

Copyright Alert Enforcement: Six Strikes and Privacy Harms

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ABSTRACT

Copyright holders have deployed a wide range of enforcement strategies this past decade. In an initial, punitive stage, content industries targeted individual copyright infringers by way of an extensive settlement demand campaign and obtained statutory damage awards in a few high profile file-sharing lawsuits. Recently however, copyright holders drastically reversed course, abandoning punitive measures in favor of a “copyright information approach” that enlists Internet service providers into sending copyright infringement notifications to subscribers.

Commentators have welcomed this shift towards copyright alert systems as providing a more balanced approach to copyright enforcement that might improve copyright law’s normative acceptance. Copyright industries are optimistic that the new copyright alert system will increase copyright awareness and decrease copyright infringing behavior.

This Article shows that the optimism with copyright law’s recent developments is misplaced. Based on social science research and insights from an empirical study conducted for this Article, we argue that architects of the copyright alert system have underestimated the robustness of social norms and have failed to anticipate the negative reactions to a copyright information system, in particular as relating to privacy harms.

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INTRODUCTION

The past decade has been a transformative period in copyright enforcement. Motivated by unmitigated and ongoing infringement practices that pose a potentially existential threat to traditional revenue sources, copyright holders have waged an aggressive legal campaign against online piracy.¹ The entertainment industry has certainly won its share of victories in this battle. It managed to persuade courts to ban several mainstream file-sharing technologies on the basis of indirect copyright liability.² Around the same time, the industry made an unprecedented shift in enforcement by beginning to target individual, non-commercial infringers with an expansive enforcement campaign.³ Over 20,000 individuals are reported to have entered into settlement agreements in order to avoid costly litigation.⁴ The unhappy few who pushed back were hit with six figure statutory damage awards for sharing copyrighted songs on peer-to-peer (P2P) file-sharing networks.⁵

This punitive approach to copyright enforcement has proven costly, however. Although copyright enforcement's traditional targeting of commercial bootleggers has always been relatively uncontroversial,⁶ the music industry's decision to send

1. For a description and discussion, see *infra* Part I.

2. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005) (holding that distributing software with manifest intent to promote copyright infringement can render the software's distributor liable for the infringing actions of third parties); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021–24 (9th Cir. 2001) (holding that Napster had sufficient knowledge of the availability of infringing material to impose indirect liability).

3. For an overview, see Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1260–64 (2011).

4. 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> [<https://perma.cc/XS7U-PBRF?type=source>].

5. *Sony BMG Music Entm't v. Joel Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011); see Dave Itzkoff, *Student Fined \$675,000 in Downloading Case*, N.Y. TIMES (July 31, 2009), http://www.nytimes.com/2009/08/01/arts/music/01arts-GRADUATESTUD_BRF.html.

6. Historically, copyright enforcement has focused on commercial “pirates” that sell for-profit bootlegs, unlicensed software, and video games. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 111 (Prometheus Books 2001) (“Our copyright laws have, until now, focused primarily on the relationships among those who write works of authorship and disseminate those works to the public.”); see also Jane C. Ginsburg, *Putting Cars on the “Information Superhighway”: Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1488 (1995); Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 713–14 (2003) (“Copyright owners have traditionally avoided targeting end users of copyrighted works. . . . One is pressed to find any example of copyright law being enforced against individuals for home copying (as opposed to commercial activity) prior to 1990.”); see, e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (contributory liability imposed on defendant who operated a swap meet where many of the vendors sold counterfeit goods); *Arista Records, Inc. v. Mp3Board, Inc.*, No. 00 Civ. 4660, 2002 WL 1997918, at *6, (S.D.N.Y. Aug. 29, 2002) (record companies brought action against Internet site operator that provided links to pirated copies of copyrighted musical recordings); *Nintendo of Am., Inc. v. Computer & Entm't, Inc.*, No. C96-0187, 1996 WL 511619, at *4 (W.D. Wash. May 31, 1996) (defendant sold video game duplication devices for Nintendo game cartridges); *Sega Entm't Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994) (defendant made available unauthorized copies of Sega games on a fee-based Internet bulletin board). See generally Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. Rev. 731 (2003) (explaining the distinctions between commercial

settlement letters to teenagers and college students has proven to be more contentious. Somewhere along the way, the music industry lost public support and copyright law earned a bad reputation.⁷ An increasing number of copyright skeptics faulted the lack of balance between the entertainment industry's chosen means and ends. Critics condemned statutory damage awards as grossly excessive⁸ and decried the callous nature of the RIAA settlement letters, portraying the campaign as a form of legal extortion.⁹

Concerned with the negative impact of its enforcement policies on public attitudes, the entertainment industry changed course. The music industry abandoned its mass settlement campaign and ceased dragging file-sharers into court for high-profile statutory award disputes in favor of a more moderate approach to digital copyright infringements. In 2011, the music and movie industries' leading organizations (the RIAA and MPAA, respectively) collaborated with the major Internet service providers (ISPs) to implement the Copyright Alert System (CAS). Modeled after so-called "graduated response" systems abroad, the CAS seeks to discourage copyright infringement by enlisting ISPs to send subscribers an escalating series of alerts upon notification by content holders of allegedly infringing activities.¹⁰ After the sixth notification, an ISP can elect to apply a "mitigation measure," which may include a reduction in upload/download transmission speeds and redirection to a landing page until the matter is resolved.¹¹

The Copyright Alert System is the latest iteration in a ten year experiment with copyright enforcement approaches in the era of broadband connection and digital content. The CAS is the final and most complete shift from one extreme enforcement strategy to another. While the settlement letter campaign and statutory awards sought to deter by way of stringent sanctions, the CAS only seeks to deter indirectly by notifying subscribers that their infringing behavior has been noticed. The hope is that this will give pause to their future decision-making and lead them to legal alternatives. Sanctions in the new system are almost non-existent.¹² This

piracy and noncommercial personal infringements).

7. See, e.g., Peter Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright in the Internet Age*, 61(2) J. COPYRIGHT SOC'Y U.S.A. 235, 262 (2014) ("These cases poured salt into the wounds opened by the mass litigation campaign. They reinforced the perception that copyright law disserves the public: it deprives consumers of easy access to a broad catalog of music, imposes grossly disproportionate penalties on those caught file-sharing, and does little to support the artists.") (examining how to improve copyright's "public approval rating").

8. See Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing*, 83 TEX. L. REV. 525 (2004); Pamela Samuelson & Ben Sheffner, *Unconstitutionally Excessive Statutory Damages Awards in Copyright Cases*, 158 U. PA. L. REV. 53 (2009).

9. See Daniel Reynolds, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J. L. SCI. & TECH. 977 (2008).

10. Chloe Albanesius, *Pirates Beware, ISPs Agree to Copyright Alert System*, PCMAG (July 7, 2011), <http://www.pcmag.com/article2/0,2817,2388184,00.asp> [<http://perma.cc/TWS9-H9JR>]

11. See Memorandum of Understanding, CENTER FOR COPYRIGHT INFORMATION (July 6, 2011), <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf> (establishing an Independent Review Program to resolve disputes arising from the Copyright Alert System).

12. See Memorandum of Understanding, *supra* note 11. Although the Memorandum of

new, softer direction in enforcement has been welcomed as a more balanced approach that could help salvage copyright law's tainted reputation¹³ while reducing infringements in the process.¹⁴

This Article shows that much of the optimism with the CAS is misplaced. First, copyright information systems are unlikely to reverse copy-norms. Social science research indicates that, once internalized, norms are exceedingly hard to displace.¹⁵ Given the widespread nature of online piracy and the perceived excesses of punitive copyright enforcement in the past, it is unlikely that moving away from punitive approaches will be sufficient to realign prevailing moral intuitions about copyright infringing behavior with copyright law.

Second, architects of the CAS have underestimated the privacy backlash effects of copyright alert systems that co-opt Internet service providers in the pursuit of more effective copyright enforcement.¹⁶ Individuals react adversely when they suspect that their online activities are being monitored, especially when the perceived privacy incursions are deemed disproportionate to the nature of the offense at issue.¹⁷

We support our claims on the basis of empirical findings that we gathered for this Article. We collected data from two generations of college students in 2011 and 2014 and combined that with data collected in the 2003 period. This decade-long timeline provides insight into the effect of copyright law enforcement on norms and behavior during a period when content industries experimented with a

Understanding between content providers and service providers provides that the latter may reduce or restrict an infringers' Internet access upon the sixth consecutive notification, such mitigation measures are at the full discretion of the service provider.

13. See Edward J. Damich, *Our Copyright Code: Continue Patching or Start Rewriting?*, 68 U. MIAMI L. REV. 361, 374–75 (2014) (“For their part, copyright owners have abandoned their relentless campaign of attack on users, which has resulted in public relations (and jurisprudential) disasters like the Lenz case”); Stefan Larsson, *Karl Renner and (Intellectual) Property—How Cognitive Theory Can Enrich A Sociolegal Analysis of Contemporary Copyright*, 48 LAW & SOC’Y REV. 3, 21 (2014) (According to Cary Sherman of the Recording Industry Association of America: “[t]his groundbreaking agreement ushers in a new day and a fresh approach to addressing the digital theft of copyrighted works” (citing to WIRED, July 7, 2011)); Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC’Y U.S.A. 235, 334 (2014) (“It remains to be seen whether this approach will achieve its goals, but there can be little doubt that it offers a more balanced approach to illegal file-sharing than the mass litigation that unfolded from 2003 through 2008”); Rachel Storch, *Copyright Vigilantism*, 16 STAN. TECH. L. REV. 453, 468 (2013) (“The program has a variety of advantages over traditional enforcement under the Copyright Act. It allows for a swift and efficient response to online infringement without the expense or procedural difficulties associated with litigation. Copyright holders also benefit from avoiding the bad press associated with copyright infringement lawsuits.”). Of course, the CAS is not without critics. See *infra* note 71.

14. Initial findings from the more punitive French HADOPI graduate response system have encouraged content industry stakeholders. See Brett Danaher et al., *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*, 62(3) J. INDUSTRIAL ECON. 541 (2014) (finding that increased consumer awareness of HADOPI caused iTunes song and album sales to increase by 22.5% and 25% respectively).

15. For a discussion on the stickiness of anti-legal norms, see Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

16. *Infra*, Part IV. B.1.

17. *Infra*, Part IV. B.1.

varied set of enforcement approaches to combat digital piracy. Specifically, it allows us to examine the various normative and deterrent effects of law enforcement, and in particular to study the change from stringent to more moderate enforcement modalities.

The results reveal a bifurcated landscape of file-sharers and non-infringers in which copyright infringement actions are relatively unaffected by changes in enforcement modalities. Noncompliant copy-norms remain remarkably stable over time and across enforcement strategies. Despite extensive efforts to improve public relations, including the development of the CAS, our data indicates that prevailing copyright norms have remained relatively robust over time. For example, our findings indicate that a majority of students do not perceive illegal downloading as immoral. The negative reactions to copyright trolls and statutory awards seem to suggest that students strongly disapprove of copyright enforcement approaches that are linked to for-profit incentives and involve rewards that are most likely to be in excess of actual damages. At the same time, however, we find that the CAS is met with as much disapproval as the RIAA settlement campaign. In fact, when asked whether students feel that the “music industry is conducting an unjust, disproportionate policy,” the CAS prompted stronger negative reactions than the RIAA settlement campaign did. We find no compelling evidence that the CAS brings about any more positive reactions that might help realign personal beliefs about online behavior with existing copyright laws.

Our findings suggest that much of the optimism about the advantages of the CAS is based on several misunderstandings about the psychology of enforcement. First, the optimism about norm reversal ignores the path dependence of norm formation. Because copy-norms have been internalized and subsequently bolstered by the heavy-handed copyright enforcement approaches of the past, it is unlikely that a moderate enforcement approach will alter preexisting public attitudes about copyright infringement. In such circumstances, relaxing enforcement measures is a risky proposition for the industry because the reduction in deterrence is unlikely to yield any appreciable improvement in copyright attitudes. Second, the creators of the CAS have underestimated the negative reactions to its graduated response system. Although disproportionate sanctions are more likely to generate backlash than a system that raises the probability of enforcement, a great deal depends on the manner in which that higher probability is attained. If more effective enforcement is accomplished by way of measures that are perceived negatively (such as perceived privacy intrusions), normative backlash may obtain regardless.

This Article proceeds as follows: Part I provides a concise review of copyright law’s recent enforcement history. Part II reflects on the turn towards more moderate copyright enforcement approaches. Part III describes our empirical study. Part IV presents the main results. Part V includes discussion and policy findings.

I. COPYRIGHT ENFORCEMENT: A BRIEF HISTORY

Digital copyright infringements present unprecedented challenges to the

enforcement of copyright law.¹⁸ Rising Internet bandwidth and advancements in digital compression technologies have greatly facilitated unauthorized access to copyrighted materials. First with peer-to-peer file-sharing platforms,¹⁹ now increasingly by way of illegal streaming sites,²⁰ it is clear that online copyright infringement is pervasive and remains widespread. A recent study suggests that roughly twenty percent of Internet traffic is devoted to piracy.²¹ As access to unlicensed copyrighted materials online became common, music record sales plummeted without digital music sales able to make up for those losses.²²

18. LITMAN, *supra* note 6 (reviewing the various challenges presented by new technology).

19. Up until 2010, there were an estimated ten million simultaneous users of peer-to-peer technologies at any given time. John Boudreau, *Illegal File Sharing Showing No Letup*, SAN JOSE MERCURY NEWS (July 3, 2006), http://old.seattletimes.com/html/business/technology/2003101281_btfilesharing03.html [<http://perma.cc/7VHQ-ZW85>]; John Borland, *Open-source P2P projects keep swapping*, ZD NET (July 15, 2005), <http://www.zdnet.com/article/open-source-p2p-projects-keep-swapping/> [<http://perma.cc/K5NT-RLMT>]; Simon Crerar, *Illegal File-Sharing As Popular As Ever*, TIMES ONLINE (Jan. 19, 2006), <http://www.thetimes.co.uk/tto/arts/music/article2418137.ece> [<http://perma.cc/H88U-PQE5>]. After the outcomes in *Napster* and *Grokster*, file-sharing activities relocated to various BitTorrent sites. See Ernesto Van der Sar, *Filesharing Report Shows Explosive Growth for uTorrent*, TORRENTFREAK (Apr. 26, 2008), <https://torrentfreak.com/p2p-statistics-080426/> [<https://perma.cc/9STU-BXKJ>] (reporting that number of uTorrent users worldwide more than doubled in 2008). The past few years have seen a decline of Bittorrent for the first time. *Decline In Us Bittorrent Traffic, Says Study*, BBC NEWS (Nov. 12, 2013), <http://www.bbc.com/news/technology-24911187> [<http://perma.cc/3Z59-SPLS>] (reporting a 20% drop of Bittorrent Traffic in six month period in the second half of 2013); see also Ernesto Van der Sar, *Bittorrent Traffic Drops in America, Grows in Europe*, TORRENTFREAK (Nov. 11, 2013), <https://torrentfreak.com/bittorrent-traffic-drops-in-america-grows-in-europe-131111/> [<https://perma.cc/N26L-X2MB>].

