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A Generation of Racketeers? Eliminating Civil RICO Liability for Copyright Infringement

*Julie L. Ross**

ABSTRACT

This article addresses questions raised in recent years by the increasingly severe penalties for copyright infringement, focusing on potential civil RICO liability as illustrated by a hypothetical peer-to-peer file-sharing example. Because civil litigation has been, by a wide margin, the favored means for pursuing copyright violators, the criminal copyright infringement statute remains largely untested, and the few cases that address its provisions offer conflicting interpretations. Now that RICO penalties are available in civil copyright infringement cases, courts faced with resolving the ambiguities in the application of the criminal copyright infringement provisions will need to reconcile divergent policies. To effectuate its remedial purpose, courts broadly interpret the RICO statute—even beyond the scope intended by Congress—yet rely heavily on the legislative history of the Copyright Act to balance the interest of copyright owners in controlling their works with that of the public in accessing them.

* © 2010 *Julie L. Ross*. Professor of Legal Research and Writing, Georgetown University Law Center; Of Counsel, Spillane Weingarten, Los Angeles; B.A., Hamilton College; J.D., Harvard University Law School. The author wishes to express thanks to the many students who have assisted her with research for this article over the years of its development, including Susan McMahon, Katherine Allen Schultz, Dara Bongarten, Moneen Nasmith, Kristina Hokenberg, Allison O'Connell, Nate Swinton, Samantha Walls, Julia Pergola, Joe Anderson, and Tom King; to the many members of the Georgetown University Law Center faculty who provided helpful advice and feedback during the summer research workshop at which the author presented an early draft of this paper, and particularly to Peter Byrne, Julie Cohen, Frances DeLaurentis, Diana Donahoe, Victoria Girard, Craig Hoffman, Neal Katyal, Jill Ramsfield, Jeffrey Shulman, and Kristen Tiscione, whose thoughtful comments and encouragement have been invaluable throughout the writing process; to Jay Spillane for provoking interest in the subject of this article; and to the Georgetown University Law Center for the writing grants and administrative support that helped to make this Article possible.

Recent amendments that increase the penalties for copyright infringement could reach much farther than Congress intended, by imposing criminal and RICO liability—not only on commercial “pirates” who make huge profits selling illegal copies—but also on noncommercial actors who share files solely for private use. RICO liability may even reach the entities that enable illegal file-sharing, under traditional theories of secondary liability. In addition, the relative ease with which plaintiffs may assert RICO claims poses a risk that traditional copyright remedies will expand broadly in ways not contemplated by Congress when it added criminal copyright infringement as a RICO predicate act.

This article asserts that the drumbeat against “piracy” has drowned out the many voices on the other side of the debate, creating the possibility of devastating punishment for conduct that millions of people believe reasonable. Congress enacted limited copyright protection as a means of encouraging the creation of artistic works and ensuring their access by the public. If the new penalty provisions are too liberally interpreted and applied, this delicate balance may tip too far in favor of copyright owners, extending their monopoly and chilling legitimate uses of copyrighted works. Ultimately, Congress should remove criminal copyright infringement from the list of RICO predicate acts, or at least limit RICO liability to the most egregious commercial infringers.

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A growing number of people—many of whom are tweens, teens, and twenty-somethings—see nothing wrong with digital copyright infringement, believing that laws banning such conduct are either unfair or inapplicable to those who make only private use of the works they download.¹ This generation of consumers downloads music and movie files from the Internet without paying for them; burns copies of music CDs and movie DVDs to share with others; and makes previously-purchased entertainment files available for others to download over the Internet through peer-to-peer (“P2P”) file sharing programs like Shareaza, Limewire, BitTorrent, and Ares.² To the industries that profit from the sale of copyrighted works, this conduct

1. See, e.g., BUS. SOFTWARE ALLIANCE, *TWEENS’ AND TEENS’ INTERNET BEHAVIOR AND ATTITUDES ABOUT COPYRIGHTED MATERIALS* (2004) [hereinafter *TWEENS AND TEENS*], available at <http://www.bsa.org/country/Research%20and%20Statistics/Research%20Papers.aspx> (follow hyperlink containing title) (summarizing results of 2004 survey of 1183 respondents, ages 8–18, showing widespread belief that downloading copyrighted content without paying for it is not wrong); Christopher Jensen, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 539–44 (2003) (discussing rationales given by those who choose to disobey copyright law); Kate Leadbetter, *Rights Group Defends P2P in Ad Campaign*, ZDNET UK (July 1, 2003), <http://www.zdnet.co.uk/news/networking/2003/07/01/rights-group-defends-p2p-in-ad-campaign-2136872> (quoting statement by Fred von Lohmann, senior staff attorney for Electronic Frontier Foundation, that 60 million U.S. citizens use file-sharing software and arguing that Congress was ignoring citizens’ interests in file sharing because of record industry lobbying).

2. See, e.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–27 (2005) (discussing the operation of Morpheus and Grokster peer-to-peer file-sharing software platforms and finding Grokster liable for copyright infringement due to its inducement of direct infringement by users of its P2P service).

is “piracy,” no different from walking into a store and stealing a CD or DVD off the shelf.³

The music and film industries have engaged in a multi-faceted effort to halt, or at least slow, the use of home computers and other digital devices to make illegal copies of copyrighted works. Industry groups like the Recording Industry Association of America (“RIAA”) and Motion Picture Association of America (“MPAA”) initially brought high-profile lawsuits against corporate entities in attempts to prohibit the sale of software or hardware that enables consumers to illegally copy audio and audio-visual works.⁴ They also launched largely unsuccessful media campaigns to persuade a generation of Internet users that illegal copying is wrong and harmful to the artists who create music and films,⁵ as well as a very successful lobbying effort in Congress to increase civil and criminal penalties available under the Copyright Act.⁶

3. Indeed, the RIAA has elaborated on the piracy metaphor, stating: “Old as the Barbary Coast, New as the Internet—No black flags with skull and crossbones, no cutlasses, cannons, or daggers identify today’s pirates. You can’t see them coming; there’s no warning shot across your bow. Yet rest assured the pirates are out there because today there is plenty of gold (and platinum and diamonds) to be had. Today’s pirates operate not on the high seas, but on the Internet, in illegal CD factories, distribution centers, and on the street. The pirate’s credo is still the same—why pay for it when it’s so easy to steal? The credo is as wrong as it ever was. Stealing is still illegal, unethical, and all too frequent in today’s digital age. That is why RIAA continues to fight music piracy.” *Anti-Piracy*, INTELL. SECURITY (Nov. 4, 2005), <http://www.intellectualsecurity.com/2005/11/antipiracy.php> (citing the Recording Industry Association of America).

4. See, e.g., *MGM Studios, Inc.*, 545 U.S. at 936–37 (upholding secondary liability for distributors of file-sharing software); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (rejecting secondary liability for the makers of the Betamax video recording device); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (imposing secondary liability for the developer of software making it possible for computer users to engage in online peer-to-peer file sharing); *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999) (refusing to impose secondary liability on manufacturer of hand-held device capable of receiving and storing digital audio files on computer hard drives).

5. See, e.g., Press Release, Motion Picture Ass’n of Am. & The City of N.Y. Mayor’s Office of Film, Theatre, & Broad., Gotham Theaters and Taxicabs Now Playing Anti-Piracy Trailers as Part of MPAA/New York City Campaign (Aug. 20, 2007), available at <http://www.mpa.org/resources/91b64c0a-d4bf-4566-b0a8-bcc53f460e6d.pdf>; Patrick Ross, Copyright Alliance Exec. Dir., Presentation for the Federal Communications Commission (Sept. 17, 2009), available at <http://www.copyrightalliance.org/files/fcctestimony.pdf> (advocating on behalf of a variety of entertainment media for independent artists whose works are infringed online); *Copyright Information*, MOTION PICTURE ASS’N OF AM., <http://mpaa.org/content/protection/copyright-info> (last visited Oct. 25, 2010) (explaining the motion picture industry’s position on copyright protections for motion pictures and why it is wrong to make unlawful copies of movies).

6. See, e.g., No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (eliminating requirement that criminal copyright infringement be for purposes of financial gain by including provision allowing criminal penalties if the retail value of the copied work or works exceeds \$1,000); Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 3,

In June of 2003, the recording industry announced its plans to file lawsuits against individuals who participated in the illegal sharing of copyrighted works over the Internet.⁷ Before ending its litigation campaign in 2009,⁸ the RIAA filed thousands of lawsuits against individual file sharers seeking civil copyright infringement damages.⁹ After announcing an end to its litigation campaign against individual infringers, the RIAA stated that it was shifting its approach in light of arrangements worked out with Internet Service

110 Stat. 1386, 1386 (adding criminal copyright infringement as a predicate act for purposes of criminal and civil RICO liability); Criminal Penalties for Copyright Infringement, Pub. L. No. 102-561, 106 Stat. 4233 (1992) (expanding felony punishment to cover infringement of at least 10 copies of any copyrighted work with a retail value of more than \$2500); Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (introducing felony penalties for criminal copyright infringement of sound recordings or audiovisual works).

7. The focus of this Article will be on the unauthorized copying of sound recordings, largely because music files are much smaller than digital copies of films or software and are more easily transferred over the Internet, and thus the recording industry has been at the forefront of efforts to enforce copyright in the digital age. See generally Damon Lussier, *Beyond Napster: Online Music Distribution and the Future of Copyright*, 10 U. BALT. INTELL. PROP. L.J. 25, 26-33 (2001) (discussing online technologies that make the transfer of audio files over the Internet quick and easy). The RIAA launched its campaign against individuals who download or make available for download unauthorized copies of copyrighted musical recordings with lawsuits against four college students filed in April of 2003. See Benny Evangelista, *Four Students Sued Over Music Trading Software*, S.F. CHRON., Apr. 4, 2003, http://articles.sfgate.com/2003-04-04/news/17485608_1_file-sharing-computer-network-riaa-president-cary-sherman. The four students were alleged to have set up file-sharing networks on their colleges' computer networks that offered tens of thousands of music files for sharing, and the lawsuits sought statutory damages of \$150,000 for each recording that was illegally offered for download over the networks. *Id.* The cases were all settled in May of 2003, with each student agreeing to pay up to \$17,500 and promising not to violate the copyrights of the plaintiffs. See Jefferson Graham, *Students Paying for Playing*, USA TODAY, May 5, 2003, http://www.usatoday.com/tech/news/2003-05-04-students_x.htm.

8. See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

9. The RIAA obtained at least 871 federal subpoenas against computer users during the three-week period in 2003 following the RIAA's announcement, "with roughly 75 new subpoenas being approved each day." *Music Industry Wins 871 Subpoenas Against Internet Users*, OZZU (July 19, 2003, 12:03 AM), <http://www.ozzu.com/ftopic1123.html>. A court ruling stopped the RIAA from obtaining the identities of potential defendants from Internet Service Providers, but the RIAA did not slow its filing of lawsuits. See *Recording Indus. Ass'n. of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1233 (D.C. Cir. 2003) (reversing and remanding on the grounds that subpoenas may not be issued under § 512(h) of the Copyright Act to ISPs that are engaged solely in transmitting infringing material on behalf of others); *News Room*, RECORDING INDUSTRY ASS'N OF AM., http://www.riaa.com/news_room.php?news_year_filter=2004 (last visited Oct. 4, 2010) (providing links to press releases that describe the filing of an average of more than 500 new lawsuits each month during 2004). As a result of the D.C. Circuit's ruling, the RIAA resorted to simply filing "John Doe" lawsuits and then using the subpoena power available once litigation is pending to identify users by their screen names. See *More Copyright Infringement Lawsuits Brought Against Illegal File Sharers*, RECORDING INDUSTRY ASS'N OF AM. (May 24, 2004), <http://www.riaa.com/newsitem.php?id=4627CFE3-3AAC-93A6-D77A-AE4C04824580> (noting the RIAA's use of the "John Doe" litigation process to sue defendants before their names are known); see also Fed. R. Civ. P. 45(a) (governing issuance of subpoenas for discovery or trial in federal lawsuits).

Providers (“ISPs”) to provide email alerts to customers found using an ISP’s services to infringe, with the threat of cessation of Internet services if the conduct continued.¹⁰ However, the RIAA noted that it still reserved the right to sue individuals it deemed “particularly heavy file sharers.”¹¹

Although the RIAA has been battling the illegal copying of musical works for years, its efforts to constrain online “sharing” of music files prior to 2003 had focused on lawsuits against the creators of the P2P networks that made such copying possible,¹² rather than the individuals actually uploading and downloading copyrighted works. The RIAA’s suits against individual users ushered in a new era for teens and twenty-somethings, who grew up in a time of unlimited, unpunished sharing of copyrighted materials,¹³ but who could now find themselves subjected to civil, and even criminal, sanctions if they actively shared files.

If these file sharers are uploading and downloading copyrighted works,¹⁴ their practices infringe the rights of the copyright owners and could subject them to civil and criminal penalties.¹⁵ To the extent that these practices take place in an organized fashion involving multiple people, such as through file-sharing software or

10. McBride & Smith, *supra* note 8; *RIAA to Stop Mass Lawsuits*, ROLLING STONE, Feb. 5, 2009, at 18.

11. McBride & Smith, *supra* note 8.

12. See, e.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litigation*, 252 F. Supp. 2d 634 (N.D. Ill. 2002).

13. See *supra* TWEENS AND TEENS, note 1; *Downloading Music is Good. Cheating is Bad. Why Teens Say Both*, INST. FOR GLOBAL ETHICS (Sept. 29, 2003), <http://www.globalethics.org/newsline/2003/09/29/downloading-music-is-good-cheating-is-bad-why-teens-say-both>.

14. Many works are available over the Internet that may be freely copied and exchanged under U.S. copyright law. For example, as copyright is a limited monopoly that expires after the passage of time, see U.S. CONST. art. I, § 8, any work that has entered the public domain can be up- or down-loaded with impunity. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 199–208, 211–214 (2003) (discussing the balance between the limited copyright monopoly and the public domain). In addition, some artists make their music or audiovisual works available to users over the Internet with express licenses permitting free copying of the music for individual use and enjoyment. See, e.g., *A-Z Artists*, SUBPOP RECORDS, <http://www.subpop.com/artists/> (last visited Oct. 26, 2010) (offering many of its artists’ songs for free downloading); *ATOM*, <http://www.atom.com> (last visited Oct. 26, 2010) (offering dozens of short films for users to download and view without charge); Michael D. Crawford, *Links to Tens of Thousands of Legal Music Downloads*, GOINGWARE, INC., <http://www.goingware.com/tips/legal-downloads.html> (last visited Oct. 26, 2010) (providing links to Internet sites where music is available for downloading without charge and with the permission of the copyright owners); *What is CC?*, CREATIVE COMMONS, <http://creativecommons.org/about/what-is-cc> (last visited Oct. 26, 2010) (providing access to numerous works that are in the public domain or licensed for individual use by their owners for free downloading).

15. See, e.g., 17 U.S.C. §§ 501, 506 (2006).

Internet sites, these file sharers could also be branded “racketeers” and subject to liability under the Racketeering Influenced and Corrupt Organizations Act (“RICO”),¹⁶ despite having no affiliation with organized crime. These RICO sanctions arise under the Anti-Counterfeiting Consumer Protection Act of 1996, which added criminal copyright infringement as a predicate act for purposes of imposing criminal and civil RICO liability on defendants and thus enabled plaintiffs who can prove multiple acts of copyright infringement to recover an award of treble damages.¹⁷

As the law now stands, a teenager who stores her music collection in MP3 files on her computer or MP3 player and who downloads several songs a day and one film a week could be subjected to statutory copyright damages in the hundreds of thousands of dollars, as well as the possible trebling of those damages if her conduct occurred through an organized public or private file sharing system.¹⁸ Of additional concern is the potential for recovery of civil RICO penalties against secondary copyright infringers—those who do not directly infringe but who knowingly make infringement possible, such as P2P service providers and even ISPs that have knowledge of and control over users’ ability to infringe. This Article argues that the addition of potential RICO damages to the already wide range of possible copyright damages is unnecessary to deter infringement and places too much power in the hands of copyright owners, leading to settlement of cases where liability is uncertain but potentially

16. 18 U.S.C. §§ 1961–68 (2006) (including as an act of “racketeering activity” any act indictable under 18 U.S.C. § 2319, which governs the punishment for violation of criminal copyright infringement under 17 U.S.C. § 506(a)).

17. Pub. L. No. 104-153, § 3, 110 Stat. 1386.

18. It is unlikely that such an award would ever be entered, both because of the lack of resources on the part of the student to defend a copyright infringement suit and because of the general public’s view that file sharing is not a great evil, which would likely lead to a much smaller damage award if the case ever reached a jury (the “sticky norm” problem). See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) (discussing “sticky norm” phenomenon when the law condemns behavior that the general public does not condemn). In one of the few articles discussing the addition of criminal copyright infringement to the list of predicate acts for purposes of RICO liability, one author has argued that the RIAA and MPAA should file civil RICO actions instead of copyright infringement actions, joining both individual P2P file sharers and P2P services like Grokster and Kazaa and seeking to impose joint and several liability against a large group of such defendants in one action. Phillip Stuller, Note and Comment, *How the RIAA Can Stop Worrying and Learn to Love the RICO Act: Exploiting Civil RICO to Battle Peer-to-Peer Copyright Infringement*, 24 LOY. L.A. ENT. L. REV. 521 (2004). Had the RIAA and MPAA taken such an approach, they would likely have been subject to even greater public criticism than that which followed the individual lawsuits filed by the RIAA, see *supra* note 9, leading to an even greater “sticky norm” problem than they currently face. However, even if juries are not likely to award the full scope of available damages in cases involving infringement for private use, this Article addresses why the threat of large statutory damage awards and treble damages is still a concern.

devastating. The rights of copyright owners were never intended to be absolute,¹⁹ and placing too much power in their hands through the amount of damages they can allege in a civil suit tips the balance too heavily in favor of the monopoly and gives too little weight to the public interest.

Part I of this Article highlights the efforts made by copyright owners over the past two decades to combat digital piracy. In particular, it introduces some of the questions raised by the increased penalties for copyright infringement in recent years, focusing on the addition of potential civil RICO liability to the already severe penalties for infringement.

Part II discusses how easy it could be to convert a civil copyright infringement claim into a civil RICO claim, using the hypothetical P2P user as an example. Because civil litigation has been, by far, the more common avenue for pursuing copyright violators, the criminal copyright infringement statute remains largely untested and, to the extent that courts have addressed its provisions, has led to conflicting interpretations. Moreover, now that RICO penalties are available in civil copyright infringement cases, courts faced with resolving the ambiguities of criminal copyright infringement provisions will have to address the clash of interpretive policies in the copyright and RICO contexts. While courts have interpreted the language of the RICO statute broadly to apply to defendants and conduct well outside its original purpose, largely ignoring its legislative history,²⁰ courts have relied heavily on the legislative history of the Copyright Act to interpret its language, typically refusing to extend the scope of the Act beyond what the legislative history supports.²¹

Part III addresses concerns raised by these recent amendments to the Copyright Act, which increase the available penalties for copyright infringement, suggesting that they could reach much farther than Congress intended, imposing criminal and civil RICO liability not just on commercial “pirates” who make illegal copies and sell them to others at huge profits but also on those who engage in file sharing solely for private use—and perhaps even those who make it possible for them to do so. The relative ease with which copyright owners may assert RICO claims risks a broad expansion of traditional copyright remedies not contemplated by Congress when it added criminal copyright infringement as a predicate act under RICO. Copyright

19. See U.S. CONST. art. I, § 8 (authorizing the granting of limited copyright monopoly).

20. See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491–93 (1985).

21. See, e.g., *Dowling v. United States*, 473 U.S. 207, 222 (1985).

exists as a means of serving the public interest by encouraging both the creation of artistic works and access to those works by the public.²² If the new penalty provisions are too liberally interpreted and applied, the delicate balance between rewarding creativity and allowing public enjoyment of such creativity will tip too much in favor of copyright owners, over-extending the monopoly rights of copyright holders and chilling legitimate uses of copyrighted works.

Part IV concludes by arguing that the pendulum has swung too far as a result of pressure from industry lobbying groups, without the benefit of the many voices on the other side of the debate, creating the possibility of devastating punishment for conduct that millions of computer users believe is reasonable. It calls for restraint from courts in interpreting and applying the criminal copyright infringement and civil RICO statutes, from copyright owners in their demands for punishment of infringers, and from Congress when considering further amendments to the Copyright Act that would permit even greater punishments for infringement. Finally, this Article proposes that Congress amend the law by either removing criminal copyright infringement as a basis for civil RICO liability or by making RICO penalties available only against those defendants who engage in large-scale, commercial piracy and not those who copy for private use.

I. INDUSTRY EFFORTS TO ADDRESS THE PROBLEM OF DIGITAL COPYING

A. *Copyright Owners' Concerns About Digital Copying and Consumer Perceptions Regarding the "Right" to Share Digital Content*

Advances in technology over the past three or four decades have been both a blessing and a curse to creators and distributors of creative works. For those who create artistic works, technology has made it cheaper and easier to record a song, produce a film, or write a novel.²³ Advances in technology have also made it easier for artists to

22. U.S. CONST. art. I, § 8; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524–27 (1994); *Stewart v. Abend*, 495 U.S. 207, 228 (1990); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

23. In 1999, for example, musician Moby recorded the album “Play” in his bedroom; it went on to sell almost ten million copies. *Biography*, MOBY.COM, <http://www.moby.com/biography> (last visited July 18, 2010). See also Owen Gleiberman, *Cold Comfort*, ENT. WKLY, Feb. 6, 2004, at 118; *Up Close and Personal*, GUARDIAN (U.K.), May 21, 2004, <http://www.guardian.co.uk/film/2004/may/21/cannes2004.cannesfilmfestival> (describing how film director Jonathan Caouette made the film *Tarnation* for \$213.72 using iMovie software, combining home movies, answering-machine messages, and still photos into a work that earned critical acclaim at the 2004 Cannes Film Festival); Ethan Smith, *Organization Moby*, WIRED, May 2002, <http://www.wired.com/wired/archive/10.05/moby.html> (discussing Moby’s home recording studio, where he recorded his CD “18” using two Macintosh computers); *The Craft of Writing*, WWW.SCOTTUROW.COM, <http://www.scotturow.com> (follow “Scott Talks” hyperlink) (last visited Oct. 26, 2010) (quoting

distribute their works to the public, making them less reliant upon corporate distributors such as record labels, video distributors, and book publishers.²⁴

While artists have benefitted from the advances in technology that assist in the creative process, these same advances have made it easier for others to copy and distribute artists' works without their consent and without compensating them. Both the hardware and software needed to copy music, films, and computer programs are readily and inexpensively available to the public.²⁵ Thus, not only does the typical consumer of entertainment and software products have the ability to reproduce copyrighted works for personal use, but copyright "pirates" need only invest a minimal stake to make thousands of illegal copies that can then be sold on the street or at flea markets.²⁶

The music, film, and software industries claim that unauthorized digital copying has resulted in hundreds of millions of dollars in lost profits over the last ten years.²⁷ While these industries

Scott Turow as saying "I think that my career as a writer owes a lot to the fact that the computer can organize all of it. You just move all of those blocks of text around.")

24. For example, musicians now post samples of their music on proprietary websites and include links to sites where their recordings can be purchased, and short film directors post their works on the Internet to create a fan-base of Internet users and enhance their opportunities to work on full-length features. See, e.g., *Working on a Dream*, BRUCESPRINGSTEEN.NET, <http://www.brucespringsteen.net/albums/workingonadream.html> (last visited Oct. 26, 2010) (offering streaming audio of songs on Springsteen's most recent CD, with links to song lyrics and sites to purchase music). Similarly, aspiring filmmakers have posted short films online to generate publicity. See Marion Hart, *A Comeback for Short Films Is Linked to the Web*, N.Y. TIMES, Jan. 14, 2001, <http://www.nytimes.com/2001/01/14/movies/film-a-comeback-for-short-films-is-linked-to-the-web.html>.

25. See Damon Lussier, *Beyond Napster: Online Music Distribution and the Future of Copyright*, 10 U. BALT. INTELL. PROP. L.J. 25, 26–28 (2001) (discussing online technologies that make the transfer of audio files over the Internet quick and easy).

26. See generally Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1031–32 (2001) (describing the manner in which technological advances have "transformed intellectual property theft"); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1373–79 (2004) (describing the changing economics of copyright infringement in light of a technology shift from analog to digital media, leading to more illegal copies and more copyright pirates in digital era than in analog era).

