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Copynorms: Copyright Law and Social Norms

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*Copynorms are the sea we swim in when we think about copyright law. We don't see them, except when they begin to break down or change.*²

—Lawrence Solum

Introduction

Social norms are essential to understanding copyright, but remain largely invisible. People interested in copyright spend a great deal of time pondering whether copyright law over or under-protects creative expression. They worry whether copyright law contains adequate safety valves to allow socially valuable uses. They wonder whether unauthorized file-sharing will overwhelm copyright as we know it. They ponder, worry, and wonder about all these things, but they all too rarely recognize that an understanding of social norms about the copying, distribution, and use of expressive works (“copynorms”³ for short) is essential to answering such questions. Copynorms moderate, extend, and undermine the effect of copyright law. For better or for worse, copynorms

¹Assistant Professor, Southern Illinois University School of Law. Earlier versions of parts of this Chapter were presented at the Second Annual Intellectual Property and Communications Law and Policy Scholars Roundtable at Michigan State University College of Law and at various faculty workshops at the Southern Illinois University School of Law. The Author thanks the participants of these events for their helpful comments as well as Eric Goldman and Paul McGreal for their extensive and thoughtful feedback. He also expresses his thanks to Todd Chapman and Christopher Frericks for excellent research assistance.

² Lawrence B. Solum, *The Future of Copyright: Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, 83 TEX. L. REV. 1137, 1148 (2005) (reviewing LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004)).

³ The origin of the term “copynorms” is uncertain, but its primary promoter has been Prof. Lawrence Solum. *See, e.g., id.*

play an important role in shaping what copyright law does and does not accomplish.

Copynorms matter because social norms matter. In recent years, legal scholars have rediscovered social norms. The renaissance in interest stems from a renewed appreciation of the simple but essential truth that human behavior is not shaped by law alone. Instead, people are often far more influenced by informal rules, implicit understandings, and behavioral regularities—collectively referred to as social norms.⁴

Law and social norms scholars have particularly focused on the interaction between social norms and the law.⁵ Social norms may supplement, supplant, or suppress the effect of law depending on the circumstances. Social norms influence the creation and enforcement of law and are in turn influenced by the creation and enforcement of law.

Despite this burgeoning interest in social norms, the effect of social norms on copyright law remains underappreciated. This omission is unfortunate. There is no reason to believe that social norms affect copyright less than any other type of law. In fact, social norms may be more important to understanding copyright law than most other laws. Copyright is largely a private right. Therefore, copyright owners may choose whether and how to enforce their rights—a choice that often is influenced by social norms. Even when copyright owners do choose to enforce their rights, however, their efforts are often easy to elude. In many situations, copyright infringement is difficult to detect. The user's choice whether to comply with copyright is also often influenced by social norms. Copynorms thus greatly influence how copyright is enforced and observed.

⁴ Richard McAdams offers a typical formulation of social norms as “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of fear of external non-legal sanctions, or both.” Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

⁵ For a comprehensive review of the law and social norms literature see Richard McAdams & Eric B. Rasmussen, *Norms and the Law*, in THE HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell, eds., forthcoming 2007), available at <http://www.rasumusen.org/papers/norms.wpd> (last visited April 16, 2006). See also *infra* notes 6-8; 23-28 and accompanying text.

Since copynorms greatly affect both enforcement and compliance, they provide fresh insight into two of the most contentious and significant issues in copyright law: (1) The debate regarding whether copyright law over-protects expressive works, thus harming society by stifling the free flow of information; and (2) The disruptive phenomenon of file-sharing and the voluble dispute that accompanies it.

First, copynorms have a great effect on how copyright law actually shapes incentives to create expressive works and whether it impedes the free flow of information. Although copyright law defines the outer boundaries of the copyright owner's rights, it does not necessarily determine whether people enforce or comply with it. Not all groups of copyright owners and users behave identically. Many depart from the script seemingly mandated by copyright law. Some owners choose to enforce copyright stringently, but others do not. Some copyright users comply scrupulously, but others do not. Copynorms explain a great deal of this variance. To understand how the scope of copyright law affects society and creative expression, we must understand how and when copynorms influence enforcement and compliance with copyright law.

Second, the file-sharing problem is in many ways a copynorms problem. Thus far, efforts to change file-sharers' behavior have focused on using increased enforcement and sanctions to deter file-sharers. Research shows, however, that social norms are a primary determinant of whether people obey the law. For copyright law to be effective, most people must comply because they believe that it is the right thing to do. If copynorms with respect to file-sharing continue on their current path, then the copyright system may need to change dramatically to function effectively. On the other hand, if consumers could be persuaded to adopt copynorms more supportive of copyright law, then the enforcement problem would become far more manageable.

