-synched performance in the 2003 MTV Video Music Awards, in which the artist began her performance by descending head first from the ceiling, an audience member responded, "Tell me, who can sing hanging on a harness upside-down? . . . I'd rather her not ruin my favorite song and just put on a good show."[108]

Finally, it is important to take into account the specific structure of the entertainment industry. At the moment, artists seem better off with live performances than record sales, due in part to the music industry's structure and its business model.[109] Whether artists will ultimately earn more through live performances than record sales, however, depends on royalty provisions, as well as the industry structure, which continues to face heavy pressure over cross-sector consolidation.[110] If promoters, booking agents, and venue operators take as substantial a cut from live performances as record companies do in sound recordings, artists will not necessarily be better off performing live. Under this scenario, the main difference between

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107. Yu, *P2P and the Future*, *supra* note 29, at 737 (footnote omitted); *accord* Liu, *supra* note 106, at 646 ("[M]ost of the alternative revenue streams, including live performance, sponsorship, merchandizing, synchronization, and acting, are based on the popularity of the musicians rather than the quality of their music. Over-reliance on those alternatives discriminates against artists with smaller niche audiences.").

108. Chris Nelson, *Lip-Synching Gets Real*, N.Y. TIMES, Feb. 1, 2004, § 2, at 1. Interestingly, lip-synching began as a result of union regulations. As historian Marc Weingarten explains:

> No one could quite figure out what sort of royalties singers deserved for a live TV performance, so in the early days they just faked it. Later, the practice continued out of sheer expediency. On "American Bandstand" and most variety shows of the 1960's, vocals and instrumentals were all faked; Keith Moon, the drummer for the Who, famously registered his contempt for the custom by flubbing his part on the Smothers Brothers' show.

Id. (quoting MARC WEINGARTEN, STATION TO STATION: THE SECRET HISTORY OF ROCK 'N' ROLL ON TELEVISION (2000)).

109. *See, e.g.*, WIKSTRÖM, *supra* note 94, at 59 ("[A]rtists generally receive up to 85 per cent of the gross revenues from a live music project while they usually receive approximately 10 per cent from recorded music revenues.").

110. *See, e.g.*, Editorial, *Music Inc. Gets Bigger*, N.Y. TIMES, Feb. 9, 2010, at A26 (discussing LiveNation's merger with Ticketmaster).

this performance-based model and the previous record-sales-based model seems to be that artists are now getting ripped off by a different group of actors. From the artists' standpoint, neither model would make them better off.

B. "File Sharing Services Free Artists from the Industry Stranglehold!"

In the early days of Napster and file sharing services, music fans often described how these services could help free artists from the stranglehold of the recording industry.[111] They also complained about the record labels ripping customers off by charging high CD prices for mediocre albums with only one or two good songs.[112] While their frustrations are understandable, it ignores the fact that Napster and most other file sharing services did not share profits with songwriters and performing artists. As Jazz artist Herbie Hancock declared:

> So far, [Napster]'s even worse than the labels. On the way to making millions for its owners and investors, Napster has yet to give anything to artists other than the chance to spread their music, for free, and whether they like it or not. Its supporters hide behind claims that labels misuse artists and consumers, as if that entitled them to take everything they want absolutely free. *Excuse me, but* just because record executives give artists a bad deal doesn't mean that everyone else can then go and do worse.[113]

Even worse, Napster took the hypocritical position of demanding protection of its own intellectual property rights while recklessly disregarding those of others.[114]

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111. *See* LASICA, *supra* note 27, at 264 (describing the Darknet as "the public's great equalizing force"); MERRIDEN, *supra* note 99, at 27 (quoting a former MTV video jockey as saying, "Napster puts the power back into the hand of the artist and the listener"); *id.* at 28 (quoting a band member as saying, "Napster puts the power back in the hands of the artist by providing access to a worldwide community of millions who are eager and willing to explore new music. I wish Napster had been around back when the record labels failed me.").

112. One music fan, for example, noted, "The record companies have been ripping customers off with huge profits for years[.] Is it no wonder people resort to using Napster[?] The record companies are worried as they won't be able [to] finance their extortionate lifestyles." MERRIDEN, *supra* note 99, at 63. Another concurred: "It's absolutely shocking . . . large multi-national companies make millions of dollars every year ripping off not only consumers, but also their 'stars.' Napster provided an incredibly important outlet for music lovers and artists to 'reclaim' what they had lost under the control of large recording companies." *Id.* at 64.

113. Herbie Hancock, *Preface* to JOHN ALDERMAN, SONIC BOOM: NAPSTER, MP3, AND THE NEW PIONEERS OF MUSIC xvii, xviii (2001); *see also* MERRIDEN, *supra* note 99, at 31–32 (quoting Richard Parsons, co-COO of AOL Time Warner, as saying, "The defenders of Napster hide the reality of what they're doing—ripping off artists—behind the fig leaf of third-party neutrality. They claim they're merely acting as a matchmaker among Web music fans who want to exchange digital music files already in their possession. That's a little like a hijacker claiming he's doing nothing more than act as an intermediary in the transfer of property from one owner to another.").

114. As one music fan observed about Napster's hypocrisy: "Remember The Offspring selling T-shirts with the Napster logo? Where are those shirts now? Napster Inc. demanded they be taken down. Immediately. Why? The Offspring was violating copyrights [sic] that Napster itself was violating. Who is to protect Napster when Napster violates what they treasure?"

It is time that we recognize that the music industry includes many different types of players: company executives, record producers, songwriters, performing artists, supporting musicians, sound engineers, programmers, assistants, warehouses, retailers (online or offline), advertising agencies, truck drivers, online service providers, and many other intermediaries.[115] It is one thing to free songs for public distribution, but another to make artists better off. If file sharing services are to fulfill their goal of freeing artists from the industry's stranglehold, they need to provide a model that supports artists—for example, by enabling them to share in whatever profits they make through the services. After all, the important question in the digital copyright debate is not whether online file sharing should be stopped, but how to provide adequate compensation to artists.[116]

Compared with Napster and other file sharing services, YouTube seems to provide better support to artists. For instance, its present prepublication service allows copyright holders to decide whether they want to monetize their music, take advantage of the data of those who access their songs without authorization, or simply block the use of those songs.[117] While one can lament the increasing

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MERRIDEN, *supra* note 99, at 76. It is worth noting that both parties eventually "agreed to a deal and gave the proceeds to charity." KNOPPER, *supra* note 29, at 134 n.*. The benefited charity was the National Center for Missing and Exploited Children. JOSEPH MENN, ALL THE RAVE: THE RISE AND FALL OF SHAWN FANNING'S NAPSTER 137 (2003).

115. Outside the entertainment industry, there are many other stakeholders within the copyright system. As a National Research Council study reminds us:

> The debate over intellectual property includes almost everyone, from authors and publishers, to consumers (e.g., the reading, listening, and viewing public), to libraries and educational institutions, to governmental and standards bodies. Each of the stakeholders has a variety of concerns . . . that are at times aligned with those of other stakeholders, and at other times opposed. An individual stakeholder may also play multiple roles with various concerns. At different times, a single individual may be an author, reader, consumer, teacher, or shareholder in publishing or entertainment companies; a member of an editorial board; or an officer of a scholarly society that relies on publishing for revenue. The dominant concern will depend on the part played at the moment.

DIGITAL DILEMMA, *supra* note 10, at 51.

116. *See, e.g.*, LESSIG, FREE CULTURE, *supra* note 22, at 298–99 (noting the important question in the online file sharing debate "should be how to assure that artists get paid, during this transition between twentieth-century models for doing business and twenty-first-century technologies"); Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 43 (2004) (noting the need to find "solutions appropriate for all those involved in the creation, production, dissemination and use of copyrighted material" if peer-to-peer technology is here to stay); Yu, *Anticircumvention and Anti-anticircumvention*, *supra* note 8, at 72 (noting that the question in the digital copyright debate "cannot be whether we can prevent that copy from being leaked to the public, but whether we can contain the leakage to ensure reasonable compensation for copyright holders").

117. As William Patry describes:

> A motion picture studio or other audiovisual content owner provides YouTube with a file of its work. YouTube then encodes the file; when a third party attempts to upload content that provides a match, YouTube contacts the studio and asks the studio what

corporate control of culture or criticize YouTube for its lack of privacy protection,[118] the service seems to have provided artists with a better profit-sharing arrangement.

Moreover, while online file sharing could help free artists (and their songs), it could also harm them by facilitating the unauthorized dissemination of incomplete or low-quality versions of those songs. As Lars Ullrich, Metallica's drummer, recalled, "One day I got a phone call telling me that this song we were working on ['I Disappear'] for this movie soundtrack [*Mission Impossible 2*] is being played on thirty radio stations in America, and I'm like, 'We haven't finished it yet. How did that happen?'"[119] Although Ullrich was heavily criticized for taking legal action against Napster, it is understandable why an artist would be disappointed when he lost the ability to shape his craft.[120] It is one thing to lose control of the work *after its completion*, but another thing to lose control *when the work is still unfinished.*[121]

C. "Britney Sucks!"

In the early days of online file sharing, commentators criticized the entertainment industry by noting how the industry benefits only a certain groups of artists—often artists that have a strong commercial appeal. Britney Spears, for example, has become the unfortunate

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> steps it wants to take. The studio can decide to block the upload, let the file be uploaded but tracked, or let the file be uploaded and run either contextual or its own advertisements against it, with the revenues generated being shared. An estimated 90 percent of content owners using video content identification have chosen to monetize their works, resulting in revenues that would not otherwise have been received. Even before the development of its video content identification, YouTube had in place a similar system for audio content contained in consumer-created videos, with an additional feature: Where an audio content owner objects to the use of the music, YouTube offers the user who created the video the ability to engage in an "audio swap." YouTube will, if requested, strip out the objected-to audio and replace it with a song that either is in the public domain or licensed, thereby leaving the user-generated, noninfringing video up for viewing, while respecting copyright owners' rights. These systems are a win-win . . . .

PATRY, *supra* note 23, at 38–39; *see also* Claire Cain Miller, *YouTube Ads Turn Videos into Revenue*, N.Y. TIMES, Sept. 3, 2010, at B1 (providing examples of how YouTube has enabled copyright holders to receive advertising revenues for the unauthorized distribution of their videos).

118. *See* Yu, *The Graduated Response*, *supra* note 6, at 1411 (noting "the potential fears of greater corporate influence on, if not control over, culture").

119. KOT, *supra* note 29, at 38.

120. *But see* KEMBREW MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY 302–03 (2005) (discussing how radio doesn't give musicians the right to choose how their music will be presented).

121. *See* Peter K. Yu, *Moral Rights 2.0*, *in* LANDMARK IP CASES AND THEIR LEGACY 13, 22–23 (Christopher Heath & Anselm Kamperman Sanders eds., 2011) (discussing Stephanie Meyer's deep disappointment over the premature release of *The Midnight Sun* and her eventual suspension of the project).

artist widely cited in literature on online file sharing and digital copyright reform.[122] Today, commentators could make the same argument against Lady Gaga, Justin Bieber, or any other commercially successful artists they dislike.