20. Andy Greenberg, *Inside Popcorn Time, the Piracy Party Hollywood Can't Stop*, WIRED (Mar. 18, 2015), <http://www.wired.com/2015/03/inside-popcorn-time-piracy-party-hollywood-cant-stop/> [<http://perma.cc/E963-D7QF>] (reporting 100,000 downloads each day); Brian Sodoma, *Inside The Battle Over Illegal Streaming Sites: How The Film Industry Fights Back*, FORBES (May 7, 2015), <http://www.forbes.com/sites/cit/2015/05/07/inside-the-battle-over-illegal-streaming-sites-how-the-film-industry-fights-back/> [<http://perma.cc/TL8B-VYYA>] (noting “the growing number of piracy sites as a whole, which some say now makes up about 24 percent of global Internet traffic”); Christina Sterbenz et al., *Here's How Many People Really Use Sketchy Streaming Sites—And Why*, BUSINESS INSIDER (Apr. 28, 2014), <http://www.businessinsider.com/business-insider-online-streaming-survey-2014-4> [<http://perma.cc/U7BE-CRWW>] (14% of survey respondents admitted to streaming unlicensed content); Howard Swains, *Free Football Streaming: How Illegal Sites Keep Outpacing Broadcasters*, THE GUARDIAN (Aug. 1, 2015), <http://www.theguardian.com/football/2015/aug/01/faster-easier-free-illegal-football-streams> [<http://perma.cc/W7QM-PR82>] (discussing the phenomenon of professional illegal sites with “extraordinary volumes of traffic” and significant earnings).

21. Aaron Sankin, *24 Percent Of Internet Traffic Is Devoted To Piracy, Study Says*, THE DAILY DOT (Sept. 23, 2013), <http://www.dailydot.com/business/nbcuniversal-comcast-piracy-study/> [<http://perma.cc/Y4SW-Z2BG>] (reporting on study that estimates that “nearly one-quarter of the Internet’s total bandwidth is taken up by the illegal distribution of copyrighted content.”).

22. David Goldman, *Music's Lost Decade: Sales Cut in Half*, CNN MONEY (Feb. 3, 2010), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/ [<http://perma.cc/9XSW-JBDM>] (reporting a drop in music sales from 14.6 billion in 2000 to 6.3 billion in 2009); see also Nielson Report, *U.S. Digital Music Sales Flat This Year*, REUTERS (Sept. 27, 2010) <http://www.reuters.com/article/2010/09/27/music-sales-us-idUSLDE68Q0SQ20100927> [<http://perma.cc/9L5F-GUZ9>] (digital music sales in the U.S. have stalled); Ethan Smith, *Sales of Music, Long in Decline, Plunge Sharply*, WALL ST. J. (Mar. 21, 2007), <http://www.wsj.com/articles/SB117444575607043728> [<http://perma.cc/9XSW-JBDM>].

When online file sharing initially became widespread, content industries issued legal challenges to software developers and web sites that facilitated copyright infringements.²³ Once courts established that non-commercial file sharing by private users constitutes direct infringement on the rights of copyright holders, the entertainment industry pursued the developers of file sharing platforms on the basis of intermediary liability. The Ninth Circuit established that developers of the first generation of centralized peer-to-peer technologies, represented by Napster, could be held accountable for copyright infringements on the basis of contributory liability.²⁴ Accordingly, developers of file sharing platforms materially contributed to copyright infringements if they provided the “site and facilities” that enabled direct infringements (hosting a central list of the files on each user’s computer, etc.).²⁵

By the time of the *Napster* decision, a new generation of file sharing applications was already in use. Though functionally equivalent to their predecessors, these file sharing platforms evaded the prevailing intermediary liability standards by decentralizing the technology and removing the role of central servers.²⁶ When content industries challenged this second generation of technologies, they were initially unsuccessful in the lower courts and appellate stages. Courts rejected the application of *Napster* to decentralized file sharing services because liability for contributory infringement implies “actual knowledge of infringement at a time when [file-sharing services] can use that knowledge to stop the particular infringement.”²⁷ Ultimately, however, the industry obtained another victory when the Supreme Court reversed lower court decisions, holding that software providers are accountable for copyright violations if they invoke

23. Prior to the file-sharing technologies, content industries had won various copyright claims against commercial applications involved in unauthorized reproductions, and novel Internet services that reproduced music. For instance, record companies won a copyright suit against MP3.com, which allowed subscribers to play music that they owned, borrowed, or had previously purchased over the Internet. *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000). The court did not uphold the defense’s argument that the service of MP3.com merely allowed subscribers to “space shift” sound recordings that they owned without carrying around physical CDs because the service was neither transformative nor productive. *See id.* at 351. According to the court, the use of a different medium did not render the use transformative. *Id.*; *see also* *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108–09 (2d Cir. 1998) (rejecting the fair use defense by the operator of a service that retransmitted copyrighted radio broadcasts over telephone lines); *L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 994–95 (9th Cir. 1998) (rejecting the fair use defense by television news agencies that copied copyrighted news footage and retransmitted it to news organizations).

24. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001).

25. *Id.* at 1022. Additionally, the Ninth Circuit also accepted the district court’s conclusion that plaintiffs had demonstrated a likelihood of success on the merits of the vicarious copyright infringement claim. *Id.* at 1023–24.

26. *See, e.g.*, Kristina Groennings, *Costs and Benefits of the Recording Industry’s Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, 573 (2005) (“The [recording] industry’s victory in Napster was fleeting as publicity over the issue increased awareness of P2P technology and users flocked to decentralized networks like Grokster and KaZaa, making the tracking of P2P use more difficult.” (footnotes omitted)).

27. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1037 (C.D. Cal. 2003) *aff’d*, 380 F.3d 1154 (9th Cir. 2004), *vacated and remanded*, 545 U.S. 913 (2005).

copyright infringing uses and take active steps to that end.²⁸ Adopting the inducement standard from patent law,²⁹ the Supreme Court held that copyright holders can bring suit against commercial agents who distribute products “with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement.”³⁰ Although the *Grokster* decision renders it more difficult to create a commercially viable business model based on infringement, it does not rule out technologies that facilitate online copyright infringements in the absence of “active steps . . . taken with the purpose of bringing about infringing acts.”³¹

To conclude, content industries were unable to prevent the further development and distribution of new file sharing and streaming technologies. As a result, with the number of online copyright infringements continuing to skyrocket unabated, the entertainment industry was compelled to target individual users of file sharing technologies. This was a historic shift in the focus of copyright piracy enforcement since copyright enforcement traditionally has been directed towards commercial pirates.³²

A. FIRST WAVE: THE RECORD INDUSTRY’S SETTLEMENT LETTER CAMPAIGN

In September 2003, the Recording Industry Association of America (RIAA) began sending subpoenas to Internet service providers, demanding the names of individuals who were allegedly sharing music on file sharing networks. The lawsuits targeted individuals who stored large amounts of music files in publicly accessible folders on their computers. These cases were settled at an average of \$1,500–\$3,000.³³ A second wave of lawsuits followed in October 2003, when the RIAA initiated eighty additional lawsuits against individual peer-to-peer file sharers.³⁴ Between 2003 and 2007, the recording industry issued over 3,400 individual lawsuits against users of peer-to-peer file sharing technology.³⁵ In November 2004, the movie industry (Motion Picture Artists Association or MPAA) joined the fray³⁶ when it launched a barrage of lawsuits against individuals who had

28. *Grokster*, 545 U.S. at 919.

29. *Id.* at 935 (citing *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62–63 (1991); *Henry v. A. B. Dick Co.*, 224 U.S. 1, 48–49 (1917); *Thomson-Houston Elec. Co. v. Kelsey Elec. Ry. Specialty Co.*, 75 F. 1005, 1007–08 (2d Cir. 1896); *Rumford Chem. Works v. Hecker*, 20 F. Cas. 1342, 1346 (C.C.D. N.J. 1876) (No. 12,133)).

30. *Grokster*, 545 U.S. at 919.

31. *Id.* at 938.

32. For an overview, see Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831 (2009).

33. This average gradually increased to \$3000. Paul Roberts, *RIAA Sues 532 ‘John Does’*, PC WORLD, <http://www.pcworld.com/article/114387/article.html> [<http://perma.cc/P4LK-PANR>].

34. *RIAA Launches Second Wave of File-Swapper Suits*, OUT-LAW NEWS (Oct. 31, 2003), <http://www.out-law.com/page-4029> [<http://perma.cc/VK4E-KWX3>].

35. ELECTRONIC FRONTIER FOUND., *supra* note 4, at 4.

36. Because the amount of motion pictures being exchanged over peer-to-peer networks had increased dramatically in 2004, mainly due to increased broadband width and improved compression technologies, the movie industry group decided to no longer sit back. Bary Alyssas Johnson, *MPAA*

allegedly shared a substantial number of movies online.³⁷ By June 2005, the MPAA had initiated five rounds of lawsuits against individual file traders.³⁸ To date, at least 18,000 individuals have received threatening letters from content industry organizations.³⁹ In addition, content industries have sent prelitigation letters to universities requesting that students come forward to pay a non-negotiable settlement amount.⁴⁰

The RIAA settlement campaign involved a number of awkward public relations incidents that likely contributed to the dwindling of public support for copyright enforcement. For instance, media outlets reported that content industries had accused a twelve year old girl in New York, whose mother lived in low income housing run by the New York City Housing Authority,⁴¹ of copyright infringement, as well as an eighty-three year old woman who had died over a month earlier, among others.⁴²

To many observers, the industry's litigate-or-settle practice reflects an unfair power dynamic. Since alleged infringers so frequently choose to settle in order to avoid the expense of litigation, many legal questions remain unanswered. According to some, the almost mechanical administration of the settlement payments is akin to blackmail, extortion, or harassment.⁴³ Moreover, the legitimacy of the litigation effort is undermined by a lack of comprehensive application. Due to the large number of offenders, any particular instance of individual enforcement seems random, creating a perception that unlucky individuals have been chosen arbitrarily in a litigation lottery.

Anti-Piracy Lawsuits Target Individuals, PCMAG (Aug. 29, 2005), <http://www.pcmag.com/article2/0,2817,1853573,00.asp> [<http://perma.cc/SV79-SGS>]; see, e.g., Press Release, Motion Picture Assoc. of Am. (MPAA), Motion Picture Industry Takes Action Against Indiana Internet Thief (Jan. 27, 2006).

37. *Hollywood Sues Alleged File Swappers*, MSNBC (Nov. 16, 2004), <http://www.nbcnews.com/id/6504024/#.Vkjtp66rSu4> [<http://perma.cc/FWL8-ENGQ>].

38. See Thomas Mennecke, *MPAA Launches New Round of Lawsuits*, SLYCK (June 3, 2005), http://www.slyck.com/story816_MPAA_Launches_New_Round_of_Lawsuits [<http://perma.cc/7XN2-ZRHL>].

39. *Id.*

40. See Press Release, RIAA, 23 New Schools to Receive Latest Round of RIAA Pre-Lawsuit Letters (July 18, 2007) ("In the sixth wave of this new initiative, the RIAA this week sent letters in the following quantities to 23 schools who are receiving letters for the first time."), <http://tech-insider.org/internet/research/2007/0718.html> [<http://perma.cc/7Z22-8NKJ>]; see, e.g., Nick Semenkovich, *RIAA Pre-Litigation Letters Sent to MIT*, THE TECH (May 8, 2007), <http://tech.mit.edu/V127/N24/riaa.html> [<https://perma.cc/4LRB-KJFM?type=source>].

41. See John Borland, *RIAA Settles with 12-Year-Old Girl*, CNET (Sept. 9, 2003), <http://www.cnet.com/news/riaa-settles-with-12-year-old-girl> [<http://perma.cc/N88M-SDEV>].

42. Andrew Orłowski, *RIAA Sues the Dead*, THE REGISTER (Feb. 5, 2005), http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/ [<http://perma.cc/KL9Z-BTY4>].

43. QJ Staff, *The Anti-Anti-Piracy Campaign: Consumers Electronic Association Tells RIAA To Stop Harassing People*, QUICKJUMP GAMING NETWORK (Apr. 27, 2006), <http://www.qj.net/qjnet/apple/the-anti-anti-piracy-campaign-cea-tells-riaa-to-stop-harassing-people.html>. But see Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 729-31 (2005) (finding that suing college students can be a financially self-sustaining long term enforcement strategy that is unlikely to backfire since the settlement lawsuits by industry groups are not associated by the public with individual record labels or movie studios).

B. SECOND WAVE: THE STATUTORY DAMAGE AWARDS

In 2008, a few individuals refused the settlement offers issued by the RIAA. Although the threatening letters sent by the RIAA routinely claimed that damage awarded by the courts could run up to \$150,000, this claim had never been tested in court. In the ensuing litigation, an initial concern was the requisite proof of dissemination of a copyrighted work. Although it can easily be demonstrated that, at one time, a file sharer had made a file accessible to the public, it is very difficult technically to provide evidence of how many times others had actually downloaded the particular file.⁴⁴ Courts ultimately decided that dissemination could be presumed on the basis of accessibility.⁴⁵ The next issue concerned the alleged harm caused by an individual accused of file sharing.⁴⁶ While it is hard to estimate the overall impact of file sharing on the revenue base of the entertainment industries,⁴⁷ it is even more difficult to discern the precise damage imposed by file sharing.⁴⁸ Fortunately for copyright holders, the Copyright Act does not require right holders to provide evidence of actual damages in all circumstances.⁴⁹ Copyright holders

44. Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008).