27. See RECORDING INDUS. ASS'N OF AM., RIAA 2003 YEAR-END STATISTICS (2003) (indicating a steady reduction in units sold every year from 1999 through 2003, with a reduction in shipment value of close to two billion dollars in 2003 as compared to 1999) (copy on file with author); Press Release, Motion Picture Ass'n of Am., Statement Thanking the Vice President and Obama Administration for Hosting a Meeting on Protection of Intellectual Property (Dec. 15, 2009), available at <http://www.mpa.org/resources/2658eb30-809f-4368-b85f-eea03760a8bb.pdf> (estimating that piracy deprives U.S. copyright owners in excess of \$25 billion per year); *For Students Doing Reports*, RECORDING INDUSTRY ASS'N OF AM., <http://www.riaa.com/faq.php> (last visited Aug. 2, 2010) (citing study reporting global music piracy causing annual economic loss of \$12.5 billion); *Global Software Piracy Study*, BUS. SOFTWARE ALLIANCE, <http://portal.bsa.org/>

have always lost some potential profits to piracy, digital technology has made it much easier and cheaper to mass-produce illegal copies for profit, because digital copying requires only relatively inexpensive equipment and limited space, and because digital reproductions are perfect copies that can be mass-reproduced without losing quality.²⁸ The advent of P2P file sharing and MP3 technology has made it even easier to make and transfer unauthorized copies, because music, films, and software can now be downloaded relatively quickly at little or no cost and then saved in compact files for later use, reuse, and copying.²⁹ The relative ease with which unauthorized copies of digital works may be produced and widely distributed poses a threat to the entertainment and software industries that profit from digital works.

That many of those who download copyrighted works without permission believe they should be permitted to do so and do not view their conduct as wrong greatly compounds the problem faced by the music, film, and software industries as a result of digital copying. Those who “share”³⁰ files online have provided numerous justifications for their conduct, including: (1) the fair use doctrine permits copying for personal use; (2) digital entertainment is overpriced and artists are overpaid; and (3) the media monopolies that control the distribution of entertainment works are inherently bad.³¹

globalpiracy2009/index.html (last visited Oct. 27, 2010) (reporting that 43% of the software installed on computers worldwide was illegally obtained in 2009, finding that for every \$100 of software sold worldwide, \$75 in unlicensed software made its way onto computers, and reporting the commercial value of unlicensed software in 2009 at \$51.4 billion); Stephen E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, INST. FOR POL'Y INNOVATION (Oct. 3, 2007), <http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullText/23F5FF3E9D8AA79786257369005B0C79> (reporting annual cost to the U.S. economy of \$58 billion from copyright piracy of motion pictures, sound recordings, video games, and business and entertainment software). *But see* Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007) (reporting results of empirical study by researchers at the Harvard Business School and the University of North Carolina at Chapel Hill indicating that illegal downloading has little demonstrable impact in terms of reducing sales of records and might, in fact, be a factor in increasing sales).

28. *See generally* Katyal, *supra* note 26 (describing the manner in which technological advances have “transformed intellectual property theft”).

29. *See id.* (describing the low costs involved in making illegal copies of digital works).

30. Representatives of the entertainment industry have opposed the use of the term “sharing” and still prefer to use terms like “stealing,” “theft,” and “piracy.” *See, e.g.*, Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 24 n. 94 (Fall 2004); Karla S. Lambert, Note, *Unflagging Television Piracy*, 84 TEX. L. REV. 1317, 1324, n.44 (2006).

31. *See* TWEENS AND TEENS, *supra* note 1 (summarizing results of 2004 survey of 1183 respondents, ages 8–18, showing that 51% of the respondents believe it is okay to download software from the Internet without paying for it because they cannot afford it; 35% because they would not use it if they had to pay for it; 33% because “lots of people do it”; 26% because “it doesn’t hurt anybody when I do this”; 19% because no one has ever told them not to; 15% because “it isn’t something I would ever get in trouble for doing”; and 8% because their parents have said it is okay for them to do it); Jensen, *supra* note 1, at 539–44 (2003) (explaining that individuals choose to disobey copyright law because of the ethereal nature of copyright, its lack of legitimacy,

The first justification is incorrect as a matter of law, at least as copyright law has been interpreted to date. The Supreme Court suggested in *Sony Corp. of America v. Universal City Studios, Inc.* that copying for personal use can be a fair use, but only where the particular use does not harm the owner or adversely affect the market for the copyrighted work.³² Those cases that have addressed these “private use” arguments in the context of P2P file-sharing networks have soundly rejected the argument that fair use protects unauthorized file sharing over the Internet.³³ Because an established commercial market exists for digital music, and because unauthorized downloading allows consumers to get for free what they would otherwise have to purchase, downloading for personal use (and perhaps uploading without permission from the copyright owner)³⁴ does not fall within the protections of fair use.³⁵

its roots in positive law, and its reputation as the domain of specialists); Mark Bazer, *An Etiquette Lesson in File Sharing*, CHI. TRIB., July 2, 2003, http://articles.chicagotribune.com/2003-07-02/news/0307030190_1_smooth-jazz-oldie-but-goodie-major-record-labels; David Greising, *Recording Industry's Pursuit Is Off-Key*, CHI. TRIB., Aug. 6, 2003, http://articles.chicagotribune.com/2003-08-06/business/0308060386_1_downloading-music-companies-new-music-business (citing overly high prices as a justification for illegal downloading); INST. FOR GLOBAL ETHICS, *supra* note 13 (stating that illegal downloading is justified by teens because they see it as a victimless crime).

32. 464 U.S. 417, 451 (1984).

33. See, e.g., *BMG Music v. Gonzalez*, 430 F.3d 888, 889–91 (7th Cir. 2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014–19 (9th Cir. 2001). Although the Audio Home Recording Act of 1992 provided an express exemption from liability for infringement for the “noncommercial use by a consumer” of a digital or analog audio recording device or medium “for making digital musical recordings or analog musical recordings,” 17 U.S.C. § 1008 (2006), this exclusion from liability has been narrowly limited to the use of devices or media that are now largely obsolete and does not apply to noncommercial consumer copying of musical recordings onto CDs, MP3 devices, or computer hard drives. See *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999) (distinguishing Diamond Multimedia’s Rio portable digital recording device, which used MP3 technology to allow users to store and listen to music files copied from the Internet or a compact disc from the types of devices covered by the Audio Home Recording Act of 1992); Kevin M. Dious, Note, *Is Home Recording Dead? A Discussion of the Atlantic v. XM Satellite Radio Litigation and Audio Home Recording Rights*, 14 J. INTEL. PROP. L. 269, 300–04 (2007) (noting that the AHRA has become “meaningless” in light of its narrow scope, advances in technology, and interpretation by the courts). Even if some protection remains for a narrow class of personal copying of musical works, the exemption established by the Act has no application to personal copying of other types of works, such as computer software or films. See 17 U.S.C. § 1001 (defining the terms of the statute to include only musical recordings and excluding devices and media commonly used by consumers for copying computer software, motion pictures, or other digital works).

34. Currently, there is some question about whether merely uploading copyrighted files to the Internet can constitute “distributing” the files for purposes of infringement. See *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216–27 (D. Minn. 2008) (evaluating arguments supporting and opposing interpretation of “distribution” to include merely making materials available on the Internet without evidence of actual downloading by others and holding that “distribution” requires more than merely making copyrighted works available online).

35. *A&M Records, Inc.*, 239 F.3d at 1017.

The next two consumer justifications reflect understandable frustration with the way the music business operates,³⁶ but the law does not recognize these excuses as valid reasons for avoiding liability. It is simply not a defense to copyright infringement for the copier to assert that the creator does not receive enough of the purchase price, that the price is too high, that the seller is too rich, or that “everyone else is doing it.”³⁷ These arguments presume an absolute right to enjoy access to copyrighted works that is not supported by the Copyright Act or its constitutional underpinnings. In fact, the law has always balanced the rights of authors to control the distribution of their works with the public interest in accessing them, and has never found either to be absolute.³⁸ Therefore, consumers who want copyrighted works—and whose use of the works would not constitute a fair use—must either pay the requested price or go without.³⁹

36. A detailed discussion of the structure and operation of the industries governing the recording and distribution of music is beyond the scope of this Article. Many fine books and articles that explain, analyze, and critique the business practices of the music industry have already been published. See, e.g., M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* (Robert Nirkind ed., 10th ed. 2007); RUSSELL SANJEK & DAVID SANJEK, *PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY* (1996); MICHAEL J. WOLF, *THE ENTERTAINMENT ECONOMY: HOW MEGA-MEDIA FORCES ARE TRANSFORMING OUR LIVES* (2000) (discussing the hit-driven business models that govern the film and music industries and the effect of digital distribution on those models); Revella Cook, *The Impact of Digital Distribution on the Duration of Recording Contracts*, 6 VAND. J. ENT. L. & PRAC. 40, 41–42 (2003) (explaining how the music business model often leaves musicians—even those with hit songs—in debt); Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, 116 HARV. L. REV. 2632, 2637–39 (2003) (critically discussing record companies' treatment of artists); Corrina Cree Clover, Comment, *Accounting Accountability: Should Record Labels Have a Fiduciary Duty to Report Accurate Royalties to Recording Artists?*, 23 LOY. L.A. ENT. L. REV. 395 (2003) (explaining the recording artist royalty system and the record labels' tendency to misrepresent the amount artists should be paid).

37. See *BMG Music v. Gonzalez*, 430 F.3d at 891 (rejecting defendant's argument that “other persons were greater offenders” as a defense to infringement for downloading); *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (rejecting as specious defendant's argument that sampling is a general practice in the rap recording industry and thus excuses infringement); 143 CONG. REC. H9883 (daily ed. Nov. 4, 1997) (statement of Rep. Cannon) (supporting enactment of the No Electronic Theft Act by stating, “Playing Robin Hood may have made sense when the Sheriff of Nottingham was extracting tribute from the peasantry, but playing Robin Hood on the Internet is a recipe for disaster for our domestic software industry.”).

38. See *Eldred v. Ashcroft*, 537 U.S. 186, 199–208, 211–14 (2003) (discussing the balance between the limited monopoly granted to authors of creative works in order to promote creative activity and the manner in which the limited monopoly rights had been expanded over the years by Congress); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524–27 (1994) (discussing the policies underlying the Copyright Act and Copyright Clause of the Constitution); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (discussing the balance of interests reflected in the grant of copyright and the fact that copyright owners' monopoly is not absolute).

39. An exception might occur where the defendant in a copyright infringement suit is able to prove that the plaintiff misused its copyright or had unclean hands. See generally 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.09 (Matthew Bender, ed.,

In short, these consumer justifications are not recognized as legitimate defenses for violating copyright owners' rights. In spite of this, tens of millions of Americans continue to engage in unauthorized downloading of copyrighted works on a regular basis,⁴⁰ because the prevailing social norm simply does not recognize copyright infringement as being wrong, at least in the form of P2P file sharing.⁴¹

B. The Industry Strikes Back

The entertainment industry's response to the prevailing social norm has been largely inadequate in providing an alternative to illegal file sharing, with far too heavy an emphasis on deterrence. The "customer is wrong" approach initially adopted by the industry made it slow to respond to consumer demands, and the severity of sanctions now available as a result of its successful efforts to amend the copyright law threatens to undermine the industry's efforts to change the prevailing view that copyright infringement is not "wrong," at least when committed by the average citizen with no commercial motive.

1. The "Customer is Wrong" Approach

In spite of the threat to copyright interests posed by the advent of digital technology, the entertainment industry was initially slow to develop business models that satisfied consumer demand for easy access to digital works in multiple formats. Consumers demanded easy, inexpensive access to digital works with the ability to use

2010). While the application of the antitrust laws to the business practices of the film, music, and software industries, as well as the dramatically increased vertical and horizontal consolidation of the entertainment industry over the past decade, are outside the scope of this Article, courts may begin reaching the misuse of copyright defense in more cases as copyright owners seek to impose liability on "deep pocket" secondary infringers. See Patrick M. Cox, Note, *What Goes Up Must Come Down: Grounding the Dizzying Height of Vertical Mergers in the Entertainment Industry*, 25 HOFSTRA L. REV. 261 (1996) (analyzing whether antitrust laws should be used to prevent vertical mergers in the entertainment industry); Anthony Maul, Note, *Are the Major Labels Sandbagging Online Music? An Antitrust Analysis of Strategic Licensing Practices*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 365 (2003–04) (describing as "collusive" the environment among record labels that resulted in effort to shut down online P2P networks).

40. See Jessica Litman, *Sharing and Stealing*, supra note 30, at 40; Kate Leadbetter, *Rights Group Defends P2P in Ad Campaign*, ZDNET (July 1, 2003, 3:26 PM), <http://news.zdnet.co.uk/internet/0,39020369,2136872,00.htm> (quoting Fred von Lohmann, Electronic Frontier Foundation Senior Staff Attorney in stating that more than 60 million Americans use online P2P file-sharing software).

41. See Jensen, supra note 1; Katyal, supra note 26.

multiple media for access and storage.⁴² The initial efforts by record companies to sell their products online generally failed; consumers complained that the first online stores offered too limited a selection, were too expensive, and were unwieldy to use.⁴³ In the last several years, companies like iTunes and Rhapsody have begun to meet these consumer demands by creating licensed sites that provide a viable alternative to unlicensed P2P file sharing,⁴⁴ but the entertainment industry asserts that increases in legal downloads have still not come close to replacing sales of works that have been (and will continue to be) lost to illegal, online file sharing.⁴⁵

Rather than focusing their attention on ways to meet consumers' demands and compete with "free" products, the music, film, and software industries devoted most of their initial efforts to trying to thwart copying. They lobbied for additional copyright protections and punishments for infringement; litigated against the companies that produced the hardware and software that made digital copying possible;⁴⁶ worked to develop copy protection technology for

42. See Warren Cohen, *CD Burning: How the Labels are Trying to Stop You*, ROLLING STONE, June 20, 2002, at 43–44 (discussing negative consumer reaction to publishers' attempts to sell CDs equipped with copy-protection); Devin Leonard, *The Music Men Are Out of Tune*, FORTUNE, June 11, 2001, http://money.cnn.com/magazines/fortune/fortune_archive/2001/06/11/304638/index.htm (discussing the inadequacy of record company online distribution sites, which did not allow consumers to use the music they purchased in most of the many ways in which consumers wanted to use it).

43. Pui-Wing Tam & Anna Wilde Mathews, *Apple Polishes Its Music Service*, WALL ST. J., Apr. 14, 2003, at B1 (discussing announcement of Apple's planned online distribution site and noting that preexisting record industry sites like PressPlay and MusicNet were criticized as "too cumbersome" and too limited in both breadth of songs offered and permitted uses of purchased songs); see also David Browne, *Wal-Mart Music Downloads*, ENT. WKLY, Apr. 16, 2004, <http://www.ew.com/ew/article/0,,609612,00.html> (criticizing Wal-Mart's entry into the online musical distribution business because of its limited availability of musical selections).

44. See Noah Robischon, *Big Mac Attack: Apple Gets Down With Music Fans - to the Tune of Millions*, ENT. WKLY, May 16, 2003, at 14; Brad Stone, *The Music Streams that Soothe an Industry*, N.Y. TIMES, July 25, 2009, <http://www.nytimes.com/2009/07/26/business/26stream.html>; Brennon Slattery, *Music Streaming Chips Away at Illegal File-Sharing*, TODAY @ PC WORLD (July 13, 2009, 9:32 AM), http://www.peworld.com/article/168923/music_streaming_chips_away_at_illegal_filesharing.html.

45. See Siwek, *supra* note 27 (giving data summarizing economic losses due to pirated music); Marguerite Reardon, *Oops! They're Swapping Again*, CNET NEWS, (Jan. 16, 2004), http://news.cnet.com/Oops-Theyre-swapping-again/2100-1027_3-5142382.html (noting that several high profile legal music download sites were launched in 2004); John Borland, *How Much is Digital Music Worth?*, CNET NEWS (Dec. 8, 2003), http://news.cnet.com/2100-1027_3-5117275.html; John Borland, *Microsoft Music Store to Open Next Year*, CNET NEWS (Nov. 17, 2003), http://news.cnet.com/2100-1027_3-5108173.html.

46. See, e.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999).

their digital works;⁴⁷ and tried to educate the public about the evils of unauthorized copying.⁴⁸ For several years, the RIAA filed thousands of civil lawsuits against individuals allegedly using P2P file-sharing technology to make sound recordings available to other P2P users over the Internet.⁴⁹

No single effort by the entertainment industry solved the problem faced by copyright owners, but together these measures have combined to provide the industry with some potent weapons that it has begun wielding to recover losses from big pockets and to deter future infringement. As discussed in Part III, this strategy ignores the dangers of excessive penalties for what is “essentially an economic offense,”⁵⁰ in terms of both deterrence theory and the public interest in access to creative works.

2. The Industry’s Success in Altering Legal Norms to Provide Severe Penalties for Infringement

Although the industry’s education, digital rights management, and litigation strategies have not greatly affected the social acceptance of illegal file sharing,⁵¹ the industry’s lobbying efforts during the last three decades met with little resistance⁵² and have led

47. See generally John Borland, *Labels to Dampen CD Burning?*, CNET NEWS (June 2, 2004), http://news.cnet.com/Labels-to-dampen-CD-burning/2100-1027_3-5224090.html (discussing plans by music companies to move forward to incorporate copy protection technology into a majority of CDs sold in the U.S. and the U.K.). Because of the strong consumer dislike for copy protection technology, the industry’s effort to prevent copying through copy protection technology has largely proved unsuccessful. See generally, Cohen, *supra* note 42 (discussing industry efforts to implement copy protection to prevent illegal copying and the complaints of consumers regarding inability to make copies for personal use). In fact, although the record labels’ licensing agreements with iTunes required that digital rights management (DRM) technology be included in MP3 files sold through the site, labels abandoned DRM protections in their distribution deals with Amazon when it entered the market. See Antone Gonsalves, *Amazon Adds Fourth Major Record Label to DRM-Free Music Store*, INFO. WK., <http://www.informationweek.com/news/global-cio/showArticle.jhtml?articleID=205602334>.

48. See, e.g., Brooks Boliek, *H’wood Steps Up AntiPiracy Fight: Trailers, Ads Flood Theaters*, THE HOLLYWOOD REP., July 23, 2003; Greg Hernandez, *Movie Piracy Ads Set Sail*, L.A. DAILY NEWS, June 16, 2004, at B1, available at 2004 WLNR 2851345.

49. See *supra* notes 8–9 and accompanying text; see also William Glanz, *Music Pirates Turn Up Volume Recording Industry Suits Fail to Squelch Use of Online Services*, WASH. TIMES, Sept. 6, 2004, at C17 (reporting that file sharing “remains widespread” in spite of the RIAA’s lawsuits against almost 5000 individual file sharers and noting that file sharing appeared to have increased in the past year).

50. H.R. REP. NO. 93-1581, at 3 (1974), reprinted in 1974 U.S.C.C.A.N. 6849, 6852.

51. See *supra* note 31 and accompanying text; see also John Boudreau, *Illegal File Sharing Showing No Letup*, SEATTLE TIMES, July 3, 2006, <http://community.seattletimes.nwsourc.com/archive/?date=20060703&slug=btfilesharing03>.

52. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) (discussing the role of industry lobbyists in crafting revisions to copyright law,

to significant changes in the legal norms governing penalties for infringement of copyrighted entertainment works. Music industry lobbyists have achieved the most striking increase in legal protection for sound recordings, particularly given that federal law has protected sound recordings for fewer than forty years.⁵³ Before Congress extended federal copyright protection to sound recordings in 1971, “pirates” faced infringement suits by the owners of the underlying musical compositions, but no federal criminal sanctions punished this conduct.⁵⁴ Since 1971, criminal penalties for copyright infringement have grown from misdemeanor sanctions (fines of up to \$1,000 and imprisonment of up to one year) to felony sentences, even for first-time offenders, including fines of up to \$250,000 and imprisonment, with repeat felony offenders subject to imprisonment for up to ten years.⁵⁵ In addition, the specter of treble damages and additional criminal penalties under RICO now augment the existing civil and criminal copyright infringement remedies.⁵⁶

disadvantaging those whose interests were not represented in the process); Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989) (noting that the important role given to existing copyright owners in the drafting process made the law unwieldy and ambiguous when applied to new technologies); Shahram A. Shayesteh, Comment, *High-Speed Chase on the Information Superhighway: The Evolution of Criminal Liability for Internet Piracy*, 33 LOY. L.A. L. REV. 183, 221–26 (1999) (criticizing the underrepresentation of interests of general public in enactment of NET Act and DMCA). It is only recently that an organized effort has been made on behalf of those who wish to have freer access to digital works over the Internet to participate in the legislative process. See, e.g., DIGITAL CONSUMER, <http://www.digitalconsumer.org/> (last visited Oct. 26, 2010); About EFF, ELECTRONIC FRONTIER FOUND., <http://www.eff.org/about> (last visited Oct. 26, 2010).

53. Before 1971, only a hodge-podge of state laws provided makers of sound recordings with any protection against the copying and sale of records without the makers’ permission. See Copyright Act of 1909, Pub. L. No. 60-349, § 5, 35 Stat. 1075, 1076–77 (codified as amended in 17 U.S.C.) (showing that federal copyright protection did not extend to sound recordings); S. 92-72, 92d Cong. (1st Sess. 1971) (“The enactment of S. 646 will mark the first recognition in American copyright law of sound recordings as copyrightable works.”). After years of lobbying Congress to obtain copyright protection for sound recordings, the recording industry finally achieved partial success in 1971, when the Sound Recording Act of 1971 was enacted. Pub. L. No. 92-140, 85 Stat. 391 (codified as amended in scattered sections of 17 U.S.C.). However, owners of sound recordings did not receive the entire “bundle” of rights to which owners of other works were entitled; rights in sound recordings were originally limited to the rights of duplication, distribution, and preparation of derivative works, with limited digital performance rights only recently added to the bundle. See 17 U.S.C. § 114(a) (2006).

54. See Sound Recording Act of 1971 § 2 (adding criminal penalties for the infringement of musical composition copyrights); *Heilman v. Bell*, 583 F.2d 373, 378 (7th Cir. 1978) (noting that although no criminal sanctions previously existed for sound recordings, the 1971 amendment to the Copyright Act permitted retroactive application of criminal penalties for infringement of musical composition copyrights).

55. Copyright Act of 1909 §§ 28, 29; see also *United States v. LaMacchia*, 871 F. Supp. 535, 539 (D. Mass. 1994) (discussing history of criminal copyright infringement provisions).

56. 18 U.S.C. § 2319 (2006).

The availability of substantial civil damages and criminal penalties for copyright infringement, though a relatively new development in copyright law, has been increasing dramatically over the past thirty-five years.⁵⁷ For civil infringement claims, the Copyright Act of 1976 provides for a prevailing plaintiff to recover both actual damages and the defendant's profits,⁵⁸ or, alternatively, statutory damages.⁵⁹ Currently, the minimum statutory damage award is \$750 for each act of knowing infringement, triple the initial rate of \$250 Congress had set in 1976.⁶⁰ Congress likewise raised the maximum statutory damage award threefold over the same period of time⁶¹ to \$30,000 for each act of infringement.⁶² In addition, the maximum statutory damage award may increase to \$150,000 where the infringement is willful, an amount thrice that of 1976.⁶³ The

57. Others have already traced the evolution of the civil and criminal copyright infringement provisions at length. See generally NIMMER & NIMMER, *supra* note 39, §§ 14, 15.01[B] (explaining remedies available for civil and criminal copyright infringement and tracing evolution of these remedies). See also Matt Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367 (2002) (tracing the expansion of civil liability and evolution of statutory damage provisions in civil cases); Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. UNIV. L.Q. 835 (1999); Aaron M. Bailey, Comment, *A Nation of Felons?: Napster, the NET Act, and the Criminal Prosecution of File-Sharing*, 50 AM. U. L. REV. 473 (2000) (discussing extension of criminal liability for copyright infringement and possibility of criminal prosecution of P2P file-sharers under § 506); Shayesteh, *supra* note 52, at 200–12 (reviewing the evolution of criminal penalties for copyright infringement); Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705 (1999). Thus, this Article does not attempt to review in any detail what prior articles have already accomplished, and instead focuses its attention more on the remedies available under current law.

58. 17 U.S.C. § 504(b); see *Miller v. Universal Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981). See generally NIMMER & NIMMER, *supra* note 39, § 14.01 (describing monetary remedies available in civil suits for copyright infringement).

59. 17 U.S.C. § 504(c)(1). Prevailing parties in civil actions may also recover an award of attorneys' fees and costs, as well as injunctive relief and orders providing for the impounding and destruction of infringing articles. 17 U.S.C. §§ 502(a), 503(a)–(b), 505.