Ironically, the argument that "Artist X sucks, and therefore we should get rid of the existing business model" ignores how the model actually works. Widespread online file sharing is unlikely to threaten the survival of performers with great commercial success. While these artists (and their record producers) will suffer financially, at times considerably,[123] they can survive quite well even with massive downloading. In fact, artists who receive handsome royalties under the current business model are usually those who make the Billboard Top 40, and whose popular appeal has made them tasteless in the eyes of many.[124]

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122. *See, e.g.*, LESSIG, REMIX, *supra* note 23, at 95 (noting the "the brain-dead melodies or lyrics of a Britney Spears"); Clay Shirky, *Listening to Napster*, *in* PEER-TO-PEER: HARNESSING THE BENEFITS OF A DISRUPTIVE TECHNOLOGY 21, 34 (Andy Oram ed., 2001) (using as heading "30 million Britney fans does not a revolution make"); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1006 (2004) ("The genius of the entertainment industry has not been in selecting Britney Spears over a million wannabes. Britney Spears *qua* musician is little different from those who competed with her on *Star Search* so many years ago."); Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 857 n.289 (2006) (comparing a Britney Spears song with a nineteen-minute Beethoven symphony); Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 217 (2006) (noting that folk musicians may "experience higher intrinsic rewards from production than pop singers in the mold of Britney Spears").

123. As a *South Park* episode reminds us jokingly, if massive file sharing continues, many top artists will lose their fancy gold-plated poolside shark-tank bars, state-of-the-art Gulfstream private jets, or even islands in French Polynesia! *South Park: Christian Rock Hard* (Comedy Central television broadcast Oct. 29, 2003).

124. As the former musician Beau Brashares explains:

> There's a saying among musicians: before you sign a record deal, get out your dictionary and look up the word "recoupable." Recoupables have been a part of major label contracts forever, and they work like this: your band has paid its dues, generated a buzz, and potentially stands ready to reap the benefits of this work in the mainstream marketplace. A label approaches you and says, we'll spend maybe a hundred thousand on recording and releasing your record. We own the masters. You get roughly a tenth of the money we make from selling it, but all the money we spend on recording, on manufacturing, on promotion, on touring, on deli trays for the music writers is taken out of your tenth. If the record looks like a hit, the label will keep spending the band's small share on more pressing, promoting, and so on. Why not? Once the act is selling, it behooves a label to spend as much of the band's future income as possible and reap virtually all the returns. This is why a major release frequently needs to sell 500,000 copies—go gold—before sales proceeds begin reaching the band's pockets.

FISHER, *supra* note 58, at 20; *see also* LASICA, *supra* note 27, at 218 ("In the dysfunctional economics of the industry, music executives estimate that major-label releases must sell half a million copies just to break even."); Janis Ian, *The Internet Debacle: An Alternative View*, PERFORMING SONGWRITER MAG., May 2002, at 65, *available at* http://www.janisian.com/reading/internet.php (lamenting that free downloads hurt only "a handful of super-successes like Celine Dion").

By contrast, online file sharing may hurt new acts that have yet to be signed (and are unlikely to be signed). It may also harm performers of alternative music (who appeal to only a small audience) as well as mid-level artists (who sell in the range of 250,000 to 500,000 records).[125] Although these artists could reach out to fans directly through online distribution,[126] not all artists are entrepreneurial.

Many artists simply do not want to focus their energy on marketing and deal making; they prefer to make music instead.[127] As Eddie Vedder, Pearl Jam's lead singer, noted: "We like to be creative with the business side, but we're not good at using both sides of our brain at once. I might work on a bridge part of a song for three weeks, but I can't imagine listening to anything about the business ideas of what we do for more than an hour without taking a hammer to my head."[128] Jonny Greenwood, Radiohead's guitarist, concurred regarding his experience contemplating the possibility of his band going into business for itself, "It makes me think we're gonna be sitting in endless business meetings talking about how to do it off our own backs, rather than sitting in studios recording music."[129]

In addition, some artists may still be interested in toiling under the industry's existing winner-take-all model.[130] After all, as Donald

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125. *See* PASSMAN, *supra* note 95, at 359 (providing the album sales range for mid-level artists).

126. Many indeed have successfully marketed themselves through the Internet. *See, e.g.*, KOT, *supra* note 29, at 232–50; Mike Masnick, *The Future of Music Business Models (And Those Who Are Already There)*, TECHDIRT (Jan. 25, 2010), http://www.techdirt.com/articles/20091119/1634117011.shtml.

127. *See* KOT, *supra* note 29, at 192–93 ("Musicians loved to complain about their record companies almost as much as they loved to complain about music critics, but few were eager to assume the responsibilities of distributing and marketing their music."); PASSMAN, *supra* note 95, at 86 ("[M]ost new artists still want to sign to a record company. Apart from guaranteeing you money (so you can avoid sleeping on park benches while creating your music), the record companies have the resources to get your music heard over the noise of all the other artists out there. They have staffs of people with experience in marketing and promotion, and they will put up the bucks needed to push your career.").

128. KOT, *supra* note 29, at 233.

129. *Id.*

130. *See* FISHER, *supra* note 58, at 78 ("[The major labels] had discovered (or decided) that it is more profitable to select a few individual performers and musical groups, promote them heavily, and market their recordings aggressively than it is to spread resources more thinly over a larger set of musicians. Consequently, only a few musicians received the exposure and support necessary to become stars and to earn correspondingly generous royalties."). As Professor Fisher explains:

> First, people (especially young people) consistently overestimate their chances of winning gambles, and their tendency to do so is magnified when the prizes are highly visible and memorable. As a result, a teenage guitarist is almost certain to exaggerate his chances of becoming the next Paul Simon, and a teenage actor will overstate his chances of achieving the status of Robert Redford. Second, even if potential creators accurately assessed their chances of great success, too many (from the standpoint of society at large) would enter the business, because each one, when selecting his or her

Passman reminds us, "[N]o artist has been able to launch a major career by using the Internet on their own."[131] Many of those who are now successfully marketing their works directly to consumers, such as Prince and Radiohead, acquired their fame through the old model.[132] Just as we criticize the entertainment industry for having a one-size-fits-all model that does not benefit different types of artists and music, it is also fair to question whether an alternative model should be imposed upon *all* artists.

D. "If You Don't Want Your Content Stolen, Share It with Others!"

Critics of the industry's existing business model often point out the inevitability of piracy or leakage.[133] As they declare, if the industry does not want its content stolen, it needs to share them with others or make them free. While this argument is pragmatic and takes seriously the challenges of providing effective copyright enforcement in the digital environment, it is wrong-headed.

The creation of copyrighted content requires a lot of time, effort, and resources. The need to provide incentives for such creation is, indeed, the reason why the copyright system exists in the first place.[134] By providing protection for a limited duration, the copyright system provides artists (and often their financiers) with an opportunity to recoup the investment incurred in the creative process.[135] Because free riding ultimately drives down prices, resulting in underproduction of creative works, such protection is needed to generate incentives for artists to create and disseminate works of social value.[136]

> career, will pay attention only to the probability that he or she will succeed, and will ignore the extent to which his or her entry into the profession will diminish the chances of all other contestants.

FISHER, *supra* note 58, at 79 (citing ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US 101–23 (1996)).

131. Passman, *supra* note 95, at 86.

132. *See* KOT, *supra* note 29, at 232–50; Masnick, *supra* note 126.

133. *See, e.g.*, Barlow, *supra* note 88; Dyson, *supra* note 90.

134. *See* Landes & Posner, *supra* note 43 (providing the economic justifications for copyright protection).

135. *See id.* at 335 ("Some copyright protection is necessary to generate the incentives to incur the costs of creating easily copied works . . . ."); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1207 (1996) ("By giving copyright protection to works of authorship, we increase the cost of copying, raise the return on creative authorship, and, at the margin, encourage more people to create.").

136. *See generally* Earl R. Brubaker, *Free Ride, Free Revelation, or Golden Rule?*, 18 J.L. & ECON. 147 (1975) (discussing free riding in public goods).

As widely criticized as it has been, the copyright system has helped underwrite an independent copyright sector.[137] As Neil Netanel observes, in our democratic society where free speech and free press are paramount values, "there remain substantial benefits to funding the creation and dissemination of many expressive works, and to funding them from sources other than state subsidy, corporate munificence, and party patronage."[138] These models, however, may limit our choices. The patronage model, for example, may reward primarily the creation of works preferred by the social elites, rather than the public.[139] Getting government involved in the creation of art also comes with significant danger.[140] Without copyright, the type of music we have today, therefore, might not be as diverse.[141]

IV. STRATEGIES TO MAKE THE INDUSTRY'S ARGUMENTS MORE PERSUASIVE

Parts II and III focused on eight unconvincing arguments made for or against online file sharing and restrictive copyright standards. Taking the position that copyright law remains important and relevant, this Part explores how the entertainment industry can better persuade the public about the need for effective copyright protection and enforcement in the digital environment. This Part focuses only on the entertainment industry, because, as the driver of the digital copyright reform, it bears the burden of explaining why its proposed

137. *See* Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 227–28 (1998) (discussing how copyright law underwrites democratic culture by "support[ing] a sector of expressive activity that is relatively independent from the state").

138. Netanel, *Impose a Noncommercial Use Levy*, *supra* note 42, at 76.

139. *See* Marci Hamilton, *Why Suing College Students for Illegal Music Downloading Is the Right Thing to Do*, FINDLAW'S WRIT (Aug. 5, 2003), http://writ.news.findlaw.com/hamilton/20030805.html ("If the class of creators were winnowed down to the rich and the government-sponsored, and the free market were thus to be replaced by a patronage system, the ability of art to speak to the American people would dwindle precipitously. Artistic works would cater to elites; classical music might survive, but rock and country would encounter grave difficulties.").

140. *See* Yu, *P2P and the Future*, *supra* note 29, at 735 (discussing how government funding of the arts may have the perverse effect of stifling freedom of expression); *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998) (upholding a statute requiring the National Endowment for the Arts to consider "general standards of decency and respect for the diverse beliefs and values of the American public" before awarding grants for artistic projects); Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996) (arguing that representative democracy demands means of challenging government and that art performs this function in a singular way).

141. As Michael Scherer has shown, many classical musicians could not have remained independent without the support of the copyright system. *See generally* SCHERER, *supra* note 92, at 53–78 (examining the political, intellectual, and economic roots of the shift of music composers from the patronage system to a freelance market).

reforms are needed, acceptable, and socially beneficial. The discussion of strategies to improve the rhetoric of those enthusiastic about online file sharing is equally important. That discussion, however, will have to be left for another day, due in part to the Article's limited length.

At the outset, it is worth noting that this Part emphasizes rhetoric and logic—that is, how the industry can make its arguments more *convincing*. It does not examine how the industry can make enforcement measures more *effective*. There are two reasons for this approach. First, many scholars have already devoted a tremendous amount of time and effort to craft and analyze proposals that address copyright problems posed by the Internet and new communications technologies.[142] So far, these proposals have enjoyed very limited success. Second, and more importantly, although convincing strategies tend to be effective, effective strategies, especially draconian ones, can be wholly unconvincing.[143] Thus, if the entertainment industry is to earn greater and more sustainable public support, it needs better arguments.

