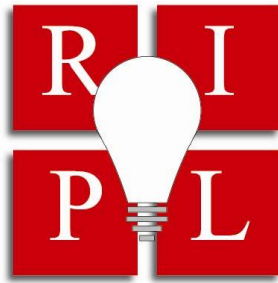


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



“CYBERANARCHY” IN THE DIGITAL AGE: DEVELOPING A SYSTEM OF HUMAN (COPY)RIGHTS

MICHAEL L. BOYLE

ABSTRACT

“Cyberanarchy,” broadly refers to the idea that legal regulation of the Internet is an infeasible objective. One prime example is current online enforcement mechanisms’ inability to quell copyright infringement. These mechanisms do little more than perpetuate a technological arms race between copyright holders and infringers. Moreover, with notable public relations failures, such as the RIAA lawsuits and digital rights management schemes, society has taken on a nonchalant attitude towards online infringement. Examining traditional justifications behind obedience to the law, this blasé attitude takes root in societal feelings of inadequacy both in “normative” and “instrumental” perspectives of justice. Normatively, there lacks a cohesive societal idea of justice and obligation. Instrumentally, there lacks proper infrastructure and administrative ability to enforce online copyright laws. This leads to unfettered digital copyright infringement. Focusing on copyrights as human rights strikes a balance between instrumental and normative considerations of copyright enforcement. Ostensibly, this would obligate lawmakers to bring end-users into the legislative discussion, while furthering the creation of a legal framework that resonates with societal perspectives of justice. When these perspectives serve as the cornerstone to the existing legal framework, legitimacy of and obedience to digital copyright law becomes attainable.

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MICHAEL L. BOYLE*

INTRODUCTION

Though “Cyberanarchy”¹ may sound like the title to the latest high-budget, CGI blockbuster, its legal referent—the theory that governments cannot feasibly regulate the Internet²—is far from science fiction. Skepticism regarding Internet regulation is neither new nor limited to the United States.³ Rather, courts, commentators, and the popular press worldwide have grappled for years over the question of how to impose rules on cyberspace.⁴

While current law establishes a framework for penalizing digital copyright infringement,⁵ to date, online enforcement mechanisms remain ineffective.⁶ The impact of widespread digital infringement goes beyond obvious economic implications,⁷ fostering a pervasive, almost blasé cultural attitude towards online copyright infringement.

* © Michael L. Boyle 2013. J.D. Candidate, May 2013 The John Marshall Law School; B.A. Philosophy and B.A. Communications, May 2009, Loyola University Maryland. To my mother, whose love and support acts as a beacon lighting my way in life; to my father, who instilled in me at an early age “*illegitimi non carborundum*”; to Ross Drath, the best editor a capricious author like myself could hope for; to my friends, colleagues, and mentors all of whom have shaped my success in countless ways; and finally, to the editorial team at The John Marshall Review of Intellectual Property Law for their assistance in making this Comment possible: thank you.

¹ See generally Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1199–1201 (1998). Professor Goldsmith coined the term “cyberanarchy” in this pivotal piece, exploring the ontological notion of cyberspace regulation.

² *Id.* at 1201; *contra* David G. Post, *Against “Against Cyberanarchy,”* 17 BERKELEY TECH. L.J. 1365, 1371 (2002).

³ See, e.g., Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 915 (1996); John Parry Barlow, *A Cyberspace Independence Declaration*, ELECTRONIC FRONTIER FOUND. (Feb. 8, 1996), <https://projects.eff.org/~barlow/Declaration-Final.html>.

⁴ See James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 178 (1997) (“For a long time, the Internet’s enthusiasts have believed that it would be largely immune from state regulation.”).

⁵ E.g., Craig A. Grossman, *From Sony to Grokster, The Failure of the Copyright Doctrines of Contributory Infringement and Vicarious Liability to Resolve the War Between Content and Destructive Technologies*, 53 BUFF. L. REV. 141, 151–53 (2005); R. Anthony Reese, *The Relationship Between the ISP Safe Harbors and the Ordinary Rules of Copyright Liability*, 32 COLUM. J.L. & ARTS 427, 429–30 (2009).

⁶ *Infra* Part II.A.; see, e.g., Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008), <http://online.wsj.com/article/SB122966038836021137.html>; Meng Ding, *Perfect 10 v. Amazon.com: A Step Toward Copyright’s Tort Law Roots*, 23 BERKELEY TECH. L.J. 373, 397–98 (2008).

⁷ See generally WILLIAM M. LANDES & HON. RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 43–45 (2003). This book is far and away the most comprehensive economic analysis of the effects intellectual property has on the free market. *Accord* Dawn R. Albert, *The Changing Face of IP Litigation*, in *LITIGATION STRATEGIES FOR INTELLECTUAL PROPERTY CASES: LEADING LAWYERS ON ADAPTING TO NEW TRENDS, IMPROVING COURTROOM TACTICS, AND UNDERSTANDING THE IMPACT OF RECENT DECISIONS* 59, 61 (2010). Since 2001, the

Private efforts have been just as unsuccessful as government attempts to effectively stem the tide of infringement.⁸ What exists now is an archetypal arms race between copyright owners and those who consume and distribute unauthorized copies of copyrighted material.⁹ Copyright owners collaborate with programmers to create better copyright protection software.¹⁰ Infringers “crack” these protective measures allowing once-protected material to be copied, downloaded, reproduced, etc.¹¹ The rampancy of online copyright infringement raises a difficult question of fundamental motivation: Why are consumers partaking in unbridled copyright infringement over the Internet? This question can be answered by exploring the disparity between personal and societal standards;¹² myriad factors are certainly at play. This paper posits that several key factors, including the lack of a legitimate governing enforcement body, the lack of peer disapproval of copyright infringement via cyberspace, and the anonymous nature of conduct on the Internet, contribute to the current state of anomie¹³ in this area.

Part I of this Comment explains the evolution of copyright regulation in cyberspace. Further, it examines the attempts of traditional sociological theory to explain why people obey law. Part II analyzes the technical difficulties the Internet poses for enforcing copyright infringement. It also explores the legal framework that copyright owners and governments have scrambled to create in the wake of this descent into “cyberanarchy.” Part III proposes a bottom-up transformation of the law, starting with governmental recognition of copyrights as a human right. Additionally, it proposes increased accountability on rights holders attempting to overexert their copyrights. Finally, it suggests that shifting the focus from legal deterrence to a targeted and meaningful education program would legitimize current copyright laws and radically improve enforcement rates.

costs associated with patent, trademark, and copyright litigation have increased forty-eight, thirty-eight, and seventy-three percent, respectively. *Id.*; see also Don. E. Tomlinson, *Intellectual Property in the Digital Age: The Piracy/counterfeiting Problem and Antipiracy and Anticounterfeiting Measures*, 8 CURRENTS: INT’L TRADE L.J. 3, 3 (1999) (indicating that the U.S. economy loses anywhere from \$2.8 to \$12.4 billion a year in piracy and/or counterfeiting of America’s intellectual property).

⁸ Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1349–50 (2004).

⁹ See Russ VerSteeg, *Viacom v. YouTube: Preliminary Observations*, 9 N.C. J.L. & TECH. 43, 44–45 (2007) (cataloging the back-and-forth battle between technology and copyright protection).

¹⁰ See Tomlinson, *supra* note 7, at 10.

¹¹ See Fernando Piera, *IPR Protection of Computer Programs and Computer Software in the Global Market*, 12 CURRENTS: INT’L TRADE L.J. 15, 17 (2003); S. REP. NO. 105-190, at 15 (1998) (“The effectiveness of [section 103 of the DMCA] depends in large part on the rapid and dynamic development of better technologies, including encryption-based technological protection measures.”).

¹² See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 11–16 (1990); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT’L L. & POL. 219, 226–33 (1997) (applying Tyler’s sociological principles to the unique case of intellectual property).

¹³ See EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* 44 (J.A. Spaulding & G. Simpson trans., Free Press 1951) (the term “anomie” literally translates to “without law” and refers to “social instability caused by erosion of standards and values”; accord Robert K. Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 672, 682 (1938)).

I. BACKGROUND

This section explores the evolution of copyright regulation in cyberspace. Additionally, this section explores the traditional, sociological justifications behind legal compliance.

A. Evolution of Copyright Regulation in Cyberspace

In the United States, the Copyright Act of 1976 (hereinafter the “Copyright Act”)¹⁴ and the Digital Millennium Copyright Act (hereinafter the “DMCA”)¹⁵ govern online copyright infringement. Because Congress enacted the Copyright Act far before the advent of the Internet, it has several shortcomings with regard to technology in the digital age.¹⁶ Congress passed the DMCA in 1998 as an effort to harmonize the traditional copyright protections offered in the Copyright Act with modern technologies, while compromising between the interests of content holders and online service providers.¹⁷ The DMCA aimed to provide adequate copyright protection with new and emerging digital age technologies.¹⁸ Section 103 of the DMCA added chapter twelve to the Copyright Act.¹⁹ As the Copyright Office points out, this section of the DMCA imposes liability on those who circumvent

¹⁴ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified in scattered sections of 17 U.S.C.).

