DEFINING OVERCRIMINALIZATION THROUGH COST-BENEFIT ANALYSIS: THE EXAMPLE OF CRIMINAL COPYRIGHT LAWS

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INTRODUCTION

As this conference and the papers presented here illustrate, the issue of overcriminalization has moved beyond the critique of economic and regulatory crimes with which it began into mainstream commentary on criminal law. Scholars now routinely link overcriminalization to such significant issues as the increased discretion of federal prosecutors, federalization of criminal law, notice problems in view of the breadth and vagueness of offenses, use of civil standards in evaluating criminal conduct, and debate over the consequentialist justification for criminal laws.[1] Associating these trends with overcriminalization, however, provides a description rather than a definition of the term. The absence of a definition makes it difficult to determine whether and how the propensity of Congress to enact criminal laws contributes to those issues.

On a practical level, without a working definition, we fall victim to the "I know it when I see it" syndrome. This syndrome allows those who oppose certain legislation to give it the negative label of overcriminalization whenever they do not like a new law. Conversely, advocates of a new criminal law can defend legislation even when it may be unnecessary or ineffective. Without a functional definition of the term, new crimes cannot be evaluated to determine on which side of the divide they fall.

Current efforts to control the unlawful use of copyrighted material through criminal laws illustrate the "I know it when I seen it" syndrome. Proponents of using criminal law to protect the interests of those who hold copyrights view criminalization as a natural evolution—an inevitable recognition of the economic value of music, films, and other copyrighted material and the harm that infringers can cause. Others view these changes as an inappropriate extension of the reach of criminal law that threatens the public's right to use copyrighted material lawfully. Which view is more accurate? In order to determine whether the new laws "overcriminalize,"

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1. *See* Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 LAW Q. REV. 225, 225 (2000) (criticizing the "unprincipled and chaotic construction of modern criminal law"); Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 24-31 (1997) (noting that lawmakers favor high criminal sentences even though research indicates that harsh sentences may not increase deterrence); Dan Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470 (1996) (recommending a federal administrative criminal law to transfer to the executive the law-making authority now exercised by the courts); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 770-88 (1999) (discussing congressional strategy for delegating authority to prosecutors in the area of federal criminal law); J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1203-04 (1999) (assessing the relationship between white collar crime and the nature of criminalization and punishment); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505 (2001) (explaining that criminal law covers far more conduct than any jurisdiction could punish and that it makes such conduct criminal many times over).

we need to have a clear sense of what the concept means.

In this Essay, I suggest that a law overcriminalizes when the costs of treating conduct as a crime exceed the benefits of the new criminal law. This suggestion employs cost-benefit analysis, a methodology more usually associated with administrative law. I use new criminal infringement statutes as a foil for consideration of this proposed definition. Part I introduces the cost-benefit analysis methodology and generally describes how it is used in the legislation of social policy. In Part II, after briefly reviewing the policy underlying copyright law and sketching the new criminal copyright offenses, I identify the benefits and costs of criminalizing copyright infringement for personal use and evaluate the analysis. As this exercise indicates, the value of a cost-benefit exercise is that it accounts for all foreseeable consequences of criminalizing the conduct at issue, categorizing them as costs or benefits. This rather common sense method provides at least a preliminary answer to whether a proposed criminal law confers a net benefit on the community as a whole. Part III treats the prospects for and limitations of using cost-benefit analysis to define overcriminalization and its general use in criminal legislation.

I. COST-BENEFIT ANALYSIS

Economists devised cost-benefit analysis as a method to evaluate whether decisions would increase social welfare.[2] Reduced to a simple conception, cost-benefit analysis is a method of comparing the advantages and disadvantages of a proposal in order to determine if it is a worthwhile expenditure of resources. The methodology requires an accurate accounting of advantages and disadvantages and a consideration of projected costs as well as anticipated benefits. The purpose of analyzing the costs and benefits of a proposed government project or administrative regulation is to ascertain whether the community as a whole would be better off by undertaking the project.[3] The inquiry is driven by the

2. *See* E.J. MISHAN, COST-BENEFIT ANALYSIS: AN INTRODUCTION 7 (1971) (noting that economists ask "whether society as a whole will be made better off by undertaking this project rather than not undertaking it"). As Professor Mishan explains, the project must be capable of producing an excess of benefits so that everyone in the community could, by a costless redistribution of the gains, be made better off. *Id.* at 316-21. Under the Kalder-Hicks variation of cost-benefit analysis, the test is whether gainers would be able to more than compensate the losers. *See* John R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696, 698 (1939) (explaining the Pareto principle as "each individual endeavoring to satisfy his tastes as is possible in view of the obstacles to satisfaction which confront him"); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550 (1939) (arguing that where an action results in physical productivity, individual satisfactions are of no matter to an economist evaluating the action).

3. *See* MISHAN, *supra* note 2, at 6-7 (suggesting that once the analysis of costs and benefits deviates from the "ideal economic scene," the benefits of such an analysis to the public may be reduced, thus leading to misallocated resources).

understanding that what counts as a benefit or a loss to a part of the community—to one or more persons, or groups—does not necessarily count as a benefit or loss to the entire community.[4] The ultimate judgment about a proposed change in the law will depend on how the community defines the social benefit it seeks.

At least in theory, that same calculation guides the development of criminal law: if the conduct is a crime, the entire community should be better off by treating it as such. The community benefits by the prevention of harm that is effected by punishing and stigmatizing those who break the law. In recent years, Congress, courts, and commentators have tended to justify criminal laws by invoking, as a consequence of treating conduct as criminal, the benefit of preventing harm.[5] Although criminal law also rests on moral foundations,[6] this utilitarian justification of punishment has strong roots in criminal theory. Jeremy Bentham, the father of utilitarian decision-making principles, urged that criminal penalties are appropriate only when they do not produce a greater harm than they would have prevented.[7] Thus, to evaluate a decision to treat conduct as criminal, it is useful to consider the consequentialist justification on its own terms: does a law produce a net social benefit? Another reason cost-benefit analysis has special resonance in white collar crimes is that those offenses may also be deterred through tort actions and administrative enforcement, as well as through criminal laws. In the specific case of intellectual property law, the community benefit is quite specifically defined through its decidedly utilitarian bargain between authors and the public. For all these reasons, analyzing criminal copyright laws through a cost-benefit analysis is

4. *Id.*

5. *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 956 (2003) (criticizing tendency of lawmakers to consider the deterrent effect as the core purpose of criminalizing conduct). For other critiques of this trend see Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 11 (2003) (explaining that late twentieth century crime control emphasized consequentialist goals of incapacitation and deterrence); Kyron Huigens, *What Is and What Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 812 (2002) (arguing that lawmakers use consequentialist theory to promote social welfare by incapacitating anyone who threatens it).

6. Generally, the moral basis of criminal law is an imperative to exact retribution or just deserts for committing an immoral act or for causing harm. *See* Peter Arnella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1517-18 (1992) (questioning whether a criminal offender deserves moral blame where he knows his act was wrong and could have acted rationally at the time of the crime).

7. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, *in* THE UTILITARIANS 162 (Dolphin Books 1961) (1789) (stating that punishment should not be inflicted "[w]here it is unprofitable, or too expensive: where the mischief it would produce would be greater than what it prevented").

appropriate.[8]

In its normative guise, especially when a decision can be reduced to monetary considerations, a cost-benefit analysis leads inexorably to a decision on the merits of a proposal.[9] An alternate vision of cost-benefit analysis eschews the normative cast and uses the result of the analysis as one factor to be considered in the final decision. This variation of cost-benefit analysis, in which decision-makers are free to reject the normative force of the analysis, is the form of cost-benefit analysis recommended here, for the reasons discussed below. Cost-benefit analysis, even in this soft form, is advantageous because the decision encourages transparent and informed decisions.[10]

II. APPLYING A COST-BENEFIT ANALYSIS TO CRIMINAL COPYRIGHT LAWS

A cost-benefit analysis of a criminal law proceeds through three stages. In the first stage, costs, or negative consequences, are identified. The second stage identifies benefits, or positive consequences, of enforcing the statute. In the third stage, decision-makers assign weights to the costs and benefits and balance them against one another. The following discussion adheres to that outline after briefly reviewing the doctrinal basis of intellectual property law and the new offenses.

A. A Primer on Copyright Policy and the New Criminal Copyright Laws

Technological developments like digitization and broadband make copyrighted material increasingly vulnerable to unauthorized use, and copyright holders have not been shy about seeking the protection of federal criminal law.[11] Responding to this pressure, Congress created the two new

8. For recent commentary on the application of cost-benefit analysis to criminal law, see generally Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323 (2004).

9. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 397 (6th ed. 2003).

10. *See* Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1037, 1037 (2000) (noting that cost-benefit analysis often seems to improve the quality of decisions); Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215, 1229-30 (1998) (arguing that even when decision-makers do not deal in commensurable factors, a belief in commensurability might produce more thoughtful discourse).

11. The new criminal infringement offenses are part of two general trends. First, Congress has used criminal law to protect a wide range of information products, confidential business information, trade secrets, and copyrighted material. Second, the criminal copyright initiatives are part of a broader trend to extend more protection to copyright holders. For a general summary of changes in copyright law, see David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233 (2004). On the use of criminal law to regulate use of information and intellectual property, see Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731 (2003) [hereinafter Moohr, *Crime of Copyright Infringement*]; Geraldine Szott Moohr, *The Problematic Role of Criminal Law in Regulating Use of Information: The*

crimes that are analyzed here.[12] The enthusiasm for using criminal law in copyright matters is a significant change in Congress' past treatment of that body of law. As recently as 1985, the Supreme Court cited Congress' caution about imposing criminal penalties for commercial, competitive infringement when it declined to treat infringement as theft for purposes of the National Stolen Property Act.[13] Since then, Congress has moved in the opposite direction.

1. National copyright policy

Whether criminal penalties are an appropriate way to deal with copyright infringement depends on whether the strategy confers a net social benefit, which is found in intellectual property policy. National copyright policy is grounded in the Constitution, which instructs Congress to enact laws that give authors certain rights in their work for a limited time for the purpose of promoting progress.[14] The Constitutional mandate expresses a two-fold purpose: to encourage authors to create expressive material and to provide public access to that material. Copyright law is thus a means to an end, rather than an end in itself.[15] In this bargain authors receive a monopoly right for a limited number of years and the public receives free access when

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Case of the Economic Espionage Act, 80 N.C. L. REV. 853 (2002); Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. ILL. L. REV. 683 (2000) [hereinafter Moohr, *Federal Criminal Fraud*].

12. Congress also increased the penalties for copyright crimes. Commercial copying was traditionally treated as a misdemeanor that applied only to certain kinds of copyrighted material. By 1992, a series of amendments had converted that misdemeanor into a felony that applied to any type of copyrighted material. The maximum penalty for first offenders is now five years or three years, depending on the charge. *See* 18 U.S.C. § 2319 (2004) (providing graded penalties for criminal copyright infringement); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2B5.3 (2004).

The offenses are a predicate act for purposes of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and money laundering, both of which can significantly increase the penalty. 18 U.S.C. § 1956(a)(1) (2000) (money laundering); 18 U.S.C. § 1963(a) (2000) (RICO). Other recently-enacted offenses target related conduct. *See, e.g.*, 18 U.S.C. § 2319A (2000) (prohibiting unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances); 18 U.S.C. § 2318 (2000) (barring trafficking in counterfeit labels for phonorecords and copies of motion pictures or other audiovisual works); 18 U.S.C. § 2320 (2000) (barring trafficking in counterfeit goods or services).

13. *See* Dowling v. United States, 473 U.S. 207, 223-26 (1985) (explaining that Congress's decisions to impose felony penalties on copyright infringers were deliberate and cautious).

14. U.S. CONST. art. I, § 8, cl. 8. The First Amendment also plays a role in copyright doctrine, preventing the rights granted to authors from restricting the public's right to free speech. *See generally* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (arguing that First Amendment challenges to copyright law require more rigorous scrutiny than most courts employ).

15. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 351 (1991) (stating that copyright law assures authors rights in order to achieve a constitutional objective); *see also* Sony Corp. v. Universal Studios, Inc., 464 U.S. 417, 429 (1984) (noting that granting limited monopoly rights to authors is a means of benefiting the public).

that term of protection expires.[16] Creators of expressive material are given the right to control, and thus profit from, the copyrighted material for the limited term. The right to control is not absolute, however. The public has access to material that is not protected[17] and may use protected material in certain circumstances.[18] Despite this inherent tension between the interests of the public and copyright holders, the paramount purpose of copyright law is to secure a public benefit.

2. The new criminal infringement offenses

Criminal law has played a limited role in protecting copyrighted material.[19] Although willful copying for profit has been a crime since 1897, criminal infringement applied only to those who copied for commercial, competitive purposes.[20] Unlike civil copyright law, the criminal provision required that the infringement be undertaken "for profit,"[21] reflecting the purpose of criminal enforcement—to protect copyright holders from unlawful competition. The No Electronic Theft Act of 1997 (NET) alters this scheme by eliminating the financial motive

16. *See* 17 U.S.C. § 302 (2004) (providing term of protection as the life of the author plus seventy years); Eldred v. Ashcroft, 537 U.S. 186, 195-96 (2003) (holding that extension of the duration of copyrights by twenty years was constitutional).

17. *See Feist*, 499 U.S. at 349-50 (distinguishing between the protection copyright law affords original expression and that afforded to ideas, facts, and imagination).

18. *See* 17 U.S.C. § 102(b) (1996) (limiting copyright protection to a work itself and not the ideas embodied in the work); 17 U.S.C. § 107 (1996) (providing a fair use exception for purposes including criticism, teaching, and reporting); 17 U.S.C. § 109(a) (1996) (permitting the owner of a copy or phonorecord to sell or dispose of it without the permission of the copyright owner); 17 U.S.C. § 115 (2004) (defining the scope and availability of compulsory licensing in the context of phonorecords); Alfred C. Yen, *What Federal Gun Control Can Teach Us About the DMCA'S Anti-Trafficking Provisions*, 2003 WIS. L. REV. 649, 662 (summarizing limitations on copyright holders and elaborating on the concept of fair use of copyrighted material).

19. *See generally* Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835 (1999) (discussing the intent requirement in the No Electronic Theft Act); Moohr, *Crime of Copyright Infringement*, *supra* note 11, at 733 (arguing that new criminal copyright statutes do not conform with the rationale for copyright law); Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705 (1999) (positing that harsh criminal penalties for copyright infringement will stifle the free flow of information).