A. Show a Human Face

One of the entertainment industry's biggest challenges in the early days of online file sharing was its inability to show the public a human face when it discussed the deleterious effects of unauthorized copying on the Internet. While file sharers may not be concerned about ripping off a faceless corporation, like a record company, they may "think twice if the victim of their predation has a human face."[144] In fact, fans are eager to pay more for the downloaded copyrighted works if they know that artists will receive what they pay. For example, even though Radiohead offered *In Rainbows* over the Internet under a name-your-price model, which allows fans to pay as little as nothing, the album "was downloaded approximately 1 million

142. *See generally* Yu, *P2P and the Future*, *supra* note 29, at 698–744 (analyzing some of these proposals).

143. "Very few people are likely to distribute music or movies without authorization of the copyright holders if they will be sent to jail for thirty years—or worse, if one or both of their hands are to be chopped off." Yu, *Digital Copyright Reform*, *supra* note 79, at 702. Nevertheless, it is clearly unconvincing to argue for reforms that jail individual file sharers for thirty years or to chop off one or both of their hands.

144. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 216 (rev. ed. 2003). Mark Schultz further notes:

> [P]eople are more likely to cooperate with others when they are in a social context and have reason to find the other party sympathetic. As copyright compliance becomes largely a matter of choice, people need to be treated as more than anonymous consumers. People participating in a loyal fan community are far more likely to perceive themselves as having a reciprocal relationship with the artist.

Schultz, *Fear and Norms*, *supra* note 48, at 719.

times and 40 per cent of the downloading fans paid on average $6 for the download," according to an Internet market research firm.[145] In the mid-2000s, Magnatune allowed users to download music by paying as little as $5 per CD or as much as they wanted.[146] In the end, it received an average of $8.93 per CD, well above the $5 minimum.[147]

One of the reasons why the recording industry has a difficult time showing a human face is that many of its musicians are actually not on its side. For example, some musicians complained about how record companies exploited them, mistreated them, or even failed to pay their hard-earned royalties.[148] While "Prince performed several times with the word 'slave' written on his forehead as a way of describing his relationship with his employer,"[149] Janis Ian[150] and

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145. WIKSTRÖM, *supra* note 94, at 110.

146. *See* Kevin Maney, *Apple's iTunes Might Not Be Only Answer to Ending Piracy*, USA TODAY, Jan. 21, 2004, at 3B; *see also* WIKSTRÖM, *supra* note 94, at 109 (discussing Magnatune and the tip-jar model).

147. *See* Maney, *supra* note 146.

148. *See* LASICA, *supra* note 27, at 195 (noting that "[m]ajor artists are split" on the appropriate response to online file sharing); *see also* STEVEN LEVY, THE PERFECT THING: HOW THE IPOD SHUFFLES COMMERCE, CULTURE, AND COOLNESS 153 (2006) ("The . . . problem with the ethics lesson was that record labels were themselves spotty on the morality thing. Their history was an unbroken litany of publishing credits pilfered from artists, unpaid royalties, and envelopes stuffed with illegal payola."). *See generally* FREDRIC DANNEN, HIT MEN: POWER BROKERS AND FAST MONEY INSIDE THE MUSIC BUSINESS (1990) (providing a portrayal of the inner workings of the music industry).

149. WIKSTRÖM, *supra* note 94, at 30.

150. As she laments:

> [I]n the hysteria of the moment, everyone is forgetting the main way an artist becomes successful—exposure. Without exposure, no one comes to shows, no one buys CDs, no one enables you to earn a living doing what you love. Again, from personal experience: in 37 years as a recording artist, I've created 20+ albums for major labels, and I've never once received a royalty check that didn't show I owed them money. So I make the bulk of my living from live touring, playing for 80–1500 people a night, $200–300 nights a year, doing my own show. I spend hours each week doing press, writing articles, making sure my website tour information is up to date. Why? Because all of that gives me exposure to an audience that might not come otherwise. So when someone writes and tells me they came to my show because they'd downloaded a song and gotten curious, I am thrilled!

Ian, *supra* note 124. Similarly, Professor Ku writes:

> [E]ven with copyright protection, the vast majority of musical artists do not earn any income in the form of royalties from the sale of music. In fact, not only do musicians rarely earn royalties from the sale of CDs, they are often in debt to the recording industry for the costs of manufacturing, marketing, and distributing their music. Recording companies typically charge the artist for all the costs of production, marketing, promotion, and other expenses, including breakage—a holdover from when albums were made from vinyl. Even in today's digital world, in which the cost of digital distribution is nonexistent, some record labels have demanded that artists surrender even larger portions of their royalties for the cost of encoding the song to digital format, encryption, and digital delivery. As one report indicates, an artist must typically sell a million copies of a CD before she receives any royalties because record companies deduct the costs of production, marketing, promotion, and other expenses from the musician's royalties. Meanwhile, the same million copies will have earned the record company approximately $11 million in gross revenue and $4 million net.

Courtney Love offered vocal criticisms that have been widely disseminated on the Internet.[151] Chuck D of Public Enemy went even further to provide support for online file sharing. As he declared:

> Piracy? The biggest pirates have been the record companies. The people running the record labels are lawyers and accountants, and they could be selling Brillo pads for all they care. It's not about the art at all. What has that got to do with music? So when people download a song, if it's a good song, people want the artist. People worship Eric Clapton or Ray Charles. What they do is bigger than any song. Downloading music gives people a chance to be exposed to an artist, not just a Brillo-pad manufacturer.[152]

Having these negative comments from its own artists is particularly problematic for the industry. As Paul Goldstein reminds us, "Public respect for the rights of entertainment companies cannot be separated from the public's perception of the respect these companies pay to the rights of the authors and artists who are the source of their products."[153] While the public is generally sympathetic to the needs of artists, they are less sympathetic toward the concerns of their wealthy investors. Even in the academia, those who support strong copyright protection tend to be pro-author, rather than pro-copyright holder.[154] To a great extent, the industry's failure to rally artists to its side has considerably weakened its rhetoric against online file sharing.

Even worse, the industry's image has been tarnished by the widely held belief that it engages in collusive pricing to overcharge consumers. It certainly did not help when the five major labels and three national retail chains agreed to pay a reportedly $143 million in refunds or CDs to settle a price-fixing lawsuit with forty states.[155] It also damaged the industry's public image when "Warner Music Group, Sony BMG Music Entertainment, EMI–Capitol, and Vivendi Universal all acknowledged paying radio programmers to play specific songs and paid fines totaling nearly $31 million" following an

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> The income to most artists from performance and mechanical rights for songwriting and composing from the sale of music are similarly insignificant.

Ku, *supra* note 30, at 306–07 (footnotes omitted).

151. *See* ALDERMAN, *supra* note 113, at 126 ("'What is piracy? Piracy is the act of stealing an artist's work without any intention of paying for it. I'm not talking about Napster-type software. I'm talking about major label recording contracts.'" (quoting Courtney Love)). The unedited transcript is available at http://www.salon.com/technology/feature/2000/06/14/love/print.html.

152. KOT, *supra* note 29, at 35; *see also id.* at 57 (quoting Jeff Ament of Pearl Jam as saying, "If the bands and artists could get more control, rather than the record companies, free downloads could be a great thing. The potential is unbelievable.").

153. GOLDSTEIN, *supra* note 144, at 216.

154. *See, e.g.*, ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES (2009); Bell, *supra* note 42; Ginsburg, *supra* note 14.

155. *See* Benny Evangelista, *$143 Million Settlement in CD Price-Fixing Suit*, S.F. CHRON., Oct. 1, 2002, at B1.

investigation by New York Attorney General Elliot Spitzer.[156] Most recently, fifteen individuals from nine states sued the major labels for violating antitrust law by engaging in a conspiracy to fix the prices and terms under which music was sold or made available through online subscription services, such as MusicNet and PressPlay.[157]

Compared with the recording industry, the movie industry seemed to have done slightly better. After some initial miscues, the MPAA brought out a human face by showing how online file sharing has hurt not only its celebrity movie stars, but also the noncelebrity supporting cast, as well as the hardworking film crew.[158] Having not publicly shown a human face for quite some time, however, the industry's late effort seemed rather desperate. By the time it showed a human face, the industry had already lost its first-mover advantage to shape the perception of the serious consequences of online file sharing. Even worse, the public had become rather cynical about the industry's campaign, in part due to the ill-timed lawsuits the RIAA had filed *en masse* against individual file sharers.[159]

Thus, if the industry wants to be more persuasive, it needs to build a strong human element back into its arguments—the sooner the better. The RIAA's recent announcement to abandon its six-year-long litigation campaign against individual file sharers[160] provides a nice opportunity for the entertainment industry to reshape its public message. The industry also needs to rethink its treatment of artists. After all, it is hard to convince the public of the industry's need for more protection and enforcement if it could not even rally artists to its side.

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156. KOT, *supra* note 29, at 23.

157. Starr v. Sony BMG Music Entm't, 592 F.3d 314 (2d Cir. 2010); *see also* PATRY, *supra* note 23, at 8 ("PressPlay was owned by Universal Music Group and by Sony. MusicNet was owned by TimeWarner, BMG, and EMI.").

158. As Lars Ulrich reminds us, when you add up all the employees working for the music industry, "you have an industry with many jobs—a very few glamourous ones like ours—and a greater number of demanding ones covering all levels of the pay scale for wages which support families and contribute to our economy." MERRIDEN, *supra* note 99, at 46.

159. *See* Yu, *P2P and the Future*, *supra* note 29, at 663–70 (discussing the first wave of RIAA's individual lawsuits); Fred von Lohmann, *RIAA v. The People Turns from Lawsuits to 3 Strikes*, ELEC. FRONTIER FOUND. (Dec. 19, 2008), http://www.eff.org/deeplinks/2008/12/riaa-v-people-turns-lawsuits-3-strikes (noting that the RIAA has filed lawsuits against more than 35,000 individual file-sharers).

160. *See* Yu, *The Graduated Response*, *supra* note 6, at 1388 (discussing the RIAA's formal public announcement about its intention to cease its highly unpopular lawsuits against individual file sharers).

B. Provide Credible Empirical Support

In the past two decades, the intellectual property industries—including not only the entertainment industry, but also software developers and manufacturers of luxury goods—have produced many studies to support their lobbying efforts. For example, the latest study by the Business Software Alliance (BSA) estimates the amount of business software piracy at more than $50 billion worldwide.[161] The International AntiCounterfeiting Coalition and the International Chamber of Commerce estimate the global trade in illegitimate goods to be approximately $600 billion annually—based on an estimate of 5–7% of global trade.[162] Most recently, MarkMonitor, a brand protection and management firm, published a report showing that traffic generated to sites suspected of offering pirated digital content or counterfeit goods amounts to more than 146 million visits per day and 53 billion visits per year.[163]

While these figures may suggest serious piracy and counterfeiting problems, both at home and abroad, they fail to show the full extent of the problems. Produced by self-interested trade groups and lacking independent verification, they also remain suspect to many.[164] As a former government official conceded, if the piracy and counterfeiting problems were as serious as industry statistics had shown, the government would have provided more resources to deal with it. The fact that industry representatives and government officials repeatedly lament their lack of resources in the area of intellectual property enforcement makes one wonder how serious the problems actually are.[165]

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161. BUSINESS SOFTWARE ALLIANCE & INTERNATIONAL DATA CORPORATION, SEVENTH ANNUAL BSA/IDC GLOBAL SOFTWARE PIRACY STUDY 13 (2010).