This Chapter makes the case for the importance of copynorms and their worthiness for further study by analyzing, synthesizing, and applying insights from the social norms literature to copyright law. Part I of this Chapter examines why one must account for copynorms when rendering judgment as to whether copyright over or under protects expressive works. This part looks at when and how copynorms interact with law and provides several examples of instances where copynorms depart from copyright law in important ways. Part II of this Chapter takes an in-depth

look at how copynorms affect the file-sharing dilemma. In particular, it examines the efficacy of deterrence strategies versus the efficacy of normative strategies.

I. Copynorms and How they Moderate the Effect of Copyright Law

Since the early 1990s, a large body of legal scholarship has examined the role of social norms in regulating people's behavior and the relationship of those norms to law. This new field of inquiry was launched by Robert Ellickson's landmark book, *Order Without Law: How Neighbors Settle Disputes*, which examined how the ranchers and farmers of Shasta County, California, settled property boundary disputes.⁶ The members of this community did not follow the pattern set forth in formal legal doctrine or pursue their self interest in quite the way that traditional economic theory would commonly predict.⁷ Instead, they chose to govern their actions according to different rules based on social norms that their community had developed and maintained.⁸ The story of Ellickson's cattle ranchers is a tale oft-retold, in part because it launched the law and social norms field and in part because it illustrates how social norms can promote more efficient results than law.

Despite the familiarity of Ellickson's account, one aspect of it is rarely emphasized. In some instances, the result dictated by the norm was less advantageous for one of the parties than the one indicated by traditional legal doctrine. Nevertheless, the ranchers of Shasta County did not choose to stand on their legal rights. They were free to make that choice, as these disputes concerned their private law rights under tort and property law. Unlike a prosecutor or public official who has limited discretion in applying public law, a private party typically may choose to forego enforcement of its legal rights.

The ranchers of Shasta County teach that if one wants to predict the effect of private law on society and its institutions, then one must consider whether social norms affect how and whether people choose to

⁶ ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991)

⁷ *Id.* at 82.

⁸ *Id.*

enforce their rights. If a social norm consistently and systematically alters how people enforce or comply with law, then analyzing the law alone will not reveal all of the outcomes likely to result from that law. Those who study copyright law would do well to consider this lesson, as copyright owners are as free as any other property owner to forego enforcement of their rights.

Therefore, to be able to understand the effect of copyright law, or any change to copyright law, we need to understand social norms. The following subsection further explains the need to account for copynorms in our discussions of the likely effects of copyright law. The subsequent subsections then survey some of the ways in which copynorms interact with law and provide some illustrative examples of copynorms that greatly moderate the effect of copyright law.

A. Why We Need to Consider Copynorms

Copyright law is largely a realm of private choice.⁹ In theory, copyright law defines the boundaries of a fairly strong property right, thus compelling people to steer clear of infringement. The reality of copyright is quite different, with copyright owners often foregoing enforcement of their rights and users often giving little thought to those rights. Copyright owners do not *have* to enforce their rights. Nothing compels them to demand compliance with law; they can choose to forego all or part of their rights to control copying, distribution, and public display or performance of their works. The private nature of copyright law creates a tremendously important role for social norms.

The users of copyrighted works similarly have choices—perhaps less legitimate, but frequently no less real. Copyright infringement is so easy to commit and hard to detect that often only the scruples of the user

⁹ This Chapter disregards the criminal portions of copyright law, as the public authorities who enforce criminal law are influenced to a great degree by legal and professional obligations, political pressures, and practical considerations regarding where to focus limited resources. Nevertheless, the public authorities are also influenced by social norms in their enforcement and sanctioning decisions. See Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 619 (2000) (describing how laws that greatly contradict social norms lead authorities to hold back from enforcement and punishment).

prevent infringement.¹⁰ Technology has empowered consumers, making infringement easier than ever before. Social norms are thus important for consumers too. Law often provides little deterrent effect,¹¹ so the decision whether or not to infringe is largely a matter of conscience.

The choices available to and often exercised by copyright owners and users result in tremendous diversity with respect to how copyright law is enforced and observed. Some copyright owners are greatly concerned with controlling access to their works in order to maximize revenue opportunities (e.g., recording companies), while many others are partly or wholly indifferent to the right to exclude access provided by copyright (e.g., scholars). Some copyright users scrupulously play by the rules (e.g., librarians¹²), others ignore them (e.g., file-sharers), while still others actively and purposefully defy them (e.g., hackers). Some of these differences among how people enforce and comply with copyright law can be written off as expressions of idiosyncratic personal preferences,¹³ while others are simply manifestations of self interest.¹⁴ In particular, investigating and litigating infringement is often too costly, given the actual harm or the likelihood and prospective amount of recovery.¹⁵ Nevertheless, at least some of the differences in willingness both to

¹⁰ See *infra*, Part II, for a further discussion of how technological change impacted the copynorms of consumers by making copying and distribution infinitely easier and cheaper.

¹¹ See *infra* Part II for a discussion of the limits of deterrence.