60. Compare 17 U.S.C. § 504(c)(1), with Copyright Act of 1976, Pub. L. No. 94-553, § 504(c)(1), 90 Stat. 2541, 2585. The 1976 Act did not change the statutory minimum, which was \$250 in the Copyright Act of 1909. Compare Copyright Act of 1909 § 25(b), with Copyright Act of 1976 § 504(c)(1).

61. See Copyright Act of 1976 § 504(c)(1) (setting maximum statutory award of \$10,000). Under the Copyright Act of 1909, the maximum statutory damage amount was \$5,000. Copyright Act of 1909 § 25(b).

62. 17 U.S.C. § 504(c)(1).

63. Compare 17 U.S.C. § 504(c)(1), with Copyright Act of 1976 § 504(c)(1). Where several works are infringed or where there are numerous incidents of infringement of even a single work, statutory damage awards can reach in the millions of dollars. See, e.g., *MCA Television Ltd. v. Feltner*, 89 F.3d 766 (11th Cir. 1996) (awarding \$9 million in statutory damages where defendant engaged in 900 separate infringing telecasts); *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332 (9th Cir. 1990) (affirming award of \$4 million in statutory damages, comprised of 80 separate awards of the then-maximum \$50,000 statutory damage award for willful

legislative history relating to these increases in available statutory damages indicates an intent to deter piracy by ensuring that “the cost of infringement . . . substantially exceed[s] the cost of compliance so that those who use or distribute intellectual property have incentive to comply with the law.”⁶⁴

Criminal penalties for copyright infringement have also dramatically increased in the last three and a half decades. Originally, only misdemeanor penalties, small fines, and forfeiture were available as punishment for criminal infringement.⁶⁵ In fact, lobbyists for the music, motion picture, and publishing industries led unsuccessful efforts to increase the available criminal remedies for many years after the enactment of the 1909 Copyright Act.⁶⁶ In 1974, Congress opted to leave the maximum imprisonment term for first-time criminal infringement unchanged⁶⁷ but elevated criminal infringement by repeat offenders to felony status for the first time.⁶⁸

infringement); *UMG Recordings, Inc. v. MP3.Com, Inc.*, No. 00 Civ. 0472 (JSR), 2000 U.S. Dist. LEXIS 17907 (S.D.N.Y. Nov. 14, 2000) (awarding \$53,400,000 in statutory damages); *Nat'l Cable Television Ass'n. v. Broad. Music, Inc.*, 772 F. Supp. 614, 653 (D.D.C. 1991) (awarding \$2 million in statutory damages). *But see* *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1053–54, 1061 (D. Minn. 2010) (reducing statutory damage award to \$2250 per infringing song, in lieu of \$80,000 per song, and stating “[t]he need for deterrence cannot justify a \$2 million verdict for stealing and illegally distributing 24 songs for the sole purpose of obtaining free music”).

64. 145 CONG. REC. H12884 (daily ed. Nov. 18, 1999) (remarks of Rep. Berman); *see also* *UMG Recordings, Inc. v. MP3.Com, Inc.*, 2000 Copyright L. Dec. (CCH) ¶¶ 28,141 (S.D.N.Y. 2000) (determining that the appropriate award of statutory damages in the case was \$25,000 per willfully infringed CD despite the absence of any evidence that defendant profited from the infringement, because it was necessary to deter others who might engage in Internet piracy).

65. Copyright Act of 1909 §§ 28, 29, 32; *see also* *United States v. LaMacchia*, 871 F. Supp. 535, 539 (D. Mass. 1994) (discussing history of criminal copyright infringement provisions).

66. *See* WILLIAM S. STRAUSS, STUDY NO. 24: REMEDIES OTHER THAN DAMAGES FOR COPYRIGHT INFRINGEMENT, (U.S. Gov't Printing Office, 1960), *available at* <http://www.copyright.gov/history/studies/study24.pdf> (describing legislative history of Copyright Act relating to remedies other than damages and noting un-enacted legislation that would have reduced or eliminated criminal penalties); STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (COMM. PRINT 1963) (including testimony by representatives of the music publishing, motion picture, and book publishing industries complaining about the lack of responsiveness of the Justice Department in pursuing criminal penalties despite multiple infringements causing great damages because of the fact that criminal copyright infringement was only a misdemeanor offense, arguing that the law should be revised to create felony liability, particularly for repeat offenders).

67. *See* H.R. REP. NO. 93-1581, at 3 (1974), *reprinted in* 1974 U.S.C.A.N. 6849, 6852 (explaining Congress' reluctance to adopt the proposed three-year and seven-year maximum imprisonment penalties for first-time and repeat offenders, respectively, because criminal copyright infringement “is essentially an economic offense”).

68. *See* Act of Dec. 31, 1974, Pub. L. No. 93-573, § 102(2), 88 Stat. 1873 (codified as amended in scattered sections of 17 U.S.C.). One factor that led to increased criminal sanctions after recognition of a federal copyright in sound recordings in the 1970s was the exponential

Since 1974, Congress has increased sanctions for criminal infringement incrementally but significantly.⁶⁹ Not only are first-time offenders now subject to felony penalties of up to five years in prison for criminal infringement, with a possibility of ten years imprisonment for repeat felony offenders,⁷⁰ but the maximum fine for criminal infringement by an individual defendant has escalated from \$25,000 in 1976 to \$250,000 today.⁷¹ Each incremental increase in criminal sanctions for copyright infringement over the past thirty-five years generated at least some Congressional debate, and several bills proposing even more dramatic increases in available penalties for criminal infringement failed to emerge from committee.⁷² However, a

growth experienced by the recording industry in the prior two decades and the resulting escalation in the amount of money the industry claimed to be losing to piracy every year. *See* H.R. REP. NO. 93-1581 at 3 (explaining Congress' support for a "very substantial proposed increase in penalties" for criminal copyright infringement in the 1974 amendments to the 1909 Act because "record piracy is so profitable that ordinary penalties fail to deter prospective offenders"); S. REP. NO. 97-274, at 3-6 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 127, 129-33 (explaining the need for increased criminal penalties for infringement in light of the great economic loss to copyright owners from piracy and great potential for profit to infringers and noting the Department of Justice's estimate that "worldwide sales in pirated sound recordings totaled \$1.1 billion in 1980, \$560 million of which occurred in North America").

69. *See, e.g.*, No Electronic Theft Act, Pub. L. No. 105-147, § 2(d), 111 Stat. 2678; (1997); Criminal Penalties for Copyright Infringement, Pub. L. No. 102-561, § 1, 106 Stat. 4233 (1992). *See generally* sources cited *supra* notes 57, 60.

70. *See* 18 U.S.C. § 2319 (2006).

71. *Compare* Copyright Act of 1976, Pub. L. No. 94-553, § 506(a), 90 Stat. 2541, 2586, with 18 U.S.C. § 3571(b)(3) (2006). The harshness of the available statutory maximum sentences for infringement of the reproduction or distribution rights of a copyrighted work varies depending on whether the defendant had a for-profit motive, whether the defendant has previous felony convictions, and whether the defendant is a corporation or an individual. *See* 17 U.S.C. § 506 (2006); 18 U.S.C. §§ 2319, 3571. Although increased criminal fines and jail terms were initially limited to infringement of sound recordings and motion pictures, Pub. L. No. 93-573, 88 Stat. 1873 (1974), these sanctions are now available for infringement of the reproduction or distribution rights of any copyrighted work, 17 U.S.C. § 506(a)(1); 18 U.S.C. § 2319(b)-(c). However, the felony provisions only apply to infringement of the reproduction and distribution rights in the "bundle" of protected rights of copyright owners. 18 U.S.C. § 2319(b)-(c). Thus, only misdemeanor penalties are available for violations of other rights, such as the performance right and the right to prepare derivative works.

72. For example, in 2003, legislation was introduced in Congress that would have made it a felony to place a single copy of a work on a computer network, essentially creating a presumption that many copies, worth in excess of the felony threshold value, are made of every work made available over the Internet for copying. *See* Author, Consumer, and Computer Owner Protection and Security Act of 2003, H.R. 2752, 108th Cong. (2003). Other bills that would affect criminal and civil penalties for copyright infringement were proposed but died in committee, including one that would have expressly imposed criminal liability on secondary offenders who "intentionally induce" criminal infringement, Inducing Infringements of Copyrights (INDUCE) Act of 2004, S. 2560, 108th Cong. (2004), and one that would have greatly expanded the powers of the Department of Justice in pursuing both criminal and civil offenders, Protecting Intellectual Rights Against Theft and Expropriation (PIRATE) Act, S. 2237, 108th Cong. (2004). Very similar bills introduced in 2006 and 2007 would have expressly provided for identical

provision that more than doubled potential exposure for copyright infringement slipped through Congress with no real debate in 1996 and has received little comment since then—the addition of copyright infringement as a basis for civil and criminal RICO liability.

3. The Creation of RICO Liability for Copyright Infringement

In 1996, the severity of both civil and criminal sanctions potentially applicable to copyright infringers increased dramatically when Congress added criminal copyright infringement as a predicate act for RICO liability.⁷³ A defendant convicted of a RICO offense could receive an additional twenty years of imprisonment and fines of up to an additional \$250,000,⁷⁴ over and above the penalties available for repeat criminal offenders under the Copyright Act, because a criminal RICO violation is a separate offense from criminal copyright infringement.⁷⁵ In a civil copyright infringement lawsuit, a plaintiff who proves civil RICO claims could recover not only the damages allowable under the Copyright Act, but also treble damages under RICO.⁷⁶

Congress added criminal copyright infringement as a predicate “racketeering” act for RICO liability as part of the Anti-Counterfeiting Consumer Protection Act of 1996,⁷⁷ which sought to “provide additional tools to combat trademark and goods counterfeiting crimes that cost our Nation billions of dollars per year.”⁷⁸ This legislation

penalties for attempt and conspiracy to commit criminal copyright infringement as for the underlying offense and would have doubled the maximum sentence for each level of offense. Intellectual Property Enhanced Criminal Enforcement Act of 2007, H.R. 3155, 110th Cong. (2007); Intellectual Property Enhanced Criminal Enforcement Act of 2006, H.R. 5921, 109th Cong. (2006). While proposed legislation such as the bills mentioned above are beyond the scope of this Article, the normative concerns discussed in Part IV, *infra*, are ones that should also be taken into account as Congress considers further proposals to expand the scope of copyright owners’ rights and the penalties that are available for infringement.

73. See Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386.

74. 18 U.S.C. §§ 1963(a), 3571(b)(3). Extensive forfeiture provisions are also included in § 1963(a), which require forfeiture of all interests acquired or maintained by the defendant in violation of the RICO statute. 18 U.S.C. § 1963(a).

75. See, e.g., *United States v. Grayson*, 795 F.2d 278, 282 (3d Cir. 1986); *United States v. Hawkins*, 658 F.2d 279, 288 (5th Cir. 1981); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979).

76. 18 U.S.C. § 1964(c). It is unclear from the text of the statute whether the treble damage provision would apply to an election of statutory remedies under the Copyright Act in lieu of actual damages, but in light of the expansive interpretation given to RICO, See, e.g., *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), even statutory damages might be subject to trebling.

77. See 110 Stat. at 1386.

78. 141 CONG. REC. S18594 (daily ed. Dec. 14, 1995) (statement of Sen. Leahy). The House Report notes that the purpose of the legislation “is to prevent counterfeiting of

focused on enhancing the penalties under 18 U.S.C. § 2318 for trafficking in counterfeit goods.⁷⁹ There was no legislative debate regarding the addition of criminal copyright infringement as a RICO predicate act, and Congress passed the legislation without objection.⁸⁰

The legislative history of the bill adding copyright infringement as a RICO predicate act makes clear that Congress failed to consider the potential impact of the legislation on copyright infringement cases unrelated to commercial counterfeiting.⁸¹ In fact, the potential implications are sweeping, largely because of ambiguities in the criminal provisions of the Copyright Act as well as in the “enterprise” and “pattern” provisions of RICO.⁸²

Prosecutorial discretion has limited the scope of criminal copyright infringement prosecutions to those cases that fall readily within what most would view as appropriate applications of criminal

copyrighted and trademarked goods and services and to ensure that counterfeit goods produced elsewhere cannot enter the United States.” H.R. REP. NO. 104-556 at 1-2 (1995), *reprinted* in 1996 U.S.C.C.A.N. 1074, 1074-75. In the “Purpose and Summary” section of the House Report, no reference is made to the addition of criminal copyright infringement as a predicate act for RICO purposes; it simply states, “H.R. 2511 includes trafficking in counterfeit goods or services as predicate offenses subject to the Racketeer Influenced and Corrupt Organizations (RICO) provisions of the criminal code.” *Id.* at 2. Similarly, the Senate Report omits any mention of a need for further punishment of criminal copyright infringement, focusing on the “phenomenal growth of the crime of counterfeiting” and the involvement of organized crime in “the manufacturing, distributing, selling, and financing of counterfeit products.” S. REP. NO. 104-177 at 3 (1995).

79. 110 Stat. at 1387-88.

80. 141 CONG. REC. S6302-03 (daily ed. June 14, 1996); 141 CONG. REC. H5780 (daily ed. June 4, 1996); *see also* 141 CONG. REC. H5777 (daily ed. June 4, 1996) (statement of Rep. Moorehead) (commenting that he is unaware of any opposition to H.R. 2511); 141 CONG. REC. H5778 (daily ed. June 4, 1996) (statement of Rep. Schroeder) (emphasizing the “very bipartisan, nonconfrontational fashion” in which the committee moved to advance the legislation).

81. The official title of the legislation provided that its driving purpose was “[t]o control and prevent commercial counterfeiting.” S. 1136, 104th Cong. (1995). The crimes other than copyright infringement that were added as predicate acts for RICO purposes all involved commercial “trafficking” in counterfeit goods and services. 110 Stat. at 1386. Statements in support of the bill emphasized the high profits earned by those who engage in trademark and copyright counterfeiting; there was no discussion of copying of copyrighted material for private use or other noncommercial purposes. *See, e.g.*, 141 CONG. REC. H5777 (daily ed. June 4, 1996) (statement of Rep. Moorehead) (“The combination of high profits and low risk of prosecution has made trademark and copyright counterfeiting a favorite activity of organized crime syndicates.”); 141 CONG. REC. H5778 (daily ed. June 4, 1996) (statement of Rep. Schroeder) (“Because there is an enormous potential for profit in illegal counterfeiting, the civil and criminal remedies must be strong if we are to deter counterfeiting.”); 141 CONG. REC. H5779 (daily ed. June 4, 1996) (statement of Rep. Goodlatte) (“[C]ounterfeiting is a highly lucrative, but relatively low-risk crime with only hand-slap penalties if caught.”). Those who spoke in support of the legislation repeatedly noted the need for the bill’s strengthened enforcement provisions to “make it easier to combat commercial counterfeiting.” 141 CONG. REC. H5778 (daily ed. June 4, 1996) (statement of Rep. Schroeder).

82. *See infra* Part II.

sanctions for copyright infringement.⁸³ However, as civil RICO claims become more common in civil copyright actions, the addition of criminal copyright infringement to the list of RICO predicate acts will likely extend to civil cases far beyond the realm of “commercial counterfeiting.” This is largely because, as interpreted and amended to date, the Copyright Act’s criminal infringement provision requires little additional proof once civil copyright infringement is established. In many cases, once criminal infringement is established, it would not be difficult to meet the additional requirements of a civil RICO claim. The next Part discusses the manner in which a civil infringement suit can be converted into a civil RICO case; the following Part will then discuss the normative concerns raised by the possibility of widespread application of the civil RICO statute to copyright infringement cases.

II. THE POTENTIAL EASE WITH WHICH COPYRIGHT DISPUTES CAN BE CONVERTED INTO CIVIL RICO LAWSUITS

Plaintiffs in copyright actions now have a potent additional remedy under the RICO Act, and little additional evidence is needed in many cases to allege a civil RICO claim on top of an infringement claim. Proof of civil RICO liability for copyright infringement requires that a plaintiff establish (A) the predicate act of criminal copyright infringement by the defendant and (B) the elements of one of four possible bases for RICO liability.⁸⁴ Although cases asserting RICO claims in addition to copyright infringement claims are starting to move through the courts,⁸⁵ reported copyright infringement cases

83. See, e.g., U.S. DEP’T OF JUSTICE, PRO IP ACT: FIRST ANNUAL REPORT 2008-2009, at 12–13 (2009) [hereinafter PRO IP], available at <http://www.justice.gov/criminal/cybercrime/proipreport2009.pdf> (describing successful prosecutions against online “warez” groups responsible for initial online release of pirated software, music, video games, and movies, including the “first-ever” P2P trial conviction against an operator of a web site that facilitated illegal distribution of over two million downloads of unlicensed, copyrighted works); U.S. DEP’T OF JUSTICE, FY 2009 PERFORMANCE AND ACCOUNTABILITY REPORT, at app. E (2010), available at <http://www.justice.gov/ag/annualreports/pr2009/appd/app-e.pdf> (reflecting receipt by U.S. Attorneys nationwide of 79 investigative matters under 18 U.S.C. § 2319, with 58 cases filed against 75 defendants); U.S. DEP’T OF JUSTICE, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT, at app. F (2009), available at <http://www.justice.gov/ag/annualreports/pr2008/appd/p254-285.pdf> (reflecting receipt by U.S. Attorneys of 125 investigative matters under 18 U.S.C. § 2319, with 76 cases filed against 86 defendants); *Intellectual Property Cases*, U.S. DEP’T OF JUST., <http://www.justice.gov/criminal/cybercrime/ipcases.html#operations> (last visited Aug. 5, 2010) (listing cases prosecuted under 18 U.S.C. § 2319).

84. 18 U.S.C. §§ 1961(1), 1964(c) (2006).

85. See, e.g., *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008) (dismissing RICO claims based in part on copyright infringement due to lack of proximate cause of damage to the plaintiff from the alleged infringements); *CoStar Realty Info., Inc. v. Field*, 612 F. Supp. 2d 660 (D. Md. 2009) (dismissing civil RICO claims based on criminal copyright infringement for failure to adequately allege the “enterprise” requirement); *Bryant v. Mattel*,

addressing RICO liability have thus far failed to resolve, or have inconsistently addressed, numerous questions regarding the scope and application of the criminal copyright infringement statute, as well as the manner in which RICO might be interpreted in the context of copyright infringement disputes.⁸⁶ This Part discusses these ambiguities in applying both the criminal copyright infringement statute and RICO.

A. Proof of Criminal Copyright Infringement

To succeed in establishing criminal copyright infringement, a plaintiff in a civil RICO case must prove (1) the elements of a civil copyright infringement claim,⁸⁷ plus two additional elements: (2) that

Inc., 573 F. Supp. 2d 1254 (C.D. Cal. 2007) (refusing to dismiss civil RICO claims based on alleged predicate acts of criminal copyright infringement involving dispute over ownership of Bratz dolls); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1127–28 (C.D. Cal. 2001) (denying motion to dismiss RICO claims based on copyright infringement but granting motion for more definite statement regarding certain RICO claim allegations). In an informal review of civil copyright infringement case filings in two federal districts during the period from January, 2002 through June, 2003 using the PACER system, the author determined that about 2% of the complaints designated as primarily copyright infringement cases also included a civil RICO claim based on infringement as a predicate act. A similar survey of the period from January, 2009 through June, 2010 yielded comparable results, although the federal courts' system for designating the subject matter of cases makes it difficult to accurately track information about the combination of claims alleged in filed cases. See *RICO Reform Act of 1989: Hearings on H.R. 1046 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearings*] (statement of Gerard L. Lynch) (discussing difficulties in assessing true number of civil RICO cases because of single-claim designation form used by Administrative Office of U.S. Courts in tracking substantive nature of cases).

86. Compare *Perfect 10, Inc.*, 167 F. Supp. 2d at 1127–28 (refusing to dismiss civil RICO claim against defendant, which served as a “gatekeeper” for fee-based Internet pornography websites, alleged to contribute to and benefit from copyright infringement of photographs owned by plaintiff that were allegedly used without permission by defendant’s linked websites), with *Stewart v. Wachowski*, No. CV 03-2873 MMM (VBKx) 2005 WL 6184235 (C.D. Cal. June 14, 2005) (dismissing civil RICO claims against defendant alleged to have violated copyright of screenwriter, finding that legislative history of Copyright Act shows no Congressional intent to expand RICO liability for copyright infringement beyond defendants engaged in counterfeiting or piracy and thus that “run-of-the-mill” acts of copyright infringement that do not amount to piracy or counterfeiting cannot support a civil RICO claim). One author has briefly addressed some of these ambiguities in the context of peer-to-peer file sharing, see Stuller, *supra* note 18, but the discussion below provides a more detailed analysis and discussion of the relevant case law and considers recent developments in the law, particularly with respect to the RICO “enterprise” requirement and the problems in attempting to impose civil RICO liability against secondary infringers that create even greater uncertainty for defendants evaluating their potential liability; this Article also reaches a different conclusion, focusing on the normative concerns raised by the addition of RICO remedies to the already heavy arsenal of remedies available to copyright plaintiffs.

87. “Reduced to most fundamental terms, there are only two elements necessary to the plaintiff’s case in an infringement action: ownership of the copyright by the plaintiff and copying by the defendant.” NIMMER & NIMMER, *supra* note 39, §13.01, at 13–5. Of course, proof of civil

the copyright was infringed “willfully,” and (3) that such infringement was done for profit, involved reproduction or distribution of one or more copies that exceeded \$1,000 in value during any 180-day period, or constituted a public distribution over a computer network of a work known to be intended for commercial distribution.⁸⁸

The following subsections focus on the issues plaintiffs would most likely raise in cases asserting RICO claims along with civil infringement claims and apply the criminal copyright infringement statute in the context of P2P sharing of copyrighted files. Ultimately, this section concludes that many civil copyright infringement plaintiffs, if successful in proving civil infringement, would likely also prove the elements of criminal infringement necessary for imposing additional civil penalties under RICO.

1. Requirement of Copyright Infringement

While the necessary elements for proving this component of criminal copyright infringement are outside the scope of this article,⁸⁹ if civil copyright infringement cannot be established, neither can criminal infringement.⁹⁰ Thus, RICO liability could only be imposed in a civil lawsuit where the plaintiff first succeeds on a claim of civil copyright infringement.⁹¹ In addition, the same doctrines that would negate a claim of civil copyright infringement are available to defeat

infringement can be a complex matter in light of the many formalities of copyright law, *see id.* § 15.01[a][2], at 15-4, and thus the proof required for success in a civil infringement claim is well beyond the scope of this Article. What is of most concern here is not how a civil infringement claim can be pled and proved in the first place, but how much more is required to convert that claim into a civil racketeering claim under RICO.

88. 17 U.S.C. § 506(a) (2006); *see also* United States v. Steele, 785 F.2d 743, 747–48 (9th Cir. 1986) (noting with approval jury instructions requiring that defendant infringe copyright willfully and for purposes of commercial advantage or private financial gain in order to be guilty of criminal infringement); United States v. Wise, 550 F.2d 1180, 1190 (9th Cir. 1977) (holding that government’s burden of proof in criminal copyright infringement action is to demonstrate (1) infringement of copyright, including the absence of a first sale; (2) done willfully and (3) for profit); NIMMER & NIMMER, *supra* note 39, § 15.01 (2002) (noting that criminal infringement is identical to civil infringement claim with the additional requirements of willfulness and intent to profit, but suggesting that profit requirement has been redefined to be “almost non-existent”).

89. Stated generally, civil copyright infringement liability requires proof of “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)); *see* 17 U.S.C. § 501(a). *See generally* NIMMER & NIMMER, *supra* note 39, §§ 13.01-13.03 (2004) (analyzing the elements of a civil copyright infringement suit); Douglas Y’Baro, *The Origin of the Contemporary Standard for Copyright Infringement*, 6 J. INTEL. PROP. L. 285 (1999) (comparing the Second and Ninth Circuit standards for establishing copyright infringement, with a discussion of the law in the remaining circuits).

90. Kelly v. L.L. Cool J., 145 F.R.D. 32, 39 (S.D.N.Y. 1992).

91. 17 U.S.C. § 506; 18 U.S.C. §§ 1961(1), 1964(c) (2006).

this element of criminal infringement, including fair use defense and the first sale doctrine.⁹²

The prototypical file-sharing defendant, such as those in the many RIAA lawsuits filed from September 2003 through December 2008, will have engaged in conduct that meets this element of criminal copyright infringement. Such a defendant will have directly copied a protected work without the consent of the owner, and neither the first sale doctrine nor the fair use defense will apply to prevent civil infringement liability.⁹³ Less clear is whether this element would be met in the case of a secondary infringer, who does not engage in direct copying but who makes it possible for others to do so.⁹⁴ Section 506(a) makes reference to “any person who infringes a copyright”; on its face, this language seems to apply only to direct infringers, but at least some secondary infringers might arguably fall within its reach.⁹⁵

92. See 17 U.S.C. § 107 (providing that fair uses of copyrighted work are not infringement); *Wise*, 550 F.2d at 1194 (holding that in addition to proving copying that was intentionally done in violation of the law, the prosecution had the burden of proving that defendant knew that the film he had sold was not the subject of a first sale by the copyright owner). See generally 17 U.S.C. § 109(a) (codifying the first sale doctrine, which provides that the owner of a particular copy or phonorecord that is lawfully made may sell or otherwise dispose of his/her copy or phonorecord without the consent of the copyright owner, limiting the copyright owner’s distribution right to the first sale of each copy).

93. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014–19 (9th Cir. 2001) (recognizing that there could be little dispute that the individual file sharers taking advantage of the Napster service were engaged in direct copyright infringement and that the plaintiffs were likely to succeed in proving that Napster’s users were not engaged in fair use of the copyrighted material). See generally Lisa J. Beyer Sims, *Mutiny on the Net: Ridding P2P Pirates of Their Booty*, 52 EMORY L.J. 1907, 1914–26 (2003) (discussing the availability of the fair use defense for P2P file sharing and concluding that those who distribute copyrighted works online via P2P systems cannot avail themselves of the fair use defense and that only a small number of P2P downloaders, who already own a copy of the downloaded work but who wish to use an MP3 version of the work for personal use, may successfully assert the fair use defense).

94. The imposition of secondary liability in civil cases includes an added layer of complexity where the defendants are Internet Service Providers who may be protected by the “safe harbor” provisions of the Digital Millennium Copyright Act. See 17 U.S.C. § 512(c) (protecting ISPs who merely store infringing material without the ISP’s knowledge at the direction of a user, if specific statutory conditions are met). The scope of these provisions is still not entirely clear, as courts are only beginning to struggle with the interpretation and application of the complex provisions of § 512, and it is outside the scope of this Article. However, to the extent that the safe harbor provisions of § 512 would be found to apply to a particular case, they would likely provide protection from criminal liability as well as for civil liability. See *id.* § 512(c)(1) (restricting liability for service providers to limited forms of injunctive relief, and referring generally to exemption from “monetary relief” for infringement without distinguishing between criminal fines and civil damages).

95. Although those who aid and abet persons who directly infringe a copyright may also be liable for criminal infringement pursuant to 18 U.S.C. § 2 (2006) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”), a discussion of potential criminal aiding and abetting liability for secondary infringers is outside the scope of this Article. Although there are interesting questions regarding whether secondary liability in the civil context might actually be

In the context of civil copyright infringement litigation, the courts have recognized two forms of secondary infringement: contributory infringement and vicarious infringement.⁹⁶ These two theories of secondary liability differ in the required level of the defendant's knowledge and participation in the infringing acts, and thus lead to different considerations in evaluating whether secondary liability can (or should) be imposed in the criminal context. Contributory copyright infringement exists when a defendant, "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."⁹⁷ In other words, "liability exists if the defendant engages in 'personal conduct that encourages or assists the infringement.'"⁹⁸ The required state of mind for contributory infringement is that the defendant "know or have reason to know" of the direct infringement.⁹⁹ For a claim of vicarious infringement to succeed, however, the plaintiff need not demonstrate that the defendant had any knowledge of the infringing conduct, but only that the "defendant 'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.'"¹⁰⁰ Thus, in contrast to contributory infringement, vicarious infringement requires proof only of an ability to supervise and a direct financial interest in the infringing conduct.

The courts have not yet directly addressed whether contributory or vicarious infringement as developed in the context of civil copyright infringement can satisfy the first element of a criminal infringement case.¹⁰¹ Every reported criminal copyright infringement

more difficult to prove than aiding and abetting in the criminal context, this Article leaves that discussion for another day, largely because recent cases have cast doubt on whether aiders and abettors are subject to civil RICO liability. *See Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (rejecting civil aiding and abetting liability under securities fraud statute because Congress did not expressly provide for civil liability for aiders and abettors); *Pa. Ass'n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 844 (3d Cir. 2000) (applying *Central Bank* decision to affirm summary judgment for defendant on grounds that civil RICO liability could not be imposed for aiding and abetting in RICO violations).

96. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 417–18 (1984).

97. *A&M Records, Inc.*, 239 F.3d at 1019 (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)); *see also MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–23 (2005).

98. *A&M Records, Inc.*, 239 F.3d at 1019 (quoting *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998)).

99. *Id.* at 1020 (quoting *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845–46 n. 29 (11th Cir. 1990)).

100. *Id.* at 1022 (quoting *Fonovisla, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996)).

101. In *United States v. Dove*, 585 F. Supp. 2d 865 (W.D. Va. 2008), touted by the Department of Justice as the "first-ever P2P trial conviction," the defendant was convicted of conspiracy to commit criminal copyright infringement and criminal copyright infringement. PRO IP, *supra* note 83, at 12. Although described as an administrator of the file-sharing group, Dove

case has involved direct infringers (or persons found to have actively conspired with or aided and abetted direct infringers); none involved a theory based expressly on contributory or vicarious infringement.¹⁰²

Moreover, the Copyright Act “does not expressly render anyone liable for infringement committed by another.”¹⁰³ While courts have

was also alleged in the Indictment (and presumably proved beyond a reasonable doubt at trial) to have uploaded pirated content to other members of the group and downloaded pirated content, violating the distribution and reproduction rights of the copyright owners of the works. Indictment, *United States v. Dove*, No. 2:07CR15 (W.D. Va. Aug. 28, 2007). Thus, his conviction on the count of criminal infringement was likely based upon proof of his acts of direct infringement and not merely those of secondary infringement related to his administration of a file-sharing service that facilitated direct infringement by others.

102. See, e.g., *United States v. Armstead*, 524 F.3d 442 (4th Cir. 2008) (interpreting meaning of “retail value” for purpose of felony conviction for selling bootleg DVDs); *United States v. Khalil*, 132 F.3d 897 (3d Cir. 1997) (defendant participated in large-scale criminal enterprise that manufactured and distributed counterfeit audio tapes); *United States v. Manzer*, 69 F.3d 222 (8th Cir. 1995) (involving defendant’s participation in sale and modification of cloning packages for decryption of satellite transmissions); *United States v. Larracuenta*, 952 F.2d 672 (2d Cir. 1992) (convicting a defendant who operated video counterfeiting laboratory); *United States v. Hernandez*, 952 F.2d 1110 (9th Cir. 1991) (convicting defendants of conspiracy to distribute counterfeit tapes and labels); *United States v. Cross*, 816 F.2d 297 (7th Cir. 1987) (holding that the defendant, who was the employee and live-in girlfriend of the owner of a video store, was properly convicted of criminal infringement where she willfully participated in a conspiracy to infringe even though she did not intend to personally profit from the conduct; evidence showed she had instructed an undercover agent how to remove labels from original videocassettes for transfer to unauthorized copies); *United States v. Sachs*, 801 F.2d 839 (6th Cir. 1986) (addressing an aiding and abetting and conspiracy conviction for copying and selling unauthorized videos of films); *United States v. O’Reilly*, 794 F.2d 613 (11th Cir. 1986) (convicting defendant for selling counterfeit video games); *United States v. Steele*, 785 F.2d 743 (9th Cir. 1986) (convicting defendant who sold 20–25 unauthorized copies of films); *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984) (convicting defendant who assisted husband in operating business that distributed unauthorized copies of pornographic films; evidence showed she had full knowledge of and active participation in conspiracy); *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977) (convicting defendant who operated business that sold copyrighted feature-length motion pictures that had been licensed, not sold, by owners of films to third parties and thus were not subject to first sale doctrine); *United States v. Cassim*, 693 F. Supp. 2d 697 (S.D. Tex. 2010) (deciding pre-trial motion in criminal prosecution of defendant charged with leading a conspiracy to infringe copyright for private gain by copying and distributing musical recordings); *United States v. Taxe*, 380 F. Supp. 1010 (C.D. Cal. 1974) (convicting defendants who, without consent of copyright owners, manufactured and sold eight-track stereo tape recordings).

103. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984). This is still generally true, although the Digital Millennium Copyright Act’s addition of § 512 to the Copyright Act recognizes the fact that secondary infringers have been held responsible for civil copyright infringement by providing certain “safe harbors” for specific types of secondary infringers who facilitate the transmission of data over the Internet and recognizes liability for those who seek to circumvent certain technological protections against copying that copyright owners might place on their works. 17 U.S.C. §§ 512, 1201 (2006). See generally Neil A. Benchell, *The Digital Millennium Copyright Act: A Review of the Law and the Court’s Interpretation*, 2 BUFF. INTELL. PROP. L.J. 30 (2003) (describing the DMCA’s anti-circumvention and safe harbor provisions and noting that the DMCA codifies existing case law regarding the liability of Internet Service Providers (“ISPs”) for copyright infringement by customers of the ISPs, providing safe harbors and limiting liability for ISPs); Francisco Castro, *The Digital Millennium Copyright Act:*

recognized, in the context of civil liability, that “[t]he absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity,”¹⁰⁴ they have not addressed this issue in the context of criminal liability. Because criminal statutes are subject to stricter interpretation than statutes imposing civil liability,¹⁰⁵ conduct that would constitute infringement in a civil context might not suffice in a criminal context:

Federal crimes, of course, “are solely creatures of statute.” Accordingly, when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a “narrow interpretation” appropriate.¹⁰⁶

The courts have traditionally held that, given a choice between two readings of a federal crime, the harsher alternative should not be chosen unless Congress has spoken in clear and definite language.¹⁰⁷ Thus, for example, in analyzing whether the National Stolen Property Act provision imposing criminal penalties on the interstate transportation of stolen property included interstate transportation of “bootleg” recordings, the *Dowling* Court conducted an extensive review of the legislative history of the criminal infringement provisions of the Copyright Act.¹⁰⁸

The history of copyright infringement provisions affords additional reason to hesitate before extending [the National Stolen Property Act] to cover the interstate shipments in this case. Not only has Congress chiefly relied upon an array of civil remedies to provide copyright holders protection against infringement, but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution.¹⁰⁹

Provisions on Circumventing Protection Systems and Limiting Liability of Service Providers, 3 CHI.-KENT J. INTEL. PROP. 3 (2004) (describing the limitations on liability relating to online materials provided for in § 512 of the Copyright Act pursuant to the DMCA); Stephen M. McJohn, *Eldred’s Aftermath: Tradition, the Copyright Clause, and the Constitutionalization of Fair Use*, 10 MICH. TELECOMM. & TECH. L. REV. 95, 122 (2003) (“The anti-circumvention provisions could arguably be characterized as adapting vicarious liability for the digital age, thus remaining within the traditional contours of copyright law.”).

104. *Sony Corp. of Am.*, 464 U.S. at 435.

105. *See, e.g., Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 408–09 (2003) (noting that although RICO statute is given broad interpretation, predicate criminal statute was to be strictly construed with ambiguities resolved in favor of lenity); *Dowling v. United States*, 473 U.S. 207, 213 (1985) (citing *Williams v. United States*, 458 U.S. 279, 290 (1982)) (recognizing that criminal statutes are to be construed more strictly than civil statutes).

106. *Dowling*, 473 U.S. at 213 (citations omitted).

107. *Id.* at 214.

108. *Id.* at 218–25. Of course, this review did not include the amendments that Congress has made to those sections since 1985, but it is nonetheless a useful indication of the Court’s interpretation of some of the language of the criminal copyright provisions.

109. *Id.* at 221.

The Court also emphasized that the history “of the criminal infringement provisions of the Copyright Act reveals a good deal of care on Congress’ part before subjecting copyright infringement to serious criminal penalties. . . . This step-by-step, carefully considered approach is consistent with Congress’ traditional sensitivity to the special concerns implicated by the copyright laws.”¹¹⁰

The legislative history of the recent amendments that imposed felony liability on certain infringers and increased the potential sanctions against them suggests that Congress did not intend to sweep traditional secondary infringers into the class of felony offenders; rather, Congress was targeting “pirates”—infringers who illegally copy protected works and sell them for a profit or who cause significant losses to copyright owners even without profit.¹¹¹

On the other hand, at least in the civil context, secondary liability is well-established, and the full scope of civil remedies for infringement is available against secondary infringers.¹¹² Because the criminal copyright statute refers simply to “any person who willfully infringes a copyright,”¹¹³ courts may conclude that this language applies equally to direct and secondary infringers, so long as the infringement itself is “willful.” If secondary infringers can meet the infringement element of criminal copyright infringement, it might be even easier for a prosecutor, or a plaintiff in a civil RICO case, to succeed against such defendants on the remaining elements, because the elements of willfulness or profit motive will have already been established by meeting the requirements for secondary infringement, as discussed in the following subsections.

2. Requirement of Willful Infringement

In many infringement cases, the willfulness requirement will not add significantly to the plaintiff’s burden of proof and should at least create a sufficient issue of fact to survive dismissal or summary judgment. The Copyright Act does not define “willful” in § 506(a), and the legislative histories of the Copyright Felony Act and the No Electronic Theft Act (“NET Act”) indicate that Congress intended that

110. *Id.* at 225. The *Dowling* Court ultimately concluded that because Congress had not clearly indicated that the National Stolen Property Act was meant to impose additional criminal sanctions for interstate transportation of works that infringe upon copyrights, copyrighted works were not a form of “property” covered by the Act. *Id.* at 229.

111. *See supra* note 68.

112. *See, e.g.*, *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 1019–23 (2005).

113. 17 U.S.C. § 506(a)(1) (2006).

courts would define the term.¹¹⁴ Although the NET Act amended the “willfulness” requirement to state that “evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement,”¹¹⁵ this language does not identify the dividing line separating sufficient from insufficient evidence of willfulness.

Courts have split over whether the requirement of “willful” infringement includes an intent simply to engage in the acts that constitute infringement or whether it is limited to a specific intent to violate the copyright laws. Most recent criminal infringement cases to address the issue, however, have concluded that prosecutors must establish that the defendant knew that the conduct at issue violated the copyright laws.¹¹⁶ The only reported decision to analyze this conflict in any depth is *United States v. Moran*, a case that preceded the NET Act amendment.¹¹⁷ The *Moran* court examined the use of the word “willful” in the context of civil copyright infringement and concluded that by using the term “willful,” “Congress intended to soften the impact of the common-law presumption that ignorance of the law or mistake of the law is no defense to a criminal prosecution by making specific intent to violate the law an element of federal criminal copyright offenses.”¹¹⁸ *Moran* thus held that “‘willfully,’ in 17 U.S.C. § 506(a), means a ‘voluntary, intentional violation of a known legal duty.’”¹¹⁹ The *Moran* court also concluded that this rule is subjective; the test is whether the defendant truly believed that the copyright laws did not prohibit his conduct.¹²⁰

114. See H.R. REP. NO. 102-997, at 4–5 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3569, 3573 (discussing purposes of amendments in Copyright Felony Act); H.R. REP. NO. 105-339, at 3–5, 9–10 (1997) (discussing purposes of amendments in NET Act and concern that providing express definition of willfulness could place too many limitations on prosecutors).

115. No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

116. Compare *United States v. Cross*, 816 F.2d 297, 303 (7th Cir. 1987) (holding that defendant must have engaged in infringing conduct with knowledge that his or her activity was prohibited by law), and *United States v. Moran*, 757 F. Supp. 1046, 1049 (D. Neb. 1991) (quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991) (“[W]illful’ means voluntary, intentional violation of a known legal duty.”), with *United States v. Backer*, 134 F.2d 533, 535 (2d Cir. 1943) (suggesting, but not holding, that “willful” only means an intent to copy, not to infringe).

117. 757 F. Supp. at 1049.

118. *Id.*

119. *Id.* (quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991)).

120. *Id.* at 1051. The Ninth Circuit seems to have adopted, or at least employed, the stricter test for “willfulness” in the context of the criminal copyright infringement statute. See *United States v. Wise*, 550 F.2d 1180, 1186, 1194 (9th Cir. 1977). In *Wise*, the Ninth Circuit did not expressly address the ambiguity in the statutory requirement of “willful” infringement, but implicitly adopted the stricter standard. See *id.* at 1186, 1194–95 (discussing at length the defendant’s actual knowledge of the absence of a first sale, of the illegality of selling film prints containing copyright notices, and of the illegal acquisition of the film prints by his sources).

The strict interpretation of the “willful” requirement adopted by *Moran* has not been widely cited but is the “better view”¹²¹ for a number of reasons. First, it draws a more distinct line between civil¹²² and criminal copyright infringement, particularly given the ease of establishing the “profit” requirement.¹²³ Second, it may be acceptable, in light of the harm to the copyright owner, to impose civil damages on a defendant who intentionally copies but believes in good faith that her conduct is permissible, but imposing criminal penalties on the same defendant seems unfair without a bright line test for fair use and given the stigma attached to a criminal conviction.¹²⁴

However, because neither Congress nor the courts have yet provided firm guidance on the state of mind requirement for criminal infringement, the criminal copyright provision may reach beyond those defendants who have a subjective intent to violate the Copyright Act to ensnare those who have constructive, but not actual, knowledge of the illegality of their conduct or who recklessly infringe. This group would include those who download material from the Internet without inquiring as to whether the work is copyrighted.

If secondary infringers can satisfy the infringement element of § 506(a), many contributory infringers likely meet the requirements for willfulness under the criminal statute. Proof of contributory liability would likely meet the “willful” element even under the strict

121. NIMMER & NIMMER, *supra* note 39, § 15.01[A][2], at 15-6 (citing *Moran* with approval and stating that the “better view” is that willfulness requires the “voluntary, intentional violation of a known legal duty”).

122. Civil copyright infringement is a strict liability offense; the mere act of copying is sufficient for purposes of civil liability and the plaintiff need not establish that the defendant intended to violate a copyright owner's rights. *See, e.g.*, *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198–99 (1931); *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 308–09 (2d Cir. 1963). The issue of willful infringement does arise in civil infringement cases in the context of determining the amount of recoverable damages and attorneys' fees. *See, e.g.*, *Chi Boy Music v. Charlie Club Inc.*, 930 F.2d 1224 (7th Cir. 1991) (holding that willful infringement was established in a civil case where club received letter informing it that its use of music was illegal and evidence demonstrated knowledge of club owners of process for obtaining license for use of copyrighted music); *Canopy Music, Inc. v. Harbor Cities Broad., Inc.*, 950 F. Supp. 913 (E.D. Wis. 1997) (holding that a radio station that repeatedly played a song after several notices of infringement engaged in willful infringement). Even in the context of determinations of willfulness in civil cases, however, there is no clear indication from the courts as to the applicable standard for determining the presence of willfulness. *See generally* Jeffrey M. Thomas, Comment, *Willful Copyright Infringement: In Search of a Standard*, 65 WASH. U. L. REV. 903 (1990). In light of the No Electronic Theft Act's express provision that willfulness cannot be established solely by evidence of reproduction or distribution of a copyrighted work in criminal cases, *see* 17 U.S.C. § 506(a) (2006), the interpretation of the civil and criminal “willfulness” provisions may very well diverge as courts continue to struggle with defining the scope of the term.

123. *See infra* Part II.A.3.

124. *See* NIMMER & NIMMER, *supra* note 39, § 15.01[A][2], at 15-6.

interpretation of the term. “Contributory liability requires that the secondary infringer ‘know or have reason to know’ of direct infringement.”¹²⁵ Some cases involving the Internet have suggested that “evidence of actual knowledge of specific acts of infringement” is required for contributory liability to attach.¹²⁶ If actual knowledge of infringement is required to prove contributory liability, such proof would likely satisfy the willfulness standard under § 506(a).

In contrast to contributory infringers, vicarious infringers will seldom meet the willfulness requirement. Proof of vicarious liability does not require knowledge of infringement.¹²⁷ Thus, for a vicarious infringer to be criminally responsible, the plaintiff bears an additional burden of proving willfulness. In the typical case of vicarious liability, this element cannot be met; indeed, the typical vicarious infringer has no knowledge of the infringement or intent to assist in it.¹²⁸

In a claim against a typical direct infringer engaging in P2P file sharing, the willfulness element likely can be established even under the strict interpretation, particularly in a civil RICO case where the burden is only preponderance of the evidence.¹²⁹ The music, film, and software industries have launched a massive media campaign in recent years to educate consumers about the fact that unauthorized copying violates copyright law,¹³⁰ which at least creates a jury question as to whether an individual defendant knew that downloading copyrighted files using P2P software services violated copyright law. To the extent that file sharers are uploading legally purchased copies of these works, subsequently distributed to others without the copyright owners’ permission, demonstrating that these

125. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001).

126. *Id.* at 1021; *See, e.g., Religious Tech. Ctr. v. Netcom On-Line Commc’n Serv., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995).

127. *See Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1060 (C.D. Cal. 2002) (“Unlike contributory infringement, knowledge is not an element of vicarious liability.”).

128. *See supra* note 99–100. In contrast, a plaintiff or prosecutor who is successful in proving vicarious infringement will likely have no difficulty meeting the “profit” element of criminal infringement. *See infra* Part III.A.3. Given the low threshold for demonstrating the “profit” element of criminal infringement discussed below, a plaintiff who can establish the requisite “direct financial interest” in an infringing activity for vicarious liability can probably also establish that the infringement was for purposes of commercial advantage or private financial gain. *See id.*

129. *See Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1302–03 (7th Cir. 1987); *cf. Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (suggesting, but refusing to decide, that preponderance of the evidence standard is appropriate for elements of civil RICO claim).

130. *See sources cited supra* note 5. While these media campaigns have not been very successful in changing social norms and reducing widespread illegal copying of protected works, they have certainly been successful in terms of providing notice to the general public about the illegality of such copying. *See TWEENS AND TEENS, supra* note 1 (summarizing results of 2004 survey of 1183 respondents, ages 8–18, showing that 86% of young people were aware that software is copyrighted and 88% were aware that music and movies are copyrighted).

works contained a copyright notice and warning will be relatively simple.¹³¹ While defendants who can demonstrate a good faith, but incorrect, belief that their conduct was permitted as a fair use may be able to defeat the willfulness requirement,¹³² plaintiffs likely can create a sufficient disputed issue of material fact regarding the file-sharing defendants' knowledge and intent to avoid summary judgment in civil proceedings.¹³³

Thus, at least in many cases involving illegal downloading of copyrighted works, and perhaps in some cases alleging secondary infringement, the willfulness requirement does not add significantly to the plaintiff's burden of proof and is unlikely to provide defendants facing allegations of direct infringement an opportunity for dismissal before trial.

3. The For Profit or Sufficient Value Requirement

To prove the third element of criminal infringement, the prosecutor or plaintiff must show that the defendant infringed for purposes of commercial advantage or private financial gain; that the value of the rights infringed by reproduction or distribution exceeded \$1,000 in any 180-day period; or that the infringement constituted a pre-release, online distribution of a work intended for commercial distribution.¹³⁴ The courts' application of this element suggests it requires a very low threshold that can almost always be established, in any case worth pursuing, where the elements of willful infringement are present.¹³⁵

First, the "commercial advantage or private financial gain" element does not require an actual pecuniary gain; it is sufficient to

131. See, e.g., *FBI and Recording Industry Unveil New Anti-Piracy Seal*, RECORDING INDUSTRY ASS'N OF AM. (Feb. 19, 2004), <http://www.riaa.com/newsitem.php?resultpage=&id=83E36774-6725-F430-C8F0-7ABBE34E9060> (reporting on FBI and RIAA unveiling of voluntary, government-sanctioned anti-piracy warning seal and warning that can be included on various types of copyrighted music to warn the public of the illegality of copying and distributing music without permission).

132. See *supra* notes 116–124 and accompanying text.

133. See FED. R. CIV. P. 56.

134. 17 U.S.C. §§ 506(a)(1)(A)–(C) (2006).

135. See NIMMER & NIMMER, *supra* note 39, § 15.01[A][2], at 15-6 (noting that "almost all civil cases that reach the stage of litigation arise in a for-profit posture"). Nimmer states that the profit motive requirement for criminal infringement "does not meaningfully winnow down the population of copyright defendants potentially liable to incarceration. Does this mean that every run-of-the-mill copyright case can serve as the basis of an indictment, if only the United States Attorney's attention can be secured? Certainly, that result lies far afield both from Congress' intent, and from any rational ordering of the copyright system." *Id.*

demonstrate “the hope of some pecuniary gain.”¹³⁶ Courts have found that P2P sharing of copyrighted works is a commercial use even though no money changes hands.¹³⁷ Thus, courts would likely deem such conduct to be “for purposes of commercial advantage” within the meaning of 17 U.S.C. § 506(a). As the court stated in *A&M Records, Inc. v. Napster, Inc.*, “[d]irect economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use.”¹³⁸ In finding file sharing a commercial use, the court also specifically noted the language of the NET Act, which defines a financially motivated transaction for purposes of criminal copyright infringement to include trading infringing copies of a work for other items, “including the receipt of other copyrighted works.”¹³⁹ Thus, even if a defendant has simply copied for personal use without permission or payment, such copying probably satisfies the commercial purpose or private financial gain prong.