162. *About Counterfeiting*, INT'L ANTICOUNTERFEITING COALITION, http://www.iacc.org/about-counterfeiting/ (last visited Jan. 13, 2011); *see also Counterfeiting Intelligence Bureau*, INT'L CHAMBER OF COMMERCE, http://www.icc-ccs.org/home/cib ("Counterfeiting accounts for between 5–7% of world trade, worth an estimated $600 billion a year."). The OECD (Organization for Economic Cooperation and Development) supplied more modest figures, but they still amounted to $250 billion in 2007. *See* OECD, MAGNITUDE OF COUNTERFEITING AND PIRACY OF TANGIBLE PRODUCTS: AN UPDATE 1 (2009), *available at* http://www.oecd.org/dataoecd/57/27/44088872.pdf.

163. MARKMONITOR, TRAFFIC REPORT: ONLINE PIRACY AND COUNTERFEITING 4 (2011), *available at* http://www.markmonitor.com/download/report/MarkMonitor_-_Traffic_Report_110111.pdf. According to the report, "[t]he top-three websites classified as 'digital piracy'—rapidshare.com, megavideo.com, and megaupload.com—collectively generate more than 21 billion visits per year." *Id.*

164. *See* Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 927 (2006).

165. *See, e.g.*, *Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.–China Econ. and Sec. Review Comm'n*, 109th Cong. 183 (2006) (oral testimony of Peter Pitts, President, Center for Medicine in the Public Interest, New York)

Even worse, some of those figures that have been widely used by, or on behalf of, the industries were unsubstantiated or untraceable. Although "a number of industry, media, and government publications have cited an FBI estimate that U.S. businesses lose $200–$250 billion to counterfeiting on an annual basis,"[166] the U.S. Government Accountability Office found that this figure, along with two others, "cannot be substantiated or traced back to an underlying data source or methodology."[167] The lack of substantiation or traceability is particularly disappointing, because policymakers, industry groups, and the media have repeatedly cited government agencies as sources to provide authority, enhance credibility, or muster support for their reform proposals.[168]

For illustration purposes, consider the widely criticized BSA studies.[169] Although BSA is not part of the entertainment industry, the flaws in its studies provide an excellent illustration of the intellectual property industries' failure to provide credible empirical evidence concerning the need for stronger copyright protection and

("When I was at the [Food and Drug Administration], people asked me why don't you stop people at the border and arrest them coming in from Canada? The answer is that's not the best bang for the regulatory dollar. What government needs to do is go after the big time criminals."); *International IPR Report Card—Assessing U.S. Government and Industry Efforts to Enhance Chinese and Russian Enforcement of Intellectual Property Rights: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 8 (2005) (statement of Chris Israel, Coordinator, International Intellectual Property Enforcement, U.S. Department of Commerce) ("With finite resources and seemingly infinite concerns, how [the United States] focus[es its] efforts is crucial."); Timothy P. Trainer, *Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?*, 8 J. MARSHALL REV. INTELL. PROP. L. 47, 58 (2008) (lamenting how "the staff dedicated solely to IPR enforcement [in the US government] could be counted on two hands").

166. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–10–423, INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 18 (2010), *available at* http://www.gao.gov/new.items/d10423.pdf [hereinafter GAO STUDY].

167. *Id.*; *see also* PATRY, *supra* note 23, at 30–34 (discussing the difficulty in tracing the original source of the claimed loss of 750,000 jobs and $250 billion claimed to have been caused by piracy). The other two figures were attributed to U.S. Customs and Border Protection and the Federal Trade Commission. *Id.*

168. *See* GAO STUDY, *supra* note 166, at 19 (noting that these untraceable figures "continue to be referenced by various industry and government sources as evidence of the significance of the counterfeiting and piracy problem to the U.S. economy").

169. To date, policymakers, economists, and academic commentators have widely questioned the accuracy of the data supplied in the BSA studies. For example, a draft Australian government report described the statistics as a "self-serving hyperbole" that is "unverified and epistemologically unreliable." *Id.* Likewise, Gary Shapiro, president of the Consumer Electronics Association, called these figures "absurd on [their] face" and "patently obscene." *Software Piracy: BSA or Just BS?*, ECONOMIST, May 19, 2005, at 93. Most recently, Ivan Png convincingly demonstrated that the BSA's change of consultants had led to a change in methodology for measurement, which, in turn, resulted in systematic effects on published piracy rates. *See* I.P.L. Png, *On the Reliability of Software Piracy Statistics*, 9 ELECTRONIC COM. RESOL. & APPLICATIONS 365 (2010).

enforcement. Among the widely documented flaws are the highly incredulous one-to-one substitution rate between legal and infringing goods,[170] the overvaluation of pirated and counterfeit goods,[171] and the failure to recognize the existence of a wide variety of offsetting welfare benefits.[172] As Li Xuan has noted in the Chinese context, if the BSA figures were correct, the market turnover of software in China would have made up for nearly a quarter of the country's GDP in 2005—a highly unlikely scenario.[173] The Chinese software market would also have been far larger than the entire information technology market—an equally implausible scenario.[174]

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170. *See* GAO STUDY, *supra* note 166, at 17. As Carsten Fink observed in an issue paper he wrote before joining the World Intellectual Property Organization as its first-ever chief economist:

> [BSA's assumption] that, in the absence of piracy, all consumers of pirated software would switch to legitimate copies at their current prices . . . is unrealistic—especially in developing countries where low incomes would likely imply that many consumers would not demand any legitimate software at all. Accordingly, estimated revenue losses by software producers are bound to be overestimated.

Carsten Fink, *Enforcing Intellectual Property Rights: An Economic Perspective*, *in* INT'L CTR. FOR TRADE & SUSTAINABLE DEV., ISSUE PAPER NO. 22, THE GLOBAL DEBATE ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING COUNTRIES xiii, 13 (2009), *available at* http://ictsd.org/downloads/2009/03/fink-correa-web.pdf.

171. *See id.* at 17–18.

172. As the U.S. Government Accountability Office (GAO) points out in its recent study, although piracy and counterfeiting may affect the core intellectual property industries, these industries, along with those in other sectors and individual consumers, may have obtained offsetting benefits. *Id.* at 15. As the study states:

> [C]onsumers may use pirated goods to "sample" music, movies, software, or electronic games before purchasing legitimate copies, which may lead to increased sales of legitimate goods. In addition, industries with products that are characterized by large "switching costs," may also benefit from piracy due to lock-in effects. . . . [Moreover,] companies that experience revenue losses in one line of business—such as movies—may . . . increase revenues in related or complementary businesses due to increased brand awareness. For instance, companies may experience increased revenues due to the sales of merchandise that are based on movie characters whose popularity is enhanced by sales of pirated movies. One expert also observed that some industries may experience an increase in demand for their products because of piracy in other industries. This expert identified Internet infrastructure manufacturers (e.g., companies that make routers) as possible beneficiaries of digital piracy, because of the bandwidth demands related to the transfer of pirated digital content. While competitive pressure to keep one step ahead of counterfeiters may spur innovation in some cases, some of this innovation may be oriented toward anticounterfeiting and antipiracy efforts, rather than enhancing the product for consumers.

Id. Although the GAO study did not go further, one could easily question how much of the losses the intellectual property industries claimed to have suffered would be cancelled out by these benefits. If the benefits indeed outweigh the claimed losses, the country will have a *net* economic gain even though the core intellectual property industries may have suffered losses.

173. *See* Li Xuan, *Ten General Misconceptions About the Enforcement of Intellectual Property Rights*, *in* INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES 14, 23 (Li Xuan & Carlos M. Correa eds., 2009).

174. *See id.*

John Gantz, the chief research officer responsible for the BSA studies, defended them in a recent public hearing before the U.S. International Trade Commission concerning the impact of intellectual property infringement in China on the U.S. economy. As he reportedly declared, "Foreign companies doing business in China 'believe [their] numbers more than the ones that are published by the Chinese government.'"[175] As valid as this observation may be, his response is rather bizarre. Since when do U.S. policymakers and companies find data supplied by the Chinese government reliable? Moreover, if the BSA figures are only comparatively better than figures produced by the Chinese government, one has to wonder how much of the American public will find the information reliable.

While BSA has been widely criticized for its highly flawed studies, the entertainment industry's approach is not necessarily better. Thus far, the industry has failed to provide convincing empirical data about the deleterious impact of online file sharing.[176] Equally problematic is the industry's habit of counting as lost sales those music downloads by individuals who are neither interested in the products nor able to afford them.[177] More disturbingly, while the industry counts pirated goods as lost sales, it refuses to count complimentary copies the same way, even though many of those who receive complimentary copies have the ability to purchase the goods.[178] Artists have also criticized labels for diluting royalties by giving out free copies in lieu of discount.[179]

In sum, the industry needs to provide more credible empirical data. Such provision is particularly important, in light of the increasing emphasis on empirical research in the intellectual property field. For example, international organizations, policymakers, and commentators have already widely endorsed empirically based impact assessments in the areas of human rights, public health, and biological diversity.[180] The recently adopted World Intellectual

175. Grant Gross, *US Panel Looks at Intellectual Property Violations in China*, PC WORLD (June 15, 2010), http://www.pcworld.com/businesscenter/article/198901/us_panel_looks_at_intellectual_property_violations_in_china.html.

176. See sources cited *supra* note 46.

177. At best, the figures reflect the retail value of pirated goods. *See* Li, *supra* note 173, at 25 (quoting John Gantz, the director of research in charge of the BSA studies, as saying, "I would have preferred to call it the retail value of pirated software."). Those figures, however, are drastically different from lost sales.

178. *See* PASSMAN, *supra* note 95, at 70 (discussing free goods as price discount).

179. *See id.*

180. *See, e.g.*, Convention on Biological Diversity art. 14(1)(a), June 5, 1992, 1760 U.N.T.S. 79 (requiring contracting parties to "introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and,

Property Organization Development Agenda also includes a number of recommendations concerning assessment, evaluation, and impact studies.[181] Moreover, in-depth economic analyses of intellectual property law and policy have gradually emerged over the past decade.[182] A growing number of legal scholars in the United States and elsewhere have also begun to engage in empirical research on intellectual property issues.[183] Thus, it is only a matter of time before

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where appropriate, allow for public participation in such procedures"); United Nations, Econ. & Social Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph 1(c), of the Covenant), ¶ 35, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) ("States parties should . . . consider undertaking human rights impact assessments prior to the adoption and after a period of implementation of legislation for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions."); COMM'N ON INTELLECTUAL PROP. RIGHTS, INNOVATION & PUB. HEALTH, WORLD HEALTH ORG., PUBLIC HEALTH, INNOVATION AND INTELLECTUAL PROPERTY RIGHTS 10 (2006), *available at* http://www.who.int/intellectualproperty/documents/thereport/ENPublicHealthReport.pdf ("Health policies, as well as inter alia those addressing trade, the environment and commerce, should be equally subject to assessments as to their impact on the right to health.").