¹⁵ Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

¹⁶ See *Tasini v. N.Y. Times Co.*, 972 F. Supp. 804, 826–27 (S.D.N.Y. 1997); Frank H. Smith, *Tasini v. New York Times Co.: A Copyright, or a Right to Copy?*, 32 NEW ENG. L. REV. 1093, 1097–98 (1998) (noting that there is virtually no case law prior to *Tasini* interpreting § 201(c) in the infringement involving modern digital technologies).

¹⁷ S. REP. NO. 105-190, at 2 (1998) (“Title II clarifies the liability faced by service providers who transmit potentially infringing material over their networks.”).

¹⁸ See *WIPO One Year Later: Assessing Consumer Access to Digital Entertainment on the Internet and Other Media: Hearing Before the S. Comm. on Telecomm., Trade and Consumer Protection*, 105th Cong. 12 (1999) (statement of Jack Valenti, President and CEO of the Motion Picture Association of America (“MPAA”)). According to Mr. Valenti, the danger of Internet copyright infringement can be summarized as follows:

Downloadable media piracy has two characteristics: One. . . [a] single pirate with a single copy of a film can download thousands of copies to be downloaded in a matter of hours. In analog, quality is degraded with each copy, but in digital the thousandth copy is as pure and pristine as the original.

These copies can be mirrored, as the term of art, at sites all over the world, making even more copies possible. Thus, with a single keystroke a pirate can do millions of dollars worth of damage to the potential market for a motion picture, even though the pirate may not make a nickel. . . [T]he equipment required to be an Internet pirate is inexpensive, and it is portable. One of the most recent innovations in obtaining illegal downloadable files is through the use of video and audio search engines.

Id.

¹⁹ Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2863–76 (1998) (codified at 17 U.S.C. §§ 1201–05 (2012)).

technological measures used to protect copyrighted materials.²⁰ The statute divides “technological measures” into two categories: measures preventing unauthorized access to a copyrighted work and measures preventing unauthorized copying of a copyrighted work.²¹ The Copyright Act does not completely outlaw measures preventing unauthorized copying due to fair use considerations.²² Rather, there are several exceptions to its general provisions preventing unauthorized access to a copyrighted work.²³

Beyond these added protections against new “technological measures,” the DMCA revised Title 17 of the United States Code to protect against the unauthorized alteration of “copyright management information” (hereinafter “CMI”).²⁴ CMI is the identifying information of a copyrighted work.²⁵ Section 1202 “prohibits the knowing provision or distribution of false CMI, if done with the intent to induce, enable, facilitate or conceal infringement.”²⁶ It “bars the intentional removal or alteration of CMI without authority, as well as the dissemination of CMI or copies of works, knowing that the CMI has been removed or altered without authority.”²⁷

The DMCA also limits liability for copyright infringement by Internet service providers (hereinafter “ISPs”).²⁸ It does so by protecting certain types of conduct in which ISPs commonly engage, including: “transitory communications,” “system caching,” “storage of information on systems or networks at direction of users,” and provision of “information location tools.”²⁹ Under certain circumstances, the DMCA bars monetary damages, as well as various forms of injunctive relief.³⁰ The DMCA also established guidelines for copyright holders to obtain subpoenas against ISPs to disclose the identities of its allegedly infringing users.³¹ Nonetheless, “to ensure that service providers are not placed in the position of choosing between limitations on liability on the one hand and preserving the privacy of their subscribers, on the other,” section 512 of Title 17 explicitly states that there is no requirement that “a

²⁰ U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 2 (1998) [hereinafter DMCA SUMMARY], available at <http://www.copyright.gov/legislation/dmca.pdf>.

²¹ *Id.* at 3–4.

²² *Id.* at 4. Fair use in cyberspace deserves a treatise of its own. Attempting to talk about it here would make this far too cumbersome. There are several insightful resources that discuss it thoroughly. See, e.g., Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 283 (1996); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007).

²³ See Carroll, *supra* note 22, at 1089–92.

²⁴ DMCA SUMMARY, *supra* note 20, at 6–7.

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 8. There is some confusion as to the meaning of ISPs in legal discussion. Courts have interpreted the safe harbor provision of the DMCA to apply to both ISPs in the traditional sense (that is, companies which provide Internet access to individuals and organizations) and ISPs in the unconventional sense (e.g. websites, cyberlockers, torrent clients, etc.). Compare *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 25 (2d Cir. 2012) (defining ISP in the traditional sense), with *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1026 (9th Cir. 2011) (finding the DMCA safe harbor applied to the operator of a website).

²⁹ DMCA SUMMARY, *supra* note 20, at 8.

³⁰ *Id.* at 9.

³¹ *Id.*; 17 U.S.C. § 512(h) (2012).

service provider . . . monitor its service or access material in violation of law (such as the Electronic Communications Privacy Act) in order to be eligible for any of the liability limitations.”³²

In his definitive work, *Why People Obey the Law*, Tom R. Tyler isolates several justifications behind a populous’ obedience to the law.³³ Tyler separates these justifications into two separate “perspectives”—instrumental and normative.³⁴ Instrumental perspectives are those known as “deterrence literature”: If people break the law, the state has the power to fine, imprison, and otherwise make their lives a little less pleasant.³⁵ Traditionally, sociologists took these instrumental perspectives into consideration when analyzing what motivates people to obey laws.³⁶ Tyler’s study, however, focused more on the normative perspectives of legal obedience.³⁷ In short, his study “is concerned with the influence of what people regard as just and moral as opposed to what is in their self-interest . . . [with] examin[ing] the connection between normative commitment to legal authorities and law-abiding behavior.”³⁸ This “normative perspective” focuses on peoples’ internalized norms of justice and obligation.³⁹ Coupled with instrumental factors, these normative factors show that beyond the legitimacy of the government making the rules, obedience to a set of laws is dependent upon the populous’ view of morality.⁴⁰

This observation is not a new one. Past scholars wrote extensively about the mixture of legitimacy and personal morality required to create a legal system with high compliance rates.⁴¹ As H.L.A. Hart observed, peoples’ obedience to the law derives “from a variety of motives: some from prudential calculation that the sacrifices are worth the gains, some from a disinterested interest in the welfare of others, and some because they look upon the rules as worthy of respect in themselves.”⁴² In the context of digital copyright law, however, several questions are

³² DMCA SUMMARY, *supra* note 20, at 9.

³³ See TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 12, at 3; Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 234 (discussing the effectiveness of the threat of punishment to enforce intellectual property rights).

³⁴ TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 12, at 3.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 165.

The instrumental perspective is clearly insufficient to explain people’s views about the legitimacy of authority and their behavioral compliance with the law. Citizens act as naïve moral philosophers, evaluating authorities and their actions against abstract criteria of fairness. The instrumental conceptions of the person that have recently dominated discussions of legal issues are incomplete.

Id.

⁴¹ Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 398 (2001); see also Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 398 (2000).

⁴² H.L.A. HART, THE CONCEPT OF LAW 197 (1961).

bound to arise: What is the general view of morality for such a diverse community?⁴³ Can an online governing body provide the legitimacy needed to properly enforce copyrights? Do the aforementioned “instrumental” perspectives provide insight in catalyzing deterrence when copyright holders have stopped relying on codified models of enforcement?⁴⁴

B. The Problem of Cyberspace Anonymity

Before the Internet, never was there such a readily available communication medium geared towards anonymous use.⁴⁵ Scholars have examined this issue from a multitude of angles.⁴⁶ The idea of anonymity and lawlessness has also been discussed by academics to an encompassing extent.⁴⁷ In relation to a legal obedience model such as Tyler’s, an arena that allows effortless anonymity drastically alters the question of consequences. That is, if an undesirable consequence occurs (in our case, copyright infringement) in an anonymous-user system, a user is less likely to be held responsible for their actions. If there is no positive identity, there is no one person (or entity, or corporation, etc.) to hold responsible for the action.⁴⁸

A recent case, *Liberty Media Holdings, LLC. v. Does 1–59*, illustrates the conflicting interests of anonymity and copyrights.⁴⁹ Under the Cable Communications Policy Act of 1984, Internet service providers cannot release subscriber information without a court order.⁵⁰ The court, in attempting to balance the plaintiff’s injury against the right to anonymous speech, cited to *Columbia*

⁴³ See Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1233–34 (2004) (discussing the relationship between public morality and government regulation); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 890 (2003) (“The same moral diversity that makes particular judicial interpretations of liberty, equality, and democracy controversial will typically preclude a supermajority consensus from forming on specific constitutional language and supermajorities are needed to distinguish constitutionalism from the radical democracy these critics prefer.”).

⁴⁴ See, e.g., McBride & Smith, *supra* note 6.