20. *See* Dowling v. United States, 473 U.S. 207, 221-23 (1985) (explaining that Congress viewed criminal infringement as an economic offense); United States v. LaMacchia, 871 F. Supp. 535, 539 (D. Mass. 1994) (describing how the 1897 Act's limited application of criminal copyright infringement remained in place until Congress revised the copyright law in 1976).

21. In 1976, the term, "for profit," was altered. The new statute reads: "Any person who infringes a copyright willfully . . . for purposes of commercial advantage or private financial gain . . . shall be punished." 17 U.S.C. § 506(a)(1) (2004). The new language retained the element of an economic motive. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 15.01(B)(1), at 15-16 (2004); Loren, *supra* note 19, at 841 (emphasizing that the 1976 formulation did not change the requirement of financial motive).

requirement and expanding the definition of financial gain.[22]

The second new statute criminalizes conduct that, although it is not infringing, may lead to infringement. Taking advantage of technology, copyright holders protect digital material by encoding digitized products with electronic instructions that restrict unauthorized use.[23] The Digital Millennium Copyright Act of 1998 (DMCA) essentially protects the codes that protect copyrighted material by barring the sale and distribution of technology that can circumvent the protective electronic codes.[24] This law has the odd result of keeping decryption tools out of the hands of those who have a right to copy the protected material.[25]

Congress shows every sign of continuing to use criminal laws to protect the interests of copyright holders. In the 108th Congress, the House passed a bill making it a felony to offer copyrighted works in a digital format for others to copy and to use a camcorder in movie theaters.[26] Numerous other bills have been introduced, including one that would add the crime of attempted criminal infringement.[27]

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22. *See* 17 U.S.C. § 506(a)(2) (2004) ("Any person who infringes a copyright willfully . . . by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000, shall be punished . . . ."). The NET defines "financial gain" to "include the receipt or expectation or receipt, of anything of value, including the receipt of other copyrighted works." 17 U.S.C. § 101 (2004). *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001) (stating that trading and receiving copyrighted works meets the definition of a financially motivated transaction under the NET).

23. These measures, especially coding that limits consumers' use of material they have purchased, have provoked significant controversy. *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998) (examining self-help provisions employed by the creators of digital works and discussing their incompatibility with copyright and First Amendment principles).

24. *See* 17 U.S.C. § 1204 (2004) (providing criminal penalties for willful violation of §§ 1201(a), 1201(b), and 1202); United States v. Elcom, 203 F. Supp. 2d 1111, 1120 (N.D. Cal. 2002) (discussing the DCMA's prohibition relating to the marketing and distribution technology used to circumvent protective technologies); *see also* Yen, *supra* note 18, at 668-79 (proposing more moderate regulation of circumvention technology than exists under the DMCA).

25. *See Elcom*, 203 F. Supp. 2d at 1134-35 (stating that Congress has not eliminated the fair use of any copyrighted material, but noting that "[t]he fair user may find it more difficult to engage in certain fair uses with regard to electronic books").

26. *See* Piracy Deterrence and Education Act of 2004, H.R. 4077, 108th Cong. §§ 108-110 (2004) (stating that the purpose of the law is to provide enhanced criminal enforcement of the copyright laws and to educate the public about the application of copyright law to the Internet).

27. *See* UNITED STATES DEPARTMENT OF JUSTICE, REPORT OF THE DEPARTMENT OF JUSTICE'S TASK FORCE ON INTELLECTUAL PROPERTY 47 (2004) [hereinafter TASK FORCE] (detailing the taskforce's recommended principles for drafting new legislation in the intellectual property realm), *available at* http://www.usdoj.gov/ag/speeches/2004/ip_task_force_report.pdf.

A criminal attempt provision may weaken or eliminate a defense to criminal infringement. Congruent with civil copyright law, prosecutors must establish that a valid copyright exists, allowing defendants to argue that the material at issue was not subject to

Do these new laws overcriminalize? The new copyright crimes present a closer question than those offenses that are the usual target of overcriminalization critics, such as economic and regulatory offenses.[28] Unlike the moral offenses that were also the target of early critics, infringing a copyright is freighted with some degree of immorality,[29] and punishing immoral conduct is a traditional justification for criminal law. Similarly, unlike victimless crimes, copyright infringement imposes harm on those who hold copyrights and on national copyright policy. Moreover, one index that signals overcriminalization—federalizing state crimes—does not exist here because copyright laws are well within Congress' purview. We must also recognize that criminal law necessarily evolves to prevent emerging harms to lawful interests.[30] Notwithstanding such preliminary evaluations, a cost-benefit exercise requires more than abstract intuitions, and the following discussion analyzes specific benefits and costs of criminal infringement laws.

B. The Benefits of Criminal Copyright Infringement

1. The benefit of preventing harm

Infringement imposes two types of related harms—harm to the copyright holder and harm to the national policy of encouraging creative effort. Infringement harms the financial interests of copyright holders by depriving them of their statutory right to act as the sole distributor of copyrighted material and thus to receive income from sales and licenses. Creative artists are less likely to spend time and money creating products if they cannot earn a profit, which undermines the intellectual property policy embodied in the Constitution and in copyright law. Deterring infringement makes it more likely that authors will profit from their work, thus

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copyright law. Federal courts have interpreted attempt law, however, so that the government need prove only that the defendant thought the material was subject to copyright. *See* United States v. Hsu, 155 F.3d 189, 200-03 (3d Cir. 1998) (eliminating the defense of legal impossibility which allowed defendants to argue that the information at issue was not subject to trade secret law because it was not a trade secret).

28. In some ways copyright crime is similar to white collar regulatory offenses. The copyright statute confers rights and obligations, creates a complex administrative scheme that is overseen by a government agency, and authorizes enforcement through private causes of action.

29. *See* Moohr, *Crime of Copyright Infringement*, *supra* note 11, at 765 (noting the immorality of cheating the copyright holder and disobeying the law).

30. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 289-91 (3d ed. 1982) (noting that criminal law necessarily changes as "misdeeds, once regarded as only mildly wrong, are now branded as . . . anti-social"). For a classic account of the application of criminal law to new circumstances, see JEROME HALL, THEFT, LAW AND SOCIETY (1952). *See generally* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003); Michael Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443 (1984).

strengthening their motivation to produce original expressive material and furthering one of the goals of intellectual property law, which is to provide an incentive to create new products. Thus, it is important on both counts to prevent unlawful copying, and one effect of criminal enforcement is that it deters the banned conduct. Even so, the benefit of deterrence may not be as great as anticipated, and it may not exceed the costs of treating infringement as a crime.

a. Identifying the harm to copyright holders

People who make their music files available to others over the Internet and those who download files are subject to criminal liability if the statutory monetary threshold is reached.[31] File sharing, which allows people to obtain copyrighted music and movies for free, is the driving force behind current criminal law initiatives and accordingly is used here as a basis for discussing the cost-benefit analysis approach. Bear in mind, however, that the new crimes apply to all kinds of copyrighted material whether or not digitized files and the Internet are involved.

Holders of copyrights in music claim to have lost billions of dollars because of file sharing.[32] Notwithstanding these claims, the reasons for declining sales in the recording industry are disputed by industry insiders and commentators.[33] Moreover, new independent studies by economists empirically challenge the claim that file sharing accounts for all of the decline in sales. The studies indicate that the reduction in sales attributable

31. File sharers violate the criminal copyright provision if they copy or distribute at least $1000 worth of copyrighted material within 180 days. 17 U.S.C. § 506(a)(2) (2004). At current prices of CDs, that amounts to about 500 songs. *See* Loren, *supra* note 19, at 845-47 (detailing the effect of the NET Act's scheme of liability). In the rubric of copyright law, those who download files are viewed as having copied them; those who make files available for others to use are viewed as having distributed them.