181. *See The 45 Adopted Recommendations Under the WIPO Development Agenda*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/ip-development/en/agenda/recommendations.html (last visited Nov. 21, 2009) (including the recommendations in cluster D).

182. *See, e.g.*, CHRISTINE GREENHALGH & MARK ROGERS, INNOVATION, INTELLECTUAL PROPERTY, AND ECONOMIC GROWTH (2010); INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH (Carsten Fink & Keith E. Maskus eds., 2005); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003); KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (2000); SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES (2004); WORLD INTELLECTUAL PROP. ORG., THE ECONOMICS OF INTELLECTUAL PROPERTY: SUGGESTIONS FOR FURTHER RESEARCH IN DEVELOPING COUNTRIES AND COUNTRIES WITH ECONOMIES IN TRANSITION (2009), *available at* http://www.wipo.int/ip-development/en/economics/pdf/wo_1012_e.pdf.

183. *See, e.g.*, John R. Allison & Mark A. Lemley, *Who's Patenting What? An Empirical Exploration of Patent Prosecution*, 53 VAND. L. REV. 2099 (2000); Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581 (2006); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008); James Bessen & Michael J. Meurer, *Lessons for Patent Policy from Empirical Research on Patent Litigation*, 9 LEWIS & CLARK L. REV. 1 (2005); Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63 (2008); Christopher A. Cotropia, *Nonobviousness and the Federal Circuit: An Empirical Analysis of Recent Case Law*, 82 NOTRE DAME L. REV. 911 (2007); Donna M. Gitter, *Should the United States Designate Specialist Patent Trial Judges? An Empirical Analysis of H.R. 628 in Light of the English Experience and the Work of Professor Moore*, 10 COLUM. SCI. & TECH. L. REV. 169 (2009); Paul J. Heald, *Does the Song Remain the Same? An Empirical Study of Bestselling Musical Compositions (1913–1932) and Their Use in Cinema (1968–2007)*, 60 CASE W. RES. L. REV. 1 (2009); Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 MINN. L. REV. 1031 (2008); Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237 (2006); Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391 (2006); Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365 (2000); Lee Petherbridge & R. Polk Wagner, *The Federal Circuit*

policymakers and academic commentators begin to hold the industry's piracy complaints and copyright reform proposals to greater empirical scrutiny.

C. Focus Only on the Bad Guys

When the law goes after bad guys and big-time criminals, the public applauds. When it goes after good guys in an effort to catch bad guys—for example, through the industry's widely criticized litigation efforts[184]—the reaction is mixed, with many finding the tactics misguided, or even repulsive. These mixed reactions are not new; they date back to the foundation of the Anglo-American criminal law system. As English jurist Sir William Blackstone wrote in the *Commentaries* in the eighteenth century, "Better that ten guilty persons escape, than that one innocent suffer."[185] To date, this foundational belief has been taught not only in law schools, but also among school children and college students.[186]

The problem with the entertainment industry's existing approach is not that it does not go after bad guys—it does. From heightened criminal penalties under the Racketeer Influenced and Corrupt Organizations (RICO) Act[187] to stronger enforcement measures and tighter border controls, the industry has explored a wide variety of strategies to target those engaging in copyright piracy on a commercial scale.[188] What is troubling, however, is that, in its

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and Patentability: An Empirical Assessment of the Law of Obviousness, 85 TEX. L. REV. 2051 (2007); Matthew Sag et al., *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801 (2009); David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 WM. & MARY L. REV. 1699 (2009); David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223 (2008); Symposium, *Frontiers in Empirical Patent Law Scholarship*, 87 N.C. L. REV. 1321 (2009); R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105 (2004).

184. *See* Yu, *P2P and the Future*, *supra* note 29, at 663–69 (discussing the industry's lawsuits against individual file sharers).

185. 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

186. *See* Dorsey D. Ellis, Jr., Vox Populi v. Suprema Lex*: A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 IOWA L. REV. 829, 845 (1970) ("Schoolboys are taught that it is 'better to let ten men go free than to convict an innocent man.'"); Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) ("Lawyers 'are indoctrinated' with it 'early in law school.'" (quoting G. Tim Aynesworth, Letter to the Editor, *An Illogical Truism*, AUSTIN AM.-STATESMAN, Apr. 18, 1996, at A14)).

187. 18 U.S.C. §§ 1961–1968 (2006).

188. *See, e.g.*, Advisory Comm. on Enforcement, World Intellectual Prop. Org., *Policy Responses to the Involvement of Organized Crime in Intellectual Property Offences*, WIPO/ACE/5/5 (Aug. 26, 2009) (by Michael Blakeney, Herchel Smith Professor of Intellectual Property Law, Queen Mary Intellectual Property Research Institute and Faculty of Law,

effort to go after commercial pirates, the industry also pushes for measures that penalize ordinary citizens for engaging in noncommercial copying.[189]

For people outside the industry, these individuals are generally not considered the bad guys, at least not compared with those engaging in copyright piracy on a commercial scale. Until the enactment of the No Electronic Theft Act[190] in 1997, criminal liability did not even attach to those who did not have financial gains in their infringing activities.[191] Given the increasing complexity of copyright law and rapid legislative changes, it is also fair to question whether the public has any reason to suspect that some of their ordinary daily activities are now prohibited by law.[192]

In addition, from the standpoint of societal development, there are strong and convincing arguments against making enforcement measures so pervasive that they cover all forms of ordinary daily activities. As Alain Strowel, a strong advocate of copyright law, declares: "[A] solution that would eliminate all piracy, if at all

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University of Western Australia), *available at* http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_5.doc; Louise Blakeney & Michael Blakeney, *Counterfeiting and Piracy—Removing the Incentives Through Confiscation*, 30 EUR. INTELL. PROP. REV. 348 (2008).

189. *See* Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 62 (2003) (noting that many industry executives believe that "most consumers . . . will infringe copyrights at every opportunity unless they are dissuaded from doing so by the fear of punishment"); *see also* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 51 n.14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (offering definitions to distinguish piracy and counterfeiting from other forms of infringement).

190. Pub. L. No. 105–147, 111 Stat. 2678 (1997).

191. Section 506(a) provides:

> Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—
>
> (A) for purposes of commercial advantage or private financial gain;
>
> (B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000 . . . .

17 U.S.C. § 506(a)(1)(A)–(B); *see also* FISHER, *supra* note, at 147 ("Until the mid-1990s, copyright infringement was virtually never prosecuted. In 1995, the growing frequency of violations, particularly over the Internet, prompted the Justice Department to establish the Computer Crime and Intellectual Property Section. Since then, rates of prosecution have increased significantly.").

192. As Jessica Litman notes in her criticism of the Digital Millennium Copyright Act ("DMCA"):

> The DMCA is long, internally inconsistent, difficult even for copyright experts to parse and harder still to explain. Most importantly, it seeks for the first time to impose liability on ordinary citizens for violation of provisions that *they have no reason to suspect are part of the law*, and to make noncommercial and noninfringing behavior illegal on the theory that that will help to prevent piracy.

JESSICA LITMAN, DIGITAL COPYRIGHT 145 (2001) (emphasis added).

possible, would seem dangerous or at least dubious for both individual liberties and technological innovation."[193] It is small wonder that consumer advocates, civil libertarians, academic commentators, and user communities have heavily criticized the RIAA's lawsuits against individual file sharers.[194]

Even worse, the industry has used unreliable technologies and questionable tactics to facilitate those ill-advised lawsuits. For example, in the early days of the RIAA's litigation campaign, its web crawlers generated many false positives. These widely reported false positives included an innocent college professor named Usher (similar to the rhythm-and-blues singer), a sixty-six-year-old Boston woman whose computer could not run the alleged file sharing software, a sick teenager receiving weekly treatments for pancreatitis in a hospital, and an eighty-three-year-old deceased woman who had hated computers while alive.[195] If these misidentification cases are not bad enough, the industry's outsourcing of take-down notices to third-party firms had created perverse incentives that encouraged those firms to find as many infringers as they could, often to the detriment of Internet users.[196]

Equally problematic was the entertainment industry's nonapologetic attitude toward the unintended problems its aggressive litigation tactics had created for innocent people. In response to the above-mentioned misidentification cases, for example, Dan Glickman, the MPAA's chairman and CEO, reportedly said, "When you go trawling with a net, you catch a few dolphins."[197] While it is understandable why the industry would find it acceptable to harm dolphins in their effort to catch fish, people outside the industry may disagree. After all, no matter how important it is to catch fish, we do not need to harm dolphins.[198] Moreover, if harm is unavoidable, we

193. Alain Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers—Is the "Graduated Response" a Good Reply?*, 1 WIPO J. 75, 86 (2009); *see also* Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1, 3 (2006) ("Pervasively distributed copyright enforcement invades, disrupts, and casually rearranges the boundaries of personal spaces and of the intellectual and cultural activities played out within those spaces.").

194. *See* Yu, *P2P and the Future*, *supra* note 29, at 663–69 (discussing the industry's lawsuits against individual file sharers).

195. *See* Yu, *The Graduated Response*, *supra* note 6, at 1395–96.

196. *See* PATRY, *supra* note 23, at 169 ("Record and motion picture companies have outsourced take-down notices to third-party firms, who rely on automated processes, indirect evidence of infringement, but who have a direct financial incentive to send out as many notices as possible.").

197. Cory Doctorow, *Online Censorship Hurts Us All: Those Who Are Trying to "Protect" Artists Are Actually Making Things Worse*, GUARDIAN (London), Oct. 2, 2007, http://www.guardian.co.uk/technology/2007/oct/02/censorship (internal quotation marks omitted).

198. It is worth noting that Congress enacted the Marine Mammal Protection Act of 1972 to protect dolphins from being killed needlessly by those catching yellowfin tuna. Pub. L. No. 92–

may need to seriously think about cutting dolphin-killing tuna out of our diet. To address the industry's fish-at-all-costs approach, the Electronic Frontier Foundation and other nonprofit organizations recently included the establishment of an informal "dolphin hotline" in the Fair Use Principles for User Generated Video Content.[199]

Finally, the effectiveness of the industry's strategy of equating file sharers with pirates (and therefore bad guys) is highly questionable.[200] To begin with, the industry has cast the net too wide by not distinguishing the different types of Internet users, who range from children to college students to independent artists.[201] It is, in fact, pointless to classify such a large segment of the population as pirates (or bad guys). It is also problematic when piracy is defined so broadly that most people violate the law.[202]

522, § 110, 86 Stat. 1027, 1041 (codified as amended at 16 U.S.C. §§ 1361–1407 (2006)). Dolphin-safe labels have also been used to encourage consumers to purchase canned tuna that have been caught without maiming or killing dolphins. *See* Philip Shabecoff, *3 Companies to Stop Selling Tuna Netted with Dolphins*, N.Y. TIMES, Apr. 13, 1990, at A1.

199. As declared in the Fair Use Principles for User Generated Video Content:

> Every system makes mistakes, and when fair use "dolphins" are caught in a net intended for infringing "tuna," an escape mechanism must be available to them. Accordingly, content owners should create a mechanism by which the user who posted the allegedly infringing content can easily and informally request reconsideration of the content owner's decision to issue a DMCA takedown notice and explain why the user believes the takedown was improper. This "dolphin hotline" should include a website that provides information about how to request reconsideration, and a dedicated email address to which requests for reconsideration can be sent. Service providers should ensure that users are informed of these mechanisms for reconsideration . . . .