¹² Librarians have their own set of social norms that often cause them to disapprove of copyright law and advocate for changes, but they are uniquely well informed and compliant. See generally Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUMBIA-VLA J.L. & ARTS 115 (2000) (discussing values and practices of librarians and how they sometimes lead to conflict with copyright owners).

¹³ For instance, rapper Chuck D. famously supports unauthorized file-sharing while heavy metal drummer Lars Ulrich famously opposes it. The views of musicians with respect to file-sharing differ greatly, even within the genres inhabited by Chuck D. and Ulrich respectively.

¹⁴ Scholars gain greatly in status the more widely known and cited their work is, with the resulting benefits far outweighing the loss of any revenue they might have gained if they treated their work more restrictively.

¹⁵ See R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COL. L. REV. 995 (2003). Wagner doubts that intellectual property owners can or will ever fully control the use of their creations because of transaction costs and many other pragmatic considerations.

enforce and to comply with copyright law can be traced to the systematic and pervasive influence of social norms.

Despite wide diversity with respect to how stringently copyright owners and users actually enforce and observe copyright law, scholars and commentators often assume the effect of copyright law follows inevitably and predictably from legal doctrine. The most prominent examples of this tendency are Professor Lawrence Lessig's dire warnings about a dystopian future being created by overly restrictive copyright laws and enforcement. Although Professor Lessig at times acknowledges the mitigating effect of norms,¹⁶ his stronger rhetoric tends to portray widespread and stringent restrictions as certain to result from the scope of copyright. For example, in this passage from *The Future of Ideas*, he draws a line from the expanded scope of copyright (he presumably has the Sonny Bono Act term extension particularly in mind) to actual control of the content of our culture:

The unavoidable conclusion about changes in the scope of copyright's protections is that the extent of "free content"—meaning content that is not controlled by an exclusive right—has never been as limited as it is today. More content is controlled by law today than ever in our past. . . [T]he content of our culture is controlled by an ever-expanding scope of copyright.¹⁷

Similarly, in another passage Professor Lessig portrays DVD encryption, backed by the force of law by means of the Anti-Circumvention Provisions of the Digital Millennium Copyright Act,¹⁸ as threatening our status as a free society:

¹⁶ Generally, Lessig's accounts of copyright are among the more thoughtful and subtle. He has long asserted the importance of social norms, both with respect to law in general, *see e.g.*, Lawrence Lessig, *The New Chicago School*, 27 J. OF LEG. STUD. 661 (1998) (discussing emerging field of law and social norms), and copyright in particular, *see, e.g.*, LESSIG, FREE CULTURE, *supra* note 2, at 126 (discussing taping of LPs as example of norm mitigating effect of copyright). But he typically portrays the mitigating effect of copynorms as something that worked well "before the Internet." *See id.* at 125.

¹⁷ LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 110 (2002).

¹⁸ 17 U.S.C. § 1201 (2004).

This struggle is just a token of a much broader battle, for the model that governs film is slowly being pushed to every other kind of content. The changes we will see affect every front of human creativity. They affect commercial as well as noncommercial, the arts as well as the sciences. They are as much about growth and jobs as they are about music and film. And how we decide these questions will determine much about the kind of society we will become. It will determine what the “free” means in our self-congratulatory claim that we are now, and will always be, a “free society.”¹⁹

There are good reasons to equate, as Professor Lessig and others do, the grant of a legal right to restrict copying and distribution with the actual exercise of the right. First, we know entire industries, like publishing, movies, and music, are based on the exercise of the rights granted by copyright. Second, it is common knowledge that many copyright owners exercise and seek to expand their rights relentlessly.²⁰ Third, the law is easier to determine and verify than social norms. Creators and investors may make decisions based solely on the legal status of works, not aware of any mitigating copynorms. Fourth, legal scholars and social scientists find parsimonious models far more useful than context-specific, overly complex ones.²¹ It is far simpler to assume that a right granted will inevitably be exercised than to attempt to account for every intervening influence. A model that includes everything runs the risk of being too unwieldy to tell us anything. If we add too much detail to our account of how copyright law affects the creation and use of expressive works, we end up with a rich description of the workings of copyright that has limited rigor and predictive value.²²

Nevertheless, considering how social norms mediate the effect of copyright law is worthwhile, even if it does increase the complexity of our account of how intellectual property works. First, the existence of certain firmly-established, consistently influential copynorms is well-known and

¹⁹ LESSIG, *THE FUTURE OF IDEAS*, *supra* note 17, at 11.

²⁰ The Walt Disney Corporation is the favorite example cited by critics of such behavior. See, e.g., LESSIG, *FREE CULTURE*, *supra* note 16.

²¹ See Robert Scott, *The Limits of Behavioral Theories of Social Norms*, 86 VA. L. REV. 1603, 1607-1608 (2000) (discussing the undesirability of complicating standard models with context-specific, non-falsifiable normative variables).