Second, the “benefit” or “gain” contemplated by the statute need not be personal to the defendant. As long as the defendant participates in the infringing conduct and does so willfully, it suffices that the activity is for the purpose of financial gain or benefit regardless of whether the individual defendant stands to profit in any way.¹⁴⁰ Thus, where willfulness can be established, the burden of proving commercial advantage or private financial gain is easily met, even without reference to the statutory exceptions regarding

136. *United States v. Moore*, 604 F.2d 1228, 1235 (9th Cir. 1979); *see also United States v. Shabazz*, 724 F.2d 1536, 1539 (11th Cir. 1984); *United States v. Wise*, 550 F.2d 1180, 1195 (9th Cir. 1977); *cf. A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (affirming district court’s finding that Napster users engaged in commercial use of copyrighted materials because distribution to anonymous requester was not a personal use and “Napster users get for free something they would ordinarily have to buy”).

137. *E.g., A&M Records, Inc.*, 239 F.3d at 1015.

138. *Id.*

139. *Id.* (quoting the No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997)); *see also Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000) (noting that church that copied religious text for its members “unquestionably profit[ed]” from the unauthorized distribution); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (concluding that for-profit research laboratory gained indirect economic advantage by photocopying copyrighted scholarly articles); *Sega Enters. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (finding a commercial use when individuals downloaded copies of video games to avoid having to buy them).

140. *United States v. Cross*, 816 F.2d 297, 301 (7th Cir. 1987) (rejecting a claim by employee of video store that she could not be criminally responsible because she did not realize any personal commercial advantage or private gain, because it suffices that the activity be for the purpose of financial gain or benefit regardless of whether defendant actually realizes any advantage or gain).

infringements valued at more than one thousand dollars¹⁴¹ or pre-release distribution of commercial works.¹⁴²

The statutory exceptions to the commercial advantage or private financial gain element permit criminal conviction even where the defendant's infringing acts had no profit motive, as long as the value of the rights infringed is sufficiently high or the unauthorized distribution is sufficiently early.¹⁴³ With respect to the exception dealing with the value of the infringed works, the statute specifies that the value be measured by the "total retail value" of the infringing copies.¹⁴⁴ Even if sufficient proof is lacking of an indirect benefit (for example, where the defendant has received nothing in exchange for uploading copyrighted material), the exception based on value will often be met in file-sharing cases. While it is unclear how the "retail value" of infringed works will be determined in these cases,¹⁴⁵ many P2P file sharers (particularly active P2P users, like those the RIAA targeted) download dozens of music files in any given week.¹⁴⁶ Because the retail value is measured over a six-month period, even if the retail value measure for an individual work is relatively low, very active downloaders will likely surpass the statutory amount within six months.¹⁴⁷ Those who download movies and software with any

141. 17 U.S.C. § 506(a)(1)(B) (2006).

142. *Id.* § 506(a)(1)(C).

143. *See id.* §§ 506(a)(1)(B), (C).

144. *Id.* § 506(a)(1)(B).

145. *See Criminal Resource Manual § 1852 Copyright Infringement—Penalties—17 U.S.C. § 506(a) and 18 U.S.C. § 2319*, U.S. DEPT OF JUST., available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01852.htm (last visited Oct. 28, 2010) ("It is not entirely clear, however, what is meant by 'retail value' in this context, and courts have relied upon a number of methods to achieve equitable results"); *see also* *United States v. Armstead*, 524 F.3d 442, 443 (4th Cir. 2008) (holding that "retail value is determined by taking the highest of the 'face value,' 'par value,' or 'market value' of copies of the copyrighted material in a retail context"); *United States v. Larracuenta*, 952 F.2d 672, 674 (2d Cir. 1992) (discussing Sentencing Guideline provision that infringing goods are to be valued at the normal retail price of noninfringing items to consumers); *United States v. Hernandez*, 952 F.2d 1110, 1118 (9th Cir. 1991) (approving "market value" of counterfeit tapes as an appropriate measure of "retail value" in criminal infringement case).

146. *See, e.g.,* *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (affirming summary judgment in favor of owners of sound recordings where individual defendant undisputedly downloaded "more than 1,370 copyrighted songs during a few weeks"); *64 Individuals Agree To Settlements In Copyright Infringement Cases*, RECORDING INDUSTRY ASS'N OF AM. (Sept. 29, 2003), http://www.riaa.com/newsitem.php?news_month_filter=9&news_year_filter=2003&resultpage=&id=28F44ED2-AF03-C3F1-1A40-F80C6F763A4F (indicating settlements in suits against individual P2P file sharers who were "illegally distributing, on average, more than 1,000 music files for millions of other peer-to-peer network users to copy for free").

147. In the *Gonzalez* case, for example, the defendant was alleged to have downloaded more than 1300 songs in a several-week period. 430 F.3d at 889. Even if "retail value" were

regularity are even more likely to meet this element, regardless of any personal profit motive, as these copyrighted works sell at a much greater retail value than music files and are not as readily separated into component parts that might have a lower retail value than the work as a whole.¹⁴⁸ Thus, the final element of criminal infringement is met even where the infringement is motivated only by indirect financial benefit or where the copyright owner suffers only \$1,000 in lost value over a six-month period; further, while either of these conditions would suffice, both are met in most civil infringement cases worth litigating over.

The criminal copyright statute thus demands little additional proof beyond that required of plaintiffs in many civil copyright infringement cases. For civil RICO liability to attach, however, in addition to proving the elements of criminal copyright infringement, the plaintiff will also need to demonstrate that the criminal infringements meet the requirements of RICO. As discussed in the next Part, just as the criminal copyright statute places little additional burden on many civil plaintiffs, proof of civil infringement will, in many cases, likely satisfy the requirements of RICO—or at least create sufficient ambiguity to survive outright dismissal.

B. Proving a RICO Claim in a Copyright Case

Since Congress added criminal copyright infringement as a predicate offense under RICO in 1996, copyright plaintiffs have begun to allege civil RICO violations under 18 U.S.C. §§ 1962 and 1964, seeking treble damages and other remedies offered by the RICO statute that are otherwise unavailable in a civil copyright suit.¹⁴⁹ Like civil RICO cases generally,¹⁵⁰ few, if any, of these cases involve traditional organized crime.

To date, only a small number of reported decisions have interpreted the RICO statute in the context of copyright infringement

determined by the typical \$.99 per song price for many Internet music stores—although many songs are now offered for higher prices—an infringer like Gonzalez would readily meet the statutory “for profit” requirement under the criminal infringement provision. See 17 U.S.C. § 506(a)(1)(B).

148. For example, new releases of DVDs typically retail for about \$16.99 per copy at online stores like Amazon.com, see *New DVD Releases*, AMAZON.COM, <http://www.amazon.com/dvds> (follow “DVD” hyperlink under “Categories”; then follow “Last 30 days” hyperlink under “New Releases”) (last visited Aug. 9, 2010), and software can range from discount prices for computer games at \$6.99 per copy to hundreds of dollars for a copy of software encompassing more complex applications, See, e.g., *Business & Office Management Software*, AMAZON.COM, <http://www.amazon.com/software> (follow “All Business and Office” hyperlink; then follow “Business and Office Management Software” hyperlink) (last visited Oct. 28, 2010).

149. See *supra* note 85 and text accompanying note 16.

150. See *infra* note 272.

claims, but under the general interpretation of RICO, at least some infringement cases will easily qualify for RICO liability and others will likely survive motions to dismiss. One of the first plaintiffs to vigorously pursue RICO claims in a copyright infringement case was Perfect 10, a company that has sued dozens of entities involved in the Internet pornography business for the alleged unlicensed use of its copyrighted photographs on a variety of commercial pornography sites.¹⁵¹ Much of this litigation involved claims of secondary infringement against entities that made access to the sites of the direct infringers possible, such as billing, web screening, and credit card companies.¹⁵² In those cases where Perfect 10 pursued RICO claims, the courts initially refrained from granting outright dismissals of the RICO allegations at the pleading stage.¹⁵³ Like many of the civil RICO cases brought in connection with commercial disputes between business entities,¹⁵⁴ the addition of civil RICO claims has added both a

151. See *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1127–28 (C.D. Ca. 2001) (permitting RICO claims to go forward in copyright infringement suit against “gatekeepers” of pornography websites alleged to have infringed copyrighted photographs of plaintiff); *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788 (9th Cir. 2007) (affirming dismissal of secondary liability claims against defendants who continued to process payments for websites that allegedly infringed plaintiff’s intellectual property rights after being notified of infringement); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (finding display of thumbnail images of copyright owner’s photographs was a fair use, but concluding that Amazon “substantially assisted” third party websites in distributing infringing copies of photographs for purposes of contributory infringement claim).

152. See *supra* note 151.

153. See *Perfect 10, Inc.*, 167 F. Supp. 2d at 1127–28 (permitting RICO claims to go forward in copyright infringement suit against “gatekeepers” of pornography websites alleged to have infringed copyrighted photographs of plaintiff); *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077, 1105–06 (C.D. Cal. 2004) (granting summary judgment on RICO claims because claims were predicated entirely on claimed copyright infringement, and district court concluded that DMCA safe harbors prevented defendants from copyright liability), *aff’d in part and rev’d in part*, *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (reversing summary judgment on copyright claims and remanding to district court for further determinations, finding that additional findings were needed before safe harbors could be found to protect defendants from copyright liability, and making no mention of disposition on appeal of RICO claims).

154. See generally *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497–500 (1985) (recognizing that the vast majority of civil RICO claims were asserted against businesses in commercial disputes rather than against organized crime figures but, nonetheless, construing the language of the RICO statute broadly to encompass such disputes). In the two decades following enactment of the RICO statute, some of the statute’s strongest criticisms resulted from successful attempts to apply the civil RICO statute to what were considered to be ordinary, commercial disputes involving legitimate businesses. See, e.g., *Hearings, supra* note 85 at 1–2 (statement of Rep. Hughes) (noting “growing concern about the increased use of the RICO statute in many areas of civil commercial fraud which appears to be far afield of the conduct Congress was considering when the RICO Act was enacted”); G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: “Mother of God—Is This the End of RICO?”*, 43 VAND. L. REV. 851 (1990); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987).

layer of complexity (because of the need to interpret the RICO statute in the context of copyright infringement) and a heightened monetary risk (due to the threat of treble damages on top of existing copyright remedies) to what would otherwise be a traditional copyright infringement suit.

Liability under any subsection of RICO's substantive provision requires proof of an "enterprise" and "racketeering activity" that occurs in a "pattern."¹⁵⁵ Although the statute defines these terms, their scope and meaning have been heavily litigated.¹⁵⁶ Despite the large number of reported decisions interpreting and applying these terms, ambiguities remain with respect to the nature and scope of activity that will be sufficient to qualify for RICO penalties, making it difficult for defendants facing civil RICO claims to evaluate their risk of liability and thus creating an incentive to settle rather than to fully litigate the claims to better define the boundaries of liability.¹⁵⁷ As discussed in the following sections, the file-sharing hypothetical could meet, or at least create a jury question as to, the enterprise, racketeering activity, and pattern requirements of the RICO statute, as well as the additional elements of proof in §§ 1962(c) or (d) and the standing requirement of § 1964(c).¹⁵⁸

155. 18 U.S.C. § 1962 (2010).

156. As Pamela Bucy has noted, "Key to all [four types of RICO claims] are three concepts: 'racketeering activity' (any of the felony offenses listed in the statute); a 'pattern' of racketeering activity (at least two 'closely related' racketeering activities that demonstrate 'continuity' and are committed within a ten-year time period); and 'enterprise' (any entity or group of individuals 'associated in fact' that affects interstate or foreign commerce). Twenty-five [now more than thirty] years of jurisprudence in thousands of court opinions have been devoted to delineating these three concepts." Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 20 (2002).

157. See, e.g., *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting) (criticizing the broad application of civil RICO liability and noting that "[m]any a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit"); A. Darby Dickerson, *Curtailing Civil RICO's Long Reach: Establishing New Boundaries for Venue and Personal Jurisdiction Under 18 U.S.C. 1965*, 75 NEB. L. REV. 476, 490 n. 75 (1996); Arthur F. Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil Rico in Securities Litigation*, 65 NOTRE DAME L. REV. 896, 900 n. 19 (1990).

158. See 18 U.S.C. §§ 1962(c), 1962(d), 1964(c) and discussion below. The same is arguably true for many other more "traditional" copyright infringement suits where willful infringement can be established, particularly those cases in which infringement of multiple works or multiple protected rights in a work is alleged or multiple defendants are involved, such as where works alleged to violate copyright law have been widely or repeatedly distributed through multiple channels. In addition, those copyright infringement actions that justify injunctive relief under 17 U.S.C. § 502 are likely to also satisfy the RICO requirements, as typically injunctions are justified where there is a threat of continuing infringement that is likely to cause irreparable harm to the plaintiff.

1. Enterprise

According to § 1961(4), “enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”¹⁵⁹ At least for purposes of liability under the most commonly used prong of the RICO statute, a single individual or entity cannot be both an “enterprise” and an individual defendant,¹⁶⁰ although two business entities can form an “enterprise” and still be named as individual defendants.¹⁶¹

In *United States v. Turkette*, the Supreme Court recognized the broad remedial purposes of RICO and held that “enterprise” encompasses both legitimate and illegitimate enterprises.¹⁶² *Turkette* essentially established a multi-pronged test to establish an “enterprise”: (1) evidence of a “common purpose”; (2) evidence of an “ongoing organization, formal or informal”; and (3) evidence that the various associates “function as a continuing unit.”¹⁶³

The Court elaborated on the second prong of this test in *Boyle v. United States*,¹⁶⁴ after courts had split on whether and to what extent a RICO plaintiff must prove an organizational “structure” for an associated-in-fact enterprise.¹⁶⁵ The Court concluded that while some structure is required, no “formal” hierarchical or managerial structure to the organization need be proved: “[A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and

159. 18 U.S.C. § 1961(4).

160. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) (“[T]o establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.”); *see also* *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1411 (3d Cir. 1991); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984).

161. *River City Mkts, Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1461 (9th Cir. 1992).

162. 452 U.S. 576 (1981).

163. *Id.* at 583; *see also* *Odom v. Microsoft Corp.*, 486 F.3d 541, 550–51 (9th Cir. 2007).

164. 129 S. Ct. 2237, 2244–45 (2009).

165. For some time, a number of courts interpreted the Supreme Court’s statement in *Turkette* that an enterprise must be “separate and apart from the pattern of activity in which it engages,” 452 U.S. at 583, as requiring that an associated-in-fact enterprise have a business-like structure distinct from the pattern of racketeering, but other courts concluded that “an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise.” *Odom*, 486 F.3d at 550–51 (discussing the split in the circuits and concluding that no particular organizational structure is required to prove an associated-in-fact enterprise, but recognizing that other circuits require such a showing). In *Boyle*, the Supreme Court granted *certiorari* to resolve the question of whether a RICO enterprise must have “an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.” 129 S. Ct. at 2244.

longevity sufficient to permit these associates to pursue the enterprise's purpose."¹⁶⁶ Relying on dictionary definitions, the Court also stated, "[t]he concept of 'associat[ion]' requires both interpersonal relationships and a common interest."¹⁶⁷ In reaching these conclusions, the Court emphasized that the statutory definition of "enterprise" is "obviously broad" and that "the very concept of an association in fact is expansive," noting that the RICO statute provides that its terms be "liberally construed to effectuate its remedial purposes."¹⁶⁸

Many traditional civil copyright infringement cases will likely meet the enterprise requirement simply because most infringement suits arise out of the alleged copying and widespread public distribution of a protected work, which almost invariably involves a series of participants, many of whom are corporations, who interact in an organized way for a common purpose over a period of time.¹⁶⁹ In the hypothetical involving college students sharing music over a P2P network, for example, the enterprise requirement could be met by the "organization" created by the software itself. The software creates an organization comprised of the users who have downloaded the software, which works by identifying which users are logged onto the Internet and commandeering their computers to operate search functions when other users request material.¹⁷⁰ The users share a

166. *Boyle*, 129 S. Ct. at 2244.

167. *Id.*

168. *Id.* at 2243.

169. For example, in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), John Fogerty, former lead singer and songwriter for the band Creedence Clearwater Revival, was sued by his old record label for allegedly copying his own song when he distributed an album through his new record label. The defendants included not only Fogerty, but also Warner Records and other entities involved in the distribution of the alleged infringing work. *Id.* at 519, n.3. While the plaintiff in that case failed to establish even civil infringement, had civil RICO claims been available and included in the suit, it is likely that the organized system of distribution for the allegedly infringing song, which included entities responsible for manufacturing records and album covers, national and international distributors, and retailers, all acting at the direction of and through contractual arrangements with the record label, would provide sufficient structure to meet the enterprise requirement. See *Odom*, 486 F.3d at 552–53 (concluding that defendants Best Buy and Microsoft were adequately alleged to have engaged in an enterprise-in-fact by having the common purpose of increasing users of Microsoft's Internet service; by establishing mechanisms, which were employed for more than two years, for exchanging information about customers' personal and financial information; and by entering into a cross-marketing contract for promoting one another's businesses).

170. See, e.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–27 (2005) (discussing the operation of Morpheus and Grokster peer-to-peer file-sharing software platforms); *Disney Enters., Inc. v. Delane*, 446 F. Supp. 2d 402, 404 n. 3 (D. Md. 2006) (explaining functioning of BitTorrent system); Matthew Helton, *Secondary Liability for Copyright Infringement: BitTorrent as a Vehicle for Establishing a New Copyright Definition for Staple Articles of Commerce*, 40 COLUM. J.L. & SOC. PROBS. 1, 17–24 (2006) (describing operation of BitTorrent system as compared to earlier P2P systems such as Napster and Grokster).

common purpose—exchanging computer files; absent such a purpose, they would not need to download the software, and downloading the software requires a purposeful act. The various users “function as a continuing unit” to the extent that they continue to use the software or even simply leave the software on their computers and continue to access the Internet, because once P2P software is downloaded it typically remains running in the background and allows other users to access files whenever the computer is connected to the Internet.¹⁷¹

The more difficult component of the “enterprise” requirement in the P2P context would be to prove “relationships among those associated with the enterprise,”¹⁷² but even this component is likely satisfied for those P2P users who download many unauthorized copies of sound recordings and films. Even though not all of the software users are necessarily participating in the activity of the organization at any one time, the enterprise requirement can be met even where some members of the organization are only involved in a piece of the organization’s activity and even where they have never met other members of the enterprise.¹⁷³ Just as participants in a traditional RICO enterprise need not participate in all aspects of the enterprise and can continue to operate the criminal enterprise even after a leader is arrested,¹⁷⁴ P2P users will drop in and out of the network of users

171. See *supra* note 170 and accompanying text; cf. Stuller, *supra* note 18, at 538–39 (arguing that the organizational structure of P2P file sharing services like Kazaa is likely to meet the enterprise requirement, but relying on the terms of the end user license agreement and the organization of the system’s supernodes).

172. Boyle v. United States, 129 S. Ct. 2237, 2244 (2009).

173. *Id.* at 2245–46. The Court stated that “[A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose. . . . Members of the group need not have fixed roles; different members may perform different roles at different times.” *Id.* In fact, “nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique.” *Id.*; see also Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 692 (S.D. Tex. 2009) (concluding that, because plaintiff alleged that defendant associated itself with another defendant, enterprise was adequately pleaded even though defendant had no contact with two other alleged members of the enterprise). In the P2P file sharing example, all of the “associates” at least have associated themselves with the person or entity offering the software for download, even if the identities of the other associates are personally unknown to them. Moreover, even if associates are anonymous—i.e., they do not introduce themselves to one another or use their legal names—that fact should not preclude a finding of an association-in-fact enterprise if they are in fact operating in a coordinated fashion as a part of the enterprise. See, e.g., Bridgetree, Inc. v. Red F. Mktg. LLC, No. 3:10-cv-228-FDW-DSC, 2010 WL 3081372, at *5 (W.D.N.C. Aug. 6, 2010) (denying motion to dismiss RICO claims, finding sufficient allegations of an enterprise and pattern of racketeering activity where associates in alleged enterprise communicated by private “Gmail” account and “anonymous” teleconference, agreeing to use first names only, and only some members met in person to discuss plan).

174. See, e.g., Odom, 486 F.3d at 552–53. See generally Lynch, *supra* note 154.

established by the software, but the software creates an enterprise that will continue to function even if the entity that launched the software ceases to exist or some—but not all—users disable it.¹⁷⁵

Moreover, the enterprise itself may be a legitimate organization.¹⁷⁶ The statute only requires that the RICO defendant be associated with the enterprise and “conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”¹⁷⁷ Thus, that P2P software can be (and in fact is) used for legitimate purposes¹⁷⁸ does not preclude a finding that it creates an “enterprise” by associating, through computer networks, all its users and providing a vehicle for some of them to engage in continuing copyright infringement by exchanging copyrighted works without the owners’ permission.

Of course, users of file-sharing programs could argue that they act autonomously, in a way not sufficiently systematic to satisfy the enterprise requirement.¹⁷⁹ Because of the vast number of P2P users, an individual user could upload or download files for years without ever exchanging illegal files with most of the other alleged members of the enterprise, and without knowing from whom she obtained any particular file or whether anyone had copied files that she uploaded. Relying on *Boyle*, which described the concept of “association” as requiring “interpersonal relationships,”¹⁸⁰ the file sharer might contend that transferring files is automated and involves no “interpersonal” contact between users. However, given the Court’s repeated statements that RICO warrants broad construction¹⁸¹ and the fact that no “interpersonal relationship” limitation appears in the RICO statute itself, courts are likely to reject these arguments. At the very least, the likelihood of success of these arguments is so uncertain that they provide little comfort to defendants facing potential civil RICO liability.

175. Peer-to-peer file sharing software also creates an entity distinct from the “racketeering activity” itself, as it is capable of both legitimate and illegitimate purposes and, as was conceded in *Grokster*, is not used exclusively for infringing copyrighted works. *Grokster*, 545 U.S. at 922–23. Even if it were used exclusively for infringement, however, the software could still create an enterprise for purposes of RICO liability. See *Boyle*, 129 S. Ct. at 2245–46.

176. *E.g.*, *United States v. Turkette*, 452 U.S. 576, 585 (1981) (stating that § 1962 applies to both legitimate and illegitimate enterprises).

177. 18 U.S.C. § 1962(c) (2010).

178. See *supra* notes 14, 175.

179. See, *e.g.*, *Elsevier, Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 307 (S.D.N.Y. 2010) (stating that an association-in-fact enterprise requires proof of more than simply individuals engaging in the same type of illicit conduct during the same time period).

180. *Boyle*, 129 S. Ct. at 2244.

181. See, *e.g.*, *id.* at 2243.

The interpretation of the “enterprise” requirement in the P2P context may depend on whether courts view the situation from the perspective of the individual user who logs in and out for various purposes unrelated to the functioning of the P2P network or from the more global perspective of the network itself. RICO jurisprudence to date has not extended the concept of enterprise to cover the activity of millions of people whose only relationship is their common use of a readily-accessible software program. However, P2P file sharing software does create an organized structure through which millions of copyrighted works are illegally exchanged, and those who use the software in this way are participating in the conduct of the enterprise—the sharing of files with other users—and taking advantage of the association of interconnected computer databases of copyrighted works that the membership of so many users creates. Both the structure created by the P2P software itself and the involvement of organizations that developed the particular P2P software in administering and maintaining their services thus make it at least feasible for the “enterprise” requirement to be met against P2P users accused of engaging in repeated copyright infringement.

2. Racketeering Activity

Proof of establishing RICO liability also requires proof that the defendant engaged in “racketeering activity,” which includes, under § 1961(1)(B), “criminal infringement of a copyright.”¹⁸² Acts of criminal copyright infringement that qualify for RICO liability include both misdemeanors and felony offenses.¹⁸³ For example, a P2P file sharer who did not download a sufficient number of works within a 180-day period for felony liability to attach, but who engaged in a pattern of infringement through repeated downloading, could be liable as a racketeer even if she could only be convicted of a misdemeanor for the underlying offenses. Moreover, while the harshest criminal sanctions under the Copyright Act are limited to infringements of reproduction or distribution rights,¹⁸⁴ the broad inclusion of *all* offenses under § 2319 in the list of RICO predicate acts sweeps infringements of all of

182. 18 U.S.C. § 1961(1)(B).