45. See *id.* at 1219 (holding that liability for violation of the exclusive right of distribution requires actual dissemination).

46. Determining the actual harm from downloading is complex because it involves questions that are very hard to access empirically, including: (1) how many times in total a file in a user's publicly accessible folder has been downloaded on a peer-to-peer network; and (2) how many of those downloads have displaced actual sales that would have taken place otherwise.

47. Some studies, for instance, contest the claim that file sharing has a positive impact on music industry sales. See, e.g., Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007); Andy McCue, *Study: Falling CD Sales Can't Be Blamed on P2P*, CNET (June 21, 2005), <http://www.cnet.com/news/study-falling-cd-sales-cant-be-blamed-on-p2p/> [<http://perma.cc/4K5X-L9AH>] (discussing study that found that file sharing has no negative impact on CD sales). But see Stan Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1 (2006) (presenting evidence that file sharing diminishes recording industry revenues). For an overview of the empirical work, see Stan Liebowitz, *Economists Examine File Sharing and Music Sales*, in INDUSTRIAL ORGANIZATION AND THE DIGITAL ECONOMY 145 (Gerhard Illing and Martin Peitz eds., 2006).

48. For instance, in order to estimate the harm imposed by one file in a publically accessible folder, one needs to gather information about: (1) the amount of times that the file was downloaded; and (2) how many of these downloads caused the individual not to buy the song through legally available alternatives. Such information is simply not available. Torrent technologies complicate the former because any act of downloading captures fragmented parts from any number of different users. For a general explanation of the operation of peer-to-peer networks, see Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679 (2003).

49. Beginning in 1790, the first Congress enacted the original Federal Copyright Act. The original purpose of statutory damages was to provide a minimum award to copyright owners because of the difficulty of measuring actual damages and profits. See Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability*, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 273 (2009). A fundamental underpinning of Congress's enactment of the Copyright Act of 1976 was its concern with potentially excessive statutory awards. Congress attempted to circumvent such a result via novel rhetorical explication in the 1976 Act. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 453 (2009). However, as Samuelson and Wheatland point out, Congress didn't limit anything and only exacerbated critics' unease. *Id.* In pertinent part, Samuelson and Wheatland argue that the 1976 Copyright Act's enactment has not had the desired impact Congress anticipated with such unintended consequences recently

can elect to apply statutory damages at any time during the litigation⁵⁰ and, as it turns out, courts are willing to apply statutory damage provisions quite liberally.⁵¹ In one instance, a defendant was ordered to pay \$222,000 in statutory damages for sharing twenty-four songs online.⁵² In another case, a jury levied \$675,000 in damages for sharing thirty songs.⁵³ The Copyright Act of 1976 made these large monetary awards possible by changing the calculation of awards from “per infringement” to “per infringed work.”⁵⁴ Moreover, courts adapted a broad interpretation of willful infringement, which in turn enhances the potential statutory award.⁵⁵ Of course, the generous application of statutory awards certainly bolsters the deterrent effect of the entertainment industry’s litigation approach.⁵⁶

The six-figure statutory damage awards for non-commercial copyright infringements, as exemplified in *Capitol Records v. Thomas-Rasset* and *Sony BMG v. Tenenbaum*, have been met with surprise⁵⁷ and hostility.⁵⁸ Commentators have

evidenced in the latest statutory damage awards in P2P file sharing cases. *Id.*

50. 17 U.S.C. § 504(c) (2012). The 1976 Act limits the availability of statutory damages to copyright holders who register their works. If an infringement was committed willfully, the court may increase the award of damages to a sum of \$150,000.

51. See *supra* notes 48–50.

52. The Eighth Circuit Court of Appeals reinstated this amount after a second and third jury trial had set willful statutory damages at \$1.92 million and \$1.5 million, respectively. See *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 902 (8th Cir. 2012); *Capitol Records v. Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. 2010); see also David Kravetz, *Jury in RIAA Trial Slaps \$2 Million Fine on Jammie Thomas*, WIRED (June 18, 2009), <http://www.wired.com/2009/06/riaa-jury-slaps-2-million-fine-on-jammie-thomas/> [<http://perma.cc/XE8F-RU4E>].

53. *Sony BMG Music Entm’t v. Joel Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011); see Dave Itzkoff, *Student Fined \$675,000 in Downloading Case*, N.Y. TIMES (July 31, 2009, 12:34 PM), <http://artsbeat.blogs.nytimes.com/2009/07/31/judge-rules-student-is-liable-in-music-download-case/> [<http://perma.cc/8P4S-53QJ>].

54. Samuelson & Wheatland, *supra* note 49.

55. Kate Cross, *David v. Goliath: How the Record Industry is Winning Substantial Judgments Against Individuals for Illegally Downloading Music*, 42 TEX. TECH L. REV. 1031, 1038 (2010) (“If one song on iTunes costs ninety-nine cents to purchase, then a judgment awarding \$80,000 for one song is not only grossly disproportionate but ‘obviously unreasonable by any measure.’”).

56. Samuelson & Wheatland, *supra* note 49.

57. COPYRIGHTS & CAMPAIGNS, <http://copyrightsandcampaigns.blogspot.com/2009/06/sony-bmg-attorney-we-were-shocked-by.html> (June 20, 2009) (noting that an executive at Sony said, “We were shocked,” about the verdict) (cited in Colin Morrissey, *Behind The Music: Determining The Relevant Constitutional Standard For Statutory Damages In Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059, 3062 (2010)).

58. Daniel Kreps, *Richard Marx “Ashamed” He’s Linked to \$1.92 Million RIAA Fine Against Minnesota Mom*, ROLLING STONE: ROCK & ROLL DAILY (June 24, 2009), <http://www.rapidbeatpromotions.com/forum/archive/index.php/t-1387.html> (discussing the opinion of Richard Marx, whose songs Thomas-Rasset distributed); Ernesto, *Moby: The RIAA Needs to Be Disbanded*, TORRENT FREAK (June 20, 2009), <https://torrentfreak.com/moby-the-riaa-needs-to-be-disbanded-090620/> (The musician Moby noted, “I don’t know, but ‘it’s better to be feared than respected’ doesn’t seem like such a sustainable business model when it comes to consumer choice.”). Upon reducing the reward from \$2 million to \$222,000 on remand, the court in *Capitol Records v. Thomas* stated that it “would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases [I]t would be a farce to say that a single mother’s acts of using Kazaa are the equivalent, for example, to the acts of global financial firms illegally infringing on copyrights in order to profit in the securities market.” *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008).

been quick to note that these awards extend well beyond the financial means of the single mother and graduate student involved in these respective cases. As applied to file-sharing, statutory damage awards have been criticized as being disproportionate and excessive.⁵⁹ Some argue that the punitive nature of the awards is inopportune because Congress intended the statutory damage framework to merely substitute for actual damages.⁶⁰ It has been stated also that statutory damage awards in copyright actions should be subject to additional scrutiny, since substantive due process protections prohibit grossly excessive awards.⁶¹ Others suggest that, given recent developments, statutory damage law should be reformed to incorporate a distinction between commercial and non-commercial infringements.⁶² Generally, criticism on the application of statutory damages in file-sharing litigation reflects a concern with a lack of balance between the entertainment industry's chosen means and ends.⁶³ Public disapproval of the litigation campaign is illustrated perhaps most vividly by online initiatives that seek to subsidize the settlement payment of unlucky defendants.⁶⁴

C. THIRD WAVE: THE COPYRIGHT ALERT SYSTEM

In 2011, content industries changed gears and adopted a new strategy. At the behest of the Obama and Cuomo administrations,⁶⁵ the largest Internet service providers (SBC, AT&T, Comcast, Verizon, CSC, and Time Warner Cable) entered into a Memorandum of Understanding with the major entertainment industries and

59. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing*, 83 TEX. L. REV. 525 (2004); Pamela Samuelson & Ben Sheffner, *Unconstitutionally Excessive Statutory Damages Awards in Copyright Cases*, 158 U. PA. L. REV. PENUMBRA 53 (2009); Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 336, 371 (2014) (“[D]eterrent enforcement through statutory damages . . . is largely counter-productive in a technological age in which consumers can easily circumvent content markets.”); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 220, 234 (1997) (“[R]eliance upon threats of punishment to enforce intellectual property laws is a strategy that is likely to be ineffective.”).

60. Samuelson & Sheffner, *supra* note 59, at 64–65; see also Colin Morrissey, Note, *Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059 (2010) (arguing in favor of due process evaluation).

61. Barker *supra* note 59, at 529.

62. Anna Cronk, *The Punishment Doesn't Fit the Crime—Why and How Congress Should Revise the Statutory Copyright Damages Provision for Noncommercial Infringements on Peer-to-Peer File-Sharing Networks*, 39 SW. U. L. REV. 181, 195 (2009).

63. See Daniel Reynolds, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH. 977 (2008).

64. See, e.g., *US file-sharer refuses donations*, BBC (Aug. 3, 2009), <http://news.bbc.co.uk/2/hi/technology/8177285.stm> [<http://perma.cc/4VXT-Z54E>] (reporting that Joel Tenenbaum received donations to compensate for his legal expenses).

65. Salil K. Mehra & Marketa Trimble, *Secondary Liability, ISP Immunity, and Incumbent Entrenchment*, 62 AM. J. COMP. L. 685, 703 (2014) (“Though presented as a form of self-regulation, the CAS seems in part a product of informal guidance by government officials. The Governor of New York, Andrew Cuomo, facilitated the negotiations, and the Obama Administration endorsed the plan, reportedly after Justice Department officials informally vetted the program.”).

firms to implement a Copyright Alert System.⁶⁶

Taking a page from France's HADOPI system,⁶⁷ CAS employs a "graduated" approach to copyright enforcement. In this system, copyright owners and ISPs escalate sanctions with each additional infringement notification. Copyright infringement alerts work their way up from educational messages (initial two notices) to messages that require acknowledgment (third and fourth notices) and conclude with two final notices that include mitigation measures. At their discretion, ISPs can take the following mitigation measures: reducing a subscriber's transmission speed, moving a subscriber down to a lower-tier service, redirecting the subscriber to a landing page for copyright "instruction" until the subscriber contacts customer service, and/or temporarily suspending Internet access.⁶⁸ After observing the final mitigation phase, ISPs are under no obligation to keep sending alerts, but must continue to track and report notices received for the subscriber in question. The entire system resets for every subscriber at the end of each twelve-month cycle.

By closely monitoring peer-to-peer file sharing sites, the CAS inspects what subscribers are downloading and matches the file signature (called a "hash") against a set of known signatures of pirated files. When an infringement has been discovered, the ISP is informed of the violation. Subsequently, the ISP relays this information to the alleged infringer's email account that is registered with the ISP.⁶⁹

A user who opposes a CAS warning may request a hearing before the affiliated reviewers of the American Arbitration Association (AAA). There are six predefined grounds available from which to challenge a CAS warning: misidentification of account, unauthorized use of account (limited to a one-time citation), authorization from the copyright holder, fair use, misidentification of file, and use of works published before 1923.⁷⁰

As might be expected, the CAS has received its fair share of criticism.⁷¹ Critics

66. Industry associations involved include the Independent Film and Television Alliance (IFTA) and the American Association of Independent Musicians (A2IM); Recording Industry Association of American members Universal Music Group, Warner Music Group, Sony Music Entertainment, and EMI Music; and Motion Picture Association of America members Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox Film Corporation, Universal Studios, and Warner Brothers Entertainment.

67. Greg Sandoval, *RIAA Gives Thumbs Up to France's Three Strikes Law*, CNET (Apr. 8, 2009, 2:28 PM), <http://www.cnet.com/news/riaa-gives-thumbs-up-to-frances-three-strike-law/> [http://perma.cc/R8TM-TG6P]. On October 22, 2009, the Constitutional Council of France approved the HADOPI law or Creation and Internet Law (« Loi favorisant la diffusion et la protection de la création sur Internet »), including a controversial "three-strike" procedure which requires Internet service providers to suspend the Internet service of the connection owner, as opposed to the actual accused infringer, for a period between two months to one year. The accused owner is blacklisted and third party Internet service providers are prevented from providing the accused owner an Internet connection. See Eric Pfanner, *France Approves Wide Crackdown on Net Piracy*, N.Y. TIMES (Oct. 22, 2009), http://www.nytimes.com/2009/10/23/technology/23net.html?_r=0.

68. See Memorandum of Understanding, *supra* note 11.

69. See Memorandum of Understanding, *supra* note 11.

70. See Memorandum of Understanding, *supra* note 11.

71. Annemarie Bridy, *Graduated Response American Style: "Six Strikes" Measured Against Five*

routinely comment on the lack of transparency during the closed-door negotiations and formation of the Memorandum of Agreement,⁷² the lack of independence of the advisory board,⁷³ and potential free speech concerns.⁷⁴ Overall, however, commentators consider CAS a welcome development that could help bridge the gap between prevailing copy norms and copyright law.⁷⁵

In its first annual report, the nonprofit Center for Copyright Information (CCI) reported that CAS sent more than 1.3 million Copyright Alerts to account holders in the first ten months of operation. The vast majority of the notifications delivered to account holders (more than 70%) were limited to the initial educational stages, with less than 3% of the notifications reaching the final mitigation stage. According to survey data gathered by the CCI, the majority of surveyed users reported that they would stop their copyright infringing activities upon receiving an alert, while 62% of respondents believe that “it is never acceptable to engage in infringing activity.” Various partners to the CAS have been quick to tout its accomplishments, stating that the CAS meets the combined goals of “being respectful of the consumers,” while remaining an effective means of informing the public about the various legitimate alternatives available in the marketplace.⁷⁶

Norms, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 6 (2012) (evaluating strengths and weaknesses of the CAS); Rebecca Giblin, *Evaluating Graduated Response*, 37 COLUM. J.L. & ARTS 147 (2014) (international comparison of graduated response systems); Daniel Lieberman, *A Homerun for Three Strikes Law: Graduated Response and Its Bid to Save Copyright*, 59 J. COPYRIGHT SOC'Y U.S.A. 223, 257 (2012) (suggesting that a lack of public oversight will reduce scrutiny on when and how many notifications to send out). For discussion on private enforcement of copyright more generally, see Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89(1) NOTRE DAME L. REV. 319 (2013) (discussing enforcement incentives of copyright holders).