32. *See* RECORDING INDUSTRY ASSOCIATION OF AMERICA, ANTI-PIRACY (2003), *at* http://www.riaa.com/issues/piracy/default.asp (on file with the American University Law Review) (claiming that the recording industry loses about $4.2 billion to piracy worldwide each year); *see also* Attorney General John Ashcroft, Release of the Report of the Department of Justice's Task Force on Intellectual Property (Oct. 12, 2004) (estimating aggregate illegal Internet distribution of 2.6 billion songs, movies, and software programs and estimating total annual cost to United States of worldwide infringement companies at $250 billion), *available at* www.usdoj.gov/ag/speeches/2004/agremarksprip.htm (on file with the American University Law Review).

33. For a review of the debate regarding the reasons for declining music sales, see Moohr, *Crime of Copyright Infringement*, *supra* note 11, at 754-55 (summarizing other causes of declining music sales, such as market saturation, high prices, changing consumer preferences, increased sales because of sampling, and competing entertainment such as cable television and computer games).

In any case, the decline seems to have abated somewhat. In the first half of 2004, record sales rose by 10.2% over the preceding year. Because downloading music continued apace during this period, the increase in sales indicates that the music industry may be able to coexist with the Internet. *See* Daniel Gross, *Does a Free Download Equal a Lost Sale?*, N.Y. TIMES, Nov. 21, 2004, § 3, at 4; Ethan Smith, *Music Industry Fears Bad Tidings in Slowing CD Sales*, WALL ST. J., Nov. 19, 2004, at B1.

to downloading is significantly less than the claimed one-to-one ratio.[34] Every downloaded song does not represent a lost sale because not every downloader would have bought the CD on which the song is recorded. If file sharing did not cause the observed drop in music sales, then making the conduct criminal is not a solution to the problem, and to the extent that file sharing had only a small effect on sales, the justification for criminal law loses force. Thus, criminal infringement laws are unlikely to prevent the lost sales the industry claims is caused by file sharing.

b. Social norms about file sharing

As anyone who has discussed the matter with a file sharer knows, the community has not yet embraced a shared social norm about the immorality of using copyrighted material for personal use.[35] When file

34. For instance, research by two economists at the Harvard Business School and the University of North Carolina found that peer-to-peer networks in 2002 did not affect sales. *See generally* Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis* 2 (2004) (analyzing the economic effect of file sharing on record sales by utilizing records of actual file sharing behavior), *available at* http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf (on file with author). *But see* Stan Liebowitz, *Pitfalls in Measuring the Impact of File-sharing* (2004) (arguing that Oberholzer and Strumpf's unit of measurement—download records—may not reveal adequate information about the effect of file sharing on the industry as a whole), *available at* http://www.utdallas.edu/~liebowit/intprop/ pitfalls.pdf (on file with author).

In a study completed in October, 2003, Wharton School economists found that on average one downloaded song would reduce purchases of 0.2 copies of that song, which is a small to moderate effect. *See* RAFAEL ROB & JOEL WALDFOGEL, PIRACY ON THE HIGH C'S: MUSIC DOWNLOADING, SALES DISPLACEMENT, AND SOCIAL WELFARE IN A SAMPLE OF COLLEGE STUDENTS 28 (Nat'l Bureau of Econ. Research, Working Paper No. 10874, 2004) (suggesting that to successfully measure the effect of unpaid music downloads would require the surveys of individuals' music purchases and music downloads), *available at* http://www.nber.org/papers/w10874 (on file with author).

David Blackburn at Harvard University finds that downloading causes a greater loss of sales for well-known artists but may increase sales for unknown artists. On balance, he finds that file sharing significantly impacts music sales because sales of works by well-known artists dominate the total industry sales. *See generally* DAVID BLACKBURN, ON-LINE PIRACY AND RECORDED MUSIC SALES 1 (2004) (concluding that thirty percent fewer on-line files would have increased music sales in 2003 by about ten percent), *available at* http://kuznets.fas.harvard.edu/~dblackbu/papers/ blackburn_fs.pdf (on file with author).

Stan Liebowitz of the School of Management at the University of Texas at Dallas provides a rich discussion of complexities in the downloading issue. *See* Stan Liebowitz, *Will MP3 Downloads Annihilate the Record Industry?: The Evidence So Far*, *in* 15 ADVANCES IN THE STUDY OF ENTREPRENEURSHIP, INNOVATION, AND ECONOMIC GROWTH: INTELLECTUAL PROPERTY AND ENTREPRENEURSHIP 229 (Gary D. Liebcap ed., 2004); *see also* A. Zentner, *Measuring the Effect of Online Music Piracy on Music Sales* (University of Chicago Working Papers, 2003) (finding that file sharing networks reduce the number of music purchases by thirty percent), *available at* http://home.uchicago.edu/~alezentn/musicindustrynew. pdf.

35. For commentary on social norms, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996). For specific commentary on social norms governing copyright, see I. Trotter Hardy, *Criminal Copyright Infringement*, 44 WM. & MARY L. REV. 305 (2003); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 226 (1997) (reporting public attitudes about

sharers were asked in February, 2004, whether they cared about the copyright status of music they downloaded, fifty-eight percent answered "no."[36] Although there is some evidence that this attitude may be shifting,[37] the significant gap between prevailing social norms and the values embodied in criminal copyright laws is likely to weaken their deterrent effect.

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.[38] The internal control theory of deterrence suggests that people instinctively obey the law because they have internalized a set of values that mirrors social norms.[39]

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the wrongfulness of violating intellectual property laws).

36. *See* LEE RAINIE & MARY MADDEN, PEW INTERNET PROJECT AND COMSCORE MEDIA METRIX DATA MEMO: THE STATE OF MUSIC DOWNLOADING AND FILE-SHARING ONLINE 11 (2004) (noting that in 2000, sixty-one percent responded that they were not concerned about the copyright status of downloaded music; in 2003, seventy percent responded in the same way), *available at* http://www.pewinternet.org/pdfs/PIP_ Filesharing_April_04.pdf (on file with author). Earlier surveys indicate that well over half of the respondents did not view downloading music as immoral. *See* Moohr, *Crime of Copyright Infringement*, *supra* note 11, at 767-68 (providing survey results that suggest the lack of a community norm to condemn infringement of music, software, books, and movies).

37. Evidence suggests that the recording industry's civil suits against file-sharers have had a deterrent effect. *See* RAINIE & MADDEN, *supra* note 36, at 1; *infra* text accompanying notes 64-66 (discussing effect of recording industry suits).

The content industry prevailed in its suits against companies that facilitated file sharing through a central server. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). The suit against companies that provide peer-to-peer software that allows computers to search the files of other computers failed, however. *See* MGM v. Grokster, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004). Should the Supreme Court reverse the Ninth Circuit decision, the content industry may return to its policy of suing facilitators, with fewer suits against the public.

38. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 64 (1990) (noting the most important reason that people comply with the law is that it comports with their views of right and wrong); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 722-24 (2000) (explaining that citizens abide by the law when they believe in the legitimacy of a law and the law reflects public moral values).