⁴⁵ See generally Kraig J. Marton et. al., *Protecting One’s Reputation—How to Clear a Name in a World Where Name Calling is so Easy*, 4 PHOENIX L. REV. 53, 68 (2010) (discussing the “difficulty of verifying users’ identities” in light of both online anonymity and the ease of posing as someone else); see also Jay Krasovec, *Cyberspace: The Final Frontier, for Regulation?*, 31 AKRON L. REV. 101, 102, 102 (1997) (highlighting the tension between First Amendment rights to remain anonymous and to “share and receive information that otherwise may be harmful or embarrassing to the sender” with the harm anonymity causes by allowing “cyber-criminals’ to shield themselves from accountability and responsibility”).

⁴⁶ See Dr. Dan Jerker B. Svantesson, *Borders on, or Border Around—The Future of the Internet*, 16 ALB. L.J. SCI. & TECH. 343, 377 (2006) (“Today’s technology with its portability and high level of anonymity provides a perfect environment for so-called fraudulent evasions or fraude à la loi.”).

⁴⁷ See M.E. Kabay, *Anonymity and Pseudonymity in Cyberspace: Deindividuation, Incivility and Lawlessness Versus Freedom and Privacy*, Paper presented at Annual Conference of the European Institute for Computer Anti-virus Research (EICAR), Munich, Germany, at 2 (1998), available at <http://www.mekabay.com/overviews/anonpseudo.pdf>.

⁴⁸ See Svantesson, *supra* note 46, at 377–78.

⁴⁹ *Liberty Media Holdings, LLC. v. Does 1–59*, 2011 WL 292128, at *1 (S.D. Cal. Jan. 25, 2011).

⁵⁰ *Id.*; 47 U.S.C. § 551(c)(2)(B) (2012).

Insurance Co. v. Seescandy.com, which articulated a four-part test.⁵¹ First, the plaintiff should attempt to identify the defendant with enough specificity so that the court can determine the defendant is a person or entity subject to the court’s personal jurisdiction.⁵² Next, plaintiff would identify previous attempts to locate the anonymous defendant.⁵³ Plaintiff should then show, “to the Court’s satisfaction,” that the complaint can survive a motion to dismiss.⁵⁴ If the plaintiff satisfies the aforementioned requirements, then the plaintiff can request limited discovery to ascertain the identity of the defendant.⁵⁵

The plaintiff in the *Seescandy.com* case first identified a connection between the multiple named webhost entities and an individual named “Ravi.”⁵⁶ Next, the plaintiff exhibited a good faith effort at locating “Ravi” through attempted telephone calls and emails to the numbers and email addresses listed on the domain registrations.⁵⁷ Third, the plaintiff demonstrated that its complaint would survive a motion to dismiss by exhibiting that “an act giving rise to civil liability actually occurred,” that is, an entity infringed upon the plaintiff’s trademark at the time the plaintiff filed the complaint.⁵⁸ Therefore, the court found the plaintiff’s request for limited discovery proper.⁵⁹ While the court ultimately sided with Liberty Media Holdings, requiring the ISP to disclose the identities of named Does, courts have gone both ways on this issue.⁶⁰

Moreover, because citizens’ right to anonymous speech is not absolute, a secondary market exists offering myriad services and protections to protect consumers’ identities.⁶¹ Services such as proxies allow for users to hide their Internet Protocol (IP) addresses⁶² or reroute their information through an anonymous IP address nowhere near the user’s physical location.⁶³ This back and forth between the desire for anonymity and copyright holders’ expectation of copyright enforcement

⁵¹ *Liberty Media Holdings*, 2011 WL 292128, at *1; *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999).

⁵² *Columbia Ins. Co.*, 185 F.R.D. at 578.

⁵³ *Id.* at 579.

⁵⁴ *Id.*

⁵⁵ *Id.* at 580.

⁵⁶ *Id.* at 576, 579.

⁵⁷ *Id.* at 579.

⁵⁸ *Id.* at 580.

⁵⁹ *Id.*

⁶⁰ *Compare Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 434–35 (Md. 2009) (holding circuit court judge inappropriately denied a motion to quash/motion for protective order regarding subpoena requiring plaintiff to identify five Internet forum participants by name), *and Mobilisa, Inc. v. Doe*, 170 P.3d 712, 715 (Ariz. Ct. App. 2007) (remanding decision by superior court that ordered defendant to provide identity of one of its account holders), *with Sony Music Entm’t Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 557 (S.D.N.Y. 2004) (holding that person who uses the Internet to engage in copyright infringement is engaging in exercise of speech only to a limited extent and that such person’s identity is not protected from disclosure by the First Amendment).

⁶¹ *See, e.g.*, Richard Abbott, *An Onion a Day Keeps the NSA Away*, 11 J. INTERNET L. 22, 22 (2010) (examining the legal ramifications of free anonymity software to Internet users’ ability to break the law online); Bryce Clayton Newell, *Rethinking Reasonable Expectations of Privacy in Online Social Networks*, 17 RICH. J.L. & TECH. 12 (2011) (discussing reasonable expectations of privacy in digital communications).

⁶² *Abbott, supra* note 61, at 22.

⁶³ *Id.*

creates yet another barrier to content owners' efficient monetization of the digital markets for their works.⁶⁴

C. YouTube: A Vehicle of Content Sharing

The ebb and flow of copyright infringement in a digital context can best be examined through an analysis of YouTube.⁶⁵ YouTube allows users to upload and share videos.⁶⁶ The social impact of this service has been enormous.⁶⁷ Never before have individuals had the power to self-produce and self-publish to a worldwide audience at such a low cost.⁶⁸

While anyone with a registered YouTube account can post videos, the company enacted a series of measures to ensure compliance with its internal "Community Guidelines" ("CGs") and copyright laws.⁶⁹ The YouTube CGs prohibit several types of videos.⁷⁰ During the upload process, YouTube issues a warning to users not to upload

⁶⁴ Compare Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 633, 634 (2008) (examining emerging markets within the Internet and their effect on infringement), with Philip S. Corwin, Lawrence M. Hadley, *P2P: The Path to Prosperity*, 24 *LOY. L.A. ENT. L. REV.* 649, 649 (2004) (suggesting that only through embracing peer-to-peer technology will the entertainment industry be able to begin to negate the economic impact of infringement), and Jeffrey A. Lindenbaum & David Ewen, *Catch Me If You Can: An Analysis of New Enforcement Measures and Proposed Legislation to Combat the Sale of Counterfeit Products on the Internet*, 32 *PACE L. REV.* 567, 568 (2012) (observing that pressuring payment systems companies to shutting infringing online marketplaces shows promise in the online world of enforcement).

⁶⁵ Philip Kunz, *Whose Tube? – A Contributory Copyright Infringement Analysis of the Pending Lawsuit*, Robert Tur v. YouTube Inc., 17 *DEPAUL-LCA J. ART & ENT. L.* 167, 167 (2006).

⁶⁶ *Id.* at 171.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *YouTube Community Guidelines*, YOUTUBE, http://www.youtube.com/t/community_guidelines (last visited Mar 7, 2013). In relevant part:

We're not asking for the kind of respect reserved for nuns, the elderly, and brain surgeons. We mean don't abuse the site. Every cool new community feature on YouTube involves a certain level of trust. We trust you to be responsible, and millions of users respect that trust. Please be one of them. . . . Okay, this one is more about us than you. YouTube staff review flagged videos 24 hours a day, seven days a week to determine whether they violate our Community Guidelines. When they do, we remove them. Sometimes a video doesn't violate our Community Guidelines, but may not be appropriate for everyone. These videos may be age-restricted. Accounts are penalized for Community Guidelines violations and serious or repeated violations can lead to account termination. If your account is terminated, you won't be allowed to create any new accounts. For more information about how the Community Guidelines are enforced and the consequences of violating them, please visit the Help Center.

Id.

⁷⁰ *Id.* These include copyrighted materials uploaded without the holder's consent, pornography, animal abuse, and certain other "shock videos."

copyrighted content that is not under their control.⁷¹ YouTube also has a takedown notice posted pursuant to the DMCA.⁷²

This has not stopped lawsuits against YouTube by a number of high profile organizations.⁷³ The most notable lawsuit is *Viacom International v. YouTube, Inc.*⁷⁴ In this lawsuit, Viacom sued YouTube for \$1 billion dollars for copyright infringement.⁷⁵ The district court, ruling in favor of summary judgment for YouTube, found that YouTube was protected under the safe harbor provision of the DMCA.⁷⁶ That court concluded that

the critical question is whether the statutory phrases “actual knowledge that the material or an activity using the material on the system or network is infringing,” and “facts or circumstances from which infringing activity is apparent” in § 512(c)(1)(A)(i) and (ii) mean a general awareness that there are infringements (here, claimed to be widespread and common), or rather mean actual or constructive knowledge of specific and identifiable infringements of individual items. . . . [T]he phrases “actual knowledge that the material or an activity” [infringes a copyright, and] “facts or circumstances” indicating infringing activity, describe knowledge of specific and identifiable infringements of particular individual items. Mere knowledge of prevalence of such activity in general is not enough.⁷⁷

Viacom appealed.⁷⁸ The Second Circuit took the opportunity “to clarify the contours of the ‘safe harbor’ provision of the Digital Millennium Copyright Act (DMCA) that limits the liability of online service providers for copyright infringement that occurs ‘by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.’”⁷⁹ Judge Cabranes substantially affirmed the district court’s interpretation of “actual knowledge.”⁸⁰ Although the body of case law interpreting the knowledge provisions of the DMCA safe harbor provision is sparse, other jurisdictions agree with Judge Cabranes’ analysis.⁸¹

Beyond the legal protection proffered by the courts, YouTube utilizes several internal safeguards to mitigate any claim of vicarious liability and to ensure lower

⁷¹ *Id.*

⁷² *Id.*; 17 U.S.C. § 512(c) (2012).