²² See *id.*

documented. Some examples are provided later, in subsection I.C. When copynorms consistently moderate the effect of copyright law, we can and should account for them in our description of how copyright law affects information exchange and production. Second, as discussed in the next subsection, we now know enough about how social norms influence behavior and interact with law to predict and test how they affect people's behavior with respect to law in certain situations.²³

While it is improbable that a grand, unified theory of copynorms will ever exist, and, in any event, such a theory is beyond the scope of this brief Chapter, the next subsection sketches out a few concepts from the law and social norms literature that may aid in better understanding the effect of copyright law on people's behavior.

B. Social Norms and the Law

There are many reasons why people behave as they do, but social norms are an important part of the explanation. The way people behave with respect to law is no exception, as social norms interact with law in many important ways, supporting, undermining, or substituting for law. Ellickson's work inspired a generation of legal scholars to try to better understand the relationship between law and social norms. Initially, these scholars employed the tools of rational choice theory to yield many useful explanations for how social norms influence behavior.²⁴ In particular, rational choice theory is useful for explaining the behavior of small, close-knit groups who interact repeatedly.²⁵ It faces a greater challenge,

²³ Insights from the social psychology literature are proving to be especially helpful in this regard. See Yuval Feldman & Robert MacCoun, *Some Well-Aged Wines for the "New Norms" Bottles: Implications of Social Psychology for Law and Economics*, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 358 (Francesco Parisi & Vernon L. Smith eds., 2005) (describing relevance of various concepts from the social psychology literature on norms for the law and economics of norms literature).

²⁴ See, e.g., Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997); Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1662 (1996); McAdams, *Origin, Development*, *supra* note 4; Eric POSNER, *Law and Social Norms*, 342 (2000). See generally McAdams & Rasmussen, *supra* note 5 (providing comprehensive overview of the law and economics of social norms literature).

²⁵ The leading work in this regard is POSNER, *supra* note 24. Posner theorizes that compliance with norms signals that one is a "good type" with a "low discount rate," thus indicating that one is a reliable and desirable person with whom to cooperate and transact. See *id.* at 19-27. For such signaling to work well, people need to know those

however, in explaining the influence of social norms in loose-knit groups or in situations where interactions are anonymous.²⁶ Scholars have begun to fill this gap by incorporating well-established, field and lab-tested models from other disciplines such as social psychology and behavioral and experimental economics.²⁷

From these sources, a picture has emerged regarding how law and social norms interact. Among the most important of these interactions are the following:

- The law can influence the content of social norms. Scholars describe this as law's "expressive function," indicating to people what is right or socially acceptable.²⁸ Mere existence or passage

with whom they are dealing and anticipate transacting with them in the future—conditions most likely to prevail in small groups and other like close-knit relationships.

²⁶ See Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 359-60 (2003) [hereinafter Strahilevitz, *Social Norms from Close-Knit Groups*] (explaining challenge of using then-extant rational choice theories of social norms to explain behavior of loose-knit groups).

²⁷ See, e.g., Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation* 57 ALA. L. REV. 1 (2005); Feldman & MacCoun, *supra* note 23; Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 333-35 (2001) [hereinafter Kahan, *Trust, Collective Action*]; Geoffrey P. Miller, *Norm Enforcement in the Public Sphere: The Case of Handicapped Parking*, 71 GEO. WASH. L. REV. 895 (2003); Neel P. Parekh, Note, *When Nice Guys Finish First: The Evolution of Cooperation, the Study of Law, and the Ordering of Legal Regimes*, 37 U. MICH. J.L. REFORM 909 (2004); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006); Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 509-10 (2003) [hereinafter Strahilevitz, *Charismatic Code*]; Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1232-35 (2000); Strahilevitz, *Social Norms from Close-Knit Groups*, *supra* note 26, at 359-60; Katherine J. Strandburg, *Privacy, Rationality, and Temptation: A Theory of Willpower Norms* 57 RUTGERS L. REV. 1235 (2005).

²⁸ Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650-51 (2000). See also Robert D. Cooter, *Expressive Law and Economics*, 27 J. LEG. STUD. 585 (1998); Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. LAW & ECON. REV. 1 (2003); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); McAdams, *Origin, Development*, *supra* note 4, at 400-

- of a law can change people's behavior. Enforcement of the law, aside from having a direct impact, can further serve to indicate that a particular value should be taken seriously.
- Social norms can encourage compliance with law. In fact, research indicates that norms have a far greater effect in securing compliance than official enforcement.²⁹ Part II of this Chapter focuses on this particular effect as it relates to the file-sharing phenomenon.
 - Social norms can discourage compliance with law. Norms are so influential that people will often choose to conform with a norm rather than to the law.
 - Social norms can substitute for law, either in law's absence or in lieu of the default rules created by law. People may be influenced by a norm to forego assertion of a legal right. Or, as Ellickson found, a norm may influence parties to arrange their affairs differently from default rules.