72. Several commentators have criticized the government's role in brokering CAS behind closed doors. See Derek E. Bambauer, *The New American Way of Censorship*, ARIZ. ATT'Y 32, 36 (Mar. 2013) (informal roles lack opportunity for judicial reviews); Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479 (2014); Salil K. Mehra & Marketa Trimble, *Secondary Liability, ISP Immunity, and Incumbent Entrenchment*, 62 AM. J. COMP. L. 685 (2014); see also Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 904–05 (2012) (raising free speech concerns); M. Flaim, *Copyright Conspiracy: How the New Copyright Alert System May Violate the Sherman Act*, 2 NYU J. INTELL. PROP. & ENT. L. 142 (2012) (raising antitrust concerns); Margot Kaminski, *Copyright Crime and Punishment: The First Amendment's Proportionality Problem*, 73 MD. L. REV. 587 (2014) (also raising free speech concerns).

73. Bridy, *supra* note 71, at 57; see also Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695 (2011).

74. Peter Groh, *Through A Router Darkly: How New American Copyright Enforcement Initiatives May Hinder Economic Development, Net Neutrality and Creativity*, 13 U. PITT. J. TECH. L. POL'Y 1, 2–3 (2012) (raising free speech concerns).

75. Timothy L. Yim, *Normative Avoision: Revising the Copyright Alert System to Circumvent Normative Backlash*, 6 HASTINGS SCI. & TECH. L.J. 1 (2014) (describing how CAS “deftly sidestepped the normative backlash dilemma”); see also, *supra* note 13.

76. Comment by CCI Board Co-Chair Steve Marks of RIAA, CENTER FOR COPYRIGHT INFORMATION (May 28, 2014), <http://www.copyrightinformation.org/press-release/cci-provides-first-copyright-alert-system-progress-report-highlighting-initial-accomplishments/> [<http://perma.cc/95BL-PCEM>].

II. ENFORCING AGAINST NORMS

It has been bumpy road for copyright enforcement in the digital era. The vast scale of copyright infringing activities that has accompanied the growth of file-sharing technologies, social networks, and broadband Internet has decreased revenues for traditionally copyright-based industries.⁷⁷ This created a vexing dilemma for copyright holders: either aggressively ramp up enforcement against infringers⁷⁸—notwithstanding widespread public condemnation of the practice⁷⁹—or face the potentially devastating effects of rampant online piracy. The copyright-holders chose the former.

Despite a decade of aggressive enforcement, however, entertainment industries observed that online copyright infringements had not been reduced satisfactorily. Moreover, thanks in part to the severe tactics of the copyright enforcement campaign, public condemnation of copyright industries has risen dramatically. The more salient and publicized features of the RIAA settlement campaign and statutory damage awards have clearly undermined the legitimacy of copyright enforcement in the mind of the public.⁸⁰

Was the music industry foolish to ignore the normative reactions to its enforcement effort? In order to break the momentum of the tidal wave of online infringements on peer-to-peer file-sharing networks, music industry representatives realized that they had to impose credible sanctions that would compensate for the low probability that any individual infringer would face repercussions. This economic calculation of deterrence neglected some important psychological considerations, however. Rather than portray them as lawbreakers, media outlets began to depict targeted infringers as unlucky scapegoats forced to atone for the wrongs of an entire generation. It is clear that negative attitudes towards copyright

77. See, e.g., Total Music Sales 1999–2008, CLICKIT TICKET (2011), <http://www.clickitticket.com/MoneyMusicandPiracy.asp> [<http://perma.cc/E86Y-JA65>]; Michael D. Smith & Rahul Telang, *Assessing the Academic Literature Regarding the Impact of Media Piracy on Sales* (Aug. 19, 2012), <http://ssrn.com/abstract=2132153> (arguing that the vast majority of empirical studies find that piracy harms media sales). But see Joel Waldfogel, *The Four P's of Digital Distribution in the Internet Era: Piracy, Pie-Splitting, and Pipe Control*, 7 REV. OF ECON. RES. ON COPYRIGHT ISSUES 3 (2010) (arguing that new technology requires media firms to create new methods for revenue sharing).

78. See, e.g., *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 901 (2012) (upholding damages of \$222,000 for infringement of twenty-four songs); *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 116-17 (D. Mass. 2010) (reducing jury statutory damage award of \$22,500 per work down to \$2,250 on the grounds that the jury award was grossly excessive in violation of the Due Process Clause), *aff'd in part, rev'd in part*, 660 F.3d 487 (1st Cir. 2011) (upholding the constitutionality of statutory damages for copyright violations and remanding for reconsideration of the remittitur motion), *on remand*, 103 U.S.P.Q.2d 1902 (D.Mass. Aug. 23, 2012) (reinstating initial jury award).

79. See Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251 (2011). On the dynamics of litigation and backlash effects, see generally Ben Depoorter, *The Upside of Losing*, 113(3) COLUM. L. REV. 817 (2013) (describing litigation strategies that anticipate and capitalize on public backlash).

80. *FindLaw Survey Reveals RIAA Lawsuits Unpopular with Americans*, FINDLAW (June 29, 2011), <http://company.findlaw.com/press-center/2004/findlaw-survey-reveals-riaa-lawsuits-unpopular-with-americans.html#sthash.69SETR9y.dpu> [<http://perma.cc/E9GK-TM3M>] (“A majority of Americans say the music industry should not sue people who illegally download music off the Internet.”).

law do not serve the interests of copyright owners. First, social psychologists have shown that legal obedience is “morality-based” and/or “legitimacy-based.”⁸¹ Individuals tend to observe laws more easily when they believe that it is the right thing to do.⁸² Infringements are more likely if the public questions the purpose and mandate of copyright law. Moreover, individuals are more likely to disregard legal commands if they believe that the law is out of touch or unjust. Some individuals will ignore the risks of noncompliance more easily and some may even disobey the legal rule as a matter of principle.

In such polarized environments, the stringent enforcement of contentious laws may actually have the unintended effect of reinforcing and strengthening the belief that that a legal rule is unjust, especially if legal sanctions are perceived as excessive relative to the infringing behavior.⁸³ In the context of tax compliance, for example, several studies document that stringent enforcement measures often backfire, inducing increased tax evasion.⁸⁴ Other notable historical examples include the failure of the Prohibition era,⁸⁵ and more recently the War on Drugs.⁸⁶

81. For instance, in the context of tax compliance, there exists an extensive literature on the assumption that “social motivations rather than mere selfishness . . . affect taxpaying behavior, such as ethical concerns and social norms, perceptions of fairness and legitimacy.” Michael Wenzel, *Motivation or Rationalization? Causal Relations Between Ethics, Norms and Tax Compliance*, 26 J. ECON. PSYCHOL. 491, 492 (2005) (citing TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990)); see also John S. Carroll, *Compliance with the Law: A Decision-Making Approach to Taxpaying*, 11 LAW & HUM. BEHAV. 319, 319–35 (1987) (applying decision-making models to tax law); Simon James, et al., *Developing a Tax Compliance Strategy for Revenue Services*, 55 BULL. FOR INT’L FISCAL DOCUMENTATION 158–64 (2001).

82. TYLER, *supra* note 81, at 3–4.

83. In the context of criminal law, William Stuntz applies the term “self-defeating crimes” to describe situations where prosecution can work against the very norms on which they rest, causing “popular norms . . . to move in the opposite direction from the law.” William Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1872 (2000) (suggesting that misguided enforcement priorities can inadvertently shift public support away the underlying laws). For a theoretical model, see Francesco Parisi & Georg Von Wangenheim, *Legislation and Countervailing Effects from Social Norms*, in *THE EVOLUTION AND DESIGN OF INSTITUTIONS* 1, 9 (C. Schubert and G. Von Wangenheim eds., 2006) (describing a cycle of opinion formation whereby public acts of disobedience and protest undermine the legitimacy of legislation, which leads to further opposition).

84. John Carroll, *A Psychological Approach to Deterrence: The Evaluation of Crime Opportunities*, 36 J. OF PERSONALITY & SOC. PSYCHOL. 1512 (1978); Harold Grasmick & Donald Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 17 J. OF CRIM. L. AND CRIMINOLOGY 325 (1980); Kent Smith, *Integrating Three Perspectives on Noncompliance: A Sequential Decision Model*, 17 CRIM. JUSTICE & BEHAVIOR 350 (1990). See generally Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453 (2003) (providing overview of various studies on norms in the area of tax compliance).

85. KENNETH ALLSOP, *THE STORY OF CHICAGO’S PROHIBITION ERA* (1970) (describing causes of success and failure in enforcement campaign on bootlegging); LARRY ENGELMANN, *INTEMPERANCE: THE LOST WAR AGAINST LIQUOR* (1979); ANDREW SINCLAIR, *ERA OF EXCESS, A SOCIAL HISTORY OF THE PROHIBITION MOVEMENT* (1962); Joseph Gusfield, *Prohibition: The Impact of Political Utopianism, in CHANGE AND CONTINUITY IN TWENTIETH CENTURY AMERICA: THE 1920S* 257, 257 (John Braeman ed., 1968); Harry G. Levine and Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69(3) THE MILBANK QUARTERLY 461 (1991).

86. David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 237 (1994) (“[A]fter the expenditure of billions of dollars on a

In this regard, adverse normative reactions to the copyright industry's settlement letter campaign and the statutory damage cases may help explain the continued persistence of copyright infringing behavior despite the increased risk.⁸⁷

The CAS represents a clean break with the past. The CAS is widely understood as an attempt to avoid additional adverse public backlash, to rehabilitate respect for the once revered music industry, and to mend the gap between prevailing norms and copyright law.⁸⁸ To achieve this agenda, the CAS forsakes punitive and compensatory measures altogether. Instead, the CAS and similar graduated response systems in other countries⁸⁹ employ an *information system* approach. By sending out millions of infringement notifications in cooperation with major ISPs, CAS communicates with copyright infringers on several levels. First, the copyright notifications increase basic copyright awareness and provide information about legal alternatives. Second, the notices put subscribers on alert about copyright infringements that have occurred on their network—either by members of the household or outsiders. Third, each alert sends a clear message that Internet behavior is being monitored for copyright infringing actions. This removes the impression of online anonymity. Although the copyright alert system itself does not set in motion legal action by copyright holders against infringers, the system signals to infringers that that copyright holders have obtained the necessary information (IP address) necessary to initiate action if so inclined.

Industry stakeholders and many academic commentators are optimistic about the potential role of copyright information systems. The system is praised for providing a more balanced, less aggressive approach that would avoid backlash, while curbing infringements overall.⁹⁰

This optimistic perspective fails to acknowledge several important drawbacks of copyright information systems. First, even if the CAS successfully avoids the negative reactions of the prior, more punitive approaches to copyright enforcement, it is doubtful that installing a copyright information system will bring about more positive, pro-copyright attitudes. As has been documented, online file sharing and

policy built primarily on the coercion and punishment of drugs distributors and users, the War on Drugs has failed to reduce significantly, much less eliminate, drugs as a problem in our society.”) (discussing negative impact of drugs war policies on constitutional norms and racial equality). For a historical review of the war on drugs, see STAN WISOTSKY, *BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY* (1990); JAMES P. GRAY, *WHY OUR WAR ON DRUGS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* (2001).

87. See Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251 (2011).

88. *Supra* note 13.

89. For an overview, see Giblin, *supra* note 71, at 153–80.

90. Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 334 (2014) (“It remains to be seen whether this approach will achieve its goals, but there can be little doubt that it offers a more balanced approach to illegal file-sharing than the mass litigation that unfolded from 2003 through 2008.”); Rachel Storch, *Copyright Vigilantism*, 16 STAN. TECH. L. REV. 453, 468 (2013) (“The program has a variety of advantages over traditional enforcement under the Copyright Act Copyright holders also benefit from avoiding the bad press associated with copyright infringement lawsuits.”); Timothy L. Yim, *Normative Avoision: Revising the Copyright Alert System to Circumvent Normative Backlash*, 6 HASTINGS SCI. & TECH. L.J. 1 (2014).

illegal streaming have a strong anti-copyright norm component.⁹¹ Social science scholarship suggests that norms are often quite robust and notoriously difficult to manipulate.⁹² The dynamics of social norms are complex and unpredictable.⁹³ Once internalized, it is widely understood that noncompliant norms are hard to reverse.⁹⁴ Given the widespread nature of online piracy and the perceived excesses of punitive copyright enforcement in the past, it seems unlikely that merely abandoning the prior enforcement model can reverse moral intuitions about copyright infringing behavior. While a literature describes how legislators can express collective commitments or set collective expectations,⁹⁵ such conditions are notably absent in the context of a privately negotiated information system such as CAS. In light of these observations, the CAS is a risky proposition for copyright holders. If the CAS indeed fails to restore the public image of content industries and reverse anti-copyright norms, copyright holders have undermined deterrence without obtaining any countervailing benefits.

Second, instead of improving public attitudes about copyright law, the privacy implications of copyright information systems may further damage copyright law's reputation. Content industries are quick to point out that CAS does not force ISP's into disclosing the identity, names or contact information of infringing subscribers. But architects of the copyright information systems overlook an important aspect of privacy harms. In their defense of copyright information systems, content industries focus on the absence of so-called "objective" privacy harms, where there is an "unanticipated or coerced use of information."⁹⁶ But privacy injuries may also involve "subjective privacy harms,"⁹⁷ where there is a perception of unwanted

91. See, e.g., Yuval Feldman & Janice Nadler, *The Law and Norms of File Sharing*, 43 SAN DIEGO L. REV. 577, 605–12 (2006) (conducting a survey study); Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing* 12 J. INTELL. PROP. L. 39, 51 (2004) (noting clash between law and social norms about online music sharing); Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 549 (2003) (discussing how computer code fosters sharing norms).