39. *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME 1-3 (1995) [hereinafter ROBINSON & DARLEY, JUSTICE] (suggesting that community standards play a large role in deterrence); TYLER, *supra* note 38, at 64 (noting that an individual's sense of right and wrong can often be attributed to the morals of society at large); *see also* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350 (1997) (explaining that one who lives in a community where crime is widespread is more likely to commit crimes because people in the community are unlikely to view criminality as morally wrong); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468 (1997) [hereinafter Robinson & Darley, *Desert*] (explaining that people usually obey the law because they value moral behavior and/or fear the disapproval of peers).

In addition, people obey the law's directives because they respect its legitimacy. *See* Tyler & Darley, *supra* note 38, at 708 (discussing two values that underlie a law-abiding society—"the belief that laws describe morally appropriate behavior, and the belief that legal authorities are legitimate authorities whose directives ought to be obeyed").

Individuals who have internalized these values become self-regulating; they unconsciously modulate their behavior to make it consistent with their internal principles and values. In copyright infringement, people are less likely to abide by the law because they have not internalized this new standard, which conflicts with the competing social norm that copyrighted material is available for personal use.[40]

The absence of a shared social norm also influences those individuals who obey the law through conscious decisions based on external controls. The external control theory of deterrence suggests that people will act in ways that avoid the costs of breaking the law; rational potential offenders weigh the penalties and the likelihood of being prosecuted against what they hope to gain.[41] When apprehension and punishment outweigh the advantages of unlawful behavior, individuals will refrain from the behavior. But such rational potential offenders must first realize that they risk criminal penalties.[42] In order to stimulate that realization and deter illegal conduct, consequentialists suggest increasing criminal penalties and enforcement efforts.[43] Unfortunately, in order to obtain adequate deterrence of copyright infringement, legislators may need to increase penalties to unpalatable levels that do not reflect the harm or moral content of the violation, increase markedly the dollars spent on enforcement, or both.[44]

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40. *See* Moohr, *Crime of Copyright Infringement*, *supra* note 11, at 771-73 (noting the presence of a powerful competing social norm—that the public is free to use copyrighted material so long as their use is personal).

41. *See* Erling Eide, *Economics of Criminal Behavior*, *in* 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 345 (Boudewijn Boiuckaert & Gerrit De Geest eds., 2000) (explaining deterrence theory as "a special case of the general theory of rational behavior under certainty"). *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (addressing the question of how punishment should be quantified and how resources should be allocated to enforce legislation); Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration*, 2003 UTAH L. REV. 439 (2003) (suggesting that a criminal law that combines deterrence and restorative justice could improve the efficiency of the criminal justice system); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference Shaping Policy*, 1990 DUKE L.J. 1 (discussing the preference-shaping function of criminal law and distinguishing between criminal and tort law on the basis of preference-shaping policy).

42. Behavioral economists have shown that personal characteristics, such as optimism, may interfere with the rational calculation that leads to deterrence. *See, e.g.*, Baruch Fischoff et al., *Facts Versus Fears: Understanding Perceived Risk*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 468-70 (Daniel Kahneman et al. eds., 1982) (explaining that when people repeatedly engage in dangerous behavior without any consequence they are likely to believe the activity is not dangerous).

43. For application of this general theory to copyright law, see Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1399 (2004) (suggesting that prosecuting a small number of high-volume uploaders would have a strong deterrent effect on others).

44. *See id.* at 1402 (recognizing that the level of sanction imposed on the few who are pursued may seem "radically disproportionate" to the crime).

A variant of the external control theory of deterrence suggests that some potential offenders might avoid conduct out of fear of disgrace. Again, when there is no shared social norm against infringement for personal use, individuals may not realize the conduct is criminal so that the negative incentive of being branded a felon has less effect. If they do violate the law, they are unlikely to experience the full impact of being branded as a felon because the criminal stigma does not attach. In the absence of a social norm, the incentive to obey the law is weaker because there is no negative consequence for disobeying. In sum, whether planned deterrence is a result of external laws or individuals' internal controls, the absence of a robust social norm against copyright infringement indicates that a criminal law will not deter infringement at the desired level.

2. The educative benefit

An educative consequence of criminalizing conduct, closely related to deterrence, may also be classified as beneficial. The theory is that the formal legislative statement, issued in the name of the community, educates the public and thereby forms new social norms against infringement.[45] It seems reasonable to assume that educating the public about the existence and thrust of the law will increase law-abiding behavior to some extent, even among those who do not share its underlying value. That is, education may change behavior. Whether the formal statement can change underlying social norms, however, cannot be so readily assumed.

Scholars have long considered the reciprocal relation between law and community values,[46] but it remains unclear how criminal laws would operate in the context of copyright laws. On the one hand, the educative benefit of criminalizing copyright may be significant because the nuanced prohibitions of copyright law do not proclaim a clear standard of conduct and ultimately confuse consumers.[47] On the other hand, if the underlying

45. Although this essay is purposefully confined to the consequentialist framework for criminal law, it bears noting that using criminal law to educate the public gives short shrift to the retributive, moral justification for criminal law. Under that theory, criminal law is most appropriately used to enforce established community norms. Violators are subject to moral condemnation and stigma precisely because the criminal law embodies and expresses the community's norms.

46. *See* Johannes Andenaes, *General Prevention—Illusion or Reality*, 43 J. CRIM. L. & CRIMINOLOGY 176, 179-80 (1952) (noting that the secondary effects of punishment include forming and strengthening the public's moral code); John C. Coffee, *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 200 (1991) (explaining that the creation of new criminal laws defines new societal views as to what constitutes blameworthy conduct); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1554-56 (1997) [hereinafter Green, *Regulatory Offenses*] (discussing the reciprocal relationship between criminal law and society's view of morality).

47. *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29,

law is opaque, enforcing it through criminal law may not make it any clearer. 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."[48]

In any case, the possibility of creating social norms through criminal law may be a chimera. Research indicates that criminal law is best viewed as a mechanism to reinforce community values that already exist.[49] Criminal laws operate indirectly on individuals by influencing and strengthening group norms,[50] which individuals then internalize through interactions during childhood with family members and friends.[51] This is not to suggest that criminal law cannot affect community values. Environmental laws are often cited as a successful example of using law to educate the public.[52] In that case, however, a significant grass roots effort supported environmental protection.[53] In the case of copyright infringement, the grass root support generally goes the other way, in favor of no criminal liability. Support for criminal copyright laws comes from copyright holders, and the new laws have been characterized as the result of their successful lobbying efforts.[54]

49-51 (1994) (noting that statutes pertaining to copyright are complex and confusing and citing licenses to perform music as an example); *see also* Christopher Jensen, *The More Things Change, The More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 544 (2003) (characterizing copyright law as an intricate web of contractual and statutory arrangements that channel money from consumers to artists through middlemen).

48. Jensen, *supra* note 47, at 532-33.

49. *See* Robinson & Darley, *Desert*, *supra* note 39, at 473-74 (presenting evidence that "[p]assing a law cannot itself create a norm").

50. *See* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 46-47 (1997) (suggesting that criminal laws may have a greater impact on reinforcing the behavior of law-abiding citizens than on changing the behavior of lawbreakers).

51. *See* Robinson & Darley, *Desert*, *supra* note 39, at 468-71 (explaining that children are taught to internalize cultural norms by a powerful socialization process); *see also* Hardy, *supra* note 35, at 332-33 (commenting that instincts formed in childhood experiences about property are stronger than rational understandings of abstract rights in intangible property).