From the above, it is clear that norms and law interact in potentially conflicting, contradictory ways. Simply describing these interactions is thus not entirely helpful. A clearer understanding of the sources of norms and when a norm is likely to influence behavior is required to understand how norms affect law generally and copynorms in particular.

The sources of norms are many, including religion, philosophy, culture, ideology education, biology, commercial practice, and the consciously and unconsciously imparted values of social, professional, and political groups.³⁰ Robert Cialdini has proposed a useful distinction between two types of social norms, injunctive norms and descriptive norms, each with different sources and a different effect on people's behavior.³¹ Injunctive norms arise from a person's perception of how

07; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

²⁹ TOM TYLER, WHY PEOPLE OBEY THE LAW 178 (1990) (reviewing studies); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-71 (1997) [hereinafter Robinson & Darley, *The Utility of Desert*] (same).

³⁰ See McAdams & Rasmussen, *supra* note 5, at 15-16 (describing biological, religious, philosophical, and cultural explanations for the origin of norms).

³¹ See Robert B. Cialdini et al., *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, 24 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 201 (1991) [hereinafter Cialdini et al. *Focus Theory*]. This taxonomy is one of several potential useful taxonomies proposed in the social psychology

others—family, peers, voluntary associations, church, authority figures, the mass media, and the like—believe he should behave.³² Descriptive norms arise from a person’s perception understanding of how most other people in a particular reference group actually behave.³³ People obey injunctive norms because of an internalized sense of morality or because they fear sanction from or loss of status with the group.³⁴ People conform to descriptive norms either because they take their cues for proper behavior from the group or because of the innate instinct of people to imitate one another.³⁵

In addition to the helpful descriptive/injunctive distinction, researchers have further refined their understanding of when social norms are more likely to have one effect than another. The following paragraphs provide a non-comprehensive list of some of the factors that affect whether a norm will influence people’s behavior.

Perceptions Regarding Peer Behavior. What others are doing matters. Descriptive norms arise because people take their cues from what they believe others around them are doing. What they *perceive* others to be doing thus matters a great deal.³⁶ For example, Cialdini contended that advertising campaigns intended to inculcate injunctive norms could actually backfire if they cause people to perceive that few others are complying.³⁷ He singled out for criticism a famous anti-littering ad portraying a Native American chief tearfully viewing a trash-littered landscape.³⁸ The intended injunctive message was “littering is bad,” but it

literature. See Feldman & MacCoun, *supra* note 23. Its use suits the purposes of this article to provide a brief overview and a few examples as to how social norms affect enforcement and compliance with copyright law, but the other theoretical frameworks described by Feldman & MacCoun, as well as others, certainly would prove useful for other, more specific purposes.

³² Cialdini et al., *Focus Theory*, *supra* note 31.

³³ *Id.*

³⁴ *Id.*; TYLER, *supra* note 29, at 24-25.

³⁵ Cialdini et al., *Focus Theory*, *supra* note 31.

³⁶ There are a number of studies and theories regarding how people arrive at their beliefs regarding what others are doing. There are certain systematic biases that cause people to develop mistaken perceptions regarding the beliefs and actions of their peers. See Geisinger, *supra* note 27 (describing these findings and their implications for the law and social norms literature).

³⁷ Cialdini et al., *Focus Theory*, *supra* note 31.

³⁸ *Id.*

clashed badly with the descriptive message “everyone is littering.” The ad thus encouraged littering.

Dan Kahan has similarly analyzed the problem of tax compliance. When the government “engages in dramatic gestures to make individuals aware that the penalties for tax evasion are being increased, it also causes individuals to infer that more taxpayers than they thought are choosing to evade. This inference, in turn, triggers a reciprocal motive to evade”³⁹ On the other hand, if people perceive that others are complying with the law, then descriptive norms can support compliance. In this regard, Kahan noted a Minnesota Department of Revenue study in which taxpayers were sent a letter that said that the overwhelming majority of people do not cheat on their taxes.⁴⁰ Taxpayers who received the letter paid taxes at a higher rate than the control group, which did not receive the letter.

Proponents of a law thus need to consider what messages people are receiving regarding other people’s compliance with law. Elsewhere, I have speculated that the apocalyptic rhetoric employed by the Recording Industry Association of America (“RIAA”) in its lobbying and public relations efforts may do more harm than good.⁴¹ It also points to the importance of providing legal alternatives like iTunes to consumers to bolster the perception (and reality) that people are complying with law.⁴² The next subsection I.C further discusses this phenomenon as well as other descriptive norms relevant to the file-sharing dilemma.

The Number of People Perceived to Follow a Norm. Size matters—but less and less beyond a certain point. As discussed above, what others are perceived to be doing influences people’s behavior, and the initial perceived size of the group complying with a norm greatly affects the influence of the norm. Additional numbers of adherents, however, impress less and less. People do not necessarily become more likely to follow a norm because they perceive more people adopting it. The growth of the number of people perceived to follow a norm has a

³⁹ Kahan, *Trust, Collective Action*, *supra* note 27, at 342.