⁷³ *See, e.g., Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (including The Football Ass’n Premier League Ltd. as named plaintiff); *Reti Televisive Italiane contro YouTube*, Trib. Roma, 24 novembre 2009, n. 54218/08 (It.) (*MediaSet v. YouTube in Italy*).

⁷⁴ *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

⁷⁵ Complaint for Declaratory and Injunctive Relief and Damages at 5, *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. Mar. 13, 2007) (No. 07 CV 2103).

⁷⁶ *Viacom Int’l Inc.*, 718 F. Supp. 2d at 529.

⁷⁷ *Id.* at 519, 523.

⁷⁸ *Viacom Int’l Inc. v. YouTube, Inc.*, 676 F.3d 19, 25 (2d Cir. 2012).

⁷⁹ *Id.* at 25 (quoting 17 U.S.C. § 512(c) (2012)).

⁸⁰ *Id.* at 30.

⁸¹ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1041 (9th Cir. 2011).

instances of copyright infringement on its the website.⁸² Through its algorithmic juggernaut,⁸³ YouTube’s Content ID “let[s] rights owners:

- Identify user-uploaded videos comprised entirely OR partially of their content, and
- Choose, in advance, what they want to happen when those videos are found. Make money from them. Get stats on them. Or block them from YouTube altogether.⁸⁴

YouTube accomplishes this by allowing rights holders to upload audio and video content they own, describe the uploaded content with holder-defined metadata, and direct YouTube towards a course of action when Content ID technology discovers potentially infringing material.⁸⁵

Content ID is a powerful technology. According to YouTube, Content ID “scans over 100 years of video every day.”⁸⁶ Over three thousand content owners use Content ID to safeguard their copyrights.⁸⁷ Over one-third of monetized views on YouTube come from Content ID flagged video.⁸⁸ Upon first introduction, when Content ID flagged a potentially infringing video, the content owner chose from three modes of action: take down the video, attach advertising with the video for a profit, or allow the video to remain online while receiving up-to-date viewing statistics about the video.⁸⁹

The main criticism of this approach was that users had no effective remedy to challenge suspect takedown requests.⁹⁰ Little, if any, consideration was given to users protected by fair use,⁹¹ which the Supreme Court has categorized as an affirmative defense.⁹² Accordingly, under certain circumstances, use of a copyright that would otherwise be infringing is protected as “fair use.”⁹³

With regard to complaints by users of overreaching takedown notices, perhaps the most public, if not the most famous example occurred when Universal Music Corp

⁸² See *Content ID*, YOUTUBE, <http://www.youtube.com/t/contentid> (last visited Mar. 7, 2013).

⁸³ See *How Content ID Works*, YOUTUBE, <http://support.google.com/youtube/bin/answer.py?hl=en&answer=2797370> (last visited Mar. 7, 2013). Content ID works by scanning videos uploaded by rights holders to an internal catalog. *Id.* Afterwards, when a future video is uploaded, Content ID compares the newly uploaded video to content within its catalog. *Id.* When Content ID matches a video to third-party content, the “copyright notices” section of the uploader’s YouTube account page will include an entry notifying her of the development and of the copyright owner’s policy. *Id.* If she disagrees with the match, she can dispute it. *Id.* Then the normal appeals process starts.

⁸⁴ See *Content ID*, *supra* note 82.

⁸⁵ *Id.*

⁸⁶ *Statistics*, YOUTUBE, <http://www.youtube.com/yt/press/statistics.html> (last visited Mar. 7, 2013).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *Content ID*, *supra* note 82.

⁹⁰ Patrick McKay, *YouTube’s New Content ID Appeals Process: Not as Useful as You Might Think*, FAIRUSETUBE.ORG (Nov. 8, 2012, 2:23 PM), <http://fairusetube.org/articles/26-appeals-process-not-useful>.

⁹¹ 17 U.S.C. § 107 (2012). This concern still exists. See McKay, *supra* note 90.

⁹² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

⁹³ *Id.* at 594.

(“Universal”), acting on behalf of The Artist Formerly Known as Prince (“Prince”), filed a takedown notice with YouTube demanding that a mother, Stephanie Lenz, remove a video of her infant dancing to Prince’s song, “Let’s Go Crazy.”⁹⁴ YouTube complied.⁹⁵ Outraged, Lenz filed a DMCA counter-notification with YouTube demanding her video be reposted,⁹⁶ which YouTube did six weeks later.⁹⁷ Following the repost, Lenz filed suit against Universal claiming misrepresentation under “17 U.S.C. § 512(f) and tortious interference with her contract with YouTube.”⁹⁸ Surviving Universal’s motion to dismiss, the court found that Lenz pleaded sufficiently to survive a motion to dismiss.⁹⁹

In the time since Lenz initially filed her suit against Universal, YouTube made several changes to its takedown policy. To further coax a free market option to traditional litigation, YouTube recently introduced a more comprehensive appeals process for those users who believe that their uploaded content either: (a) does not infringe any copyright, or (b) would be infringing but for the defense of fair use.¹⁰⁰ Prior to this this new process, a user whose appeal was denied by the allegedly affected copyright owner was left with little recourse.¹⁰¹ Under the new system, if a user challenges a takedown notice filed directly with YouTube by a copyright holder, the holder now has two options: (1) release the claim or (2) file a formal DMCA notification.¹⁰² If the holder files a formal DMCA notification, “the video will be taken down and the uploader will receive a copyright strike.”¹⁰³ Multiple strikes can lead to the suspension of a user’s YouTube account.¹⁰⁴

Although YouTube found some limited protection from the appellate court in *Viacom International v. YouTube, Inc.*,¹⁰⁵ and created internal protective measures subsequent a takedown notice, users continue to upload content to YouTube daily—both infringing and fairly used.¹⁰⁶ It will be interesting to see if Content ID will effectively reduce infringement, and if so, whether similar technology could be

⁹⁴ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008) (denying Universal’s motion to dismiss).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1153.

⁹⁹ *Id.* at 1156.

¹⁰⁰ Frederic Lardinois, *YouTube Changes its Content ID Appeals Process*, TECHCRUNCH (Oct. 3, 2012), <http://techcrunch.com/2012/10/03/youtube-changes-its-content-id-appeals-process/>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26 (2d Cir. 2012). The issue is more nuanced than this but is beyond the purview of this Comment. On remand, the Second Circuit expressed its interest in whether a jury could find YouTube had “actual knowledge” of infringement.

¹⁰⁶ See *Transparency Report*, GOOGLE, <http://www.google.com/transparencyreport/removals/copyright/> (last visited Mar. 7, 2013). Although Google does not release the number of allegedly infringing materials uploaded to their website (ostensibly because their ContentID technology did not recognize it and thus they are unaware of the uploaded content), through the use of their “Transparency Report,” Google offers insight to what rightsholders claim the most amount of infringement online.

applied to other classic avenues of infringement.¹⁰⁷ As of now, however, Content ID may best be regarded as YouTube's attempt to divorce itself even further from liability.

While the DMCA sets out penalties for infringing users,¹⁰⁸ to date there has been no demonstration of its efficacy as an enforcement tool.¹⁰⁹ Infringing behavior continues to flourish,¹¹⁰ especially in more traditional vehicles of content sharing.¹¹¹ Coupled with the shifting power structure articulated by Tyler's "normative perspective" of why people obey laws and the problems with cyber anonymity, current enforcement inefficiencies create an environment ripe for copyright infringement.¹¹² The next section of this Comment analyzes the effect of said inefficiencies on copyright infringement in cyberspace.

II. ANALYSIS

This Part analyzes the difficulties of regulating copyrightable materials in cyberspace. By examining the troubles copyright holders have had with enforcing their copyrights digitally, it becomes apparent that current legal options offered to copyright holders are insufficient and ineffective.

¹⁰⁷ See, e.g., Sonia K. Katyal & Jason M. Schultz, *The Unending Search for the Optimal Infringement Filter*, 112 COLUM. L. REV. SIDEBAR 83 (2012); Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status As Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279 (2010).

¹⁰⁸ See Julie Hilden, *Anonymity Versus Law Enforcement: The Fight Over Subpoenaing Alleged Downloaders' Names From Internet Service Providers*, FINDLAW.COM (Oct. 1, 2003), <http://writ.news.findlaw.com/hilden/20031001.html>.