92. On the internalization of social norms, see Robert C. Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000).

93. Robert Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1 (2000) (describing tipping point effects with norms); Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) (suggesting that gradual approaches are more effective when anti-legal norms are in place); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996) (describing effect of accidental conditions).

94. Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1867 (2009).

95. On the role of laws in shaping community norms and influencing behavior, see Paul Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839 (2000). When law creates a focal point by expressing values that might tip norms to a new equilibrium, this process may create a social norm or internalize a normative value. See GARY S. BECKER, *ACCOUNTING FOR TASTES* (1996); Robert D. Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 585 (1998). The idea of law as focal point that coordinates social expectations among citizens is explored further in Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000).

96. M. Ryan Calo, *The Boundaries of Privacy Harms*, 86 IND. L.J. 1131, 1134 (2011).

97. These privacy harms are "subjective" in the sense of being internal to the person harmed.

observation.⁹⁸ Such privacy harms involve “unwelcome mental states—anxiety, embarrassment, fear—that stem from the belief that one is being watched or monitored.”⁹⁹ Importantly, an unwanted observation need not be actual in order to constitute a privacy harm, only perceived or suspected, following from a “the mere belief that one is being observed.”¹⁰⁰

Although copyright information systems sidestep the problem of objective privacy harms, they likely inflict these more subjective privacy injuries. Like other surveillance systems that intrude on subjective privacy, the CAS involves observations that are systematic, part of a plan or pattern that involves “pervasive individual monitoring.”¹⁰¹ Such systems disrupt what privacy specialist term “episodic solitude”—i.e., the periodic absence of the perception of being watched.¹⁰² By coopting Internet service providers in the pursuit of more effective copyright enforcement, copyright information systems amplify the perception that online activities are being monitored. Individuals can be expected to react adversely to this, especially if such privacy harms seem disproportionate to the nature of the offense at issue.

Given these observations, like the earlier enforcement approaches that preceded it, the CAS might in fact further widen the gap between noncompliant copy-norms and copyright law. In the next Section we examine our intuitions on the basis of a series of survey studies and experiments that span a ten-year period.

III. STUDY DESIGN

A. INTRODUCTION

We collected data from two generations of college students in 2011 and 2014–2015. Together with data obtained in the 2003 period,¹⁰³ we study copyright norms and online behavior among young college students for a period close to a decennium. This timeline provides insight into potential changes in norms and behavior during a period when both copyright related technologies evolved at a rapid pace and content industries experimented with a varied set of enforcement approaches to combat digital piracy. In doing so, the current study seeks to determine the effectiveness of various approaches to copyright enforcement. Moreover, given the wide range of enforcement approaches deployed by the

98. In a seminal book Alan Westin identified four essential aspects of privacy: (1) solitude; (2) intimacy; (3) anonymity; and (4) reserve (“the creation of a psychological barrier against unwanted intrusion”). ALAN F. WESTIN, *PRIVACY AND FREEDOM* 31–32 (1967).

99. Calo, *supra* note 96, at 1144–52 (distinguishing “subjective” and “objective” privacy harms).

100. See M. Ryan Calo, *People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship*, 114 PENN. ST. L. REV. 809, 842–48 (2010).

101. *Id.* at 1145.

102. See DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 163–64 (2008) (describing the role of solitude in daily life); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject As Object*, 52 STAN. L. REV. 1373, 1423–28 (2000); Paul Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1640–41 (1999).

103. See Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251 (2011).

entertainment industry, the study also contributes to the empirical literature on law enforcement generally.

To advance our understanding of the interaction between norms and deterrence, we explore the dynamics of enforcement on self-reported norm evaluations in the context of a survey study and experiment.

B. METHODOLOGY AND CONSTRUCTION OF VARIABLES

Our study applied scenario and vignette methodologies. Students were unaware that the study would be conducted in class the day it was administered. None of the students had taken classes in intellectual property law or copyright law. To avoid underreporting and esteem-based distortions,¹⁰⁴ the survey was conducted anonymously in a large auditorium with a large seating capacity. Participants were informed that the survey was part of a study on how people respond to copyright enforcement. No financial compensation was offered for participating in the study.

A total of 455 students participated in experiments conducted in 2011 (n=263) and 2014 (n=108) and 2015 (n=84). We employed the same materials and procedures across all studies.

The study consisted of three consecutive parts.

1. First Part

In the first part of the study, we examined: (1) how respondents obtain copyrighted content; (2) the personal norms and perceived social norms regarding copyright infringements; (3) the perceived likelihood of enforcement.

First, we obtained information about participants' prior history as consumers of digital content and their use of various technologies to obtain such content. Specifically, we asked if and how much music or movies participants had obtained by way of various technologies, including Napster, Grokster, Kazaa, Vuze, The Pirate Bay, Rapidshare, Bittorrent platforms, or "any other online technology that enables downloading music without paying for it."¹⁰⁵ We also inquired whether and to what extent respondents had shared music or movies with friends by copying

104. Colin Camerer, & Ernst Fehr, *Measuring Social Norms and Preferences Using Studyal Games: A Guide for Social Scientists*, in FOUNDATIONS OF HUMAN SOCIALITY (J. Henrich, R. Boyd, S. Bowles, C. Camerer, E. Fehr, H. Gintis, R. McElreath eds. 2004).

105. See survey form, Appendix. We asked students to "exclude from consideration iTunes store or other licensed downloading sites." In a 2015 extension of the study (n=84) we included additional questions that distinguished between unlicensed peer-to-peer downloading and unauthorized online streaming. Questions relating to unauthorized streaming included: "Have you ever streamed TV shows or movies from the Internet from sites that might be unauthorized/operate without licenses from the copyright owner?"; "If so, how many TV SHOWS AND MOVIES have you streamed from these sites (estimate)"; "Do you currently (in the past 3 months) STREAM music or movies on/from sites that might be unauthorized/operate without licenses from the copyright owner?"; and, "In your estimation, what percentage of the students who violate copyright law by watching content on STREAMING SITES will eventually be caught?" Because the results are similar across 2014 peer-to-peer and 2015 streaming studies, we will focus primarily on the results of the 2014 survey.

from each other's computer or iPod.

We obtained information regarding current online behavior by asking whether participants had experience with technologies that provide unlicensed content from the Internet within the past three months and whether they currently were subscribed to any licensed music or movie platforms or download services (including but not limited to iTunes Store, Netflix, Spotify, Amazon Prime, etc.).

The answers to these survey questions allowed us to put together a profile of each respondent, enabling us to: (1) distinguish between frequent-, infrequent-, and non-infringers of copyright; (2) identify respondents with file-sharing experience in the past who are now exclusively purchasing content through legal avenues; (3) observe intentions to engage in future copyright infringements.

Next, we surveyed: (a) the perceived likeliness of copyright enforcement; (b) the personal norms and perceived social norms regarding copyright infringements; and (c) current and intended future copyright infringing behavior online.

In order to measure these attitudes and assumptions, we presented participants with a list of statements. The following items (dependent variables) were included in the study:

(a) *Moral Perception of Copyright Infringements in Part 1.* Two statements and questions gauged respondents' attitudes toward copyright law and copyright infringements: (1) "I feel that it is morally wrong to use file-sharing technology to download music without paying"; (2) "The use of file-sharing technology to download movies without paying is morally condemnable." An additional statement examined public attitudes: (3) "Do people in general think that downloading music without paying for it is morally correct?" And one statement probed into the attitudes of the peer group: (4) "How likely is it that your friends and peers will disapprove when you tell them that you download music on file-sharing networks?"

(b) *Perception of Copyright Enforcement in Part 1.* Four questions assessed the participants' evaluation of the effectiveness and likeliness of enforcement with regard to their own and others' potential copyright infringing behavior online: (1) "In your estimation, how many file-sharers that continue to download on a daily basis will face repercussions?"; (2) "In your estimation, what are the chances of getting detected and prosecuted for file-sharing?";¹⁰⁶ (3) "In your estimation, what are the chances of getting detected and receiving a letter from your Internet service provider or the Recording Industry Association of America (RIAA) about your file-sharing?"; (4) "In your estimation, what percentage of the students who violate copyright law by downloading music on file-sharing networks will eventually be caught?" Additionally, we verified whether a respondent had "received a Copyright Infringement Alert letter from their Internet Service Provider."¹⁰⁷

106. Respondents were requested to indicate the perceived likelihood on a scale between "Zero, Less than 1/million, Less than 1/10000, About 1/1000, About 1/100, About 1/10, About 1/2, Almost certain."

107. We included this question at the end to verify whether a respondent's perception of enforcement might be affected by this experience. Due to small sample bias, receiving a CAS notification likely induces higher estimation of likeliness of enforcement.

(c) *Future Copyright Infringing Behavior in Part 1.* Four items measured respondents' current and future online consumption of copyrighted content: (1) "In [the coming year],¹⁰⁸ how likely is it that you will download music from file-sharing platforms or technologies (not including iTunes and other licensed download stores)?"; (2) "Your favorite new artist is about to release his/her/their new album. You receive a text message from a friend that the new album is available on the file-sharing platform that you use. How likely is it that you will download the album rather than wait and buy the album when it will be released?"; (3) "A friend shows you a file-sharing site that has all the music albums that you ever wanted. Everyone on the site seems to have the same music taste as you do. How many songs will you download?"

Overall, Part 1 of our study provides a bird's-eye view of the online copyright landscape over the past four years. First, these questions enable us to verify how copyright infringing behavior is affected by deterrent (i.e., likeliness of enforcement), normative (i.e., perceived immorality of file-sharing) or pragmatic (i.e., availability of legal alternatives) factors. Second, the data allows us to observe the evolution of infringing behavior over time. To that end, the questions provide a timeline of past and present behavior and norms among students in 2011 and 2014. Additionally, in order to evaluate the recent trends towards online streaming, we conducted an additional study in 2015 that applied the same questions to online streaming. This second survey also increased the amount of CAS recipients in the sample population.¹⁰⁹ Finally, we are able to extend the timeline back to 2003 with data obtained from identical survey questions presented to undergraduate students in that year.¹¹⁰

2. Second Part

After all respondents had completed the survey part of the study, Part 2 randomly assigned our participants with a vignette that described a current (past) enforcement approach to online copyright piracy. By "priming" respondents with vignettes that described enforcement systems, the subsequent series of questions examined if and how students react to various copyright enforcement modalities and compare the effects of various enforcement regimes.¹¹¹

Respondents were randomly assigned to one of six groups. We presented each group with a newspaper clipping from a "recent article in a major American

108. The dates were 2011–2012 and 2014–2015, respectively for the 2011 and 2014 studies.

109. See *supra* note 107. Moreover, in this separate study we removed the survey questions part and started with the scenario vignettes of Part 2 instead. This allowed us to check for inadvertent priming effects of the survey itself, separate from the vignette scenario. As we expected, the opening survey questions do not have a significant effect on the results in subsequent parts of the study.

110. See Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127 (2005).

111. Priming is an implicit memory effect, developed in psychology research, where exposure to one stimulus influences the response to another stimulus. See, e.g., Endel Tulving et al., *Priming Effects in Word-Fragment Completion Are Independent of Recognition Memory*, 8 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 336, 336 (1982).

newspaper” that described a particular enforcement approach (independent variables). The newspaper clippings were selected to accurately describe the various enforcement modalities employed to combat online piracy.

The first scenario described the original RIAA settlement letter campaign: “On September 8, 2003, the recording industry first sued 261 individuals for sharing songs on peer-to-peer (P2P) file sharing networks, kicking off an unprecedented legal campaign against the people that should be the recording industry’s best customers: music fans. Since then, the recording industry (Record Industry Association of America) has filed, settled, or threatened legal actions against at least 30,000 individuals—a random selection from the millions of Americans who have used P2P networks. Lawsuits are filed monthly, and are also supplemented by a flood of ‘pre-litigation’ settlement letters designed to extract settlements without any need to enter a courtroom.”¹¹²

We also presented to different groups two variations of the RIAA campaign. One clipping highlights the random nature of the selection of recipients of settlement letters;¹¹³ a second newspaper clipping contains the announcement by the RIAA that it has decided to abandon the settlement letter strategy and stop sending out enforcement notifications.¹¹⁴

The second scenario recounted the most (in)famous case involving a statutory damage award for file-sharing: “Jammie Thomas-Rasset, the woman who has been fighting the recording industry (Record Industry Association of America) over 24 songs she illegally downloaded and shared online four years ago, has lost in court. A court decided today that she was liable for \$1.5 million in copyright infringement damages to Capitol Records, or \$62,500 for each song she illegally shared in April 2006.”¹¹⁵

Additionally, we presented a second group of respondents (n=46) with a similar scenario that also described how, in a later stage, the court reduced the award substantially.¹¹⁶

The third enforcement scenario described the new Copyright Alert System: “This month, several major Internet service providers, including Verizon, Comcast, AT&T and Time Warner Cable, agreed to help record labels identify Internet users who downloaded copyrighted content illicitly, warn them about the piracy and punish recalcitrant abusers. Under the agreement, the Internet providers would send up to four warning letters to owners of accounts suspected of pirating content.

112. *RIAA v. The People: Five Years Later*, ELECTRONIC FRONTIER FOUND. (Sept. 30, 2008), <https://www.eff.org/wp/riaa-v-people-five-years-later> [<http://perma.cc/32LB-KRHU>]. The language of this Article was edited to provide a more detailed and factual description for the purposes of the scenario.

113. Steven Musil, *Jammie Thomas Hit with \$1.5 Million Verdict*, CNET (Nov. 3, 2010), <http://www.cnet.com/news/jammie-thomas-hit-with-1-5-million-verdict/> [<http://perma.cc/7EBQ-Z5MN>] (“Earlier this year, the judge reduced the amount to \$54,000.”).

114. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec 19, 2008), <http://www.wsj.com/articles/SB122966038836021137> [<http://perma.cc/7EBQ-Z5MN>].