⁴⁰ *See id.* at 340 – 41 (citing STEPHEN COLEMAN, THE MINNESOTA INCOME TAX COMPLIANCE EXPERIMENT: STATE TAX RESULTS 18-19, 25 (1996), http://www.taxes.state.mn.us/taxes/legal_policy/research_reports/content/complnce.pdf).

⁴¹ *See* Schultz, *supra* note 27.

⁴² *See* Schultz, *supra* note 27.

marginally decreasing effect on adherence to a norm.⁴³ At some point, people are either convinced or not. Marginal increases in educational efforts, enforcement, sanctions, and perceived compliance will thus yield diminishing returns in changing people's perception of what is right. When large numbers of people already eschew an action as immoral, it thus is more challenging to change the minds of those holding out. Although this dynamic is worth considering, there still seems to be ample room for improvement with respect to the most prominent of current copynorm challenges—file-sharing.⁴⁴

Relevant Peer Groups. Context matters. People do not necessarily conform to the norms of the population at large. As common experience tells us, there are many important norms that differ greatly among different groups. Such groups include firms, industry associations, religious and ethnic groups, formal and informal social associations, and other social networks. People often take their normative cues from the groups to which they belong rather than generalized morality, law, or other influences.⁴⁵ Social networks and norms can operate in place of or within more formal institutions, either complementing them or subverting them.⁴⁶ The challenge for determining group influence is not whether a group is likely to have influence over norms, but rather determining which

⁴³ This phenomenon is described in the literature on social impact theory. See Bibb Latane, *The Psychology of Social Impact*. 36 AM. PSYCHOL. 343 (1981); Andrez Nowak, Jacek Szamrej, & Bibb Latane, *From Private Attitude to Public Opinion: A Dynamic Theory of Social Impact*. 97 PSYCHOL. REV. 362 (1990).

⁴⁴ See *infra* Part II for further discussion.

⁴⁵ See Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness* 91 AM. J. SOCIOLOGY 481 (1985) (contending that people's actions are not only governed by formal institutions, but also is "embedded" in social structures of personal relations or networks). In this seminal article that launched the New Economic Sociology, Mark Granovetter criticized economists for disregarding the affect of informal networks and their norms. See *id.*

⁴⁶ See Victor Nee and Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in THE NEW INSTITUTIONALISM IN SOCIOLOGY 247, 248 (Mary C. Brinton and Victor Nee, Eds., 1998); Victor Nee, *Norms and Networks in Economic and Organization Performance*, 88 AMERICAN ECON. REV. 85 (1998).

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group. Depending on the circumstances, physical proximity⁴⁷ or social ties⁴⁸ may play a role.

Group norms play a very important role in moderating and altering the impact of copyright law. Some groups like hackers and warez traders expressly define their norms in opposition to copyright law. Other organizations, like Creative Commons, simply seek to create alternatives to the existing regime. The next subsection I.C provides several illustrative examples.

Self Interest. Self-interest matters. Most law and social norms theorists thus far have favored rational choice theory to explain social norms, focusing on game theory and rational self interest to explain how social norms influence behavior.⁴⁹ They contend that people enforce and comply with norms as a result of self interest expressed through mutually beneficial cooperation.⁵⁰ Since copyright law is largely enforced and relied upon by commercial parties, self interest naturally influences many copynorms.

Reciprocity. Fairness and cooperation matter. Sometimes people cooperate while at other times they behave opportunistically. There is a wide variance among individuals as to these behaviors, but sometimes a norm of either cooperative or opportunistic behavior prevails. Research suggests that a set of behavioral characteristics known as reciprocity determines what type of norm prevails.⁵¹

⁴⁷ Bibb Latane, et al, *Distance Matters: Physical Space and Social Impact*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 795 (1995)

⁴⁸ Robert Axelrod, Rick L. Riolo, & Michael D. Cohen, *Beyond Geography: Cooperation with Persistent Links in the Absence of Clustered Neighborhoods*, 6 PERSONALITY & SOC. PSYCHOL. REV. 341 (2002).

⁴⁹ This includes Robert Ellickson's work, see Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998), the empirical work of Lisa Bernstein on the norms of close-knit commercial groups like the diamond and cotton industry, see Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996), and the theoretical work of Eric Posner, see POSNER, *supra* note 25, and Richard McAdams, see McAdams, *Origin, Development, supra* note 4.

⁵⁰ See, e.g., POSNER, *supra* note 25.

⁵¹ See Schultz, *supra* note 27 (summarizing and surveying research on reciprocity extensively and applying it to the problem of file-sharing).