¹⁰⁹ Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 TEX. INTELL. PROP. L.J. 111, 166 (2010).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 150.

¹¹² See Frank Pasquale, *Toward an Ecology of Intellectual Property: Lessons from Environmental Economics for Valuing Copyright's Commons*, 8 YALE J.L. & TECH. 78, 79 (2006):

Responding to decisions restricting fair use, critical IP scholars have developed innovative First Amendment-based arguments for extending it in the digital realm. Some have also proposed legislative and regulatory schemes to protect an intellectual commons. While acknowledging the value of these approaches, [I] propose a different route: informing "fourth factor" (or "effect on the market") analysis with economic assessments drawn from efforts to value physical, real-space commons. Environmental economists have developed sophisticated methods of measuring the value of commons in natural resources. Application of the techniques and concepts developed in environmental economics to "effect on the market" analysis in fair use cases would enable courts to recognize the Pareto-optimal features of an intellectual commons which restrictions on fair use threaten.

Id.

A. *The DMCA: Or, “No Church in the Wild.”*¹¹³

Since implementation, the DMCA faced much scrutiny from scholars, lawmakers, and the civilian press alike.¹¹⁴ Although past criticisms have focused on fair use considerations,¹¹⁵ censorship,¹¹⁶ and stunting innovation,¹¹⁷ this Comment will focus its criticisms purely on enforcement. The concern that the DMCA is unenforceable is not new, and in fact was raised before the DMCA was even enacted.¹¹⁸ Some critics have even likened ISPs to the United States Postal Service in saying: “[J]ust like the postal service cannot (and indeed should not) monitor the contents of all the envelopes it handles, it is simply not possible for an infrastructure provider to monitor whether the millions of electronic messages it transmits daily have been authorized.”¹¹⁹ In the same way that it would be unrealistic to expect the postal service to ensure strict legal compliance with every letter mailed, it would be prohibitively expensive (both in resources and manpower), as well as legally and morally impractical from a privacy standpoint, for ISPs to ensure copyright compliance digitally.¹²⁰

That is not to say there have not been legal “victories” for copyright holders. On the contrary, several high profile cases have reiterated federal law’s commitment to cyberspace copyrights.¹²¹ However, what, if any, long-term deterrent effects have these cases had on copyright infringement in cyberspace? It seems that, at best,

¹¹³ Kanye West & Jay-Z, *No Church in the Wild*, LYRICSMODE http://www.lyricsmode.com/lyrics/k/kanye_west_jay_z/no_church_in_the_wild.html (last visited Mar. 7, 2013). The song, *No Church in the Wild*, essentially proposes that one must believe in a God for that God to have any influence on one’s life. See *id.* It is this author’s belief that, by analogy, without belief in a law, its influence is similarly compromised.

¹¹⁴ See Declan McCullagh, *DMCA Critics Say Reform Still Needed*, CNET (Dec. 17, 2002, 6:35 PM), <http://news.cnet.com/2100-1023-978296.html>; Cassandra Imfeld, *Playing Fair with Fair Use? The Digital Millennium Copyright Act’s Impact on Encryption Researchers and Academicians*, 8 COMM. L. & POL’Y 111, 111–12 (2003); Nate Anderson, *Corporate Critics Feel the Stinging Lash of DMCA Misuse*, ARSTECHNICA (Oct 11, 2007, 9:27 PM), <http://arstechnica.com/uncategorized/2007/10/corporate-critics-feel-the-stinging-lash-of-dmca-misuse/>.

¹¹⁵ See Imfeld, *supra* note 114.

¹¹⁶ See Anderson, *supra* note 114.

¹¹⁷ See McCullagh *supra* note 114.

¹¹⁸ See BRUCE A. LEHMAN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 149 (1995) (raising concerns about the WIPO treaty—the legal precursor to the DMCA—and ISPs’ ability to effectively monitor infringement on their servers); Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 834–35 (2000).

¹¹⁹ Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369, 386 (1997).

¹²⁰ Sonia Katyal, *Filtering, Piracy Surveillance and Disobedience*, 32 COLUM. J.L. & ARTS 401, 410 (2009).

¹²¹ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014–15 (9th Cir. 2001) (affirming district court’s rejection of a fair use defense in file sharing); *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 638 (N.D. Ill. 2002) (enjoining Aimster’s file sharing service). Chief Judge Aspen characterized Aimster’s file sharing service as “the facilitation of and contribution to copyright infringement on a massive scale.” *In re Aimster*, 252 F. Supp. 2d at 638; see also *Arista Records, Inc. v. Mp3Board, Inc.*, No. 00 CIV.4660(SHS), 2002 WL 1997918, at *12–13 (S.D.N.Y. Aug. 29, 2002).

these victories represent the compliant façade on a building constructed of scofflaws.¹²²

Rights holders' attempts to stop vehicles of copyright infringement have largely treated individual symptoms of the problem without addressing the underlying cause.¹²³ For example, last year, federal agents shuttered Megaupload.com.¹²⁴ The website acted as a host for infringing material.¹²⁵ At the time of seizure, Megaupload visitors accounted for four percent of all Internet traffic.¹²⁶ Although the federal attack focused only on Megaupload, it was effective in its ability to deter payment system operators and advertisers from doing business with other cyberlocker sites.¹²⁷ Accordingly, a large percentage of cyberlockers like Megaupload are now defunct.¹²⁸ Those still functioning have greatly altered their policies in the face of public and governmental objections.¹²⁹

While agents were able to remove this “big fish” of content hosting sites, numerous other sites continued to operate.¹³⁰ Moreover, YouTube is not the only vehicle of copyright infringement, nor the most popular.¹³¹ Torrenting still remains one of the most effective infringement vehicles available online.¹³² Torrent aggregators, such as *The Pirate Bay*, not only allow users to search for and download video, audio, and software, but also allow users to rank uploaders as “VIPs” or “Trustworthy” to reduce the risk of downloading content tracked by rights holders and authorities, or harmful content.¹³³ While federal suits going after individual

¹²² See Christopher Jensen, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 538 (2003) (describing such legal battles as “pyrrhic victor[ies] for the recording industry”); Matthew Green, *Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet*, 63 OHIO ST. L.J. 799, 823–24 (2002) (noting that copyright holders have been weary of pursuing legal action against infringing users as opposed to the services that cater to them).

¹²³ See, e.g., Kevin C. Hormann, *The Death of the DMCA? How Viacom v. YouTube May Define the Future of Digital Content*, 46 HOUS. L. REV. 1345, 1374 (2009).

¹²⁴ David Kravets, *Feds Shutter Megaupload, Arrest Executives*, WIRED (Jan. 19, 2012, 3:14 PM), <http://www.wired.com/threatlevel/2012/01/megaupload-indicted-shuttered/>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Nate Anderson, *Google Cut Off Megaupload's Ad Money Voluntarily Back in 2007*, ARSTECHNICA (Jan. 20, 2012, 2:11 PM), <http://arstechnica.com/tech-policy/2012/01/google-cut-off-megauploads-ad-money-voluntarily-back-in-2007/>.

¹²⁸ See *LimeWire Shuts Down After Losing Court Battle With the RIAA*, TORRENTFREAK (Oct. 26, 2010), <http://torrentfreak.com/limewire-loses-court-battle-with-riaa-shuts-down-101026/>.

¹²⁹ See, e.g., *Fighting Against The Sharing Of Pirated And Illegal Content*, STOPFILELOCKERS.COM, <http://stopfilelockers.com/> (last visited Mar. 7, 2013).

¹³⁰ Eliot Van Buskirk, *File Sharing Sites Cast Themselves into Exile Over MegaUpload Bust*, GIZMODO (Jan. 23, 2012, 8:20 PM), <http://gizmodo.com/5878653/file-sharing-sites-cast-themselves-into-exile-over-megaupload-bust>.

¹³¹ See Shelly Rosenfeld, *Taking the Wind out of the Movie Pirates' Sails: The Constitutionality of Senate Bill 3804*, 36 SETON HALL LEGIS. J. 57, 63 (2011) (describing the illegal peer-to-peer website, *The Pirate Bay*, as “a notorious conduit for infringement”).

¹³² Salil K. Mehra, *Keep America Exceptional! Against Adopting Japanese and European-Style Criminalization of Contributory Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. 811, 821 (2011) (discussing the difficulties of international enforcement with websites such as *The Pirate Bay*).

¹³³ Wendy Boswell, *The Pirate Bay*, ABOUT.COM, <http://websearch.about.com/od/torrentsearch/p/pirate-bay.htm> (last visited Mar. 7, 2013).

users comprising a Torrent “swarm” have seen some success, effective enforcement against webhosts remains sparse.