183. See 18 U.S.C. §§ 2319(b)(3), (c)(3) (2001).

184. 17 U.S.C. § 506 (2000); 18 U.S.C. § 2319. As Nimmer has noted, “[L]arge-scale commercial pirates of sound recordings and motion pictures usually infringe either or both of these rights, but not the other rights under the copyright.” NIMMER & NIMMER, *supra* note 39 at § 15.01[B][1].

the “bundle of rights” included in copyright into the realm of potential RICO liability.¹⁸⁵

In addition, a defendant need not be convicted of the underlying predicate offenses for a civil RICO action to proceed.¹⁸⁶ In fact, the Supreme Court has strongly suggested, albeit in dicta, that proof of the underlying criminal offense need not be established beyond a reasonable doubt in civil RICO proceedings.¹⁸⁷ The circuit courts have adopted the dicta in *Sedima, S.P.R.L. v. Imrex Co.* and concluded that “the preponderance of the evidence standard applies to proof of predicate acts in civil RICO litigation.”¹⁸⁸ Thus, even those who could not be convicted of criminal copyright infringement (for example, because of conflicting evidence or the possible application of one or more defenses to infringement that create “reasonable doubt”) could be found liable for treble damages in a civil RICO case arising out of the same conduct.

3. Pattern

Under 18 U.S.C. § 1961(5), “pattern of racketeering activity” means “at least two acts of racketeering activity,” the last two of which occurred within ten years of each other.”¹⁸⁹ A “pattern” requires more than just commission of the requisite number of predicate acts.¹⁹⁰ To prove a “pattern of racketeering activity,” the plaintiff must show that “the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.”¹⁹¹ Both of these requirements will typically be met in the context of copyright infringement.

First, the “relationship” element of the “pattern” requirement demands proof that the predicate acts have “the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are

185. In addition to the reproduction and distribution rights granted to owners of copyrights, the Copyright Act also includes adaptation, performance, and display rights in the owners’ “bundle of rights.” 17 U.S.C. § 106.

186. 473 U.S. 479, 493 (1985); *see also* *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 61 (1989) (holding same with respect to criminal prosecution under state RICO statute).

187. *Sedima*, 473 U.S. at 491 (“We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). . . . But we need not decide the standard of proof issue today.”).

188. *E.g.*, *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 531 (9th Cir. 1987).

189. 18 U.S.C. § 1961(5) (2010).

190. *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238 (1989).

191. *Id.* at 239.

not isolated events.”¹⁹² Second, the “continuity” element may be met by either proof of a series of related predicate acts “extending over a substantial period of time” or proof of a threat of continued racketeering activity.¹⁹³ Thus, “[c]ontinuity’ is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.”¹⁹⁴ For “closed-ended” continuity, “[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.”¹⁹⁵ For “open-ended” continuity, whether a threat of continued racketeering activity exists will depend on the specific facts of each case, and it may be established “by showing that the predicate acts or offenses are part of an ongoing entity’s regular way of doing business.”¹⁹⁶

Both the “relatedness” and “continuity” requirements of the pattern element would likely be established in the file-sharing hypothetical. The typical illegal file sharer does not limit herself to only one copy of one copyrighted work,¹⁹⁷ but instead uploads and downloads multiple works through identical methods and for similar, if not identical, purposes over an extended period of time. Plaintiffs could probably establish this element in many copyright infringement cases, which typically involve multiple infringements of multiple rights even where a single copyrighted work is at issue.¹⁹⁸ In addition,

192. *Id.* at 240 (quoting 18 U.S.C. § 3575(e), now partially repealed, which provided for enhanced sentences for defendants who committed a felony as part of a pattern of criminal conduct).

193. *Id.* at 242.

194. *Id.* at 241.

195. *Id.* at 242.

196. *Id.* In *H.J., Inc.*, the acts of bribery that were alleged to form the pattern of racketeering activity were claimed to be related by the common purpose of influencing commissioners to win approval of unfair rates for the defendant and were alleged to have taken place frequently over a six-year period. The Court held that these allegations satisfied the relatedness requirement and were likely to satisfy the continuity requirement for the “pattern” element. Alternatively, the Court held that the allegations sufficiently indicated that the alleged bribes were part of the defendant’s way of conducting its ongoing business, and thus reversed the dismissal of the plaintiff’s RICO claims. *Id.*

197. Any such “one time” infringers would be unlikely targets for litigation, even if the other elements of a RICO claim could be established, as the measure of damages would be low even if statutory damages were elected under the Copyright Act and treble damages then imposed under the RICO Act.

198. There is some debate even in the civil context with respect to the treatment of multiple infringements of a single work for purposes of calculating statutory damages. See generally NIMMER & NIMMER, *supra* note 39, at § 14.04[E] (2004). However, it is conceivable that a defendant who willfully infringed both the reproduction and the distribution right in a particular copyrighted work could be found to have committed two separate crimes. *Cf. Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984) (allowing a separate statutory damage

many copyright defendants are large corporations involved in the distribution of entertainment products that infringement suits often target, potentially enabling plaintiffs to rely on past findings of infringement to support the pattern requirement.¹⁹⁹

4. Proof of Liability under § 1962(c) or (d)

The only remaining burden on the plaintiff in a civil RICO case based on copyright infringement is establishing that the plaintiff suffered a business or property injury under one of the four categories of prohibited conduct under the RICO statute, all of which require proof of an enterprise and a pattern of racketeering activity.²⁰⁰ Of the four subsections that define prohibited conduct, far more civil and criminal cases implicate § 1962(c) than all of the other subsections combined, largely because of its broad scope and the limitations that

award for each infringement of a copyrighted work); *United Feature Syndicate, Inc. v. Rheingold*, 209 U.S.P.Q. 317 (S.D. Fla. 1979) (same). Those crimes would clearly meet the relatedness test in light of the identity of the victim and of the purpose of the infringement. Moreover, the plaintiff need not be the victim of each racketeering act that forms the “pattern.” *See Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1127 (C.D. Cal. 2001). It would thus be possible for this element to be met by proof by a preponderance of the evidence that the defendant had committed criminal infringement in the past through similar methods. This avenue for establishing the pattern element would open defendants up to relitigation of past infringement claims, whether meritorious or not, that had been settled to avoid litigation costs or the possibility of an adverse ruling. As many copyright defendants are large corporations involved in the distribution of multiple copyrighted works, *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) (noting that copyright defendants “run the gamut from corporate behemoths to starving artists”), they can be frequent targets for infringement claims. In these situations, plaintiffs seeking to establish a “pattern” of infringement would be entitled to investigate past allegations of copyright infringement by the defendants, which would be likely to greatly increase the settlement value of infringement cases in which RICO claims are asserted. *See generally Lynch, supra* note 154.

199. *See supra* note 198 (citing *Fogerty*, 510 U.S. at 524). Of course, if the alleged infringement is an isolated event—involving a first-time infringement defendant, implicating only one of the bundle of protected rights in a copyrighted work, and extending over only a brief period of time—then it will not meet the “pattern” requirement. *See Durning v. Citibank, Int’l*, 990 F.2d 1133, 1138 (9th Cir. 1993) (stating that sporadic or isolated predicate acts will not be sufficient to form a “pattern”). In *Durning*, the court found no pattern of racketeering activity even though there may have been numerous predicate acts and more than one victim was involved, as all of the predicate acts “arose from a single, isolated event: the distribution of the misleading Official Statement.” *Id.* at 1139; *see also Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366 (9th Cir. 1992) (finding no pattern because continuity requirement was not met where defendants’ activity took place over only six months, and where it served only one goal, prosecution of a state tort suit, and there was no threat of any activity continuing beyond conclusion of lawsuit). *But see Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995) (predicate acts occurring over thirteen months demonstrate sufficient period of time to satisfy continuity requirement, and open-ended continuity was also shown where extorting kickbacks had become defendants’ regular way of doing business).

200. 18 U.S.C. § 1962.

courts have read into the remaining provisions.²⁰¹ However, recent precedent limiting the scope of this section to those defendants who exercise some level of control over the “enterprise”²⁰² may prevent RICO from reaching at least some of the hypothetical situations discussed in this Article.

Section 1962(c) makes it unlawful for “any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”²⁰³ The elements of a § 1962(c) claim require proof of “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.”²⁰⁴ While this section would not apply where an employee of a legitimate enterprise happens to commit racketeering acts unrelated to the business while on the its premises,²⁰⁵ courts are split as to how close the relationship must be between the business of the enterprise and the racketeering acts,²⁰⁶ and the most recent Supreme Court decision on point left many issues unresolved.²⁰⁷ Thus, the primary questions that remain most

201. See, e.g., Emmette F. Hale, III, *Civil RICO and Intellectual Property After Sedima*, 56 MISS. L.J. 567, 594 (1986) (noting that most civil RICO actions are brought under § 1962(c) and that §§ 1962(a) and (b) are “rarely used in civil RICO cases”). For example, the application of § 1962(a) has been limited by the courts’ requirement that the plaintiff demonstrate that it suffered injury specifically from the use or investment of income in the named enterprise in order to succeed on a § 1962(a) claim. See, e.g., *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083 (9th Cir. 2000) (citing *Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992)); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1411 (3d Cir. 1991). Because the first two subsections are unlikely to apply to copyright infringement actions, the focus of this analysis will be on the potential application of subsections (c) and (d).

202. See *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993).

203. 18 U.S.C. § 1962(c).

204. *Sun Sav. & Loan Ass’n v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987); *Sedima, S.P.R.I. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

205. See, e.g., *United States v. Jannotti*, 729 F.2d 213, 226 (3d Cir. 1984); *United States v. Cauble*, 706 F.2d 1322, 1332 (5th Cir. 1983). In *Cauble*, the court held: “A defendant does not ‘conduct’ or ‘participate in the conduct’ of a lawful enterprise’s affairs, unless (1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant’s position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise.” 706 F.2d at 1332–33.

206. See, e.g., *United States v. Hartley*, 678 F.2d 961, 990–91 (11th Cir. 1982) (finding that the government did not need to prove a benefit to the enterprise from the racketeering activity); *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980) (concluding that § 1962(c) requires that the defendant’s position in the enterprise or involvement in or control over its affairs enables the commission of the predicate acts and the predicate acts are related to the activities of the enterprise).

207. *Reves v. Ernst & Young*, 507 U.S. 170 (1993). In *Reves*, the Court resolved the split among the circuits with respect to whether the “conduct or participate” language of the statute required participation in the enterprise at a managerial level in the affirmative, at least where company outsiders are named as defendants, finding that § 1962(c) requires that the defendant

ambiguous under § 1962(c) are how close the relationship must be between the “affairs” of the enterprise and the pattern of racketeering activity and what level of control over the enterprise is required for a defendant to “conduct or participate, directly or indirectly in the conduct of” an enterprise’s affairs.²⁰⁸

In spite of these ambiguities, many typical copyright infringement cases, including P2P file sharing cases, may meet the nexus and participation requirements or will at least survive summary judgment motions. Users of P2P services who upload and download works without the owners’ permission are involved in the reproduction and distribution of illegal copies of copyrighted works and thus satisfy the required nexus between their acts of copying and distributing the works and the enterprise that facilitates the infringement. Moreover, if the test for participation articulated by the First Circuit is applied and those who are “integral to carrying out” the illegal activities meet the participation requirement,²⁰⁹ many civil copyright infringement defendants are likely to satisfy this element. In the P2P context, in particular, where the enterprise comprises many associates who use the enterprise to facilitate infringement, the defendants in civil RICO cases will have taken an active and direct role in facilitating infringement. By using P2P software to locate and copy works, each user could be said to be “directing” the affairs of the enterprise for unlawful purposes, because each of the users has the ability to exercise such control.²¹⁰

have played some “integral” part in directing the affairs of the enterprise. *Id.* at 179. However, the Court did not resolve the question of how high in the managerial hierarchy of the enterprise a defendant must be in order to satisfy § 1962(c), stating in dicta that liability could extend to “lower-rung participants” under the direction of management. *Id.* at 184.

208. See, e.g., *United States v. Fowler*, 535 F.3d 408, 418–19 (6th Cir. 2008) (holding that *Reves* did not require proof of a managerial role in the enterprise and that jury could reasonably have found that defendant member of motorcycle club had “some part” in directing affairs of enterprise); *United States v. Oreto*, 37 F.3d 739, 750–51 (1st Cir. 1994) (concluding that § 1962(c) liability may be imposed against “lower rung participants in the enterprise who are under the direction of upper management” because they were “plainly integral to carrying out the collection process,” and that “Congress intended to reach all who participate in the conduct of [the] enterprise, whether they be generals or foot soldiers”).

209. *Oreto*, 37 F.3d at 750.

210. Such a conclusion would be consistent with the Supreme Court’s reasoning and approach in *Boyle v. United States*, in which the Court emphasized that an association-in-fact enterprise “need not have a hierarchical structure or a ‘chain of command.’” 129 S. Ct. 2237, 2245 (2009). If an enterprise need not have a hierarchical structure or chain of command, then it follows that an associate in such a non-hierarchical enterprise may “conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs,” 18 U.S.C. § 1962(c), without holding some sort of managerial or directorial role in the enterprise, so long as that associate’s actions further the pattern of racketeering activity and are closely enough connected to the enterprise itself. See generally G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345 (1996).

Section 1962(d) may also allow the imposition of RICO liability on non-managerial participants in the enterprise who can be shown to have agreed to the racketeering activity. Subsection (d) imposes RICO liability upon those who conspire to violate any of the other three subsections of § 1962.²¹¹ Although the Supreme Court has recently limited the scope of liability under subsection (d),²¹² it remains broad enough to sweep many forms of direct (and perhaps contributory) infringement into the RICO net.

In most jurisdictions, simply entering into an agreement to violate the substantive provisions of RICO can subject a defendant to liability under § 1962(d)²¹³:

[T]he requirements for RICO's conspiracy charges under § 1962(d) are less demanding [than for subsection (c) liability]: A 'conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor.' In the civil context, a plaintiff must allege that the defendant 'knew about and agreed to facilitate the scheme.'²¹⁴

Defendants accused of conspiracy need not have agreed to personally commit any of the predicate acts of racketeering, nor do they need to have actually participated in the conduct of an enterprise's affairs through the pattern of racketeering activity. Instead, they need only have agreed to the scheme that creates substantive RICO liability under one of the other subsections of § 1962.²¹⁵ "A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense."²¹⁶ Moreover, "[t]he conspiratorial agreement need not be express so long as its existence can plausibly be inferred from the defendants' words and actions and the interdependence of activities

211. 18 U.S.C. § 1962(d) (2010)

212. *Beck v. Prupis*, 529 U.S. 494, 505–06 (2000) (interpreting § 1962(d) in the context of civil RICO liability to require an injury to the plaintiff caused by an overt act by the defendant that is "independently wrongful under RICO").

213. *See, e.g., Baisch v. Gallina*, 346 F.3d 366, 376–77 (2d Cir. 2003) (stating that while a defendant is only liable under § 1962(c) if he has discretionary authority in carrying out directions from principals or plays a part in directing the affairs of the enterprise, conspirator liability under § 1962(d) only requires that the defendant know about and agree to facilitate the scheme).

214. *Id.* (quoting *Salinas v. United States*, 522 U.S. 52, 65, 66 (1997)).

215. *See, e.g., Salinas*, 522 U.S. at 63–66; *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 598, 600–01 (7th Cir. 2001); *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721 (7th Cir. 1998); *Handeen v. LeMaire*, 112 F.3d 1339 (8th Cir. 1997); *Aetna Cas. Sur. Co. v. P&B Autobody*, 43 F.3d 1546, 1561–63 (1st Cir. 1994).

216. *Salinas*, 522 U.S. at 63.

and persons involved.”²¹⁷ Thus, if a RICO violation can be established under § 1962(a), (b), or (c), a defendant who engages in an overt racketeering act that injures the plaintiff may be found liable as a conspirator under § 1962(d) so long as circumstantial evidence demonstrates a tacit agreement by the defendant to facilitate the criminal endeavor.²¹⁸

The breadth of the conspiracy component of RICO could be staggering if applied as liberally in the copyright infringement cases as in other contexts.²¹⁹ Given the unresolved ambiguities in interpreting § 1962(c), individual users of P2P file-sharing software might not exercise sufficient “managerial” control over, or direct enough participation in, the affairs of the enterprise to be found liable under § 1962(c). Nonetheless, many cases may present sufficient circumstantial evidence of a tacit understanding among users of the P2P network that they are participating in an illegal enterprise for plaintiffs to prove P2P users to be conspirators under § 1962(d), or at least to create a jury question.²²⁰ The users of P2P networks arguably participate indirectly, if not directly, in the conduct of the enterprise established by the P2P software. Those who set up private P2P networks, like the defendants in the first four RIAA lawsuits against P2P users in 2003,²²¹ should readily meet this test, as well as the *Reves* standard for conducting, or participating in the conduct of, the affairs of the enterprise for § 1962(c) liability. In addition, secondary infringers, like those shown to have sufficient knowledge and control over the actions of direct infringers in *Napster* and *Grokster*,²²² could

217. *United States v. Boylan*, 898 F.2d 230, 241–42 (1st Cir.1990); *see also Handeen*, 112 F.3d at 1355 (stating that proof of conspiracy can be entirely based on circumstantial evidence and plaintiffs need only establish a “tacit understanding”).

218. *See Beck*, 529 U.S. at 505–06.

219. *See, e.g., Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001) (allowing civil RICO § 1962(d) action to go forward against title companies and mortgage brokers who were alleged to have conspired with a developer to mislead homeowners into buying homes they could not afford); *Aetna Cas. Sur. Co.*, 43 F.3d at 1562 (affirming jury verdict against defendants under § 1962(d) in case involving fraudulent insurance claims submitted through several auto body shops because “the jury reasonably could have found that, although each defendant may not have known the entire sweep of the conspiracy, each defendant knew that he or she was a part of a larger fraudulent scheme”).

220. *See Salinas*, 522 U.S. at 64 (“If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators . . . so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators.”); Stuller, *supra* note 18, at 544–45 (discussing likelihood that secondary copyright infringers like the P2P service providers could be found liable for conspiracy to violate RICO based on general knowledge of use of the service to violate copyright laws).

221. *See supra* note 7.

222. *See MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634 (N.D. Ill. 2002).

also face RICO liability under either § 1962(c) or (d), assuming they run the enterprise's operations and facilitate their users' participation in the enterprise, particularly if they also meet the *Grokster* test for "inducement" of infringement.²²³ At the very least, the potential for many copyright infringement plaintiffs to prove this element of a civil RICO claim ought to give defendants pause when thinking about their potential liability for treble damages, in addition to any award for the infringement itself.

5. Standing under § 1964(c)

Once an enterprise, pattern of racketeering activity, and the requirements of one of the subsections of § 1962 are established, the final component of a civil RICO claim requires a plaintiff to show injury to her "business or property by reason of a violation of § 1962."²²⁴ Thus, the harm to the plaintiff must flow directly from the pattern of racketeering activity and fall within the "class of risks" that Congress intended the RICO statute to prevent.²²⁵ Although no bright line test defines the nature and degree of causation required for civil liability under § 1964(c),²²⁶ in the context of copyright infringement, a very direct relationship between a pattern of racketeering activity (infringing conduct) and harm to the plaintiff copyright owners exists. The harm typically manifests itself in terms of lost profits or loss in market value suffered by the copyright owners from unauthorized copying and distribution of their works, and an award of actual damages for civil copyright infringement requires proof of a causal connection between the infringement and the lost revenues.²²⁷

223. *Grokster*, 545 U.S. at 1019–23.

224. 18 U.S.C. § 1964(c).

225. See *Baisch v. Gallina*, 346 F.3d 366, 375 (2d Cir. 2003). The court stated in *Baisch* that "[w]here a racketeering enterprise intends no specific harms to any particular individual, but causes harm by the creation of substantial risk of harm, the victim injured by that enterprise's harm may have RICO standing . . ." *Id.* at 376.

226. *E.g.*, *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265–68 (1992) (holding that proximate cause is required, not simply "but for" causation, under § 1964(c), but that there is no bright line rule); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) ("Proximate cause . . . is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'") (quoting *Holmes*, 503 U.S. at 272 n. 20).

227. 17 U.S.C. § 504(b) (2006); see *Harper & Row Publishers, Inc. v. Nation Enters.*, 472 U.S. 539, 567 (1985) (stating that when causal connection is established between infringement and loss of revenue, award of damages is appropriate unless defendant can meet burden of showing that lost revenue would have occurred even without the infringement); *Montgomery v. Noga*, 168 F.3d 1282, 1294–95 (11th Cir. 1999) (finding that proof of actual damages requires causal connection between defendant's infringement and injury to market value of plaintiff's work).

Congress has repeatedly recognized that copying without authorization or justification establishes an injury to the copyright owner direct enough to permit an award, both in its provision for statutory damages²²⁸ and in the amendments adding exceptions to the “for profit” requirement of the criminal copyright infringement statute.²²⁹ Because of this longstanding and express recognition of a direct connection between copyright infringement and presumed harm to the owner of the infringed work, a copyright owner will easily meet the standing requirement of § 1964(c) if the predicate acts for the claimed pattern of racketeering activity are infringements of the plaintiff’s copyrighted works.²³⁰ However, it remains to be seen whether the presumption of damage applied in the copyright context would suffice to establish proximate cause in the context of civil RICO claims brought under § 1964(c). If a RICO plaintiff must prove actual, rather than statutory, damages to succeed, it would greatly reduce the number of copyright infringement plaintiffs who meet this requirement.

III. CONCERNS ABOUT IMPORTING RICO LIABILITY INTO THE COPYRIGHT CONTEXT

The ambiguities discussed above in both the criminal copyright infringement and RICO statutes create the potential for civil RICO claims in copyright cases that were not intended by Congress to be subject to severe penalties and in a manner that would disserve the policies underlying copyright. When litigators began to recognize the powerful tool available to them in the civil enforcement provisions of the RICO Act,²³¹ one of the most frequent criticisms of civil RICO was its application outside the intended scope of the legislation—organized crime.²³² Although the Court has interpreted RICO as a broad, remedial statute, not limited to situations involving organized

228. 17 U.S.C. § 504(c); see 145 CONG. REC. H12884 (daily ed. Nov. 18, 1999) (statement of Rep. Berman) (purpose of increases in statutory damages was to deter piracy by insuring that cost of infringement “substantially exceed[s] the cost of compliance”).

229. See *supra* Part II.A.3.

230. A more difficult question regarding standing might arise if only one of the alleged predicate acts was infringement of the plaintiff’s copyrighted work and the “pattern” was made up of a history of infringement of works other than the plaintiff’s works. See *supra* note 198. But there is at least some precedent that permits a plaintiff to pursue a civil RICO claim even where the racketeering acts alleged to make up the pattern include infringements of copyrights belonging to victims other than the plaintiff. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1117 (C.D. Cal. 2001).

231. 18 U.S.C. § 1964(c) (2006).

232. See *Blakey & Perry, supra* note 154, at 859 & n.14 (noting criticism of civil RICO and citing numerous articles of critics claiming RICO should not be extended to non-mafia defendants).

crime,²³³ the importation of its broad remedies into the copyright context raises special concerns that received little attention in the initial debate over the breadth of RICO and that were never discussed when Congress added copyright infringement to the list of RICO predicate acts. Here, the concern is not that RICO will reach non-mafia defendants, but rather that many defendants accused of copyright infringement may be threatened with penalties far more severe than Congress intended, interfering with the policies underlying copyright.

As discussed above in Part I.B.2, although Congress has incrementally increased the available criminal penalties under the Copyright Act since enacting the 1976 Act, its express intent has been to limit the most severe penalties to those who commit large-scale infringement²³⁴ and to insulate from felony liability those who engage in more limited copying for personal use.²³⁵ Where the application of the criminal copyright infringement provisions rests in the discretion of federal prosecutors, the public has some assurance that the most severe penalties will apply only to the most egregious cases of infringement.²³⁶ However, the addition of RICO penalties to the copyright scheme also enables plaintiffs in civil infringement suits to

233. See, e.g., *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248 (1989) (stating that although RICO statute “had organized crime as its focus,” RICO was “not limited in application to organized crime”); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985) (holding that RICO applies to all “persons,” not just to mobsters).

234. See, e.g., *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1020 (9th Cir. 2001) (quoting *Cable/Home Comm’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845, 846 n.29 (11th Cir. 1990)). Although there is little evidence of any particular intent in the legislative history of the Anti-Counterfeiting Consumer Protection Act of 1996, which added criminal copyright infringement as a predicate act for RICO liability, the context of the legislation and the repeated references to trafficking in counterfeit items suggest that the intent in adding copyright infringement to the list of predicate acts was to enhance the available penalties for commercial infringement. See, e.g., *supra* note 78.