52. *See, e.g.*, Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENVTL. AFF. L. REV. 733, 737 (1996) (arguing that environmental law "has come to incorporate a set of principles representing and accounting for civic values that extend far beyond the realm of science and current events"). Another often cited example is insider trading, which excites community condemnation, even when the harm imposed by such trades is diffuse and does not always occur. *See* LEO KATZ, ILL GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 171-73 (1996) (noting that most people believe insider trading is clearly wrong despite the inability to define any concrete harm that the insider has caused).

53. *See* David Sive & Daniel Riesel, *A Grass-Roots Fire Spread Through the Law*, NAT'L L.J., Nov. 29, 1993, at S24 (describing the grass roots efforts by many individuals to heighten public awareness of the need for environmental law).

54. *See* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 903 (1987) (concluding that the 1976 Copyright Act skewed copyright law toward proprietors because of Congress' reliance on industry specialists); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 22-23 (1996) (claiming

In the case of environmental law, there was also no competing social norm that valued pollution. In copyright, there is a powerful competing social norm that is enshrined in copyright law itself—that the public is free to use material, subject to civil law limitations. Except for possible long-term educative effects, the benefit of using criminal law to educate the public about copyright norms is not particularly promising.

3. A note on enforcement efforts

Effective deterrence depends on criminal and civil enforcement efforts, which give concrete meaning to statutory prohibitions. Thus, the Department of Justice issues periodic press releases that announce arrests and warn about the wrongfulness of file sharing and other infringing activities.[55] Nevertheless, some members of Congress have criticized DOJ efforts, and the content industries are likely to continue to lobby for increased enforcement.[56] The expense of civil suits and the problem of collecting damages from consumers motivate the industry to shift the cost of enforcement to the criminal justice system and ultimately to taxpayers.

The DOJ, however, has shown little enthusiasm for actively pursuing consumers who engage in file sharing.[57] DOJ statistics, which do not differentiate between commercial and personal use infringers, show that in 2003 U.S. Attorneys investigated only eighty-eight copyright matters and filed charges against fifty defendants; the preceding three years show similar statistics.[58] If other copyright-related offenses like bootlegging are included, 229 crimes were investigated and charges were brought against 165 people.[59]

There are nevertheless some signs that the DOJ is beginning to take

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that, until recently, copyright law was geared primarily toward commercial participants in copyright-related businesses); Lanier Saperstein, Comment, *Copyrights, Criminal Sanctions and Economic Rents: Applying the Rent Seeking Model to the Criminal Law Formulation Process*, 87 J. CRIM. L. & CRIMINOLOGY 1470 (1997).

55. *See* UNITED STATES DEPARTMENT OF JUSTICE, COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION (CCIPS), *at* http://www.usdoj.gov/criminal/cyber crime/docs.html#doca (last updated Mar. 17, 2005) (on file with the American University Law Review) (collecting press releases relating to enforcement of intellectual property laws).

56. *See* Bill Holland, *Royalty Bill Heads to Bush*, BILLBOARD, Dec. 4, 2004, at 6 (discussing a number of unresolved bills created to enforce copyright infringement laws).

57. *See* Jonathan Band & Masanobu Katoh, *Members of Congress Declare War on P2P Networks*, J. INTERNET L., Oct. 2003, at 22 (noting that criminal enforcement against personal use infringers has not been a DOJ priority because the public is not interested in seeing students sent to prison for file sharing). For commentary on the resistance of law enforcers to the effort of lawmakers to change social norms, see Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 608 (2000) (recommending that lawmakers "gently nudge" citizens toward desired behavior and attitudes by using less draconian penalties).

58. UNITED STATES DEPARTMENT OF JUSTICE, FY 2003 PERFORMANCE AND ACCOUNTABILITY REPORT, INTELLECTUAL PROPERTY REPORT, *available at* www.usdoj.gov/ag/annualreports/ar2003/appendices.htm#cc (last visited Mar. 22, 2005).

59. *Id.*

personal use infringement more seriously. Former Attorney General John Ashcroft recently announced that the DOJ had committed more resources to combating infringement, including adding personnel to district offices.[60] In August, 2004, federal investigators mounted a complex enforcement effort against peer-to-peer file sharers alleged to have copied and distributed movies, software, games, and music.[61] The initiative targeted those who made copies available for others to download. As a result, two men recently pleaded guilty to criminal copyright infringement for participating in peer-to-peer file sharing and face sentences of up to five years.[62]

Civil enforcement of copyright laws provide an alternative to criminal enforcement and can also deter infringement. Civil copyright law provides for generous statutory damages and enhanced damages when infringement is willful.[63] Despite this source of redress, copyright holders have been reluctant to sue consumers. Civil suits are expensive, may alienate consumers, and are unlikely to yield the copyright holder the full amount of awarded damages. That reluctance to use civil suits has been set aside, however, and the Recording Industry Association of America (RIAA) is suing individual file sharers on behalf of copyright holders.[64] To the extent

60. *See* TASK FORCE, *supra* note 27, at 19-20 (outlining recommendations for significantly expanding enforcement).

61. *See* Terry Frieden, *Feds Launch Internet Crime Crackdown*, CNN.com, Aug. 26, 2004, *at* http://www.cnn.com/2004/TECH/08/26/cybercrime.probe/ (on file with the American University Law Review) (reporting a raid of locations in three states targeting a peer-to-peer network known as the "Underground Network"); Press Release, United States Department of Justice, Attorney General Ashcroft Announces First Criminal Enforcement Action Against Peer-to-Peer Copyright Piracy (Aug. 25, 2004) (stating that enforcement officials seized computers, software, and other equipment used to distribute movies, music, and other materials over peer-to-peer networks), *available at* http://www.usdoj.gov/criminal/cybercrime/operation_ gridlock.htm. Operation Digital Gridlock marked the first time that the government targeted users of peer-to-peer networks. *Id.*

62. *See First Convictions in Peer-to-Peer Piracy Fight*, USA TODAY, Jan. 19, 2005 (noting that the offenders operated networks in which file-sharers shared from one to one-hundred gigabytes of data), *available at* http://www.usatoday.com/tech/news/ internetprivacy/2005-01-19-file-share_x.htm.

63. Those who infringe copyrights for personal use are subject to civil suits brought by copyright holders. 17 U.S.C. § 504(a) (1996). Damages can be substantial. First, copyright holders may sue for actual damages. 17 U.S.C. § 504(b) (1996). Alternately, if they have met registration requirements, plaintiffs may elect to recover statutory damages of up to $30,000 with respect to any one work. 17 U.S.C. § 504(c)(1) (1996 & Supp. 2004). When the plaintiff has proved the infringement was committed willfully, the court may increase the statutory damage award up to $150,000 per work. 17 U.S.C. § 504(c)(2) (1996 & Supp. 2004).

64. *See* Press Release, Recording Industry Association of American, Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online (Sept. 8, 2003) (describing the first wave of lawsuits by the RIAA's member companies against peer-to-peer users), *available at* http://www.riaa.com/news/ newsletter/090803.asp; *see also* Press Release, Recording Industry Association of America, RIAA Files New Copyright Infringement Lawsuits Against 754 Illegal File Sharers (Dec. 16, 2004) (announcing new lawsuits against 754 individuals, including twenty university students),

this effort is effective, it reduces the need for criminal law enforcement.