115. Musil, *supra* note 113.

116. The instructions provide as follows: “However, CNET reports that a judge has now cut that fee to \$54,000.”

If illegal downloads continued, the Internet service providers could take a range of punitive measures—redirecting users to a landing page with material on copyright abuse, throttling their Internet speeds, possibly cutting their broadband connections.”¹¹⁷

A fourth enforcement scenario explained the recent development of the private enforcement model known as copyright trolling,¹¹⁸ whereby individuals acquire copyrights in order to gain commercial profit by means of copyright enforcement: “At least 23,000 file sharers soon will likely get notified they are being sued for downloading the latest music album by [name omitted] in what has become the single largest illegal-BitTorrent-downloading case in U.S. history. A federal judge in the case has agreed to allow the U.S. Copyright Group to subpoena internet service providers to find out the identity of everybody who had illegally downloaded the album—meaning the number of defendants is likely to dramatically increase as new purloiners are discovered. Once an ISP gets the subpoena, it usually notifies the account holder that his or her subscriber information is being turned over to the Copyright Group, which last year pioneered the practice of suing BitTorrent downloaders in the United States. Subpoenas are expected to go out this week.”¹¹⁹

Although every respondent might have different experiences with or knowledge about the various enforcement regimes, Part 2 sought to prime respondents on a particular regime in order to clarify and make more salient the details of that regime. After reading their respective randomly assigned enforcement scenario, participants again completed a survey containing some of the items from the first study: anti-copyright norms, the evaluation of music industry enforcement policies, and download behavior. We included the following items:

(a) *Normative Response to Copyright Enforcement in Part 2.* Five statements and questions gauged the normative appraisal of online copyright infringements to detect potential anti-copyright norms: (1) “These new developments are gradually making me realize that illegally downloading music is not ethical”; (2) “The policies of the music industry conflict with my sense of justice”; (3) “The policies of the music industry are an attack on my freedom to listen to music”; (4) “These developments are causing me to adjust my norms regarding the illegal exchanges of music”; and (5) “This is making me realize that legislators should step in and create more balanced rules in copyright law.”

(b) *Deterrent Effect of Copyright Enforcement in Part 2.* Four questions assessed participants’ evaluation of the effectiveness and likelihood of enforcement

117. See Nate Anderson, *Major ISPs Agree to “Six Strikes” Copyright Enforcement Plan*, ARSTECHNICA (July 7, 2011), <http://arstechnica.com/tech-policy/2011/07/major-isps-agree-to-six-strikes-copyright-enforcement-plan/> [<http://perma.cc/JA4G-A4VJ>].

118. Shyamkrishna Balganes, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723 (2012); Luke S. Curran, *Copyright Trolls, Defining the Line Between Legal Ransom Letters and Defending Digital Rights: Turning Piracy into a Business Model or Protecting Creative from Internet Lawlessness?*, 13 J. MARSHALL REV. INTELL. PROP. L. 170, 189–90 (2013).

119. David Kravets, *Biggest BitTorrent Downloading Case in U.S. History Targets 23,000 Defendants*, WIRED (May 14, 2011), <http://www.wired.com/2011/05/biggest-bittorrent-case/> [<http://perma.cc/PQ3S-BD9M>].

with regard to their own and others' potential copyright infringing behavior online: (1) "In your estimation, what are the chances of getting detected and prosecuted for file-sharing?"; and (2) "In your estimation, what percentage of the students who violate copyright law by downloading music on file-sharing networks will eventually be caught?"

(c) *Future Copyright Infringements in Part 2.* One item measured respondents' current and future online consumption of copyrighted content: (1) "In [the coming two years],¹²⁰ how likely is it that you will download music from file-sharing platforms or technologies (not including iTunes and other licensed download stores)?"; and (2) "Most people will continue to take the risks involved with file sharing."

Respondents provided their responses on the basis of a seven-point scale, assigning scores between two endpoints (an answer of "1" indicated that the student strongly disagreed with the statement; "9" indicated that the student strongly agreed).¹²¹

3. Third Part

The final part of our study presented respondents with a so-called immunity condition. We informed respondents that a new technology is now capable of fully shielding them from all enforcement. The scenario described how "a number of young computer experts have developed a new file-sharing application that cannot be traced." With this technology individual IP numbers are "scrambled as a result of which it will be as good as impossible for the music industry to detect and identify individuals who share music." In the first months of introducing this technology, the likelihood of getting caught will be reduced to 0.00000001% (1 in 100,000,000 or 1/100 million). We ask respondents what they will do in this "new situation" where "the likelihood of getting caught is reduced to 0.00000001% and the current policy of pursuing file sharing continues."

We asked participants if, and to what extent, they will resume downloading in light of this immunity. We included the following items:

Behavioral Adjustment in Part 3: (1) "Because of the enforcement policy of the music industry prior to the introduction of the new protective software influences (see newspaper clipping), I will download more"; (2) "The enforcement policy of the music industry prior to the introduction of the new protective software (see article) influences the amount of music I will resume downloading"; (3) "In [the coming years], how likely is it that you will download music from file-sharing platforms or technologies (not including iTunes and other licensed download stores)?"; (4) "Your favorite new artist is about to release his/her/their new album. You receive a text message from a friend that the new album is available on the file-sharing platform that you use. How likely is it that you will download the

120. The dates were 2011–2012 and 2014–2015, respectively for both studies.

121. Items 2, 3, and 4 were reverse coded and combined with item 1 to form one average anti-copyright norm score.

album rather than wait and buy the album when it will be released?"; and (5) "A friend shows you a file-sharing site that has all the music albums that you ever wanted. Everyone on the site seems to have the same music taste as you do. How many songs will you download?"

Finally, it should be noted that the scenario methodology, as employed in this study, has certain strengths and weaknesses. Generally, scenario studies combine the benefits of laboratory research and correlation research.¹²² Our study design enabled us to analyze causality by manipulating the independent variables, while using realistic, everyday situations based on statutory rules and case law.¹²³ As is the case with all laboratory experiments, a study of this nature is susceptible to the criticism that the results cannot be generalized to the public at large. For the present purpose, however, this criticism is less damaging. By exclusively enlisting college students, our design measures the reactions of the specific group targeted in the litigation campaign by the entertainment industry. A general limitation of any scenario study is of course that it does not measure actual behavior in the real world. In this context, however, a laboratory experiment involving actual downloading by respondents is not feasible due to the copyright infringing nature of the activities involved.¹²⁴

IV. RESULTS

Part IV presents the main findings of our empirical study. First, we describe the background of survey participants as it relates to their access to copyrighted content, past infringing behavior, subscription to legal content, future plans, perceived deterrence, and their judgment about the (im)morality of copyright infringements. Next we present the results from the comparison of various enforcement systems. Finally, we review the main findings when new technologies prevent enforcement.

A. PROFILE OF THE RESPONDENTS: THE COPYRIGHT LANDSCAPE

The first part of our study surveyed how young individuals obtain copyrighted content, how they feel about copyright infringement, and what their expectations are about copyright enforcement.

122. See David De Cremer & Daan Van Knippenberg, *How Do Leaders Promote Cooperation? The Effects Of Charisma And Procedural Fairness*, 87 J. APPLIED PSYCHOL. 858, 860 (2002).

123. See, e.g., Robert L. Dipboye, *Laboratory vs. Field Research in Industrial and Organizational Psychology*, 5 INT'L REV. INDUS. & ORG'L PSYCHOL. 1, 25 (1990) (addressing the legitimacy of laboratory research studies).

124. Studies that measure the effect of real-world file sharing on music industry sales have yielded varying findings and outcomes. Compare Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 3 (2007) (minimizing the negative impact of file sharing on CD sales) with Stan Liebowitz, *File-Sharing: Creative Destruction or just Plain Destruction?*, 49 J.L. & ECON. 1, 14-17 (2006) (presenting evidence that file-sharing diminishes recording industry revenues). For an overview of the empirical work in this area, see Stan Liebowitz, *Economists Examine File-Sharing and Music Sales*, in INDUSTRIAL ORGANIZATION AND THE DIGITAL ECONOMY 145 (Gerhard Illing & Martin Peitz eds., 2006).

1. Copyright Infringements

Most respondents admit having engaged in copyright infringing behavior at some point in the past. As Table 1 below illustrates, over half of respondents report having downloaded more than 100 music files on peer-to-peer file sharing platforms (193 out of 349) and/or having exchanged other music from iPods and similar music storage devices (149 out of 349).¹²⁵ Barely 11% of respondents (41 out of 349) indicate that they never have downloaded unlicensed copies of music or movies from file sharing technologies.

Music files are obtained in much larger numbers than movies: 70% of respondents report having downloaded more than 51 songs, compared to 12% who report having downloaded a comparable number movies. Although movie files take more time to download than music due to their comparatively larger size, movies are regularly obtained by way of file-sharing platforms, as well as by direct transfers across devices.

	P2P		Swapping	
	Music	Movies	Music	Movies
None		41		66
Less than 10	16	92	16	99
Between 10-50	48	61	51	54
Between 51-100	51	19	65	15
More than 100	193	25	149	10

Table 1. Access to Unlicensed Materials

2. Legal Consumption

Over the past ten years, content industries have developed a wide range of online services through which one can obtain licensed music and movies (Spotify, Netflix, Amazon Prime, etc.). To measure the impact of these legal alternatives on file-sharing and online copyright infringements, our 2014 and 2015 studies also surveyed respondents' consumption patterns.

Although obtaining music through authorized, online channels is commonplace,

125. Individuals can transfer their music and movie libraries readily across USB hard drives, memory sticks, iPod players, etc. Like audiotape recordings of long-play records before it, such infringing copying is intractable to copyright holders. Media reports suggest that young individuals have massive amounts of unauthorized music and movie content on their iPods and personal computers. See Depoorter et. al, *supra* note 3, at 1254. Our data confirms this trend. As we discuss below, the distinction between users of peer-to-peer technologies on the one hand and users of direct swapping on the other hand can be useful in distinguishing between respondents with different levels of technological expertise.

illegal downloading is a complement to legal consumption for the vast majority of respondents. In the 2014 group, 92.60% (88 out of 95) of respondents obtain music or movies from legal as well as unauthorized platforms. Only 7.4% of illegal downloaders obtain music exclusively through illegal means.

A similar pattern obtains for illegal and illegal streaming. In the 2015 survey, 98.3% of respondents indicate that they access licensed content from online streaming channels, while 42% of these respondents also report obtaining access by way of unlicensed streaming sites.

3. Prospective Copyright Infringements

With regards to a declared intention to infringe copyright in the future, the data reveals a bifurcated landscape. Both sides of the extreme are well-represented, with a large group of frequent downloaders (76/343 or 22%) and a large group of individuals not downloading at all (112/343 or 32%). Download intensity was distributed fairly evenly between 2-8 over a 9 point scale, where 9 indicated “very likely.” Download intentions have not reduced significantly over the past four years (4.34 in 2011 compared to 4.27 in 2014). The data from 2014 provides some evidence of the potential impact of legal alternatives and copyright enforcement to date: a subset of respondents indicates that it is very unlikely that they will engage in illegal downloading (31/103), while another group indicates that it is very likely that they will engage in illegal downloading (21/103).

Overall it appears that past infringing behavior is a relatively good predictor of future behavior. Analysis of variance of future infringement behavior reveals a significant effect of past infringement behavior, $F(1,338) = 20.78$, $p < .001$. Respondents who have not engaged in copyright infringing behavior in the past do not reveal any intention to do so in the future.¹²⁶ Conversely, frequent downloaders indicate that it is very likely they will continue to download in the future.¹²⁷

4. Moral Perceptions of Copyright Infringements

Respondents express ambivalence regarding the morality of online copyright infringements and illegal downloading. When asked whether they feel that it is morally wrong to download music on peer-to-peer platforms, the median response (4.29) is near the midway point on a scale of 1 (“not at all” immoral) to 9 (“very” immoral). Downloading movies is considered to be only slightly more immoral than music (4.59).

Respondents also believe that the public is not very opposed to downloading music from peer-to-peer platforms (3.59). Respondents do not anticipate disapproval of copyright infringing behavior from peers and friends (2.01).

As illustrated by Figure 1 below, the moral perception of copyright infringing

126. On average, non-downloaders score 1.7 on a 9 point scale—with 9 being very likely—that they will begin downloading unlicensed content in the future.

127. On average, heavy downloaders score 5.54 on a 9 point scale—with 9 being very likely—that they will begin downloading unlicensed content in the future.

behavior has not changed much over the past decade. Despite the content industry's effort to align social norms with existing copyright laws, the normative evaluation of illegal downloading has remained relatively stable over the period from 2003 to 2014. If anything, the perceived immorality of copyright infringements has reduced over time (from 4.86 in 2003 to 4.08 in 2014).

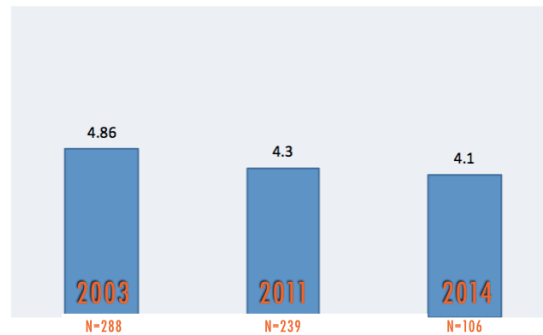


Figure 1. Perceived Immorality of Illegal Downloading (9 = very immoral)

Next, we examined the relationship between illegal downloading and the normative evaluation of copyright infringements. As expected, moral evaluations and behavior are aligned: frequent downloaders of infringing materials do not believe that file-sharing is very immoral. Conversely, individuals who have never downloaded music or movies from peer-to-peer platforms are more likely to find such behavioral immoral. Table 2 below illustrates this pattern.¹²⁸

Past Download History	Perceived Immorality
None	1.70
Less than 10	2.94
Between 10 - 50	3.26
Between 50 - 100	3.16
More than 100	5.54

Table 2. Download History & Perceived Immorality (1 = Very Immoral)

128. Past download behavior significantly affected the moral perceptions of infringement behavior. We obtained a significant effect of past behavior, $F(1,340) = 7.11, p < .001$, on the item, "I feel that it is morally wrong to use file-sharing technology to download music without paying." A similar effect was obtained, $F(1,338) = 6.18, p < .001$, for the item, "The use of file-sharing technology to download movies without paying is morally condemnable."