Reciprocity motivates people to repay the actions of others with like actions—value received repaid with value given, kindness with kindness, cooperation with cooperation, and non-cooperation with retaliation. Under favorable conditions, it takes only a minority of people influenced by reciprocity to push a group to a sustained equilibrium of cooperation. If conditions favor opportunism, however, reciprocity may actually hasten the demise of cooperation by causing people to withhold cooperation.⁵²

Research shows that people come to new situations inclined to cooperate. Reciprocity will tend to sustain such cooperation where people perceive outcomes as fair and have an opportunity to retaliate against or withhold benefits from those free riding or otherwise behaving unfairly.⁵³ People are willing to enforce a norm of cooperation even at a cost to themselves.⁵⁴ Conversely, people will cease cooperating if they perceive that others are getting away with behaving opportunistically, even if they are still receiving a net benefit.

Depending on the context, reciprocity can sustain either pro-copyright copynorms or pro-filesharing copynorms. In a previous case study of the segment of music fans that follow “jambands,” I found that reciprocity helped to generate and sustain copynorms that supported the rights of copyright owners.⁵⁵ Conversely, Lior Strahilevitz described how illegal file-sharing occurs in a context that makes it seem to be a pro-social, cooperative behavior, thus encouraging reciprocal norms that support file-sharing.⁵⁶

Deterrent Strategies vs. Normative Strategies. When attempting to persuade people to comply with the law, enforcement and sanctions

⁵² *Id.* at 693 (citing Armin Falk, Ernst Fehr & Urs Fischbacher, *Appropriating the Commons—A Theoretical Explanation*, in *THE DRAMA OF THE COMMONS* 157, 158-59 (Elinor Ostrom et al. eds., Nat’l Acad. Press, 2002); Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 *J. OF ECON. PERSP.* 159, 159-60 (2000)).

⁵³ See Schultz, *supra* note 27.

⁵⁴ This characteristic is one of several that take theories of reciprocity far beyond more simple explanations for social norms based solely on self interest.

⁵⁵ See Schultz, *supra* note 25.

⁵⁶ See Strahilevitz, *Charismatic Code*, *supra* note 27 at 542-543.

matter, but social norms matter more. Research indicates that norms are typically a far more powerful determinant of whether people will comply with the law than enforcement strategies. Moreover, enforcement and penalties that contradict social norms too greatly may backfire, further undermining support for the law and making matters worse. Little more needs to be said here about this effect of social norms, as it is examined in detail in Part II of this Chapter.

The factors discussed above are among the more important and better-understood influences on the emergence of a norm that supports or undermines law. Although other influences exist and none of these factors, separately or together, constitute a grand theory of social norms appropriate for all occasions, they can help to determine whether and how social norms are likely to influence behavior in a given situation. The next subsection describes several specific situations in which copynorms influence the behavior of copyright owners and users in ways that depart from copyright law.

C. Some Examples of Copynorms that Moderate the Effect of Copyright Law

As legal scholarship pursues a new interest in empirical research,⁵⁷ the subject of copynorms offers a potentially rich field of inquiry. While an extensive exploration of copynorms is a work of many years and many scholars, this subsection offers a few brief examples intended to illustrate how copynorms can moderate the effect of copyright law.⁵⁸ This subsection organizes these examples into the categories proposed by Cialdini: (1) Injunctive Norms—copynorms that are explicitly articulated and consciously advocated by certain groups and individuals, and (2) Descriptive Norms—copynorms that reflect behavioral regularities prominent and consistent enough to inform people’s behavior.

⁵⁷ See, e.g., N. William Hines, *Empirical Scholarship: What Should We Study and How Should We Study It?*, http://www.aals.org/services_newsletter_presFeb05.php (February 2005) (speech of entering president of American Association of Law Schools describing increasing importance of empirical legal studies and announcing it would be the theme of his presidency of AALS).

⁵⁸ The examples are intended to be brief illustrations of this effect rather than comprehensive case studies explaining how and why each of these norms arose. Each norm is a potential source of further research and experimentation.

1. *Some Examples of Injunctive Copynorms.* The following examples of injunctive copynorms demonstrate how people have tried to use norms to reshape the effect of copyright law. The first three examples, the norms advocated by Creative Commons, the attribution and plagiarism norms of journalists, scholars, and other writers, and the norms of the open source software community, are examples of norms whose proponents seek to supplant copyright law in many significant ways and to modify its effect. The fourth example, the norms of professional librarians, are an example of copynorms that operate within the framework of copyright law, but constantly push at its constraints and cause its proponents to advocate for change. The fifth and sixth examples, the hacker ethic and the norms of warez traders, are examples of copynorms that encourage community members to defy and undermine copyright law.