Although legal action has been taken against individual users of file-sharing software,¹³⁴ there is yet to be any legal action taken against individual infringing users of services such as YouTube. This very well might be because of the transitory nature of video posting on YouTube.¹³⁵ That is, users watch over 4 billion hours of video footage on YouTube each month.¹³⁶ Seventy-two hours of video are uploaded to YouTube every minute.¹³⁷ Over eight hundred million unique users visit the website each month,¹³⁸ with seventy percent of YouTube’s traffic coming from outside the United States.¹³⁹ The sheer amount of content uploaded each day, combined with the number of users uploading the content, acts as a legal and economic quagmire for rights holders interested in going after individual YouTube users.¹⁴⁰ To rights holders, YouTube offers an enforcement mechanism that is more efficient and effective than litigation.¹⁴¹

Issues of cyberspace anonymity also raise concerns over cyberspace legal enforcement.¹⁴² These issues are multifaceted.¹⁴³ Although YouTube requires users who upload content to register with its site, technology exists to keep their identities hidden from the website.¹⁴⁴ YouTube admittedly does everything within its power to deter uploading infringing content on its website, however, it has yet to develop or implement security measures to protect its content from being “ripped” off the website and downloaded by a third party.¹⁴⁵ If utilizing one of these third-party

¹³⁴ See *RIAA v. The People: Five Years Later*, ELECTRONIC FRONTIER FOUND. (Sept. 30, 2008), <https://www.eff.org/wp/riaa-v-people-five-years-later> (noting that within five years of beginning its legal campaign against illegal downloaders, the RIAA had “filed, settled, or threatened legal actions against at least 30,000 individuals”).

¹³⁵ See *Statistics*, *supra* note 86.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Steven Seidenberg, *Copyright in the Age of Youtube*, A.B.A. J. (Feb. 1, 2009, 10:29 PM), http://www.abajournal.com/magazine/article/copyright_in_the_age_of_youtube/print/.

¹⁴¹ *Id.*

¹⁴² See, e.g., Charles B. Vincent, *Cybersmear II: Blogging and the Corporate Rematch Against John Doe Version 2.006*, 31 DEL. J. CORP. L. 987, 1001 (2006) (discussing the legal issues of cyberspace anonymity in the context of defamation); Rodney A. Smolla, 1 *Law of Defamation* § 4:86.50 (2d ed. 2012) (“To fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would ignore the First Amendment values of anonymity, and the strong push for privacy online in modern American society.”).

¹⁴³ See Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-sharing*, 12 J. INTELL. PROP. L. 39, 52 (2004) (“If policy makers insist on making illegal socially-acceptable conduct, technology will adapt to the legal environment either by circumventing the legal norm or by making enforcement either impossible or too costly.”).

¹⁴⁴ See, e.g., THE TOR PROJECT, <http://www.torproject.org> (last visited Mar. 7, 2013). Tor, originally developed for use by the U.S. Navy to protect its classified communications, today champions the right of anonymity on the Internet. *About Tor*, THE TOR PROJECT, <https://www.torproject.org/about/overview.html.en> (last visited Mar. 7, 2013).

¹⁴⁵ A Google search of the terms “YouTube Rip” or “YouTube Save” returns first page results with websites that provide the service or direct information on how to save a YouTube video (or audio) to one’s computer. Ironically enough, now that YouTube has partnered with copyright holders such as Vevo, to provide exclusive, high-quality content, users now have the option to “rip”

sources, an infringing user offers even less identifying information to YouTube than a registered user.

When one begins to observe actions of digital copyright infringement as illegal, yet largely unprosecutable due to the technological shortcomings of identification and deterrence, it is not so much a question anymore as to *how* people can get away with infringement. Considered in light of sociological examinations of societal norms, copyright infringement in the digital age becomes the twenty-first century equivalent to jaywalking: quick, pervasive, and guilt-free.¹⁴⁶

B. Social Norms (or the Lack Thereof)

Beyond the aforementioned technological inadequacies plaguing copyright enforcement, applying traditional sociological frameworks of legal disobedience to current digital copyright laws leads one to the conclusion that, under the current legal model, there cannot be a serious expectation of compliance with digital copyright laws.¹⁴⁷

The concern of compliance with copyright laws in the digital age has been examined before.¹⁴⁸ As mentioned in Part I, compliance with the law is based on a number of factors, with personal morality and legitimacy of the governing body chief among them.¹⁴⁹ There exists a lack of connection between the current legal framework, the populace it seeks to govern, and their personal views of morality and the legitimacy of the state.

Under the current model of copyright enforcement, deterrence via threats of large fines and imprisonment is the only internal impetus guiding people towards law-abiding behavior.¹⁵⁰ This method of enforcement is obviously ineffective.¹⁵¹ The

high-quality, high-definition renderings of some of the most in-demand music and videos available. See e.g., LISTENTOYOUTUBE.COM, <http://www.listentoyoutube.com/> (last visited Mar. 7, 2013); KEEPVIDKEEPVID.COM, <http://www.keepvidkeepvid.com/> (last visited Mar. 7, 2013); YOUTUBEMP3, <http://www.youtube-mp3.org/> (last visited Mar. 7, 2013).

¹⁴⁶ See Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 220.

¹⁴⁷ *Id.*

¹⁴⁸ See Rochelle Cooper Dreyfuss & Diane L. Zimmerman, *Convenors' Introduction: The Culture and Economics of Participation In An International Intellectual Property Regime*, 29 N.Y.U. J. INT'L L. & POL. 1, 6–7 (1997).

¹⁴⁹ See TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 12, at 19; Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 224.

¹⁵⁰ See Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 221–22.

The conclusion that deterrence concerns have a clear, but minor, influence on law-related behavior is reinforced by the results of a review of research on the antecedents of drug-related behavior. That review concludes that variance in the certainty and severity of punishment accounts for approximately five percent of the variance in drug-related behavior. In other words, since most of how people react to laws is not linked to risk judgments, deterrence strategies based upon changing such judgments will have, at best, a minor influence upon law-related behavior.

Id. (footnotes omitted).

¹⁵¹ *Id.*

key to legal compliance, as Tyler points out, is not so much a question of the “objective risk of being caught,”¹⁵² but the “psychological estimates of risk.”¹⁵³ That is, if people believe that performing an illegal action has a high probability of getting them in trouble, they are less likely to do it, regardless of whether that “estimate of risk” is accurate or not.¹⁵⁴

In the copyright context, there appears to be a relatively low belief that infringing behavior will result in apprehension, conviction, or a sizable monetary penalty.¹⁵⁵ This may be for a number of reasons. First, perhaps the most infamous copyright holder, the Recording Industry Association of America (“RIAA”), stopped filing suit against individuals in 2008.¹⁵⁶ Additionally, as Tyler points out, “[p]eople have greater opportunities to break rules in certain situations.”¹⁵⁷ The aforementioned technological shortcomings, coupled with near-anonymity and poor legal framework, create an almost perfect storm of factors favoring low psychological estimations of the risks attendant to infringement.¹⁵⁸

The lack of connection between personal moral considerations and digital copyright law, on first sight, is rather concerning. While some make the comparison that copyright infringement is no different than stealing,¹⁵⁹ overwhelming public perception seems to perpetuate a disconnection between theft of a physical good and copying a digital resource.¹⁶⁰ Some behaviorists have attributed this to the lack of

¹⁵² *Id.* at 222.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 234.

¹⁵⁶ See, e.g., McBride & Smith, *supra* note 6 (“Though the industry group is reserving the right to sue people who are particularly heavy file sharers, or who ignore repeated warnings, it expects its lawsuits to decline to a trickle.”).

¹⁵⁷ Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 223.

¹⁵⁸ *Id.* at 224.

¹⁵⁹ Jon Healey, *File Sharing or Stealing?*, L.A. TIMES (Feb. 18, 2008), <http://www.latimes.com/news/opinion/la-oe-w-healey18feb18,0,5092348.story>.

¹⁶⁰ See Mohsen Manesh, *The Immorality of Theft, the Amoralilty of Infringement*, 2006 STAN. TECH. L. REV. 5, ¶¶ 1, 3.

[T]he famous Stanford law professor Paul Goldstein engages his students in discussion of copyright law. Goldstein first asks his students, would they take a book from a bookstore even if they were certain that they would not be caught? Overwhelmingly, the students say no. Goldstein then asks them to suppose the book was available electronically on the Internet. Would they make a copy of the electronic book, again certain that they would not be caught? This time a majority say yes, including those who had answered no to the first question.

....

Professor Goldstein’s two hypotheticals present his students with similar circumstances. From the students’ perspective, both taking a physical copy of the book and making an electronic copy yield the same result: a copy of the book obtained at no cost to them. Of course, the law proscribes both, one as theft and the other as infringement. Yet . . . the students seem to intuitively distinguish theft from infringement.

Id.