5. Deterrence

Respondents perceive the risks involved with illegal downloading to be quite modest. When asked about the chances of getting caught for illegal downloading, 34% of respondents estimate that the probability is less than one in a million. About 43% of respondents put the chance at less than 1/10,000. When asked how many illegal downloaders will “face repercussions,” over 64% of respondents believe that “very few” will face any repercussions (1 out of 9 on a 9-point scale where 9 indicates very many and 1 very few). The perceived chance of getting caught remained relatively stable between 2011 and 2014.

Risk-estimations are very similar among non-downloaders and downloaders alike. Both groups of respondents perceive the risk to be very modest (3.05 and 3.18 on a 9 point scale where 1 indicates that “very few downloaders will face repercussions”).¹²⁹ Moreover, as Table 3 below illustrates, when presenting different probabilities of getting caught, non-downloaders and downloaders are evenly distributed across risk estimations.¹³⁰

Perception of Risk	Non-Downloader (in %)	Downloader (in %)
< 1/million	30.00	32.57
< 1/10000	30.00	41.69
< 1/1000	30.00	17.92
< 1/100	7.50	4.23
< 1/10	0.00	0.98
< ½	0.00	0.98
Zero	2.50	1.62

Table 3. Perceived Risk and Infringement Profile

Just 7 out of 107 respondents in the 2014 survey received CAS notifications from their Internet service provider. Although this number is too low to provide reliable information, respondents who previously received a CAS notification estimate the chances of enforcement to be much higher compared to respondents who have not received any CAS notification (for instance, 42% of CAS recipients estimate the chances of getting caught at 1/100, compared to 8% of non-CAS recipients).

129. The difference between the group of non-downloaders and the group of downloaders was non-significant, $F(1,345) = .13, p < .75$.

130. No significant differences between the group of non-downloaders and downloaders occurred, $\chi^2 (df=6) = 5.70, p < .50$.

B. EFFECT OF VARIOUS ENFORCEMENT APPROACHES: SCENARIOS

In Part 2 we presented students with various current (and past) enforcement approaches. By priming respondents with these enforcement systems, we examined the reactions of respondents to the various copyright enforcement approaches that have been deployed in the past decade. We obtained the following results.

1. Effect on Public Attitudes

Respondents reacted most negatively to the award of statutory damages for music-file sharing and to copyright enforcement as a law firm business strategy.

On a 9 point scale, where 1 indicated maximum agreement with the statement that “music industry is conducting an unjust, disproportionate policy,” the news clipping of the statutory damage award in the Jammie Thomas-Rasset case received an average response of 4.09 (n=55), while the private troll model scored 4.60 (n=50). The other scenarios yielded higher scores on this item.¹³¹ The RIAA’s settlement letter campaign for instance was considered more acceptable (5.47, n=68). Remarkably, however, respondents that read the description of the CAS (n=51) provided an evaluation that is only slightly more favorable than respondents in the group that read a description of the RIAA settlement campaign (5.74 versus 5.47).

Similarly, respondents agree most strongly with the statement that private troll enforcement and statutory damage awards “conflict with their sense of justice” (5.10 and 4.89, respectively, on an inverse 9 point scale, compared to an average of 5.65 across all enforcement systems).¹³² Remarkably, respondents did respond more favorably to the CAS system (6.04) than to the RIAA settlement campaign (6.53).¹³³ Although respondents do not agree very much (6.63 where 9 indicates disagreement) with the statement that the policies of the music industry are “an attack of the freedom to listen to music,” respondents again did not react more favorably to the CAS (6.47) than the RIAA settlement campaign (6.79).¹³⁴

When asked whether “legislators should step in to create more balanced rules in copyright law,”¹³⁵ respondents voiced stronger agreement when confronted with the private troll description (3.64 where 1 indicates maximum agreement and 9 greatest disagreement) than when assigned the statutory award newspaper clipping (4.07).¹³⁶ Here as well, responses to the CAS (4.61) are more negative than to the

131. The differences among scenarios on this item were significant, $F(6,297) = 2.74, p = .013$.

132. The full question reads, “I am of the opinion that the music industry is conducting an unjust, disproportionate policy. The score of 1 indicates maximum agreement and 9 represent maximum disagreement.” Table A.1 (see Appendix) presents the results for the various scenarios and variations. The effect of scenario on this item was significant, $F(6,297) = 21.42, p = .027$.

133. Although the response to the CAS was more negative than to the RIAA campaign, no significant difference was observed across both these enforcement scenarios.

134. Scenario type did not affect the scores on this item, $F(6,297) = 1.54, p = .16$.

135. The differences among scenarios were significant, $F(6,295) = 3.82, p < .001$.

136. Respondents in the group that received the newspaper clipping that described the decision of

RIAA settlement campaign (5.47).¹³⁷ Downloaders (4.63) and non-downloaders (4.4) alike seem to share this sentiment.¹³⁸

None of the enforcement regimes seem likely to alter pre-existing attitudes about copyright infringement.¹³⁹ When asked whether they agree that the developments in enforcement make them “realize that illegal downloading is unethical,” all enforcement systems fare rather poorly (5.58 on average, where 1 indicates maximum agreement and 9 maximum disagreement).

2. Deterrent Effects

When asked what the chances are of getting caught eventually for downloading music on file-sharing networks, 28% to 48% of respondents believe that the probability is less than one in a million. Seventy to 80% of respondents estimate that the likelihood is between 1/1,000,000 and 1/10,000. Although the difference is non-significant, respondents estimate that the chances of getting caught under the CAS are somewhat higher than with the RIAA settlement letter campaign (49% versus 35% at 1/10,000; 9.80% versus 2.94% at 1/100). While 44.12% of respondents in the RIAA group put the chances at less than one in one million, only 29.41% of respondents in the CAS group estimate the chances that low.¹⁴⁰

Overall, respondents do not anticipate that any of the presented enforcement models are likely to deter online piracy. Across all enforcement scenarios, respondents believe that “most people will continue to take the risks involved with file-sharing” (2.78 on a 9 point scale where 1 indicates maximum agreement). The private troll model and the CAS are the only two enforcement scenarios that obtain a statistically significantly higher score than the other scenarios (3.58 and 3.61, respectively).¹⁴¹

C. EFFECT OF PERFECT ANONYMITY

Prior research suggests that punitive approaches to copyright enforcement regimes can have a backlash effect. A prior research study that we conducted with 360 undergraduates demonstrated that stringent enforcement regimes might induce higher overall downloading when new technologies reduce the risk of apprehension.¹⁴² The present study extends this research by exploring the effect of

the judge to lower the jury award felt even more strongly (3.68) that reform is needed.

137. The mean scores are 5.26 for non-downloaders and 4.32 for downloaders.

138. Differences do appear, however, with regard to the reactions to the RIAA settlement campaign. Downloaders reacted much more adversely to downloading than non-downloaders. This observation is in line with prior research that showed that public reaction to file sharing depends on prior usage of file sharing technology.

139. Non-significant: $F(6,297) = 1.94, p = .075$.

140. Non-significant: $\chi^2 (df = 36) = 40.44, p = .28$.

141. Scenario type yielded a significant effect on this item, $F(6,297) = 5.47, p < .001$.

142. See Ben Depoorter, et. al, *supra* note 3, at 1252 (observing download backlash effect when manipulating the severity of punishment in enforcement scenarios).

variations in the severity of enforcement within existing copyright enforcement approaches. The final part of our study informed participants of a new technology capable of creating perfect anonymity, thereby fully shielding them from copyright enforcement.¹⁴³ We examined the effect of the various enforcement regimes on the prospective download behavior of respondents in this subsequent, hypothetical state of immunity.

Participants who previously faced the scenario of severe sanctions indicate that they plan to engage in more downloading relative to participants faced with more moderate enforcement scenarios. When asked whether the enforcement policy prior to the introduction of the new protective software would make them download more, private trolls and statutory awards scored the highest (4.54 and 4.45, respectively on a scale where 1 = not at all and 9 = very much so). Again, the results for the RIAA settlement campaign and the CAS are closely matched (3.88 and 3.84, respectively).

When respondents were asked about the likelihood that they will download music from file-sharing platforms or with unlicensed technologies in the coming years, the overall number is 4.46 (9 being likely). The most punitive enforcement conditions (trolls and statutory awards) and the settlement campaign generate higher numbers (4.77, 4.94, and 4.91, respectively) than the CAS (4.39).

When presented with the opportunity to download all possible music albums on a new file-sharing website, participants in the statutory award and the RIAA groups indicate the most strongly that they will be inclined to do so (5.45 and 5.18, respectively; about 25% of respondents in those groups indicate the maximum score of 9 where 1 indicates “unlikely” and 9 indicates “likely”).

Finally, our analysis reveals that the differentiated backlash effect triggered by the various enforcement scenarios applies to illegal downloaders and non-downloaders alike. Although non-downloaders of course report a lower intention overall of downloading in the future (1.7) than prior downloaders (4.7), the CAS and the RIAA campaign equally increase the likelihood to download once shielded from enforcement.

V. DISCUSSION

A. THE STATE OF COPYRIGHT INFRINGEMENTS TODAY

In the late 1990s, online music copyright infringements were widespread among the younger generation. What has changed in the intervening fifteen years between Napster and today? Many commentators attribute the massive scale of music copyright infringement in the 1990s to the lack of legal online alternatives to compete with popular file-sharing services such as Napster.¹⁴⁴ Perhaps, then,

143. To some degree, virtual private networks can provide some of the anonymity that shields against most online enforcement. See Ernesto Van der Sar, *Which VPN Service Takes Your Privacy Seriously?*, TORRENTFREAK (Dec. 12, 2014), <http://torrentfreak.com/which-vpn-services-take-your-anonymity-seriously-2014-edition-140315/> [http://perma.cc/B9Q5-698Y].

144. For an overview of these developments, see Raymond Ku, *Creative Destruction*, 69 U. CHI.

fifteen years later, licensed Internet music stores and subscription services have diminished the appeal of illegal file-sharing and unlicensed streaming platforms.¹⁴⁵

Although our data does not measure actual downloading, Part 1 of our study provides a window into infringement and consumption patterns among the young adults that were on college campuses during the peak of the peer-to-peer file-sharing era in the late '90s.

The results from our study suggest that most young adults have indeed embraced digital markets to obtain licensed music and movies. Ninety-three percent of respondents report buying music at online stores or subscribing to licensed content providers (e.g. Netflix and Spotify). At the same time, however, our results indicate that individuals have not sworn off illegal downloading. Most respondents who are currently subscribed to streaming music services or who purchase music online also engage in illegal downloading. What's more, they report an intention to continue doing so.

It appears that illegal access to copyrighted materials remains an important part of the lives of many young individuals. For many, illegal-streaming sites serve a supplementary role, perhaps providing content that is not currently available from licensed subscription services or that is missing from the services they have subscribed to.¹⁴⁶ For others, illegal downloading might be a means to obtain additional music and movies on a maxed out budget. Additionally, some individuals may be using online platforms to obtain access to copyrighted materials that they would not purchase anyway. In this manner, illegal downloading may serve to satisfy a curiosity about copyrighted content in a way that does not displace sales that would have occurred but for piracy. Here, the best-case scenario for artists is that the resulting, additional exposure may generate some additional income by way of additional tickets sale for live performances, sales of derivative works, etc.¹⁴⁷

B. STABLE COPY-NORMS

In the period between 1999 and 2004, young individuals were relatively anti-

L. REV. 263 (2002) (describing peer-to-peer file sharing as a disruptive technology that challenges the outdated music business model).

145. The development of relatively inexpensive subscription models, such as Spotify, that mimic the all you can eat buffet style of peer-to-peer venues, holds the promise of substituting for less convenient and riskier, illegal content.

146. HBO, for instance, is not included in most mainstream subscription services (Netflix). HBO's *Game of Thrones* has been the most illegally downloaded show for three years straight in this country. See Erik Hayden, 'Game of Thrones' Tops List of 2014's Most Pirated TV Shows, HOLLYWOOD REPORTER (Dec. 27, 2014), <http://www.hollywoodreporter.com/news/game-thrones-tops-list-2014s-760409> [<http://perma.cc/5ZEU-J6JG>].

147. Raymond Ku, *Creative Destruction*, 69 U. CHI. L. REV. 263 (2002) (describing the effect of file-sharing technology as disrupting old business models). New business models are needed to generate income if sampling or exposure decreases subsequent sales of albums. See Stan J. Liebowitz, *Testing File-Sharing's Impact by Examining Record Sales in Cities*, 54(4) MANAGEMENT SCIENCE 852, 852-59 (2008) (arguing that sampling and exposure effects reduce music album sales).

copyright.¹⁴⁸ By imposing indirect copyright liability on file-sharing software developers and host sites, the music industry's legal campaign effectively shut down new technologies that had become an integral part of the daily lives of young individuals. Because the RIAA's aggressive campaign turned college campuses into major targets for enforcement, college students (many of whom were already confronting large amounts of debt and soaring tuition fees) perceived the organization's settlements letters as excessive and punitive in nature.

Despite extensive efforts to improve public relations, including the development of the CAS, little seems to have changed. Our data demonstrates that prevailing copy-norms have remained relatively robust over time. If anything, there has been a slight regression. A vast majority of students do not perceive downloading as immoral, a view held by even more students today than just three years ago. Social science research confirms that once internalized, normative priorities do indeed become robust or "sticky," presenting a more pervasive challenge to law enforcement.¹⁴⁹

Not surprisingly, our data confirms that frequent downloaders tend to find copyright infringing behavior less immoral than do individuals who have never downloaded music or movies from peer-to-peer platforms. This moral belief among file sharers appears to be self-serving. Prior research on the bi-directional causality observed between self-interest and normative evaluations suggests that individuals tend to "adjust their own beliefs so as to justify their behavior as right and ethical."¹⁵⁰ In the context at hand, frequent infringers simply have more to lose from stringent enforcement. This, in turn, may induce a normative belief that file sharing *should* be legal.¹⁵¹ This finding is in line with research on cognitive dissonance¹⁵² that suggests individuals tend to adjust their attitudes and beliefs whenever they experience a conflict with their perceptions of reality.¹⁵³

148. Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1141 (2005).