Fair Use Principles for User Generated Video Content, ELEC. FRONTIER FOUND., http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen (last visited Oct. 4, 2010).

200. *See generally* Patricia Loughlan, *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes . . . The Metaphors of Intellectual Property*, 28 SYDNEY L. REV. 211, 218–19 (2006) (critically analyzing the use of the metaphor "pirate" in the copyright debate).

201. It is worth contrasting this with the argument made by the publishing industry. As Patricia Schroeder noted with respect to piracy by classroom teachers in China: "[T]he problem with it is, is these aren't criminals. These are teachers and students doing this. But this is one of our hardest because these are respectable citizens and think what they're teaching the entire university, that you can just take this stuff and hand it out to everybody." *Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.–China Econ. and Sec. Review Comm'n*, 109th Cong. 129 (2006) (oral testimony of Patricia Schroeder, President and CEO, Association of American Publishers).

202. As Professor Lemley reminds us:

> A law which nobody obeys is not a good thing as a philosophical matter. It may lead to disrespect for laws in general. More specifically, it may lead those who violate the unenforced parts of the copyright laws with impunity to assume that they can violate the copyright law in other ways as well. At a different level, if a law is so out of touch with the way the world works that it must regularly be ignored in order for the everyday activities of ordinary people to continue, perhaps we should begin to question whether having the law is a good idea in the first place.

Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 578 (1997); *see also* PATRY, *supra* note 23, at xxiv ("Laws should be fair, fit for their purpose,

Even more importantly, the piracy-filled rhetoric is self-defeating; it undermines the longstanding efforts to promote effective copyright enforcement. Although pirates are some of the most detested people among policymakers and industry representatives,[203] the term "pirate" does not have the same negative connotations for children and teenagers. For many youngsters, pirates are cool, sexy, and glamorous. The wild popularity of pirate ships in amusement parks, movies in *The Pirates of the Caribbean* franchise, and pirate stories like *Treasure Island* and *Peter Pan* speak for themselves.[204] At that young age, who does not want to be a pirate, looking for treasures while hoisting the skull-and-bones flag? To many of these youngsters, pirates may even carry a "Robin Hood" sense of justice—and sadly, a romantic notion of illegality.

Given the dueling perceptions of pirates and piracy—a negative one for policymakers and industry representatives and a positive one for young Internet users—it is no surprise that Agnette Haaland, the head of the International Actors' Federation, demanded a stop to

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and accountable to the reality of the world we live in. We do not respect, and will not follow, laws that conflict with the realities of our lives, nor should we."). Likewise, Geraldine Moohr notes:

> Criminal enforcement actions that impose harsh penalties for conduct that is not viewed as immoral or harmful can lower the community's respect for the criminal law and thereby diminish both its legitimacy and its general effectiveness. People who have not internalized the legal standard may obey the law because they respect its legitimacy, even when social norms are in transition. But if respect and legitimacy are diminished, people will be less likely to obey or to impose informal sanctions on others.
>
> Respect and legitimacy are threatened when a community norm that condemns prohibited conduct is not yet in place. In that situation, criminal enforcement coupled with severe penalties can make pawns of those caught in the transition period and offend community notions of due process, fairness, and commonly held ideas about notice and legality. If the community believes these severe sanctions are disproportionate to the offense, especially if only a small percentage of personal infringers are targeted, then enforcing criminal infringement crimes may be detrimental. To the extent that citizens reject rules that target people unfairly, they may similarly reject the legal system that promulgates and enforces such rules. In these circumstances, enforcing rules that do not embody a shared community norm may actually undermine the formation of a norm against the forbidden conduct.

Moohr, *supra* note 20 at 804–05 (2005).

203. Many intellectual property bills, for example, included the term "piracy" in their title. *E.g.*, Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010); Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); Piracy Deterrence and Education Act of 2004, H.R. 4077, 108th Cong. (2004); Piracy Deterrence and Education Act of 2003, H.R. 2517, 108th Cong. (2003); Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1999); Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. (1998).

204. *See Man, Oh Man!: Sorry, Ladies the Guys Are Takin' it to the Bank*, CHI. TRIB., July 24, 2008, at 50 (reporting that *The Pirates of the Caribbean* franchise "is worth an estimated $2.76 billion, according to Forbes").

branding file sharers as "pirates."[205] As he reasoned, "To me, piracy is something adventurous, it makes you think about Johnny Depp. We all want to be a bit like Johnny Depp. But we're talking about a criminal act. We're talking about making it impossible to make a living from what you do."[206]

In sum, the entertainment industry needs to rethink its strategy of dealing with bad guys. Who exactly are they? How bad do they need to be? Rather than pushing for tougher enforcement across the board, the industry will be better off targeting only those whom the public generally considers bad. For example, the industry could target only those who commit copyright piracy for profit or on a commercial scale, thus leaving alone those ordinary citizens who engage in noncommercial copying activities. After all, in light of the intent of these bad guys and the damage they inflict upon artists (and other rights holders), it is hard to defend those who engage in commercial piracy.[207]

D. Develop a Generally Acceptable Sense of Priorities

Today, the entertainment industry's aggressive push for stronger copyright protection and enforcement has caused serious collateral damages to society at large, eroding the protections of free speech, free press, privacy, due process, and other civil liberties.[208] The proposed ACTA, for example, calls for draconian measures that threaten to undermine the United States' longstanding interests in promoting human rights, civil liberties, and the rule of law abroad.[209] Likewise, the push for the worldwide adoption of the graduated response system has undermined the protections of free speech, free press, privacy, and both procedural and substantive due process.[210] In

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205. *See* Nate Anderson, *"Piracy" Sounds Too Sexy, Say Rightsholders*, ARS TECHNICA (Mar. 18, 2010), http://arstechnica.com/tech-policy/news/2010/03/piracy-sounds-too-sexy-say-rightsholders.ars.

206. *Id.*

207. Lawrence Liang, however, cautions us not to draw quick conclusions about piracy in less developed countries. *See* Lawrence Liang, *Beyond Representation: The Figure of the Pirate*, *in* ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 353 (Gaëlle Krikorian & Amy Kapczynski eds., 2010); *see also* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 562–86 (2004) (articulating the value of pure copying).

208. *See* discussion *supra* Part II.D.

209. *See* Yu, *Six Secret Fears*, *supra* note 7.

210. *See* Yu, *The Graduated Response*, *supra* note 6, at 1397–400. Consumer advocates, civil libertarians, and academic commentators have widely raised concerns about how stronger copyright protection could undermine the protection of procedural due process. However, as Jennifer Rothman points out insightfully, such protection could also undermine the protection of substantive due process. *See* Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free*

addition, the introduction of anti-circumvention laws and the ongoing push for greater protection of digital rights management tools have brought about many unintended consequences, chilling innovation and competition while raising concerns over free speech, privacy, consumer protection, academic freedom, learning, scientific advancement, cultural development, and democratic discourse.[211]

If these concerns are not serious enough, some of the earlier, and thankfully rejected, proposals were even more disturbing. In July 2002, for example, Representative Howard Berman introduced the Peer to Peer Piracy Prevention Act, which would have allowed movie and record companies to hack into personal computers and peer-to-peer networks when they suspected that infringing materials were being circulated.[212] The next year, at a Senate Judiciary Committee hearing, Senator Orrin Hatch made the shocking remark that "he favored developing new technology to remotely destroy the computers of people who illegally download music from the Internet."[213] In the mid-2000s, BMG Sony was found to have installed without authorization "rootkits" onto its customers' computers, making the machines vulnerable to viruses and outside attacks.[214] The label has

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Speech, 95 CORNELL L. REV. 463, 513 (2010) ("Copyrighted works are fundamental to an individual's liberty when their use is integral to the construction of a person's identity. In particular, uses that are necessary for mental integrity, communication, the development and sustenance of emotionally intimate relations, or the practice of one's religion are all at the core of one's identity").

211. *See* Yu, *Anticircumvention and Anti-anticircumvention*, *supra* note 8, at 37–38; Yu, *P2P and the Future*, *supra* note 29, at 725–26.

212. H.R. 5211, 107th Cong. (2002); *see also* Howard L. Berman, *The Truth About the Peer to Peer Piracy Prevention Act: Why Copyright Owner Self-Help Must Be Part of the P2P Piracy Solution*, FINDLAW'S WRIT (Oct. 1, 2002), http://writ.news.findlaw.com/commentary/20021001_berman.html (explaining the need for the legislation); Julie Hilden, *Going After Individuals for Copyright Violations: The New Bill that Would Grant Copyright Owners a "License to Hack" Peer-to-Peer Networks*, FINDLAW'S WRIT (Aug. 20, 2002), http://writ.news.findlaw.com/hilden/20020820.html (criticizing the legislation).

213. Ted Bridis, *Senator Favors Really Punishing Music Thieves*, CHI. TRIB., June 18, 2003, at 2C (reporting about Senator Hatch's remark). According to this newspaper report, Senator Hatch reasoned that damaging someone's computer "'may be the only way you can teach somebody about copyrights.'" *Id.*; *see also* Dwight Silverman, *Senator's "Extreme" Cure for Piracy Is Unconstitutional*, HOUS. CHRON., June 21, 2003, Business Sec., at 1. The Senator, however, quickly clarified his statement through a press release: "'I made my comments at yesterday's hearing because I think that industry is not doing enough to help us find effective ways to stop people from using computers to steal copyrighted, personal or sensitive materials. I do not favor extreme remedies—unless no moderate remedies can be found. I asked the interested industries to help us find those moderate remedies.'" Press Release, Senator Orrin Hatch, Hatch Comments on Copyright Enforcement (June 18, 2003), *available at* http://hatch.senate.gov/public/index.cfm/releases?ContentRecord_id=0e5ac383-8dcf-4036-924d-357ddd622354.

214. *See generally* Megan M. LaBelle, *The "Rootkit Debacle": The Latest Chapter in the Story of the Recording Industry and the War on Music Piracy*, 84 DENV. U. L. REV. 79 (2006) (discussing BMG Sony's rootkit debacle).

since recalled or replaced millions of CDs while paying a total of $5.75 million in fines to forty-one states.[215]

Tension inevitably exists between copyright protection and enforcement on the one hand and greater protection of individual human rights on the other. Indeed, it is not uncommon to find industry representatives lamenting how the protection of human rights has stifled efforts to strengthen copyright enforcement. While the frustrations of these representatives are understandable, copyrights should not be enforced at the expense of human rights. While most policymakers seek to reconcile the conflict between the two by adding limitations and exceptions, there will unavoidably be areas where such reconciliation is hard, if not impossible, to achieve.

If members of the public are asked whether they prefer greater protection of human rights to stronger copyright enforcement, many are likely to pick the former—and rightly so.[216] In the grand scheme of things, copyright protection is just not that important.[217] While the entertainment industry understandably considers copyright protection and enforcement highly important, policymakers, after taking into account other competing public needs and the costs of overzealous copyright enforcement, may give it a different priority.[218] After all, copyright holders still account for only a small portion of our total population.