“personal contact” between a copyright infringer and their victims or the subject of their infringement.¹⁶¹

Some behaviorists posit that the further removed a behavior is from our ancestral background, the more amoral, or morally ambiguous, the act tends to be.¹⁶² While acts such as physically taking another’s property or life are directly linked with our ancestral heritage, one can easily suggest that the idea of making an unauthorized digital copy that does not deprive the original owner of anything other than profits gained and control of distribution is a foreign concept with regard to our intuitive morality. As Tyler notes, “[i]n the case of intellectual property law, these findings imply that one crucial problem is the lack of a public feeling that breaking intellectual property laws is wrong. In the absence of such a conception, there is little reason for people to follow intellectual property laws.”¹⁶³

This lack of moral connection may also be linked to ideas of fairness.¹⁶⁴ For example, it seems that much copyright infringement arises out of a distorted idea of fair use.¹⁶⁵ Intellectual property law, in the digital context, generally operates outside of a “moral climate that supports formal laws.”¹⁶⁶

Legitimacy of the State is also at issue. Online copyright infringement is a worldwide problem.¹⁶⁷ While the United States has been on the forefront of ensuring copyrights are respected and enforced, as previously mentioned, attempts at doing so have been futile at best. A view that the State is enforcing legitimate authority over its populace is nearly as important as the connection between law and personal morality.¹⁶⁸

This legitimacy has been lacking with regard to the enforcement of copyright laws in cyberspace. It is not a matter of whether or not a legitimate authority exists. Rather, there are several issues with the current enforcement regime. First, as previously mentioned, the RIAA has switched its enforcement strategy so many times since the initial rounds of lawsuits began in 2003, that there really is no legal consequence for infringing users to expect. Additionally, public respect for the law and legal authorities has waned in recent decades.¹⁶⁹

¹⁶¹ See Joshua D. Greene, *Cognitive Neuroscience and the Structure of the Moral Mind*, in THE INNATE MIND: STRUCTURE AND CONTENTS 338, 349–50 (Peter Carruthers, Stephen Laurence & Stephen Stich, eds. 2005) (proposing that a physical connection helps establish innate feelings of morality).

¹⁶² Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS IN COGNITIVE SCI. 517, 517 (2002).

¹⁶³ See Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 226.

¹⁶⁴ *Id.* at 227 (“[T]he law can have an important symbolic function if it accords with public views about what is fair, but it loses that power as the formal law diverges from public morality.”).

¹⁶⁵ See *id.* at 228.

¹⁶⁶ *Id.*

¹⁶⁷ Debbie Legall, *Restricted Content*, INT’L B. ASS’N, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=D5024924-65D4-486E-8164-97325FE9168D> (last visited Mar. 7, 2013).

¹⁶⁸ Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 229.

¹⁶⁹ SEYMOUR M. LIPSET & WILLIAM SCHNEIDER, THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND 1–3 (1983); see also Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 235. Such dissatisfaction with legal authority in America is multifaceted, complex, and certainly too deep an issue to adequately describe in this Comment. See, e.g., Eric Silver et al., *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 LAW & HUM. BEHAV. 63 (1994); Tom R. Tyler & Robert Boeckmann, *Three Strikes and You Are Out, But Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC’Y REV. 237 (1997); Austin

The very nature of the Internet exacerbates this lack of legitimacy. While the United States, at the very least, attempts to create laws with aims to protect intellectual property rights, other such nations are not as concerned or receptive to these rights.¹⁷⁰ Although the United States may eventually and successfully enjoin infringement through its federal court system, jurisdictional and censorship issues arise when websites wholly owned and operated by foreign entities are blocked by the American court system.

III. PROPOSAL: TOWARDS AN UNDERSTANDING OF COPYRIGHTS AS HUMAN RIGHTS

To review, we are left with a situation where, despite laws and attempts at legal enforcement, copyright infringement in cyberspace is as rampant now as it has ever been.¹⁷¹ Despite efforts to legislate around the problem, safe harbors and loopholes in the DMCA effectively bar copyright holders from going after ISPs providing vehicles of infringement.¹⁷² So how does the United States protect copyrights in the digital age? A proposed framework exists: creating a connection between personal morality and the law as well as a reaffirmation of legitimacy in the government.¹⁷³

Although legal devices such as strict liability have been suggested,¹⁷⁴ a shift toward a more European “natural law” alternative¹⁷⁵ and a shift away from the “copyright-as-property rhetoric”¹⁷⁶ is more effective. This Comment suggests that a

Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 428–29 (1977). Suffice it to say, the RIAA lawsuits did the United States government no favors in fostering a feeling of goodwill and voluntary compliance towards digital copyright laws. See Fred von Lohmann, *RIAA v. The People Turns from Lawsuits to 3 Strikes*, ELECTRONIC FRONTIER FOUND. (Dec. 19, 2008), <http://www.eff.org/deeplinks/2008/12/riaa-v-people-turns-lawsuits-3-strikes>; see also Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1388 (“[I]t remains unclear whether the industry will actually abandon those tactics or whether it will only scale back some of its prior efforts to alleviate the public outcry.”).

¹⁷⁰ See *Swiss Govt: Downloading Movies and Music Will Stay Legal*, TORRENTFREAK (Dec. 2, 2011), <http://torrentfreak.com/swiss-govt-downloading-movies-and-music-will-stay-legal-111202/>.

¹⁷¹ See Declan McCullagh, *RIAA: U.S. Copyright Law 'Isn't Working'*, CNET (Aug. 23, 2010, 2:48 PM), http://news.cnet.com/8301-13578_3-20014468-38.html (complaining that the DMCA is rife with loopholes, RIAA President Cary Sherman is quoted as saying, “The DMCA isn’t working for content people at all You cannot monitor all the infringements on the Internet. It’s simply not possible. We don’t have the ability to search all the places infringing content appears”).

¹⁷² See *RIAA Increasingly Unhappy with DMCA*, THECMU (Nov. 10, 2011, 11:36 AM), <http://www.thecmuwebsite.com/article/riaa-increasingly-unhappy-with-dmca/>.

¹⁷³ Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 234.

¹⁷⁴ See, e.g., *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998–99 (2d Cir. 1983) (affirming district court’s ruling “‘innocent copying’ can nevertheless constitute an infringement”); See also Eugene C. Kim, *YouTube: Testing the Safe Harbors of Digital Copyright Law*, 17 S. CAL. INTERDISC. L.J. 139, 147–48 (2007) (discussing whether YouTube’s posting of infringing content would be direct or secondary infringement).

¹⁷⁵ See Manesh, *supra* note 160, at 101. *But see* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 n.10 (1984) (“The enactment of copyright legislation . . . is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.”).

¹⁷⁶ See 17 U.S.C. § 106 (2012).

focus on copyrights as human rights may be able to strike the most resonant chord in the context of both morality and legitimacy.

If someone had made the suggestion ten years ago that intellectual property rights should be placed on the same plane as human rights, it would have sounded glib, at best. In the past few years, however, the global public developed an overwhelming reliance on the Internet as a medium of both communication and social change.¹⁷⁷ This is symptomatic of the growing importance of the Internet as a worldwide communication tool. Accordingly, this pervasive reliance on the Internet for communication supports the notion that Internet access be considered a human right.

The first step toward achieving copyright protection in cyberspace is the creation of a moral framework that supports the current infringement laws. Also, recognizing fair use protection and punishing overreaching copyright claims will help this framework materialize. Finally, to achieve morality in cyberspace there needs to be a common understanding between lawmakers and end-users. YouTube's creation of an internalized takedown appeals process serves as a city on a hill for not only an increased respect for fair use, but also for a common understanding between lawmakers and end-users.

A. Creating the Framework

As Tyler notes, the first step in creating a moral framework for law is “creat[ing] and maintain[ing] a moral climate that supports formal laws.”¹⁷⁸ In traditional legal contexts, Americans are culturally predisposed to support law abiding behavior.¹⁷⁹ The real dichotomy, then, “is how such a culture [has failed to] be created in the area of intellectual property law.”¹⁸⁰ Threats alone have not achieved this end.¹⁸¹ What is required is an integration of educational methods to spur critical thinking on issues of morality in the digital context.¹⁸²

Moral legitimacy cannot arise solely out of legislation espousing a position as just.¹⁸³ Instead, there must be a socially accepted moral framework that creates the demand for legislation and not vice versa. In short, communal understanding of moral standards begets effective legislation based in morality; legislation based in morality does not precipitate a moral understanding and connection amongst a populace.¹⁸⁴

¹⁷⁷ See Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 135 (2001).

¹⁷⁸ Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 228.

¹⁷⁹ *Id.* at 228–29.

¹⁸⁰ *Id.* at 229.

¹⁸¹ *Id.* at 234.

¹⁸² See James R. Rest & Stephen J. Thoma, *Relation of Moral Judgment Development to Formal Education*, 21 DEV. PSYCHOL. 709, 712 (1985); Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 229 (“[W]e need to create an awareness of and commitment to the moral principles that underlie formal laws. In particular, the public’s awareness of the reasons underlying intellectual property rules needs to be developed more effectively, so that a basis for a positive moral climate can be created.”).

¹⁸³ Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 231.