149. On the process of social norm internalization and the relation to law, see Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000); Robert Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1 (2000).

150. Michael Wenzel, *Motivation or Rationalization? Causal Relations Between Ethics, Norms and Tax Compliance*, 26 J. OF ECON. PSYCHOL. 491, 505 (2005).

151. Daniel S. Nagin & Greg Porgarsky, *An Experimental Investigation of Deterrence: Cheating, Self-serving Bias, and Impulsivity*, 41 CRIMINOLOGY 167 (2003) (presenting new experimental evidence).

152. For a description of how individuals reconcile the conflict between normative priors and legal regulation, see Joshua Rosenberg, *The Psychology of Taxes: Why They Drive us Crazy, and How We Can Make Them Sane*, 16 VA TAX L. REV. 155, 200 (1996) (explaining that according to the theory of cognitive dissonance, "[w]hen we sense something in the world that is inconsistent with the cognitive frame through which we see the world, we initially (unconsciously) ignore or distort our perception. If that becomes impossible, we eventually amend our cognitive frame (i.e., the way we see and understand the world) to incorporate our new perception.").

153. See, e.g., JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); LEO FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957). The classic example of this is expressed in the fable where a fox sees some high-hanging grapes and wishes to eat them. When the fox is unable to reach the grapes, he surmises that the grapes are probably not worth eating, as they must not

Accordingly, file-sharers might adjust their beliefs about copyright infringement as a means of coping with the uncomfortable feeling of engaging in immoral conduct. Research in cognitive psychology suggests that individuals come to disregard the obviously self-interested origin of such normative adjustments.¹⁵⁴ Following this self-adjustment in belief, the next step is to “generalize these views to others, presumably to gain further social support.”¹⁵⁵ Predictions about others’ beliefs or behaviors, based on casual observation, are very likely to err in the direction of one’s own personal beliefs or behavior.¹⁵⁶

Indeed, the findings from our study indicate that students (a) don’t believe that non-commercial, copyright infringing behavior online is particularly immoral, (b) think that the rest of the world deems it even less immoral, and (c) believe that their peers don’t think it is immoral at all.

C. IN PURSUIT OF DETERRENCE WITHOUT BACKLASH

Students perceive the risks involved with illegal downloading to be very modest. In the minds of students, copyright enforcement is an issue faced only by the unlucky few.

Interestingly, downloaders and non-downloaders share similar perceptions of the risks involved with downloading. This suggests that when individuals refrain from downloading, it is not because they consider the risk to be higher than downloaders do. Other variables, such as greater risk aversion, lower technical proficiency, or a lesser desire to obtain content, must be influencing the decision not to download.

Although we did not obtain sufficient data points to confirm this finding with confidence, our preliminary findings suggest that CAS notification letters considerably increase expectations of enforcement. Indeed, the small sample bias effect among recipients is a key to the potential efficacy of the CAS as an enforcement strategy. A CAS letter received by just one individual in a small group of peers might induce within the group a risk estimation that far exceeds the actual statistical probability of receiving a CAS letter on average.¹⁵⁷ To further this purpose it is of course paramount that sufficient CAS letters are issued.¹⁵⁸ It should also be noted that even when an individual regards the chances of CAS detection as

be ripe or that they are probably sour. AESOP, THE FOX AND THE GRAPES (ca. 620–564 BCE).

154. Wenzel, *supra* note 150 (describing two-way causality between self-interest and normative beliefs).

155. Wenzel, *supra* note 150.

156. For a description of the false consensus effect, see, e.g., Brian Mullen, Jennifer Atkins, Debbie Champion, Cecelia Edwards, Dana Hardy, John Story & Mary Vanderklok, *The False Consensus Effect: A Meta-Analysis Of 115 Hypothesis Tests*, 21 J. OF EXPERIMENTAL SOC. PSYCHOL. 262 (1985); Lee Ross, David Greene & Pamela House, *The False Consensus Phenomenon: An Attributional Bias In Self-Perception And Social Perception Processes*, 13 J. OF EXPERIMENTAL SOC. PSYCHOL. 279 (1977).

157. Economists refer to small-sample bias where a set of observations is too small to obtain an accurate average measure from the sample.

158. In its first annual report, the nonprofit Center for Copyright Information (CCI) reported that CAS sent more than 1.3 million Copyright Alerts to account holders in the first ten months of operation. *Supra* note 76.

extremely high, due to a prior CAS notification, this does not necessarily deter future infringements. Since the mitigation measures are postponed to stages 5 and 6, the first four CAS notifications merely intend to inform subscribers that their download behavior has not gone unnoticed. To technologically proficient subscribers, CAS simply provides a timeline to invest in their own mitigation measures to prevent future detection, measures that most often involve hiding one's IP address (usually by installing a Virtual Private Network (VPN), or by subscribing to a TOR service). The private costs imposed by a CAS notification to a recipient consist of (a) the feeling of being watched and (b) having to take additional measures to avoid the inconvenience of potential mitigation measures in stages 5 and 6. Metaphorically, if a RIAA settlement letter is akin to being struck by lightning, a CAS notification resembles a weather report warning one to avoid open areas. To ramp up deterrence another notch, content holders could create credible fear among subscribers that they might initiate legal action against some CAS recipients. This option would clash with the goal of CAS as a non-aggressive enforcement approach and also undermine the mutual understanding with ISPs, however.

D. NEGATIVE REACTIONS TO COPYRIGHT ENFORCEMENT

While Part 1 of our study observed the beliefs, behavior, and expectations of students with respect to their experience of the past decade of digital copyright enforcement, in Part 2 we examined student reactions to specific enforcement approaches.

The negative reaction to copyright trolls and statutory awards seem to suggest that students most strongly disapprove of enforcement approaches to copyright law that (a) are linked to for-profit incentives and (b) involve rewards in excess of actual damages. Interestingly, the CAS is consistently met with as much disapproval as the RIAA settlement campaign. While the stated goal of the CAS is to “enhance the consumer experience in the digital world”¹⁵⁹ and “to reach consumers, provide them with useful information”,¹⁶⁰ our findings indicate that college students perceive the system very differently. The CAS, like the RIAA before it, is not perceived as an ideal compromise between various stakeholders, but rather as another indication of the need for more balanced copyright law. In fact, when students were asked whether they feel that the “music industry is conducting an unjust, disproportionate policy,” a description of the CAS prompted more negative reactions than the RIAA settlement campaign. Finally, we find no compelling evidence that the CAS brings about any more positive reactions that might help realign personal beliefs about online behavior with existing copyright laws than any other system.

These findings beg the question of why the moderate approach of the CAS has not generated more positive reactions. Several observations from social science scholarship are informative. First, the optimism about the CAS's potential for

159. Statement by CCI Executive Director Jill Lesser, after the first year of CAS, *supra* note 76.

160. Statement by CCI Board co-chair Tom Dailey of Verizon, *supra* note 76.

norm reversal ignores the path dependence in the evolution of norms. Because copy-norms have been internalized and subsequently bolstered by harsh enforcement strategies, it is unrealistic to expect that a more moderate enforcement approach alone can reverse the prevailing social norms around copyright. Second, the architects of the CAS may seem to have underestimated the privacy sensitivity of young individuals.¹⁶¹ Although this generation voluntarily turns over volumes of personal information on social network sites, survey reports show that today's Internet users are very concerned about the illicit use of their personal information.¹⁶² The CAS partners are quick to point out that the system respects consumer privacy. Copyright holders generate their notices of alleged copyright infringement through the use of publicly available IP address data, and ISPs deliver their alerts to account holders without sharing their personally identifiable information with content owners.¹⁶³

Yet many subscribers are not so easily reassured. Setting aside the differences in final outcome, the CAS shares some important attributes with the RIAA campaign. Under both systems, subscribers are informed that their online behavior is not under the radar. Although the architects of the CAS emphasize that ISPs shield the identity of infringing subscribers from content holders, the fact remains that making the ISP the messenger might counteract the system's conciliatory goals. From a privacy perspective, an ISP hits close to home since it provides the gateway to a person's online activities. Even the noblest, moderate intentions of the CAS might not be able to undo the suspicions and subjective privacy harms brought about in the process.

VI. CONCLUSION

In an effort to halt online piracy, copyright holders have experimented with a wide variety of enforcement approaches this past decade. Along the way, copyright law's approval ratings plummeted.¹⁶⁴ Despite its soft stance and lack of punitive intentions, the latest iteration of copyright enforcement is unlikely to reverse liberal copy-norms and halt copyright infringing behavior online.

Based on social science research and our empirical findings, this Article suggests that architects of the Copyright Alert System may have underestimated the

161. Although the CAS was not designed primarily to address the behavior of the most fervent online infringers (perhaps the majority of which are young individuals), the reactions of this generation to the CAS nevertheless is highly relevant since young individuals are major consumers of entertainment products and because they are of course the adults (voters, policy-makers, etc.) of tomorrow.

162. For an overview of results of privacy surveys, see *Public Opinion on Privacy*, ELECTRONIC PRIVACY INFORMATION CENTER, <https://epic.org/privacy/survey/>.

163. *CCI Provides First Copyright Alert System Progress Report Highlighting Initial Accomplishments*, CENTER FOR COPYRIGHT INFORMATION (May 28, 2014), <http://www.copyrightinformation.org/press-release/cci-provides-first-copyright-alert-system-progress-report-highlighting-initial-accomplishments/> [<http://perma.cc/7LXH-6ZEJ>].

164. Peter Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright in the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 241-69 (2014) (noting that it is essential to restore public support for copyright law's purposes and rules).

robustness of social norms and have failed to anticipate the negative reactions to a copyright information system, in particular as it relates to perceived privacy harms.

Like other copyright enforcement approaches before it, the Copyright Alert System makes no advances in distinguishing between harmful infringing behavior and non-harmful yet infringing behavior, a failure that likely will continue to plague the normative acceptance of copyright law in the Internet age.

APPENDIX

SURVEY FORM

1. INSTRUCTIONS:

1. Please answer the question below. All responses will remain strictly anonymous.
2. Please answer all questions chronologically. Do not switch between pages or leave open questions or return to previous questions at any point.

A. Have you ever downloaded music or movies from the Internet using file-sharing technology?

Note: this could include your use of Napster, Grokster, Kazaa, Vuze, Pirate Bay, Rapidshare, all existing Bittorrent platforms, or any other on line technology that enables downloading music without paying for it. Please exclude from consideration iTunes store or other licensed downloading sites.

YES NO (please circle)

If so, how many songs have you downloaded with these technologies (estimate)?

0 / less than 10 / between 10-50 / between 51-100 / more than 100 _____ songs

If so, how many movies have you downloaded with these technologies (estimate)?

0 / less than 10 / between 10-50 / between 51-100 / more than 100 movies

B. Have you shared music or movies with your friends from each other's archives on your PC/MAC/IPODS?

YES NO (please circle)

If so, how many songs have you shared (estimate)?

0 / less than 10 / between 10-50 / between 51-100 / more than 100 songs

If so, how many movies have you shared (estimate)?

0 / less than 10 / between 10-50 / between 51-100 / more than 100 movies

TABLE A.1: SCENARIOS: MEAN DIFFERENCES FOR THE PUBLIC ATTITUDES

	Unjust	Sense of justice	Attack	Balanced	Downloading unethical
RIAA regular	5.47 ^b	6.53 ^b	6.79	5.47 ^b	6.74
Rasset – Stat D	4.09 ^a	4.89 ^a	5.96	4.07 ^a	5.26
Rasset – RED	5.28 ^b	5.76 ^{ab}	7.18	3.68 ^a	5.04
CAS	5.74 ^b	6.04 ^{ab}	6.47	4.61 ^{ab}	5.51
RIAA random	5.55 ^b	5.70 ^{ab}	6.97	5.39 ^b	6.03
Trolls	4.60 ^{ab}	5.10 ^a	6.42	3.64 ^a	5.27
RIAA dropped	5.46 ^b	6.00 ^{ab}	7.03	4.78 ^{ab}	5.81
Grand Mean	5.11	5.65	6.63	4.42	5.59
F	2.74	2.42	1.54	3.82	1.94
P	< .02	< .03	< .17	< .001	< .08

Note. Different superscripts refer to significant differences among figures written in the same column. Unjust refers to the item “I am of the opinion that the music industry is conducting an unjust, disproportionate policy”; Sense of justice refers to the item “The policies of the music industry conflict with my sense of justice”; Attack refers to the item “The policies of the music industry are an attack on my freedom to listen to music”; Balanced refers to the item “This is making me realize that legislators should step in and create more balanced rules in copyright law”, and Donwloading unethical refers to the item “These new developments are gradually making me realize that illegally downloading music is not ethical.”

TABLE A.2: SCENARIOS: MEAN DIFFERENCES FOR DETERRENCE

	Continue	Likely download	Songs new site
RIAA regular	1.97a	4.91	5.18
Rasset – Stat D	2.69a	4.94	5.45
Rasset – RED	2.44a	3.71	4.95
CAS	3.61b	4.39	4.59
RIAA random	2.33a	3.70	4.70
Trolls	3.58b	4.77	4.86
RIAA dropped	2.22a	4.54	4.53
Grand Mean	2.77	4.46	4.91
F	5.47	1.15	.55
P	< .001	< .34	< .77

Note. Different superscripts refer to significant differences among figures written in the same column. Continue refers to the item “Most people will continue to take the risks involved with file sharing”; Likely download refers to the item “In 2011-2012, how likely is it that you will download music from file-sharing platforms or technologies (not including iTunes and other licensed download stores)?” and Songs new site refers to the item “A friend shows you a file-sharing site that has all the music albums that you ever wanted. Everyone on the site seems to have the same music taste as you do. How many songs will you download?”