In addition, it is debatable whether the strengthening of copyright enforcement still remains a top priority after Congress has

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215. Dawn Kawamoto, *Sony Settles with FTC in Rootkit Case*, CNET NEWS (Jan. 30, 2007, 10:22 AM), http://news.cnet.com/Sony-settles-with-FTC-in-rootkit-case/2100-1027_3-6154655.html.

216. Of course, the choice is never as simple as one between enforcement of copyright and protection of human rights. For example, there are different standards for copyright enforcement. There are also different types of human rights. If the variations are not complicated enough, except perhaps for such rights as the right to life and the right to free speech, countries have yet to achieve a consensus over what human rights should be universally recognized. *See* Yu, *Reconceptualizing Intellectual Property Interests*, *supra* note 81, at 1046; Yu, *Ten Common Questions*, *supra* note 81, at 716.

217. *See* Peter K. Yu, *Three Questions that Will Make You Rethink the U.S.–China Intellectual Property Debate*, 7 J. MARSHALL REV. INTELL. PROP. L. 412, 414 (2008) (stating that the author has "yet to meet a U.S. policymaker who picks 'intellectual property protection' over" nuclear nonproliferation and currency exchange as the most important issue in the U.S.–China bilateral agenda); *see also Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.–China Econ. and Sec. Review Comm'n*, 109th Cong. 6 (2006) (letter from Larry M. Wortzel, Chairman, U.S.–China Econ. and Sec. Review Comm'n, & Carolyn Bartholomew, Vice Chairman, U.S.–China Econ. & Sec. Review Comm'n) (observing that "the Department of Homeland Security (DHS) has not placed the seizure of counterfeit goods among its top enforcement priorities").

218. *See generally* Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1 (2010) (discussing the costs of strong intellectual property enforcement norms and the resulting trade-offs).

already ratcheted up the copyright standards repeatedly and considerably over the past two decades.[219] To begin with, creativity will not stop, even if copyright enforcement is not strengthened further. As shown in Part II, the sky-is-falling argument is just weak.[220]

Moreover, even if the existing level of copyright protection and enforcement is needed to incentivize creativity, there is no guarantee that stronger protection and enforcement will promote further creativity. As Judge Alex Kozinski warned us in his famous dissent in *White v. Samsung Electronics America, Inc.*:[221] "Overprotecting intellectual property is as harmful as underprotecting it."[222] Likewise, Josh Lerner writes, "Almost all economists would agree that some intellectual property protection is better than no intellectual property protection at all. But this does not mean that very strong protection is better than a more moderate level of protection."[223]

Moreover, the arrival of MySpace, YouTube, Facebook, and other social networking platforms has shown the immense creative potential of netizens. Much of this potential, however, does not depend on the incentives generated by the existing copyright system.[224] While policymakers and commentators have yet to reach a

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219. *See, e.g.*, Digital Millennium Copyright Act of 1998, Pub. L. No. 105–304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.); Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106–160, 113 Stat. 1774 (codified as amended at 17 U.S.C. 504(c), 28 U.S.C. 994); Family Entertainment and Copyright Act of 2005, Pub. L. No. 109–9, 119 Stat. 218 (codified as amended in scattered sections of 2, 15, 17, 18, 28, and 36 U.S.C.); No Electronic Theft (NET) Act, Pub. L. No. 105–147, 111 Stat. 2678 (1997); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 304 (2000)).

220. *See* discussion *supra* Part II.A.

221. 989 F.2d 1512 (9th Cir. 1993).

222. *Id.* at 1513 (Kozinski, J., dissenting).

223. Josh Lerner, *The Patent System in a Time of Turmoil*, 2 WIPO J. 28, 32 (2010); *see also* Yu, *Anticircumvention and Anti-anticircumvention*, *supra* note 8, at 17 ("[M]ore [copyright protection] is not always better, and small can be beautiful.").

224. As Jessica Litman reminds us:

> The most powerful engine driving this information space turns out not to be money—at least if we're focusing on generating and disseminating the content rather than constructing the hardware that it moves through. What seems to be driving the explosive growth in this information space is that people like to look things up, and they want to share. This information economy is largely a gift economy. The overwhelming majority of the information I'm talking about is initially posted by volunteers. Many of them are amateurs, motivated by enthusiasm for their topics, a desire to pass interesting stuff on, and, perhaps, an interest in attention and the benefits it may bring. When one is a volunteer, the time and effort one is willing to put into contributing to the information space can seem limitless. Volunteers move on, of course: they get bored, or broke, or caught up in other things, but there seems to be an inexhaustible supply of new volunteers to take their places, and, luckily, the new volunteers are able to build on earlier volunteers' foundations. I potentially know all of the information the other participants know. Their knowledge can be my knowledge

consensus on the appropriate standards for treating user-generated content, the creation of this new type of content has undoubtedly inspired innovative thinking about the development, dissemination, and exploitation of creative works.[225]

Finally, if society has to give up so much just to provide copyright-based incentives to only a small group of artists who otherwise would not create, perhaps society should rethink how to generate incentives for creation. The protection and enforcement of copyright is important, but not so important that it should be protected at all costs. As the U.K. Commission on Intellectual Property Rights reminds us, the protection and enforcement of intellectual property rights is only "a means to an end, not an end in itself."[226] If a certain group of artists would not create under a different incentive structure, another group may. Unless we can show why society needs to privilege this particular group of artists, it will be challenging to defend a specific incentive structure, even if we agree that incentives need to be provided through market-based mechanisms.

E. Don't Use Foreign Piracy as an Excuse

It is politically expedient to blame foreign countries for domestic problems, because domestic politics rarely accommodate foreign voices. Copyright enforcement is no exception. While online copyright problems remain troublesome at the domestic level, many of the complaints about copyright enforcement thus far have focused on piracy in foreign countries.[227] The concern about foreign piracy was,

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> with a few clicks of a mouse. In return, I make my knowledge available to anyone who happens by. Each of us can draw on the information stores of the others.

Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 8–9 (2004) (footnotes omitted); *see also id.* at 50 ("[T]he idiosyncratic interests of large numbers of individuals who want to share is directly responsible for the wealth and incredible variety of information we can find when we go looking for it . . . ."); Yu, *P2P and the Future*, *supra* note 29, at 717 ("[T]he Internet started when users networked their computers, offering information gratis to other users with no firewalls, no technological protection measures, and no intellectual property protection.").

225. *See, e.g.*, CHRIS ANDERSON, FREE: THE FUTURE OF A RADICAL PRICE (2009); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); CLAY SHIRKY, COGNITIVE SURPLUS: CREATIVITY AND GENEROSITY IN A CONNECTED AGE (2010); CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS (2008); DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING (expanded ed., 2008).

226. COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 6 (2002).

227. Members of the International Intellectual Property Alliance, including the movie, music, and software industries, have been particularly vocal about foreign piracy. *See generally*

indeed, the reason why the U.S. movie, music, software, and game industries aggressively lobbied the government to establish ACTA.[228]

To some extent, the linkage between domestic and foreign enforcement problems is unavoidable. After all, globalization and the popularization of the Internet have made it impossible to tackle domestic problems without considering their foreign counterparts. From allofmp3.com in Russia to the Pirate Bay in Sweden, foreign websites, services, and networks have created significant challenges for copyright holders.[229] Indeed, the problems are so severe that Senator Patrick Leahy recently introduced the Combating Online Infringement and Counterfeits Act (COICA).[230] If enacted, the law would enable the Attorney General to shut down infringing websites, services, and networks by applying for "a temporary restraining order, a preliminary injunction, or an injunction against the domain name used by an Internet site dedicated to infringing activities."[231]

Unfortunately, a focus on foreign piracy could create an illusion about the government's enforcement priorities. It will also create the misleading impression that many of the existing domestic copyright problems would disappear if foreign piracy were eradicated. Worse still, such a focus suggests that the domestic problems resulted from some foreign culprits, even though a causal link between the two does not always exist. The obsession with foreign piracy may even divert the policymakers' much-needed attention to tackle domestic copyright problems.[232]

Moreover, the extent of foreign piracy and its impact on domestic markets may have been largely overstated. As territorial as copyright protection is, international audiences have different interests, consumer tastes, and language capabilities. Although the transborder nature of foreign piratical activities has made tackling domestic enforcement problems difficult, domestic problems would certainly continue even if the foreign activities did not take place. It is also worth noting that, while major productions were created with a

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Peter Drahos, *Securing the Future of Intellectual Property: Intellectual Property Owners and Their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53, 62–74 (2004) (discussing intellectual property rights holders and their nodally coordinated enforcement pyramid).

228. *See* Yu, *Six Secret Fears*, *supra* note 7 (discussing the origins of ACTA).

229. USTR, OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS (2011), *available at* http://www.ustr.gov/webfm_send/2595 (reporting about the massive piracy threats posed by such notorious Internet sites as Baidu in China, vKontake in Russia, allofmp3.com clones in Russia and Ukraine, isoHunt in Canada, and The Pirate Bay in Sweden).

230. Combating Online Infringement and Counterfeits Act, S. 3804, 111th Cong. (2010).

231. *Id.* § 2.

232. *See* Yu, *P2P and the Future*, *supra* note 29, at 693–95 (discussing the potential for a focus on foreign piracy to divert public attention from domestic copyright issues).

worldwide audience in mind, many U.S. entertainment products were created without considering the interests of foreign markets. Many of these products, in fact, were not even marketed abroad; rap songs that sell well in the United States, for example, do not always sell well in non-English-speaking markets.

More problematically, while the industry continues to emphasize the need to protect American jobs by reducing foreign piracy, its active efforts to outsource production abroad actually does the opposite. As the *Los Angeles Times* recently reported, many local firms, including some accomplished ones, now face the threat of closure after a growing number of filmmakers outsourced their productions abroad to cut costs.[233] Likewise, Susan Sell observes, "[The motion picture industry] is always telling Congress how many American jobs counterfeiting costs Hollywood. Yet [it] does [a] huge amount of filming in Canada due to lower production costs and generous subsidies; Hollywood unions have tried to sue MPAA for taking jobs out of the country."[234]

In sum, we need a reality check on how serious the foreign copyright problems actually are, and whether foreign piracy is used mostly as a pretext to divert attention from difficult domestic challenges. The further the public debate is from reality, the more likely policymakers will be misled, and the less likely they are to secure public support for solutions that target the crux of the domestic problems.

To be certain, the industry could take advantage of its heavily entrenched political position to lobby for stronger protection[235] even if it fails to provide strong justifications. However, as online file sharing activities continue to erode the industry's economic power, and therefore political leverage, the industry will slowly lose its support

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233. *See* Richard Verrier, *Company Town: Fade Out for Visual Effects*, L.A. TIMES, Feb. 1, 2011, at B1.

234. Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play* 14 (IQsensato, Occasional Papers No. 1, 2008), *available at* http://www.iqsensato.org/wp-content/uploads/Sell_IP_Enforcement_State_of_Play-OPs_1_June_2008.pdf; *see also* DEP'T OF COMMERCE, THE MIGRATION ON U.S. FILM AND TELEVISION PRODUCTION: IMPACT OF "RUNAWAYS" ON WORKERS AND SMALL BUSINESSES IN THE U.S. FILM INDUSTRY 21 (2000), *available at* http://www.ftac.org/files/doc2000.pdf (reporting about a study showing that the total budgets for runaway productions in Canada could be as high as $2 billion).