235. For example, the 180-day period for measuring the value of the infringing work or works was justified as necessary to “exclud[e] from felony prosecution children making copies for friends as well as other incidental copying of copyrighted works having a relatively low retail value.” H.R. REP. No. 102-997, at 6 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3569, 3574. In addition, in enacting the exception to the profit motive set forth in 17 U.S.C. § 506(a)(2), Congress emphasized that “*De minimis* infringement (e.g., a teen-ager copying a software program for a younger sibling) will not be punished.” H.R. REP. No. 105-339, at 8 (1997). In passing the NET Act, although Congress rejected efforts to increase the minimum threshold for felony infringement from \$2,500 to \$5,000, it did so in light of the establishment of a *de minimis* threshold for misdemeanor offenses of at least \$1,000, reflecting an intent that those who engage in criminal infringement at a smaller scale should not be as severely punished. *Id.*

236. See, e.g., *Hearings, supra* note 85 (statement of Professor Gerard E. Lynch) (“Federal prosecutors have in fact applied the RICO statute relatively sparingly and mostly in contexts where most would regard their actions as appropriate and the defendants as legitimate targets for law enforcement activity.”).

seek automatic awards of treble damages. Plaintiffs' lawyers in civil cases are not bound by prosecutorial discretion to file RICO charges against only the most serious of offenders; rather, their job is to maximize their clients' recovery in civil actions and thus to include all possible good faith bases for recovery in an infringement suit.²³⁷

Although Congress may have intended its enhanced punishments for copyright infringement, and particularly for criminal infringement, to apply only to willful commercial infringement, adding criminal infringement as a RICO "racketeering activity" may have the practical effect of adding a punitive component to many ordinary civil infringement cases through the mandatory treble damage provision and creating a situation in criminal cases in which a "pattern" of mere misdemeanor copyright infringements could result in a twenty-year prison sentence.²³⁸

This situation creates a clash of interpretive schemes, in which the well-established practice in RICO cases of interpreting the RICO statute broadly²³⁹ conflicts with the well-established practice in copyright cases of interpreting the copyright statute narrowly. Moreover, while RICO liability has grown in spite of a clear congressional purpose to primarily target organized crime, the Court has shown heavy reliance on the intent of Congress in enacting specific provisions of the copyright scheme.²⁴⁰ The unresolved

237. See, e.g., *id.* ("Many lawyers have reportedly remarked that if a client has a legitimate claim that can be cast in RICO terms, it is virtually malpractice not to add a RICO cause of action to the complaint—how can a lawyer committed to represent her client zealously fail to take advantage of a provision that provides three times the payoff And, into the bargain, framing the suit as a RICO claim labels the defendant a racketeer—terminology that, at least marginally, increases the settlement pressure on defendants worried about the reputational damage of extended and possibly unsuccessful defense of a lawsuit.").

238. See 18 U.S.C. § 1963 (2001). Of course, as noted above, prosecutorial discretion would likely prevent such a case from being brought in the criminal context, as government resources would be better spent prosecuting those who engage in felony infringement. But just as a twenty-year prison term for someone engaging in two or more related acts of misdemeanor copyright infringement (i.e., the value of which does not exceed \$2,500 per incident) within a ten year period would seem excessive to most and exceeds the intent of Congress in limiting felony cases to those involving significant losses to copyright owners, the imposition of a treble damage award for the same conduct when the Copyright Act already provides for recovery of statutory damages up to \$150,000 for each willful act of infringement seems equally excessive and beyond the intent of Congress. See 17 U.S.C. § 504(c)(2) (2001).

239. See *H.J. Inc. v. Nw. Bell Tele. Co.*, 492 U.S. 229 (1989); *Sedima, S.P.R.L. v. Imrex Co., Inc.* 473 U.S. 479 (1985).

240. See *Dowling v. United States*, 473 U.S. 207, 227–28 (1985) (discussing careful deliberation and caution of Congress in enacting and amending criminal copyright provisions and "wisdom of leaving it to the legislature to define crime and prescribe penalties"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (noting that judiciary's "reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme" in copyright and that courts should be "circumspect" in construing the scope of Copyright Act when "Congress has not clearly marked our course").

ambiguities in both the application of the criminal copyright infringement provisions and the scope of RICO's enterprise, pattern, conduct, and standing provisions, when combined with the competing interpretive schemes that have been adopted in the two statutes, make it difficult to predict the full scope of RICO's application in copyright infringement cases.²⁴¹ These uncertainties leave copyright defendants with the possibility that RICO claims in many civil infringement suits would survive motions to dismiss, which is likely to weigh heavily in a defendant's decision whether to mount a defense in cases of questionable liability, rather than settle to avoid risk of a large damage award.²⁴²

241. In *Scheidler v. National Organization for Women, Inc.*, the Supreme Court made clear that even if the RICO statute's provisions are to be broadly interpreted, the criminal statutes that form the basis for the predicate racketeering acts must be narrowly construed according to the rule of lenity: "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." 537 U.S. 393, 409 (2003) (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)); see also *Scheidler*, 537 U.S. at 412 (Justice Ginsburg, concurring) ("The Court is rightly reluctant, as I see it, to extend RICO's domain further by endorsing the expansive definition of 'extortion' adopted by the Seventh Circuit"). While *Schneidler's* narrow reading of the Hobbes Act in the context of a civil RICO claim suggests that the ambiguities in the criminal copyright infringement statute would also be narrowly construed, it provides little guidance in evaluating whether or how the intent of Congress in its treatment of copyright law would be considered in the context of evaluating the application of RICO's enterprise, pattern, conduct, and standing requirements to copyright infringement cases alleging RICO violations.

242. In fact, such cases are beginning to make their way into the federal courts, with mixed results in terms of surviving initial motions to dismiss the RICO claims. See, e.g., *Internet Archive v. Shell*, 505 F. Supp. 2d 755 (D. Colo. 2007) (finding allegations sufficient to support RICO claim based on criminal infringement as a predicate act but insufficient allegations of enterprise distinct from defendant); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 456 F. Supp. 2d 131, 153 (D. Maine 2006) (dismissing RICO claims based on criminal copyright infringement because of failure to allege proximate causation of damage from alleged infringement); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1127-28 (C.D. Cal. 2001) (permitting RICO claims to go forward in copyright infringement suit against "gatekeepers" of pornography websites alleged to have infringed copyrighted photographs of plaintiff). The handful of reported decisions applying RICO in the copyright context do not provide a reliable indication of the number of civil copyright infringement cases being filed that also include civil RICO claims, and there is no easy way to determine how many pending or settled copyright infringement cases also include civil RICO allegations. Although this was a source of frustration in early studies of the impact of civil RICO on the federal court system, see Blakely & Perry, *supra* note 154, at 870 & n. 47; *Hearings*, *supra* note 85 (statement of Gerald E. Lynch) (discussing difficulties in assessing true number of civil RICO cases because of single-claim designation form used by Administrative Office of U.S. Courts in tracking substantive nature of cases), it still remains the practice of the federal courts to require that litigants check only one box in their civil filing forms to indicate the nature of the dispute. Thus, when statistics are compiled, there is no systematic way to determine whether a case includes both a copyright infringement and a copyright-based RICO claim short of reviewing all copyright and RICO complaints filed in every district in the country. In an admittedly unscientific sampling of complaints in several district courts accessible through the PACER system that were designated as copyright cases, the author estimated that just under 2% of the civil copyright infringement cases surveyed included a RICO claim as well as copyright infringement claims for an 18-month

The breadth of RICO's civil remedy provisions presents a number of important concerns. First, copyright infringement differs from most of the other RICO predicate acts in that the Copyright Act creates a complex regulatory scheme that aims to benefit the public by allowing access to creative works and not simply to protect copyright owners from infringement. Second, the "private attorney general" function of the civil RICO provisions is unnecessary in the context of copyright infringement, as the Copyright Act already provides a more than adequate civil enforcement mechanism. Third, the reputational stigma created by allegations of racketeering conduct raises special concerns in the copyright context in light of the murky legal standards governing liability and the potential for over-deterrence to harm the public interest. Finally, by allowing racketeering charges to be asserted in a context in which the wrongful conduct is not socially condemned and, at least within a large subset of the public, the law is widely disobeyed, the inclusion of copyright infringement in the list of RICO predicate acts may ultimately deter good faith, fair uses of copyrighted works, while simultaneously limiting copyright owners' ability to deter and punish large-scale commercial piracy.

A. Differences Between Copyright Infringement and Other RICO Predicate Acts

Copyright infringement differs from other types of RICO predicate acts because those who test the boundaries of copyright law serve the public good in ways that are at least as important as those who seek to enforce copyrights. Because clear lines seldom distinguish ideas (which are not copyrightable) from expressions of those ideas (which are copyrightable), original components of a work (protected) from unoriginal components (unprotected), and fair use from impermissible use of a copyrighted work, testing and clarifying those lines through litigation serves the public interest.²⁴³

When the potential negative outcome of litigation increases dramatically, such as by adding RICO liability to the already

period preceding June of 2004; when repeated for the 18-month period preceding June of 2010, the number was comparable.

243. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). In *Fogerty*, the Court noted that copyright's primary purpose is not to provide financial reward to authors for their labor, but rather to fulfill the Constitution's stated objective that copyright laws be enacted to "promote the Progress of Science and useful Arts." *Id.* at 526 (quoting U.S. CONST., art. I, § 8, cl. 8). The Court stated, "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Id.* at 527.

substantial civil infringement remedies, there is greater incentive to settle cases early and thereby avoid court decisions that might better demarcate uses of creative works that are protected by the copyright monopoly from those that fall within the public domain. The staggering penalties facing copyright defendants strongly suggest that defendants who would otherwise test the boundaries of copyright will simply choose to accede to copyright owners' demands, even where those demands unreasonably expand the limited monopoly.²⁴⁴

The other crimes included in the long list of predicate acts considered as racketeering activity for purposes of RICO liability simply do not share the countervailing interests that copyright presents and the Constitution recognizes.²⁴⁵ For example, no public interest encourages a con artist to take as much as legally possible without technically defrauding the victim, or an applicant for citizenship to stretch the truth so long as the misrepresentations do

244. The P2P hypothetical provides a dramatic illustration of this point. If an infringing P2P user lives in a dormitory of a private college and gains access to the Internet through her college's wireless network, both the student and the college could be named in a lawsuit for copyright infringement and civil RICO damages. The RIAA has already put large institutions like universities and corporations on notice that it may seek to hold them responsible for policing their servers and prohibiting access to students and employees who participate in illegal file-sharing. See, e.g., Geoff Duncan, *RIAA Cracks Down on College Music Sharing*, DIGITALTRENDS.COM, (Feb. 23, 2007), <http://www.digitaltrends.com/lifestyle/riaa-cracks-down-on-college-music-sharing>; Rebecca Dana, *To Fight Music Piracy, Industry Goes to Schools*, WASH. POST, Aug. 28, 2003, at A01 (discussing RIAA letters and warnings to colleges and universities regarding infringement by students and changes made by some of them in response to the letters); Jon Healey, *Industry Targets File Swappers' Employers: The RIAA Sends Letters to About 300 Companies, Warning of "Significant Legal Damages,"* L.A. TIMES, March 18, 2003, §3, at 1; Christine Winter, *Corporations Hit With Copyright Warnings*, SUN-SENTINEL, Feb. 23, 2003, at 3G. Secondary infringers like the college have deeper pockets—which is the primary reason that plaintiffs target them—and thus can usually afford to defend themselves. They also have more defenses potentially available to them, particularly if they can show that they fall within the “safe harbor” provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512 (2006), or if the criminal copyright infringement statute is interpreted more narrowly than the civil enforcement provisions have been interpreted in recent years. If the college defended the claims against it at trial, it would help to “demarcate” more clearly the lines between permissible and impermissible conduct in the distribution of copyrighted works. See *Fogerty*, 510 U.S. at 524–27 (1994). Despite its financial ability to defend the suit and the availability of some strong possible defenses, the college likely would give in to the copyright owners' demands in light of the extent of the possible damage award and the potential stigma of being labeled as a “racketeer.” Settlement of these cases would also not necessarily accomplish deterrence of widespread infringement because such informal resolutions of copyright suits do not carry the same social and moral weight as a judgment after a jury trial. See, e.g., Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332, 350 (2007) (discussing survey reflecting lawyers' and clients' concerns about a formal, public declaration of wrongdoing when judgment is entered against them, as opposed to the private and usually confidential nature of settlements).

245. See *infra* note 275 (describing other crimes listed in 18 U.S.C. § 1961(1) that constitute predicate acts for purposes of RICO liability).

not violate the federal laws against unlawful procurement of citizenship.

In contrast, the Supreme Court has recognized that, unlike “private attorney general” plaintiffs in civil rights cases,²⁴⁶ who are typically individuals of limited means asserting claims against deep-pocket defendants,²⁴⁷ both plaintiffs and defendants in copyright infringement suits “can run the gamut from corporate behemoths to starving artists.”²⁴⁸ Moreover, the Supreme Court has repeatedly emphasized that the purpose of the Copyright Act is “to encourage the production of original literary, artistic, and musical expression *for the good of the public.*”²⁴⁹ Indeed, the Court has averred:

[T]he policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement. . . . We have often recognized the monopoly privileges that Congress has authorized, while “intended to motivate the creative activity of authors and inventors by the provision of a special reward,” are limited in nature and must ultimately serve the public good.²⁵⁰

In interpreting the 1909 Copyright Act, the Court explained that the limited scope of the statutory monopoly enjoyed by copyright

246. Similar to the provisions of the Civil Rights Act allowing civil suits to redress injuries suffered as a result of unlawful discrimination, *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1)-(3) (2006), the RICO statute expressly permits private plaintiffs to bring civil suits against those who have injured them through the commission of a pattern of racketeering activity, 18 U.S.C. § 1964(c). The legislative history for both of these statutory schemes reflects consideration by Congress of the need for “private attorney general” plaintiffs to bring civil suits because of the lack of sufficient government resources to enforce laws prohibiting discrimination and organized criminal conduct. *See, e.g.*, *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (describing civil RICO provisions in § 1964(c) as “bring[ing] to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate”); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978) (discussing legislative history of Civil Rights Act of 1964). Because plaintiffs in such cases were often “impecunious” and unable to “litigate their claims against defendants with more resources,” attorneys’ fee awards are generally available to prevailing plaintiffs in such cases and unavailable to prevailing defendants. *Fogerty*, 510 U.S. at 524; *see also Christiansburg Garment*, 434 U.S. at 418 (holding that prevailing plaintiffs in civil rights cases were entitled to an award of fees and costs as a matter of course, while prevailing defendants in such suits could only recover fees and costs if the lawsuit was frivolous or brought in bad faith); 18 U.S.C. § 1964(c) (2006) (providing only for award of attorneys’ fees to plaintiffs in civil RICO cases). In contrast, the Supreme Court has noted that, unlike in civil rights litigation, because prevailing defendants in copyright cases serve the interests of the Copyright Act as effectively as prevailing plaintiffs, defendants do not bear a heavier burden than plaintiffs in recovering attorneys’ fees under the Copyright Act. *Fogerty*, 510 U.S. at 526–27, 534 (noting that a successful defense of a copyright suit may further the policies underlying the statute as much as a successful prosecution of an infringement claim by a copyright owner).

247. *Fogerty*, 510 U.S. at 524.

248. *Id.* (quoting *Cohen v. Virginia Elec. & Power Co.*, 617 F. Supp. 619, 622–23 (E.D. Va. 1985), *affd on other grounds*, 788 F.2d 247 (4th Cir. 1986)).

249. *Fogerty*, 510 U.S. at 524 (emphasis added).

250. *Id.* at 526 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

owners reflects “a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.” The Court thus concluded that “the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”²⁵¹ Similarly, in interpreting the 1976 Act, the Court emphasized that to achieve copyright’s purpose of promoting creativity, “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”²⁵² This delicate balance between encouraging artistic creativity through a limited monopoly and promoting wide-spread public access to creative works is unique to copyright and distinguishes it from other contexts in which courts have interpreted the civil RICO statute expansively.

B. Civil RICO’s “Private Attorney General” Function Is Unnecessary in the Copyright Context

Most of the initial justifications for broad application of RICO remedies to contexts well outside the stated purpose of Congress²⁵³ either do not apply at all or carry much less weight in the copyright context. Private justice actions like RICO claims have been said to serve the public good “in supplementing governmental regulatory resources, deterring wrongful conduct, and providing relief for victims who may have no other effective remedy.”²⁵⁴ In copyright infringement cases, however, unlike cases involving other RICO predicate crimes, the “public interest” served by litigation does not depend on who prevails, because the suits themselves clarify the scope of the limited monopoly.²⁵⁵ In fact, none of the purported justifications for civil RICO as a “private justice action” apply in the copyright context.

First, unlike most predicate acts listed in the RICO statute, Congress never intended civil copyright infringement actions to

251. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

252. *Feist Publ’ns., Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 349–50 (1991).

253. *See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (describing civil RICO provisions in § 1964(c) as “bring[ing] to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate”).

254. *Bucy*, *supra* note 156, at 17. *Bucy* goes on to note, however, that “[c]ourts have also noted how disruptive such actions may be to an already comprehensive enforcement scheme . . .” *Id.*

255. *Fogerty*, 510 U.S. at 527 (1994).

“supplement” government enforcement; criminal enforcement of copyright law was an afterthought.²⁵⁶ Congress conceived of copyright as a civil enforcement scheme wherein private parties protect and enforce their own copyright interests, probably because the limitations on this purely economic right exist for the public good. Under the enforcement provisions of the Copyright Act itself, statutory damages are available so that plaintiffs can obtain a significant monetary recovery even if actual damages and the illicit profits are low or difficult to prove.²⁵⁷ Orders for the impoundment and ultimate destruction of unlawfully manufactured copies are also available for prevailing plaintiffs,²⁵⁸ as are attorneys’ fees and costs.²⁵⁹ While the RICO statute certainly enhances the amount of damages recoverable by a plaintiff in a civil action, it does not serve to supplement *government* regulatory resources, as the government has never been the primary enforcer of copyright laws.

Second, notwithstanding the increased remedies for infringement over the past few decades, deterrence is not (or at least should not be) the primary goal of copyright law as a whole.²⁶⁰ While the Copyright Act certainly provides penalties for infringement that are intended to deter such conduct,²⁶¹ the Act serves the larger purpose of “enriching the general public through access to creative works”²⁶² and creates a complex regulatory structure governing the nature and scope of copyright owners’ rights and public access to copyrighted works. Thus, over-deterrence is (or at least should be) an important concern in the context of copyright law, unlike other underlying RICO offenses, where over-deterrence is of much less concern.²⁶³ For example, society loses nothing if severe RICO

256. See *supra* Part III.A (discussing development of criminal copyright infringement provisions); *Dowling v. United States*, 473 U.S. 207, 221 (1985) (“Congress [has] chiefly relied upon an array of civil remedies to provide copyright holders protection against infringement . . .”); see 17 U.S.C. §§ 502–505 (2006), but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution.

257. 17 U.S.C. § 504(c)(1).

258. 17 U.S.C. § 503.

259. 17 U.S.C. § 505.

260. A discussion of the legitimacy of deterrence theory in law enforcement is beyond the scope of this article. One of the stated purposes of the RICO legislation was to deter the infiltration of legitimate business by those engaged in organized criminal activities, see *United States v. Turkette*, 452 U.S. 576, 588 (1981), and one of the stated purposes of each increase in the available remedies under the Copyright Act has been deterrence of copyright infringement; see also *supra* Part II.B.2. This article simply addresses the effectiveness of the addition of RICO penalties to the already extensive available penalties under the Copyright Act in serving the goal of deterring infringement and the dangers of over-deterrence.

261. See *supra* text accompanying notes 63–64.

262. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

263. See *infra* notes 284–286 and accompanying text; *infra* Part IV.D.

penalties deter would-be con artists from soliciting money through the mails under some misleading pretense that does not fall squarely within the mail fraud statute.²⁶⁴ In contrast, if those inclined to test the boundaries between the copyright monopoly and the public domain are deterred by the threat of RICO damages in addition to the already large damages available under the Copyright Act, this over-deterrence will harm the public interest in access to creative works, and the copyright monopoly will ultimately extend far beyond its intended reach.²⁶⁵ Given the expansiveness of pre-existing remedies available under the civil and criminal provisions of the Copyright Act, additional remedies under the RICO statute are not needed to deter infringement and pose a great risk of deterring desirable conduct in exploring the boundaries of the copyright monopoly.

Third, the purpose of private justice actions—to provide relief for victims otherwise bereft of effective remedies—is also inapplicable in the copyright context. The Copyright Act already provides for more than adequate relief for victims of copyright infringement.²⁶⁶ While victims of infringement certainly deserve compensation for their losses, the addition of RICO penalties serves no compensatory purpose.²⁶⁷ If private attorneys general were needed to prosecute copyright cases, the Copyright Act's provisions for statutory damages, ranging from \$250 to \$150,000 per infringement, and for awards of attorneys' fees and costs would certainly fill the vacuum without importing all of the baggage that comes with the RICO statute. In the copyright context, RICO damages serve a solely punitive purpose in a system that already grants extensive remedies for willful infringement.²⁶⁸

264. See 18 U.S.C. § 1341 (2006).

265. See *infra* Part IV.D.

266. For example, successful victims may recover statutory damages even if actual damages are difficult to prove, as well as attorneys' fees and costs incurred in bringing the action. See 17 U.S.C. §§ 504(c), 505 (2006).

267. The Copyright Act's statutory damage remedy already serves the purpose of compensating plaintiffs for infringements that have *de minimis* value or that are difficult to value, as well as serving as a vehicle for punishing willful infringement and deterring future infringement. See 17 U.S.C. § 504(c); *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1337 (9th Cir. 1990). See generally NIMMER & NIMMER, *supra* note 39, at § 14.04 (2004). Thus, the effect of the addition of RICO treble damages to the already existing remedies available under the Copyright Act is purely punitive and serves no compensatory purpose.

268. In addressing the so-called "myths" propounded by critics of civil RICO, Blakey & Perry rejected arguments about, *inter alia*, the creation of a "floodgate" of litigation and the potential for litigation abuse. Blakey & Perry, *supra* note 154, at 869–70, 877–79. However, Blakey & Perry's rejection of these arguments was framed in terms of the assertion of frivolous RICO claims and assumed, without any real support, that RICO remedies were justified because the existing remedies for RICO's predicate acts were inadequate. *Id.* Even if this were true outside of the copyright context, it has little application here, where the Copyright Act already

Prior to the addition of criminal infringement as a RICO predicate act in 1996, the consistent view of Congress and the courts had been to maintain the Copyright Act as a self-contained statutory vehicle for balancing copyright owners' interests in receiving compensation for their works and the public's interest in accessing them.²⁶⁹ If victims of copyright infringement deserve more compensation than that provided by the current remedies under the Copyright Act, then the most appropriate course of action would be to amend the remedies available under the Copyright Act rather than to import RICO's broad statutory scheme into the copyright context. While perhaps an important tool for victims of other crimes who would otherwise lack any civil remedy, the "private attorney general" function of RICO is unnecessary in light of the extensive civil remedies already available under the Copyright Act. Furthermore, the importation of civil RICO remedies into civil copyright infringement cases could upset the delicate balance between the copyright monopoly and the public domain.

C. The Stigma of "Racketeer" and Its Effect on Settlement

The stigma of being labeled a "racketeer" and the effect of RICO claims on the settlement value of cases cause legitimate concern in the copyright context and caution against civil RICO liability for most infringement claims. Public shaming, like that which arises from labeling a defendant as a "racketeer," can be a powerful tool in enforcing social norms.²⁷⁰ However, the use of the label as a shaming device is unfair when private litigants have the power to impose it on a wide class of people whose conduct does not approach the kind of activity that the label is commonly understood to describe. It will ultimately also fail as a method for enforcing social norms, because the more that label is applied in a way deemed unfair and inaccurate,

provides a more than adequate mechanism for recovering lost revenues and the costs of suit. The reach of RICO is broad enough, and the law governing criminal copyright infringement is murky enough, that non-frivolous RICO claims based on copyright infringement may be asserted in many circumstances in which RICO would be an inappropriate and excessive remedy, but arguably available under existing law.

269. See, e.g., *Dowling v. United States*, 473 U.S. 207, 221, 225 (1985); cf. 17 U.S.C. § 301 (2006) (illustrating Congress' intent, through preemption provision, to limit copyright to a federal scheme and prevent states from imposing their own inconsistent copyright protections and remedies).