Evidence suggests that the RIAA suits may have had a deterrent effect on music file sharing. Following the first round of recording industry suits against peer-to-peer file sharers in 2003, downloading appeared to decline.[65] A follow-up survey indicated that three months later, the rate of file sharing had modestly increased from fourteen percent to eighteen percent.[66]

In sum, the deterrence of infringement through criminal law may be less effective than anticipated, a general educative benefit is unlikely to change underlying social norms about personal use of copyrighted material, and enforcement efforts are uncertain. For these reasons, the benefit of using criminal law is smaller than might otherwise be anticipated. In contrast, the costs of using criminal law may be larger than expected.

C. The Costs of Criminal Infringement

Legislators seldom consider the costs of using criminal law. Those costs include financial expenses that can be predicted and quantified as dollar amounts, such as the community's costs of enforcement and incarceration. Economic harm to families of the convicted and the value of the imprisoned felon's lost income can also be estimated and should be included in the tally.[67] If these items were the only costs, we could compare an estimate of the dollars gained by deterrence with the dollars spent on enforcement. But the cost of invoking criminal law entails more than dollars. Though some of these costs are not readily subject to quantification, it would be misleading to ignore them. The following sections discuss three non-monetary costs: the effects on public access, the underlying policy of copyright law, and the criminal law itself.

1. Costs of reduced access to copyrighted material and costs to copyright policy

Copyright law delineates rights of both copyright holders and the public. New criminal laws—and their interpretation and enforcement—should account for both interests. Put another way, a new offense should cause no harm to either policy. But using criminal law encourages the idea that copyrighted material "belongs" to someone in the same way that physical

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available at http://www.riaa.com/news/newsletter/ 121604.asp.

65. *See* RAINIE & MADDEN, *supra* note 36, at 1 (reporting that the percentage of music file downloaders had fallen from twenty-nine percent to fourteen percent); *see also* BLACKBURN, *supra* note 34, at 3 (noting that downloads decreased after the RIAA brought civil suits against individual participants in file sharing networks).

66. *See* RAINIE & MADDEN, *supra* note 36, at 5.

67. *See* Brown, *supra* note 2, at 343-49 (describing various costs of criminalization that may be reduced to monetary terms).

property does, and that copyrighted material, like physical property, cannot be used without permission.[68] This message is contrary to copyright law and policy, which accords the public certain uses in copyrighted material. In a global sense, treating personal use infringement as a type of theft creates a bias in copyright law that upsets the balance between the two purposes of copyright law. Using criminal law to deter unlawful copying emphasizes one purpose of copyright law, to encourage creation of new work. That emphasis on the incentive to create implies that the goal of maintaining public access is less important, an implication that undermines the balance between the dual mandates of copyright law.

More specifically, criminal enforcement, to the extent it deters infringing activity, may also deter socially valuable conduct that is not unlawful. Such overdeterrence occurs when people refrain from lawful conduct because they fear involvement with the criminal justice system.[69] In the context of copyright, the threat of being branded a thief and going to jail may cause a decline in public use of copyrighted material because law-abiding citizens may refrain from using it even when doing so is not illegal. Although that might not be viewed as problematic with respect to Internet file sharing of music and movies, the criminal copyright laws are not limited to file sharing.

The complexity of copyright law makes overdeterrence of using all kinds of copyrighted material more than a hypothetical problem.[70] Consider that users have to distinguish between the factual aspects of copyrighted material, which they are free to use, and the expression of those facts, which they may not use. Similarly, they have to distinguish between the idea embodied in the work and the expression of that idea.[71] The point is not that such good-faith users will be criminally liable, but that they may believe they are and so refrain from lawful use.

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68. *See* Stuart 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. REV. 167, 215-16 (2002) (highlighting the distinction between theft of real property and copyright infringement); Moohr, *Crime of Copyright Infringement*, *supra* note 11, at 765-66 (discussing distinctions between copyright and tangible property); *see also* Moohr, *Federal Criminal Fraud*, *supra* note 11, at 722-24 (addressing the dynamic of creating property rights by prohibiting certain conduct).

69. *See* United States v. Walters, 997 F.2d 1219, 1224 (7th Cir. 1993) (noting that those citizens who obey the law out of a sense of civic obligation rather than fear of sanctions will alter their conduct); *see also* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 68 (1968) (noting the desire of law-abiding citizens to avoid involvement with the criminal justice system); Lynch, *supra* note 50, at 63 (suggesting that criminal law is most effective at speaking to the law-abiding public because it reinforces their values and behavior).

70. *See* Litman, *supra* note 47, at 48 (stating that "much of the activity on the net takes place on the mistaken assumption that any material on the Internet is free from copyright unless expressly declared to be otherwise").

71. In addition, some uses of copyrighted material are protected. *See supra* note 18 and accompanying text for a description of limitations on holders' rights.

Moreover, chilling legitimate use of copyrighted material can have the further effect of decreasing production of expressive creation. Most copyrighted works are based, directly or indirectly, on the work of others.[72] Potential creators may be reluctant to use copyrighted work, which is a sort of "raw material" for new work, when the potential cost of doing so is very high.[73] In this sense, overdeterrence burdens the incentive to create in much the same way that higher license fees would.[74] Although criminalizing copyright infringement may motivate creative activity by increasing its potential value, it may also reduce the material that is available for creative use and as a result lead to less creative output. Admittedly one cannot be certain that a criminal law will overdeter in this way or have this effect, but it seems inconsistent to rely on criminal law because of its power to deter and at the same time ignore the unintended consequence of overdeterrence.

In sum, using criminal laws against infringement may impose costs on copyright policy by reducing public use of all kinds of copyrighted material, creating a bias in copyright policy that emphasizes protection more than public use, and reducing production of creative expression. In comparison, civil laws, with their generous statutory damages, can achieve a better balance because they do not run the risk of overdeterrence.

2. The cost to criminal law

Instituting a criminal law regime to address copyright infringement, especially when infringement is for personal use, can impose significant

72. For instance, a recent survey showed that "artists and musicians have embraced the internet as a tool that helps them create, promote, and sell their work." *See* MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, ARTISTS, MUSICIANS AND THE INTERNET iv (2004) (reporting that fifty-two percent of all online artists and fifty-nine percent of paid online artists say they get ideas and inspiration for their work from searching online), *available at* http://www.pewinternet.org/ pdfs/PIP_Artists.Musicians_Report.pdf. The survey also revealed that thirty-five percent of artists and thirty-three percent of musicians thought downloading a music or movie file should be legal. *Id.*

73. Desisting from creative activity does not produce an observable event, making it hard to prove this proposition directly. Nonetheless, economists provide evidence from antitrust law showing that compliance measures adopted by firms to avoid antitrust problems have the effect of eliminating some lawful actions. *See* Alan Beckenstein & H. Landis Gabel, *The Economics of Antitrust Compliance*, S. ECON. J., Jan. 1986, at 691 ("If public policy makers hope to reduce antitrust violations without at the same time reducing healthy competitive aggressiveness, then policies to raise fines and reduce the probability that violations go unprosecuted will have to be coupled with policies to reduce the likelihood that legitimate behavior is legally challenged by enforcement agencies or private parties."); *see also* Michael K. Block & Joseph Gregory Sidak, *The Cost of Antitrust Deterrence, Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131, 1133 (1980) (arguing that overinvestment in private enforcement is one reason not to combine a low level of enforcement with excessive penalties).

74. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989) (noting that increasing costs of using copyrighted material may result in less production of innovative material).

costs on the future effectiveness of the criminal law and may even prove counterproductive. 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.[75] People who have not internalized the legal standard may obey the law because they respect its legitimacy,[76] 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.[77]

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75. This is a theme of early critics of regulatory crimes. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 421 (1958) (observing that use of criminal sanctions for morally neutral laws dilutes the effectiveness of community condemnation for criminal conduct in general); SANFORD H. KADISH, *The Crisis of Overcriminalization*, *in* BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 21, 22-32 (1987) (explaining the social costs of punishing conduct that does not significantly harm society); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 437 (1963) (explaining that democratic communities are reluctant to affix blame to conduct that lacks moral culpability). The theme has been revived by more recent scholarship. *See* Robinson & Darley, *Desert*, *supra*, note 39, at 481 (noting that the deterrent effect of sentences may be undermined when the community views punishment as disproportionate and unjust). For current commentary on regulatory crime, see Green, *Regulatory Offenses*, *supra* note 46, at 1542-44; *see also* Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 11-18 (2002) (describing the regulatory responses to corporate fraud in recent years).

76. *See* TYLER, *supra* note 38, at 178 (citing empirical evidence that suggests Americans feel a strong obligation to obey the law and generally do so).

77. *See* Robinson & Darley, *supra* note 5, at 986 (noting that when people believe a law is unjust they may then perceive the legal system as a whole to be unjust, which leads to a generalized contempt for the criminal justice system); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1882 (2000) (explaining why broader criminalization of lying over the last century has failed to create stronger societal norms against lying and may actually undermine the societal norm against it).

D. Evaluating the Costs and Benefits of Criminal Infringement

The assessment of benefits and costs indicates that the deterrent benefit of criminalizing infringement may be limited, while the costs to copyright policy and long-term effectiveness of the criminal law may be large. Although this assessment is not definitive,[78] identifying costs and benefits makes it possible for decision-makers to compare and balance them. That final assessment and the process of identifying and classifying effects is useful when a legislature considers a criminal enforcement measure. As a preliminary matter, the possibility that costs of criminalizing personal-use infringement may outweigh its benefits serves as a signal to lawmakers that treating infringement as a crime may not be an effective way to protect the long-term interests of copyright holders or the public. For our purposes, the cost-benefit analysis also serves a second function; it provides a specific conceptualization of the concept of overcriminalization.

III. THE BENEFITS OF DEFINING OVERCRIMINALIZATION THROUGH COST-BENEFIT ANALYSIS

Defining overcriminalization as occurring when the costs of criminal enforcement outweigh the benefits serves as a screening device for proposed criminal legislation. Laws that survive the screening process are likely to be more specific as lawmakers tailor them to avoid unnecessary costs. This definitional strategy may also result in less reliance on criminal law as a regulatory device and, perhaps, fewer criminal laws. These results may have the further effect of avoiding or moderating the unintended effects of overcriminalization, such as vague prohibitions and duplicative crimes that expand prosecutorial authority and other problems identified in this symposium.

The cost-benefit analysis employed here is different from that used by economists when they evaluate the efficacy of new regulations. The economists' evaluation of collective investment projects or social programs reduces social factors to a common denominator, money. In that sense, the analysis deals in commensurables, comparable factors that can be arrayed along a single dimension. In contrast, the costs and benefits of criminalizing personal use infringement that were identified in the preceding analysis are not easily converted into dollars because the factors occupy many other dimensions. The dollar loss that criminal infringement law prevents must be set against the resulting harm to copyright policy and

78. For instance, this analysis did not consider whether the prevalence of plea bargains detracts from the deterrent benefit of enforcement. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 223 (2003) (stating that, in 2001, ninety-four percent of cases adjudicated in federal district courts were resolved through plea bargains).

to the criminal justice system, factors that are difficult to convert to a monetary value.[79] Weighing the gain to present and future copyright holders against the cost in decreased public use, the cost to copyright policy, and the possible lost credibility of criminal law is an exercise in weighing incommensurables. Thus, an admitted shortcoming of defining overcriminalization through cost-benefit analysis is the difficulty, in the absence of a common dimension, of weighing them against each other to make a global estimate of costs and benefits. Nevertheless, the difficulty of weighing factors that occupy different dimensions is not fatal. Even if the factors are not susceptible to monetization[80] and are incommensurable, they are still comparable.[81]

The main advantage of defining overcriminalization through cost-benefit analysis is that the method compels Congress to confront the effects—especially the costs—of treating conduct as criminal. Identifying costs and benefits brings information into the decision-making process and opens a fuller range of considerations that might otherwise escape public attention. By forcing decision-makers to weigh or prioritize these factors, the method identifies important social considerations.[82] Thus, even when costs and benefits cannot be readily reduced to a common metric like dollars, estimating them is still likely to produce a better and more transparent decision.

In one sense, using cost benefit analysis to define overcriminalization accords with an underlying thrust of cost-benefit analysis in the administrative realm, which is to restrain the use of political considerations when making decisions. The analysis will necessarily reveal how a criminal law may privilege some interests and national policies and sacrifice others. In addition, as other considerations rise to the forefront during the identification and evaluation stages of the analysis, political considerations may become less significant.

The recommendation to utilize cost-benefit analysis when considering criminal legislation, although preliminary, merits further thought. As a first step, consideration might be given to integrating a cost-benefit definition of overcriminalization into the legislative process as it actually occurs. One issue is whether a cost-benefit analysis would alleviate the blurring of the

79. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 149-53 (1982) (outlining difficulties in monetizing risks and costs); *see also* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 841 (1994) (pointing out that measuring social goods along a monetary metric can obscure the values hidden behind a dollar amount).

80. *See* Schauer, *supra* note 10, at 1215 n.3 ("[N]othing about the claim that all values are commensurable entails the claim that the common metric is money."). Schauer suggests other common metrics such as utility, self-expression, or virtue.

81. *See id.* at 1216 (distinguishing between commensurability and comparability).

82. *See* Sunstein, *supra* note 79, at 842-43 (arguing for a disaggregated accounting of effects in order to expose the full set of effects to public view).

institutional roles of Congress, the federal courts, and the executive branch that current academic research has identified in criminal lawmaking.[83]

CONCLUSION

While acknowledging a lack of precision because the many consequences of criminalization occupy different dimensions, the analytic method of cost-benefit analysis offers a working definition: overcriminalization occurs when a complete analysis of the consequences of treating conduct as criminal indicates that the costs of treating a matter as criminal outweigh the benefits. This definition has the advantage of providing the content for debate over the substantive law at issue. In identifying and classifying all the consequences of a new law, the analysis provides necessary input into the determination of whether proposed criminal legislation is appropriate, ineffective, or counterproductive. The exercise recognizes that criminal laws impose costs as well as benefits. Advocating criminal penalties by invoking only likely benefits is somewhat disingenuous when its consequentialist justification requires an evaluation of all the effects of a criminal law.

Widespread criminalization exacerbates almost every critical issue in the jurisprudence of white collar crime. The issues affected include federalism and the federal role in criminal law, prosecutorial discretion and the power of prosecutors to obtain expansive interpretations of existing criminal laws, vagueness concerns and the preference of Congress to enact open-ended criminal laws, and the use of civil standards in evaluating criminal conduct. Yet it is difficult to tell when Congress is relying too much on criminal law to control conduct. Using a uniform definition of the term "overcriminalization" based on cost-benefit analysis would facilitate discussion not only of overcriminalization but also of its consequences.

83. *See, e.g. generally* Kahan, *supra* note 1, at 470; Richman, *supra* note 1, at 812.