235. *See generally* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) (discussing the heavy lobbying of the copyright industries in the copyright law revision process).

from politicians, not to mention the technology developers' increasingly active participation in the political process.[236]

F. Evaluate the Existing Business Model

The effectiveness of copyright enforcement often depends on consumer expectations and social reality.[237] Regardless of how well copyright is protected abroad, domestic enforcement problems will surface if the entertainment industry fails to meet consumer demand. Meeting such demand, however, has not always been easy. After all, how one industry player responds may ultimately affect the choices and decisions of other industry players, thus creating what one commentator has described as the "pirates' dilemma."[238]

Nevertheless, there is no excuse for the entertainment industry to ignore the negative enforcement-related ramifications of its outdated business model.[239] The frustration of music fans in Napster's early days was well captured by noted technology lawyer James Burger when he recounted his experience at the National Youth Leadership Forum, a gathering of the nation's brightest high school students in Washington:

> "How many of you routinely download music and burn CDs?" [I] asked the fifty teens . . . . Every hand shot up. I said, "Don't you think you're stealing? Don't you have a little hesitation?" Here's what they told me: "Do you know what you're asking us to do? How do we find new music without these file-trading services? We know the record labels are bribing the radio stations to jam the latest boy band or CD Barbie down our throats. But let's suppose I hear a song I like. How do I get it, under your system? I've got to ask my mom or dad to drive me to the mall. I buy a $16 or $18 CD, take it home to listen to it, and I like only one song on the album. And I know almost none of the $16

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236. *See* Yu, *P2P and the Future*, *supra* note 29, at 684–85 (discussing how the interests of the computer and consumer electronics industries have increasingly diverged from those of the recording industry).

237. Thanks to Laura Heymann for encouraging me to emphasize this point as a separate strategy.

238. MATT MASON, THE PIRATE'S DILEMMA: HOW YOUTH CULTURE IS REINVENTING CAPITALISM 231–40 (2008) (describing the "pirate's dilemma" where the decision one player makes concerning its response may pose a threat to the other players).

239. As Olufunmilayo Arewa declares:

> [T]he recording industry fundamentally erred in its reaction to market signals. When it realized that its customers were interested in a new product (DRM-free digital music files made available one track at a time), it first refused to provide that product and then chose to sue its customers instead of making the product itself readily available. This meant that the industry chose a path that was doubly difficult. In refusing to meet identified customer demand, the recording industry made it more likely that unauthorized black market downloads would actually increase. Digital music litigation strategies have also focused on using copyright law to block unauthorized or unlicensed uses that present a competitive business threat to recording industry business models.

Olufunmilayo B. Arewa, *Youtube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431, 447 (2010) (footnote omitted).

to $18 is going to the artists. So I don't feel guilty at all. I'm being ripped off by the music industry."[240]

As shown in this exchange, conducted before the arrival of iTunes, the widespread practice of unauthorized file sharing cannot be blamed on file sharers alone. As Pink Floyd's first manager observed, "The flagrant spread of 'Internet piracy' in developed counties is a reflection of the failure of the industry as a whole to develop an appropriate copyright response to the distribution and remuneration options made possible by the new technologies."[241] Napster succeeded because it supplied a market solution to an emerging demand; Shawn Fanning created Napster in part due to his college roommate's frustration over the difficulty in searching for MP3s on the Web.[242]

With the arrival of a new generation of users and changing consumer spending habits, as well as the proliferation of multipurpose media platforms,[243] the entertainment industry will have to rethink its business model as well as its marketing and distribution strategies. As William Patry reminds us, "Successful Internet business models are based on satisfying consumer preferences, honed and targeted through information provided by consumers. Such business models offer more choices, more consumer satisfaction (since they are based on consumers' own preferences), and therefore ultimately lead to greater revenue."[244]

In the last five years, a growing number of models have emerged to enable artists to reach out directly to their fans. Had the industry decided not to explore these alternative models, it would be rather hard for the industry to convincingly argue that strengthening copyright enforcement—and more dreadfully, criminal copyright enforcement—is the industry's *last resort*. After all, there will always be only one solution left if all the other viable solutions have been prematurely eliminated.

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240. LASICA, *supra* note 27, at 194–95.

241. KOT, *supra* note 29, at 2.

242. As one commentator explains:

> People wanted something like Napster—so Fanning did his best to come up with the goods. It is a rare example of supply matching demand in technology, which is why Napster simply cannot be ignored. Usually supply comes first and then its creators wonder why the general public isn't smart enough to understand its potential. Suppliers often whine that the public doesn't understand their product or service and "needs educating" but at the end of the day the public will buy only those things that improve the quality of their lives, or save them time or money.

MERRIDEN, *supra* note 99, at 170. *See generally* MENN, *supra* note 114, for a history of Napster.

243. These platforms include "home and office desktop computers, laptops, cellular phones, gaming devices . . . , and a wide variety of portable consumer electronics." STRANGELOVE, *supra* note 50, at 171.

244. PATRY, *supra* note 23, at 11.

More importantly from the industry's standpoint, if the industry continues to fail to adjust its business model to respond to consumer demand (and the resulting frustrations), the existing copyright system may undergo a radical transformation in the near future. Drawing on the history of copyright and creativity, Adrian Johns has shown how crisis in the area could lead to a "profound shift in the relation between creativity and commerce."[245] As he reminds us:

> Such turning points have happened before—about once every century, in fact, since the end of the Middle Ages. The last major one occurred at the height of the industrial age, and catalyzed the invention of intellectual property. Before that, another took place in the Enlightenment, when it led to the emergence of the first modern copyright system and the first modern patents regime. And before that, there was the creation of piracy in the 1660s–1680s. By extrapolation, we are already overdue to experience another revolution of the same magnitude. If it does happen in the near future, it may well bring down the curtain on what will then, in retrospect, come to be seen as a coherent epoch of about 150 years: the era of intellectual property.[246]

In short, whether the industry can buck this historical trend and avoid a radical transformation of the business and legal environment will depend on whether it responds adequately to consumer demand—and more importantly, their continued frustrations.

V. CONCLUSION

Ever since the arrival of the World Wide Web, new communications technologies and online file sharing services, the entertainment industry has pushed aggressively for stronger copyright protection and enforcement in the digital environment. Although the industry thus far has had only mixed success, one has to wonder whether the industry will achieve greater success when many young Internet users grow up. As I wrote earlier, the ongoing "copyright wars" could be viewed as a transitional clash between the copyright-abiding generation and Generation Y[247] (or what others

245. ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 498 (2010).

246. *Id.* at 508.

247. *See* Yu, *P2P and the Future*, *supra* note 29, at 756–63 (discussing Generation Y in the file sharing context). Such a clash is exacerbated by the fact that many of today's schoolchildren and college teenagers are unable to learn appropriate online conduct from their parents and teachers, most of whom did not grow up in a digital environment. *See id.* at 757. Although some of these adults have successfully migrated to the new digital environment, others have only limited computer literacy and use the Internet primarily for email and online shopping. *See id.* Even if the adults have made a successful transition to the digital age, the nuances of the application of copyright law to online content may be foreign to them. They are therefore ill equipped to teach children which Internet activities are legal and which ones are not, let alone to serve as role models. *See id.*

have called "Generation YouTube,"[248] "digital natives,"[249] or the "Net Generation"[250]). Many members of this generation do not share the norms reflected in existing copyright law. Many of them also do not understand copyright law or see the benefits of complying with it.

Before the arrival of the World Wide Web and new communications technologies, how this generation behaved had no commercial significance.[251] After all, retail purchases and consumption were the primary connections between this generation and copyrighted entertainment products. Today, however, the attitude of Generation Y has become a problem for copyright holders, as the Internet has provided ample opportunity to make high-quality reproductions of copyrighted content and distribute them free of charge.

As this generation grows up, however, its members may begin to understand why copyright protection is needed, especially after they start working in a real job. Many of these youngsters may also view piracy differently after seeing their musician friends struggling to obtain their well-deserved royalties or much-needed recording contracts. Under this scenario, online file sharing problems could slowly fade away even without significant copyright reforms.[252]

Unfortunately for the industry, such a do-nothing approach is very risky. The above scenario is speculative to begin with. Even if the industry knows that things will indeed improve after a generation, it may still want to accelerate progress by introducing reforms to strengthen copyright protection and enforcement in the digital environment. After all, many constituents in the industry will suffer in the transitional period. If many artists eventually abandon their current profession for other more remunerative careers, the eventual fix may arrive too late for the industry. Thus, it is understandable

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248. STRANGELOVE, *supra* note 50, at 187.

249. PALFREY & GASSER, *supra* note 63.

250. DON TAPSCOTT, GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD (2008).

251. *See* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1376–77 (2004) ("The wide dissemination of copies made by end users over the Internet means that content owners can no longer ignore end-user copies and focus on professional counterfeiters. In order to stop large-scale infringement online, copyright owners must stop the end-user copies as well.").

252. *See* LESSIG, FREE CULTURE, *supra* note 22, at 298 ("The 'problem' with file sharing—to the extent there is a real problem—is a problem that will increasingly disappear as it becomes easier to connect to the Internet. And thus it is an extraordinary mistake for policymakers today to be 'solving' this problem in light of a technology that will be gone tomorrow. The question should not be how to regulate the Internet to eliminate file sharing (the Net will evolve that problem away).").

why the industry continues to push for reforms to strengthen copyright protection and enforcement in the digital environment.

If these reforms are to be successful, the industry needs to convince the public why stronger protection and enforcement are needed and why the proposed reforms are fair, acceptable, and socially beneficial. Making persuasive arguments about these reforms is both important and urgent. As Jessica Litman, Geraldine Moore, Tom Tyler, and numerous other commentators have noted, whether the public obeys copyright law will depend on whether they successfully internalize the law's underlying norms and values.[253] The more persuasive the industry's arguments are, the more likely it will educate the public about the need for copyright protection and enforcement, and the more sustainable public support it will secure for its reform proposals.

253. *See* Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 238 (2002) ("People whose internal moral codes would never allow them to walk into a store and steal a piece of merchandise apparently think there is nothing wrong with making an unauthorized copy of a videotape or downloading a bootlegged computer program."); Jessica Litman, *Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 239 (1997) ("People don't obey laws that they don't believe in. It isn't necessarily that they behave lawlessly, or that they'll steal whatever they can steal if they think they can get away with it."); Moohr, *supra* note 20, at 795 ("Under any theory of deterrence, it is more difficult to induce law-abiding behavior when underlying social norms do not support the law. Simply put, people are more likely to obey criminal laws that reflect community values or moral judgments of right and wrong." (footnote omitted)); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 234 (1997) ("[L]egal authorities need to focus on creating the values that underlie voluntary compliance with the law. . . . Two such values are the beliefs that following a law is the morally right thing to do, and that laws and legal authorities are legitimate and ought to be obeyed."); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 221 (2000) ("Laws alone are insufficient, no matter how well they are enforced. These laws must be accompanied by a legal culture that fosters voluntary compliance.").