¹⁸⁴ *Id.*

Beyond the educational measures needed to establish a moral framework, there must be a legitimizing factor for the authority attempting to enact the legislation.¹⁸⁵ To reestablish legitimacy, one must first identify the “antecedents of legitimacy.”¹⁸⁶ These antecedents primarily lie in “people’s judgments about the procedures through which legal authorities make rules.”¹⁸⁷

In the context of copyrights in cyberspace, a problem with the DMCA may arise from the context in which it was created.¹⁸⁸ Lawmakers drafted the DMCA as the result of negotiations between ISPs and copyright holders. One set of stakeholders never involved with these talks is the group most affected by such legislation: the end-users.¹⁸⁹ Although critics raised this concern before the initial drafting of the DMCA, these warnings went largely unheeded.

Contrarily, YouTube created an internal model of enforcement based directly on the input and concerns of end-users. This arguably created a more efficient and effective system of copyright enforcement by reducing the need for drawn out litigation. It also takes into account end-users’ fair use of copyrighted content.¹⁹⁰

Perhaps this experience should be a lesson in identifying relevant stakeholders. That is, there can be little expectation of willful compliance if there exists no mutual feeling of participation in the drafting and implementation of laws.¹⁹¹ Rather, legitimacy and trust stem from a combination of views of fairness combined with participation.¹⁹² In this vein, it was wholly useful for YouTube to go beyond industry insiders, law makers, and academics, and take end-user demands and concerns into consideration when forging changes to the current cyberspace intellectual property regime.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*; see also E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 65–66 (1988).

¹⁸⁸ See Greg Sandoval, *RIAA Lawyer Says DMCA May Need Overhaul*, CNET (Nov 6, 2011, 8:59 AM), http://news.cnet.com/8301-31001_3-57319344-261/riaa-lawyer-says-dmca-may-need-overhaul/. Jennifer Pariser, RIAA Senior Vice President of Litigation, was quoted as saying, “I think Congress got it right, but I think the courts are getting it wrong . . . I think the courts are interpreting Congress’ statute in a manner that is entirely too restrictive of content owners’ rights and too open to [Internet] service providers.” *Id.*; see also Miquel Peguera, *When the Cached Link Is the Weakest Link: Search Engine Caches Under the Digital Millennium Copyright Act*, 56 J. COPYRIGHT SOC’Y U.S.A. 589, 599 (2009) (noting that “[a]fter several years of intense debates, a compromise was eventually reached between the different stakeholders on the issue of the liability of Internet intermediaries for online copyright infringements”).

¹⁸⁹ See JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* 35–63 (2001) (proposing the public have its own copyright lawyer available to represent them during the course of legislation drafting); Mike Scott, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 99, 115–19 (2006) (discussing the warnings of The Working Group in drafting legislation without talking to all relevant stakeholders).

¹⁹⁰ See *What is Fair Use?*, YOUTUBE, <http://www.youtube.com/yt/copyright/fair-use.html> (last visited Mar. 7, 2013).

¹⁹¹ Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 232; see also JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 458–60 (1996) (positing that utilizing discourse within a democratic state offers legitimacy through consensus).

¹⁹² Tyler, *Compliance with Intellectual Property Laws*, *supra* note 12, at 232.

After lawmakers create a moral framework that supports current copyright law and legitimizes the law by considering the end-user, there needs to be a proliferation of morality in cyberspace.

B. Bolstering End-User Influence By Penalizing Overreaching Copyright Claims

For a long time now, commentators have expressed concerns that over-aggressive copyright enforcement stifles fair use.¹⁹³ That is, with fair use being an affirmative defense and not a categorical right, end-users unaware of the proper way to raise the defense are at an extreme disadvantage to major rights holders.¹⁹⁴ One scholar describes this enforcement overreach as “Copyfraud.”¹⁹⁵ That is, deep-pocket rights holders, for the sake of efficiency, tend to overstate their exclusive rights over the content they own.¹⁹⁶

The question, then, is how best to allocate the cost of initial identification of infringement between the rights holder and webhost. By recognizing fair use as equally important as traditional copyright protections, the current legal framework under the DMCA would realize several efficiencies. Under the current framework, rights holders can send irresponsible takedown notices with no regard for fair use at minimal cost, and with no realistic expectation of reprisal.¹⁹⁷ Instead, the framework must reduce the cost of raising a fair use defense to a takedown notice.¹⁹⁸ Moreover, rights holders should be held meaningfully accountable for overexerting their copyrights.¹⁹⁹ This would force rights holders to better pick and choose their battles against potentially infringing content.²⁰⁰ YouTube’s internal appeals process achieves this to an extent. At first, uploaders’ appeals to a YouTube takedown were adjudicated by the rights holder requesting the takedown. Now, YouTube serves a mediation role between uploaders and rights holders. If an uploader challenges a takedown of one of their videos, YouTube now requires rights holders to file a formal DMCA takedown. In this vein, rights holders now have to decide whether it is worth their time and effort to file a formal takedown.

This current framework solves only half the problem, however. Although end-users are now more protected by once-removing the takedown abilities of rights holders, they still face an uphill battle in challenging a formal DMCA takedown.²⁰¹ Ideally, there should be a balance between users’ ability to fairly use copyrighted material and rights holders’ ability to enforce their copyrights. By recognizing fair

¹⁹³ See JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY (2011). Perhaps the most comprehensive observation of overreaching copyright claims in all mediums, Mazzone provides an extensive review of the multiple ways rights holders overexert their copyright protection.

¹⁹⁴ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

¹⁹⁵ Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1028 (2006).

¹⁹⁶ *Id.*

¹⁹⁷ Dena Chen et al., *Updating 17 U.S.C. § 512’s Notice and Takedown Procedure for Innovators, Creators, and Consumers*, BERKELEY LAW 8 (Mar. 31, 2011), <http://www.publicknowledge.org/files/docs/cranoticetakedown.pdf>.

¹⁹⁸ *Id.* at 8–9.

¹⁹⁹ *Id.* at 10–11.

²⁰⁰ *Id.* at 12.

²⁰¹ *Id.* at 10.

use as a right as opposed to an affirmative defense, rights holders could ostensibly be liable for filing a DMCA takedown of uploaded content that is later found to be fairly used.²⁰² This would better streamline deeper-pocket rights holders into picking and choosing their enforcement battles.

C. Human (Copy)Rights: Bolstering Morality and Legitimacy Through a Common Understanding

Perhaps the most important goal in creating a more secure digital copyrights framework is to “reestablish the social connection between citizens and legal authorities that underlies feelings of trust in the motives of leaders.”²⁰³ To achieve this, there must be a meeting of the minds as to the importance of said rights in society.

This must happen on a level beyond that of economic discourse. The economic importance of intellectual property has never been overlooked.²⁰⁴ Indeed, it often serves as the underlying theme of intellectual property cases.²⁰⁵ Respect for these laws will evolve through the realization that they benefit individuals and not just industry behemoths like the RIAA and the Motion Picture Association of America (“MPAA”).

This idea is becoming more of a reality as the Internet is becoming a basic necessity. The United Nations has declared Internet access a human right.²⁰⁶ There is no doubt that as the Internet reaches the last nooks of technologically deprived regions, the protections copyrights offer will be increasingly relevant.

Similar to how the Internet democratizes access to new and emerging ideas, emergent online technologies democratize the ability to disseminate ideas. For the first time in a major communication medium, this democratization is creating a powerful stakeholder in the end-user as opposed to merely focusing on industry oriented participants. For the first time in history, end-users have taken on a large portion of the content generation responsibility. As such, the issue of copyrights can best be internalized if it is placed in a context that is beneficial to them.

²⁰² Cf. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

²⁰³ Tom R. Tyler et al., *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J. PERSONALITY & SOC. PSYCHOL. 913, 927 (1996).

²⁰⁴ Kevin A. Hassett et al., *The Economic Value of Intellectual Property*, SONECON 2, <http://www.sonecon.com/docs/studies/IntellectualPropertyReport-October2005.pdf> (last visited Mar. 7, 2013).

²⁰⁵ *Id.* at 12.

²⁰⁶ See Adam Clark Estes, *The U.N. Declares Internet Access a Human Right*, THE ATLANTIC WIRE (June 6, 2011), <http://www.theatlanticwire.com/technology/2011/06/united-nations-wikileaks-internet-human-rights/38526/>.

CONCLUSION

Under the current legal framework, there remains ineffective regulation of copyrights in cyberspace. Issues of enforcement aside, questions of the speed of technological evolution raise concerns as to whether the legislative process can keep up with emerging technologies. Anonymity coupled with various vehicles of content delivery hurt rights holders' ability to enforce their copyrights. Through anonymity, people are more likely to break the law due to a lack of effective enforcement as well as lack of effective legal targeting. In the context of copyrights in cyberspace, this has led to "cyberanarchy."

Recent legal developments—both statutory and common—have been unable to reverse, or even slow, this descent into "cyberanarchy." The problem can best be solved through foundational changes in societal standards. By focusing on a bottom-up framework that contemplates intellectual property rights as human rights, the state would not only stress the importance these rights have on the individual (as opposed to, say, media conglomerates), it would unify a collective thought that legitimizes and bolsters personal moral views on this subject. This development, in turn, would promote the perception that the State is a legitimate entity caring about individual rights.