270. See generally Kahan, *supra* note 18 (discussing the current "renaissance in American law" embracing shaming penalties for nonviolent common and white collar crimes); Katyal, *supra* note 26 (noting the deterrent effect that public shaming can have on crime).

the less social stigma will be associated with the label, making it increasingly less effective at inducing shame.²⁷¹

The stigma of the “racketeer” label, even if only in a civil complaint and not a final judgment or criminal conviction, raises concerns in the copyright context similar to those expressed immediately following enactment of RICO,²⁷² but with greater potential negative effects due to the public interest served by defendants in copyright infringement suits.²⁷³ In their defense of civil RICO, Gerard Blakey and Thomas Perry argue that the reputational stigma of being labeled a racketeer in a civil RICO claim is of no concern, because “the racketeer label inhibits, rather than facilitates, settlement” in typical fraud cases.²⁷⁴ Even if this were accepted as

271. See Kahan, *supra* note 18, at 625; Margaret Raymond, *Penumbra Crimes*, 39 AM. CRIM. L. REV. 1395, 1397–98, 1403–05, 1425–29 (2002) (discussing effects of lack of compliance with “penumbra crimes” such as speeding violations).

272. The application of civil RICO liability to “garden variety fraud” cases inspired a great deal of initial criticism, with opponents of the broad application of RICO liability against defendants who had no affiliation with organized crime arguing that legitimate businesses were paying extortionate amounts to settle “garden-variety fraud” cases to avoid the stigma of the racketeer label. Compare Bucy, *supra* note 156, at 23 (noting that civil RICO allegations can be harmful to defendants in terms of the cost of defending against nonmeritorious claims and in terms of “reputational damage when [defendants are] named in a serious civil lawsuit, where treble damages are at stake and they are branded as ‘racketeers’”), with Blakey & Perry, *supra* note 154, at 875–76 (rejecting complaints regarding the stigmatizing effects of the racketeer label and asserting that the label “inhibits, rather than facilitates, settlement”). This debate often referenced Justice Marshall’s statement that “[m]any a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.” *Sedima, S.P.R.L. v. Imrex Co., Inc.* 473 U.S. 479, 506 (1985) (Marshall, J., dissenting). In fact, once the broad scope of civil RICO’s reach had become clear, Congress considered amending the statute to provide that, in civil RICO cases that did not involve a crime of violence, plaintiffs would be precluded from using the terms “racketeer” or “organized crime” in any documents filed with or oral presentations made to the court. *Hearings, supra* note 85 (text of proposed legislation). As one Congressman stated in support of the amendment,

Unfortunately, the overwhelming majority of the cases have not been filed against mobs or mobsters and other professional criminals to strip them of their ill-gotten gains. Instead, civil RICO cases have been filed against legitimate businesses, churches, the FBI, Government officials, and the like. All of these individuals and entities have been tarred with the label of racketeer.

Id. at 22 (statement of Rep. Smith).

273. See *infra* Part III.A.

274. Blakey & Perry, *supra* note 154, at 875. In challenging the assertion that legitimate businesses would choose to settle rather than vigorously defend against RICO allegations, Blakey and Perry rely on a report indicating that at least some “seasoned litigators in the RICO area” believe that adding a RICO claim to a suit inhibits settlement where legitimate businesses are involved. See *id.* (citing *A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee*, 1985 A.B.A. SEC. PUB. CRIM. JUST. REP. 121, at 12123. While this anecdotal report loosely supports Blakey and Perry’s assertion, their discussion oversimplifies the complex considerations that go into litigation strategy and settlement decisions. Their presumption that “if the plaintiff’s suit has no merit, the chance of

true, the same reasoning does not apply to typical copyright infringement suits in which plaintiffs might assert civil RICO claims. Unlike “garden-variety fraud” cases, copyright cases involve a complex statutory scheme designed to balance competing interests between copyright owners and public access to their works. These competing interests cannot be properly balanced when plaintiffs are given far more chips at the bargaining table than defendants.

Unlike the other crimes in the laundry list of predicate acts that qualify as “racketeering activity” under the RICO statute, the crime of copyright infringement causes only monetary damages, and the victim—the copyright owner—enjoys only limited property rights in the works infringed.²⁷⁵ Whereas plaintiffs in fraud cases have been deprived of tangible money or property to which defendants have no right, copyright owners are not absolutely entitled to their “property,” but possess only a specifically limited “bundle” of intangible rights²⁷⁶ subject to numerous exceptions and technical requirements.²⁷⁷ Because copyright protections are limited, many uses may be made of this property without the owners’ consent and without any legal

success is zero, and zero multiplied by three (or any other number) is still zero,” *id.* at 876, is flawed. In the author’s experience (an admittedly anecdotal response to the anecdotal support offered for Blakey and Perry’s conclusions), where claims are truly frivolous, defendants will generally choose to move to dismiss or for summary judgment rather than to settle the case for anything but a nuisance value. However, where the underlying law is ambiguous and subject to competing interpretations or where a motion to dismiss the case before trial has failed, defendants become much more interested in settling, particularly in RICO cases where their business reputations could be injured by a determination that they engaged in “racketeering.” This is because, where the law is ambiguous or a motion to dismiss has failed, the chance of success is not zero. Rarely is anything certain in litigation other than the fact that a party will incur attorneys’ fees and costs in going forward with the suit, and thus the risk of treble damages and the label of “racketeer” will certainly be considered in the settlement calculus and will in many cases lead to earlier or more costly settlements than in cases where RICO is not alleged.

275. The list of predicate acts that may constitute “racketeering activity” for purposes of RICO liability is found at 18 U.S.C. § 1961(1) (2010). It includes the commission of state law felonies that involve murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance; the commission of a host of federal crimes, including bribery, counterfeiting, felony theft, embezzlement from pension funds, extortion, numerous crimes involving fraud, unlawful procurement of citizenship, the sale of obscene matters, obstruction of justice, witness tampering, slavery or trafficking in persons, illegal gambling activities, money laundering, murder, sexual exploitation of children, trafficking in counterfeit goods or services, trafficking in contraband cigarettes, violating restrictions on payments or loans to labor organizations, felonious drug crimes, and immigration violations. *Id.* Aside from the possible First Amendment concerns raised by the obscenity crimes included in the list of predicate acts, criminal copyright infringement is distinct among these crimes because of the public interest in allowing the fair use of copyrighted works and access to works in the public domain.

276. See 17 U.S.C. § 106 (2010).

277. See, e.g., 17 U.S.C. §§ 102, 107–122, 408. Copyright owners also have no right to the ideas underlying or contained in the work, and they have no right to preclude fair uses of the work. See 17 U.S.C. §§ 102, 106, 107, 301.

sanction, making copyright infringement distinct from the other RICO predicate acts.

Moreover, the case law interpreting the Copyright Act provides little certainty for defendants evaluating the scope of their potential liability. For example, few bright lines exist to guide defendants about whether uses of copyrighted works are permitted fair uses or are infringing;²⁷⁸ what differentiates an idea from the expression of that idea;²⁷⁹ what state of mind is required for “willful” infringement;²⁸⁰ or how the broad construction of the RICO statute can be reconciled with the traditionally narrow construction of the Copyright Act.²⁸¹

Thus, although innocent defendants accused of fraud may very well choose to litigate to protect their good name rather than settle a fraud-based RICO claim because they can have some confidence in being able to prove their innocence at trial,²⁸² even “innocent” copyright infringers can be subject to civil penalties under the strict-liability regime of copyright law. Given the murky boundaries between permissible and impermissible uses of copyrighted works and the fact that liability can result even for unintentional violations, a heightened incentive already exists for defendants to settle copyright infringement lawsuits to minimize their exposure to damage awards. Adding the potential for treble damages and the label of “racketeer” is likely to increase both defendants’ incentive to settle and the settlement value of infringement suits that include civil RICO claims.

In some contexts, including civil cases arising out of most other RICO predicate acts, it would be appropriate for the law to provide heightened incentives for defendants to settle quickly and for greater amounts. For example, it makes perfect sense for the law to provide heightened incentives for a defendant to settle a civil RICO claim arising from a kidnapping, both to spare the victim the ordeal of discovery, trial, and appeal, and to expedite compensation to the victim. In the context of copyright infringement, however, the remedies available in a simple infringement suit already provide an incentive for defendants whose conduct falls within the gray area of permissible copying to settle rather than incur the expense and uncertainty of trial. The possibility of treble damages and the

278. See 17 U.S.C. § 107.

279. See 17 U.S.C. § 102.

280. See *infra* Part II.A.2.

281. See *infra* Part II.B.

282. See Blakey & Perry, *supra* note 154, at 876 (asserting that “if the plaintiff’s suit has no merit, the chance of success is zero” and thus that innocent defendants in fraud cases will have no greater incentive to settle even if a RICO claim is added to the suit).

reputational harm from the label of “racketeer” tips the balance far too heavily in favor of plaintiffs, especially where the Supreme Court has recognized that testing the boundaries of the copyright monopoly serves important public interests.²⁸³

Providing too much bargaining power to plaintiffs in copyright cases, who typically seek to prohibit others from using or selling copyrighted works, will not only encourage defendants to settle rather than test the limits of copyright protection through litigation, but will also chill legitimate uses of copyrighted works.

D. Problems with Over-deterrence and Under-deterrence

In addition to the problems created by the potential chilling effect on legitimate uses of copyrighted works, the inclusion of civil RICO claims in copyright infringement cases is unlikely to deter the most egregious infringers and may ultimately work to the disadvantage of copyright owners. The addition of a civil RICO claim to a copyright infringement lawsuit is likely to tip the balance in favor of settlement for many risk-averse defendants who would otherwise have legitimate defenses to copyright infringement, but some will still litigate, and the outcome of those cases that do result in judgments or appellate decisions will impact the subsequent behavior of some potential infringers.

If courts award both copyright and RICO damages for large-scale copying for commercial purposes, the publicity about a large damage award could certainly have a deterrent effect, but on whom? Those who seek to make legitimate uses of copyrighted works are likely to be deterred, as law abiding citizens are more likely to alter their conduct to fall more squarely within what is permitted by law where the penalties associated with crossing the line are severe and include the possibility of public shame and reputational harm.²⁸⁴ Those who knowingly infringe for private use, rather than for profit,

283. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994) (noting that a successful defense of a copyright suit may further the policies underlying the statute as much as a successful prosecution of an infringement claim by a copyright owner). While copyright law was intended as a vehicle for inspiring creativity, too broad an expansion of the “limited” copyright monopoly can stifle creativity and thus interfere with the purposes underlying copyright; see Lawrence Lessig, Commentary, *The Creative Commons*, 65 MONT. L. REV. 1, 1–4 (2004) (noting that the Disney Corporation built its entertainment empire by “taking works that were in the public domain, and parroting, changing, improving them to produce something new” but that the law has changed so dramatically in the past forty years that the kind of creativity that Disney took advantage of may no longer be possible).

284. See, e.g., Raymond, *supra* note 271, at 1422–25; cf. Katyal, *supra* note 26, at 1059 (noting in the context of discussing the effect of gaps in information between the public and law enforcement, “[i]f individuals do not know whether a given act falls on the positive or negative side of the line, then they may be deterred from pursuing it”).

may also be initially deterred by a well-publicized award of significant damages, because the risk of high sanctions outweighs their small personal gain. However, the deterrent effect on such infringers may still be fairly small or only short-lived in light of the slim likelihood of being detected and sued.²⁸⁵ Those infringers whose conduct inspired the addition of civil RICO remedies for copyright infringement—the “pirates” who copy and sell others’ works for commercial profit—are least likely to be deterred by a well-publicized award of significant damages for similar infringement, because the high profits available for such enterprises likely outweigh the low risk of being caught even if the potential penalties are severe.²⁸⁶

Thus, while successful pursuit of copyright and civil RICO remedies against a “pirate” who engages in large-scale copying for profit may end up deterring some willful infringers from future infringement, it is most likely to deter those who would serve the public interest by making legitimate uses of copyrighted works and to fail to deter other commercial copyright pirates. The potential harm to the public interest in access to copyrighted works from over-deterrence is simply not worth the possibility of deterring some willful infringers.²⁸⁷ Because the enhanced penalties available under the

285. See, e.g., Katyal, *supra* note 26, at 1006 (“Beccaria and Becker have observed that the expected penalty for criminal activity is not only the sentence in the criminal code, but also a function of the probability that one will get caught.”).

286. See, e.g., *supra* note 234 (discussing legislative history for Anti-Counterfeiting Consumer Protection Act); Katyal, *supra* note 26 at 1011 (noting that in the context of cybercrime, “it may be difficult to increase the sanction enough to compensate for a very low probability of getting caught”).

287. As one author has noted, RICO’s treble damages provision seeks “to serve the common good by deterring future violations through large judgments.” Bucy, *supra* note 156, at 17. But such remedies should be limited in the copyright context, where there is as much, if not more, risk that the common good will be disserved by the application of RICO’s treble damage provision because it over-deters conduct that benefits the public and that copyright policy should encourage. Those who are most likely to be deterred by enhanced penalties are those who seek to use copyrighted works for what are arguably legitimate purposes but who are unwilling to take the risk that they have crossed the line. For example, several years ago a Baltimore artist who documented and commented upon the experience of movie-goers by taking a camcorder with him into Baltimore movie theaters decided to give up his art as a result of a newly-enacted Maryland law that made it a crime to videotape inside a movie theater. Michael Ollove, *Last Picture Show: With a New Maryland Copyright Law Set to Make His Art Illegal, Bootlegger Jon Routson Faces the End*, THE BALTIMORE SUN, June 22, 2004, at 1C, 5C.

His films of films—often poorly framed, poorly focused and occasionally with a big fat head obscuring the view—have been shown in a New York gallery and generated positive notices in publications such as *The New York Times*, *The New Yorker*, and the *Village Voice*. His work is, in the view of some critics, a clever comment on American film and the movie-going experience.

Id. at 1C. Because he does not want to risk going to jail, this artist will no longer be taking his camcorder into theaters with him despite never intending to use his videotapes to sell bootleg copies of the films; his intent was only to create a form of conceptual art that made its own

RICO statute are unlikely to deter the very offenders that the law intended to target—the true “pirates”—permitting such penalties creates more problems than it solves.

Furthermore, if the first well-publicized cases testing the scope of civil RICO liability in copyright infringement cases involve willful infringements for private use, such as those in the P2P file sharing hypothetical, the interests of copyright law likely will be harmed regardless of which party succeeds in the litigation. A judgment imposing RICO liability against infringers for private use would likely be met with wide-spread public disapproval, as the public has already scorned civil lawsuits against private-use infringers that did not allege racketeering.²⁸⁸ With so many people engaged in unauthorized downloading of music, films, and software, the imposition of severe punishment might fuel further disrespect for the law rather than deter illegal conduct, because the existing social norm, at least among the majority of the sixty million P2P users in the United States, does not condemn this conduct.²⁸⁹ Moreover, a well-publicized judgment for the defense in a case involving infringement for private use would deal copyright owners a significant setback in their attempts to change existing social norms, due to enhanced public perception that infringement for private use is either not wrong or will not be punished.²⁹⁰ Those who would otherwise obey the law, even a law

“cultural comment.” *Id.* at 5C. While the resulting loss to the world of art may be debatable (the artist also “once had a show in New York that consisted of allowing five cats to roam free in a gallery”), this artist’s work could very likely be found to be protected by both the First Amendment and the fair use defense if he were to choose to challenge the law. *Id.* Instead, he has opted to self-police and to avoid the potential risks of prosecution or litigation.

288. See, e.g., Richard J. Dalton Jr., *Music Industry Takes Aim at Pirates*, NEWSDAY, Jan. 22, 2004, at A50 (discussing the resolve of online file sharers to stay ahead of industry efforts to enforce copyrights online, noting that “while the recording industry is suing individuals, software designers have already developed technology to protect the identity of those sharing music, and more is on the way”); William Glanz, *Music Pirates Turn Up Volume; Recording Industry Suits Fail to Squelch Use of Online Services*, THE WASHINGTON TIMES, Sept. 6, 2004, at C17 (reporting that file sharing “remains widespread” in spite of the RIAA’s lawsuits against almost 5000 individual file sharers and noting that file sharing appeared to have increased in the past year); *File Sharing*, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/issues/file-sharing> (last visited Oct. 26, 2010) (describing the RIAA’s campaign of lawsuits against file-sharers as “misguided” and “irrational”).

289. See, e.g., Jensen, *supra* note 1, at 560–68 (providing a detailed discussion of social norms in the context of copyright enforcement); Kahan, *supra* note 18, at 625; Raymond, *supra* note 271, at 1400.

290. Those who argued against increased criminal sanctions for copyright infringement in the years between the enactment of the 1909 Act and the Sound Recording Act of 1971 noted that increasing sanctions could lead to reduced enforcement because of the perception of excessive punishment. See, e.g., STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., DISCUSSION AND COMMENTS ON THE REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 31 (Comm. Print 1963) (statement of Abraham L. Kaminstein, Chairman) (noting that where penalties are perceived as being too large, juries will not impose

they deem unwise, may decide that infringement is more like speeding than shoplifting, and infringing activity could increase.²⁹¹

Attempts to broadly apply civil RICO penalties to “garden variety” copyright cases could also work to the ultimate disadvantage of copyright owners by creating precedent that hampers their ability to pursue the most egregious offenders who seek to reap large profits from the commercial exploitation of copyrighted works.²⁹² To date, the criminal copyright provision has been the subject of very little judicial attention as compared to the civil provisions. As more and more courts deal with civil RICO claims in copyright infringement cases, key issues such as the meaning of “willfulness,” whether the criminal infringement provisions extend to secondary infringers, and the scope of the “enterprise” requirement in the copyright context will need to be explored and addressed in the context of civil litigation. If commercial disputes present the first opportunities for courts to resolve these ambiguities, and if they construe the criminal provisions of the Copyright Act narrowly to limit the availability of civil RICO remedies in copyright disputes, these decisions could ultimately limit the power of prosecutors to win criminal infringement penalties in more severe cases.²⁹³

Thus, the inclusion of copyright infringement among the predicate acts for civil RICO liability makes for poor public policy. Although it increases the monetary recovery available to plaintiffs in civil infringement suits, the Copyright Act already provides more than adequate remedies to compensate the victims of infringement. The addition of possible RICO damages disrupts the delicate balance between plaintiffs and defendants in copyright cases, over-detering those who would serve the public interest by testing the boundaries of the copyright monopoly while providing inadequate deterrence to the targets of the legislation, namely large-scale, commercial pirates.

liability); *id.* (Statement of Joseph A. Dubin, Universal Pictures Co., Inc.) (reporting results of survey proposing that willful infringement be a felony rather than a misdemeanor, showing that half of the respondents opposed making infringement a felony because they did not believe juries would return guilty verdicts where the penalty was so stringent).’

291. See Raymond, *supra* note 271, at 1397–98; Jensen, *supra* note 1, at 539–44.

292. See Bucy, *supra* note 156, at 66 (noting that one way in which private justice actions like civil RICO may hamper regulatory efforts is “by generating harmful precedent that applies to public regulators”).

293. Cf. *supra* note 114 (discussing legislative history of NET Act, in which it was expressed that Congress wanted to leave “willfulness” undefined in order to expand discretion of prosecutors).

IV. RECOMMENDATIONS

Many commentators have been critical of the ever-broadening expansion of the copyright monopoly over the past three decades; others have presented specific proposals to remedy the problems created by the ease of digital copying in the Internet era.²⁹⁴ But even if one accepts the entertainment and software industries' arguments that the harsher penalties for civil and criminal infringement already incorporated into copyright law are necessary to deter infringement in the Internet age, the addition of civil RICO penalties to existing copyright damages is a step too far.

Some caution is needed to avoid treading too heavily on the public domain and the public interest in access to creative works. Because prosecutors exercise discretion in pursuing criminal infringement cases, the government has limited the application of criminal RICO provisions to the most severe, profit-seeking conduct. Plaintiffs in civil RICO actions cannot be relied upon to exercise similar discretion,²⁹⁵ so as courts begin to interpret the application of civil RICO in copyright cases, they should read the criminal copyright statute narrowly. Only those defendants who have demonstrated a specific intent to infringe a copyright should be found to have acted "willfully." Additionally, the "commercial advantage or private financial gain" provision should not apply where consumers make copies for personal use and no evidence exists of any express "bartering" of copies.

Moreover, in light of Congress' longstanding hesitancy in applying penalties from other legal doctrines to copyright violations, courts should interpret the provisions of RICO narrowly in the copyright context. The "pattern" requirement should require more than what is necessary to satisfy the "for profit" element of § 506(a)(1)(B), which requires the reproduction or distribution during a

294. See, e.g., Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L. J. 1, 43–48 (2006) (discussing the numerous ways that major copyright industries currently seek to enforce their monopoly and arguing that this "crisis management" mode of enforcement carries too great a cost and that there are better options for achieving an "acceptable balance between protection of intellectual content and preservation of personal liberties"); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003); William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907 (1997) (arguing that copyright law and policy is shaped by powerful corporations who seek to extend their monopoly while depriving authors of any significant share in their profits, and in creating this system Congress has exceeded its constitutional authority).

295. "Broad regulations, directions and other forms of guidance are promulgated with the expectation that prosecutorial discretion will be exercised. Yet plaintiffs in private justice actions . . . have every incentive to push theories of liability as far as possible." Bucy, *supra* note 156, at 64.

180-day period of copies of one or more copyrighted works with a retail value in excess of \$1,000.²⁹⁶ Otherwise, the pattern requirement would add no element of proof beyond that required for the underlying offense when the \$1,000 threshold is met by infringement of more than one work, which will be true in most cases relying on § 506(a)(1)(B) as proof of the “for profit” element of criminal infringement. Similarly, the “enterprise” requirement should be narrowly interpreted in copyright cases. If too broadly applied in the context of P2P file sharing, the mere participation in a P2P network might constitute participation in an enterprise.

Ultimately, Congress should act to eliminate, or at least limit, the availability of civil RICO penalties in copyright cases. The addition of criminal copyright infringement as a predicate RICO act resulted from the absence of any considered analysis of the potentially broad impact of the proposed legislation and was unnecessary to accomplish Congress’ objectives in preventing counterfeiting. The other crimes added as predicate acts by the Anti-Counterfeiting Consumer Protection Act provide more than enough protection against organized trafficking in counterfeit goods and services.²⁹⁷ In fact, the commercial traffickers that Congress intended to target will often commit the other crimes at the same time as copyright infringement by creating counterfeit packaging for films or records or by representing the copies as legitimate products. Congress thus should amend the statute to omit criminal copyright infringement from the list of predicate acts in § 1961(1).

If Congress perceives a need for RICO remedies in extreme copyright infringement cases, then RICO liability should be tailored to avoid sweeping in even misdemeanor copyright infringement and copying for private use. Thus, if criminal copyright infringement is to remain a RICO predicate act, § 1961(1)(B) should, at the very least, be amended to apply only to felony copyright infringements that involve copying for commercial purposes, with “commercial purposes” expressly excluding the exchange or bartering of copyrighted works for private use. Doing so would at least eliminate RICO liability for

296. 17 U.S.C. § 506(a)(1)(B) (2000).

297. The Act added “section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks)” after “sections 2314 and 2315 (relating to interstate transportation of stolen property).” Anticounterfeiting Consumer Protection Act, Pub. L. No. 104–153, 110 Stat. 1386 (1996) (codified as amended in 18 U.S.C. 1961–1968).

conduct that, although punishable as a misdemeanor because of the value of the works infringed, lacks any commercial motive.

Adopting these limits on RICO liability would not imply that copyright infringement for personal use is permissible or warrants immunity from either criminal prosecution or civil actions. Digital copying over P2P networks has led to significant lost profits to copyright owners in the entertainment industry, diminishing the value of these copyrighted works. The above recommendations would still permit both criminal and civil enforcement against those who repeatedly copy or distribute copyrighted works without authorization, but those who infringe copyrighted works purely for their own private enjoyment should not face RICO liability, with the possibility of treble damages in civil lawsuits. In their educational campaigns to discourage infringement of music recordings and films, the RIAA and MPAA compared unauthorized copying to shoplifting, which is an apt analogy.²⁹⁸ Today's digital shoplifters should not be branded as "racketeers," because doing so threatens the delicate balance between the limited copyright monopoly and the public domain and is unnecessary given the formidable remedies already available to copyright owners under the Copyright Act itself.

298. See *Recording Industry to Begin Collecting Evidence and Preparing Lawsuits Against File [Sharers]*, RIAA NEWS ROOM (June 25, 2003), <http://www.riaa.com/newsitem.php?id=2B9DA905-4A0D-8439-7EE1-EC9953A22DB9> (including quotations from numerous participants in the music industry, with many of them equating P2P file sharing with shoplifting).