Creative Commons. As Professor Lawrence Solum has noted, Creative Commons is a conscious attempt to propagate a set of copynorms that differs from standard law and practice.⁵⁹ Creative Commons states its goal as “to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules,” which is also referred to as a declaration of “some rights reserved.”⁶⁰

Creative Commons encourages creators to embrace a new norm of copyright protection, a middle ground between full copyright protection and releasing a work into the public domain.⁶¹ Under the standard licenses created and propagated by Creative Commons, creators may choose to forego significant portions of their rights. Among other things, they may allow others to copy their works or even to prepare derivative works, so long as the user provides attribution. Creators always could and always have foregone enforcement of the default rules of copyright, but Creative Commons encourages creators to make such choices the norm. It also seeks to propagate the norm by encouraging adopters to announce their choice to the world. To further these objects, Creative Commons has

⁵⁹ Solum, *supra* note 2, at 1148 (2005).

⁶⁰ Creative Commons – About Us, at <http://creativecommons.org/about/history> (last visited July 21, 2006) (“We use private rights to create public goods: creative works set free for certain uses. Like the free software and open-source movements, our ends are cooperative and community-minded, but our means are voluntary and libertarian. We work to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them — to declare “some rights reserved.””).

⁶¹ *Id.*

created a set of licenses, accompanied by standard summary terms and graphics, which allow creators to easily choose and announce a Creative Commons license.⁶² Since their advent a few years ago, Creative Commons licenses have become a common sight, especially on the Internet. It seems fair to say that Creative Commons has succeeded in creating a new, alternative set of copynorms; the interesting question is whether it will succeed in its longer term goal of altering or overtaking the dominant copynorms.

Writer's Norms In Favor of Limited Borrowing With Attribution and Against Plagiarism. The ethical injunction against plagiarism—passing off another's writing as one's own—is the most visible component of a set of copynorms regarding attribution that is both a supplement and an alternative to the default system embodied in copyright law.⁶³ Journalists, scholars, and other writers frequently engage in copying by taking brief quotations from others' work for purposes of reporting, commentary, criticism, or support. Although such copying is almost always fair use (at the very least), writers rarely approach the practice from a legalistic perspective. Rather, the social norms of academia and journalism embrace such pervasive, albeit limited, copying as one of the building blocks of a writer's work.⁶⁴ Both the one quoted and the copier thus expect and accept such behavior, so long as the second writer provides attribution. However, if the copier fails to provide attribution to the original author, an otherwise flattering and perfectly acceptable use of another's work turns into a serious breach of social norms: plagiarism.⁶⁵

The quotation-with-attribution and plagiarism norms of writers are so commonplace and pervasive that they seem almost unworthy of comment. They are (we hope) taught to every school child who writes a term paper and thus seem inevitable and completely natural. Consider,

⁶² Creative Commons – Choose a License, <http://creativecommons.org/license/> (last visited July 21, 2006).

⁶³ See Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights* 54 HASTINGS L. REV. 167 (2002) (authoritative treatment of plagiarism and the norm of attribution as they relate to copyright law).

⁶⁴ *Id.*

⁶⁵ Plagiarism norms cover a broader set of activities than copyright law. See generally, *id.* For example, copying from a public domain work without attribution would be plagiarism, but not infringement. The copying of novel ideas without attribution also would not be copyright infringement, but probably would be plagiarism.

however, how other content owners demand compensation for brief uses of their works: Record labels have demanded royalties for brief sampling of songs in hip hop songs.⁶⁶ Artists and television studios have demanded royalties for brief appearances of their work in the background of television shows and films.⁶⁷ Because of social norms, the expectations and practices of writers are significantly different from those of the entertainment industry. The social norms of writers thus provide an essential shelter from the chilling effects of such demands.⁶⁸ Plagiarism norms assure writers that they are safe to borrow a bit from other writers so long as they do not plagiarize by failing to provide attribution.

Open Source and Free Software. Like those creators who embrace the Creative Commons license, open-source software developers willingly forgo some of the copyright protection they could assert, in this case by allowing others to see and alter the source code for the software they develop.⁶⁹ Also like Creative Commons, many open source proponents seek to do more than arrange their affairs a bit differently from the mainstream—they want to build a new set of copynorms. A major proponent of open-source software, the Free Software Foundation, describes itself as “dedicated to promoting computer users' rights to use, study, copy, modify, and redistribute computer programs.”⁷⁰ The open source community is willing to defend its values. If someone from the community violates its norms by seeking to profit by taking back control

⁶⁶ See, e.g., *Bridgeport Music v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (reversing district court’s summary judgment ruling against plaintiff who complained that defendant had sampled three notes). “Get a license or do not sample,” the Bridgeport court declared. *Id.*

⁶⁷ See, e.g., *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997) (holding that appearance of quilt in background of a TV show for 27 seconds was not fair use).

⁶⁸ Although attribution norms provide a safe harbor, they are not an absolute assurance. Copyright owners can always defy norms by suing, and sometimes they win. Borrowing from unpublished works is particularly problematic, especially if it undermines the economic value of the original. See *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985) (holding that the Nation’s scooping of President Ford’s soon-to-be published memoirs was infringement); see also *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987) (holding that extensively paraphrasing unpublished letters of reclusive author J.D. Salinger was not fair use).

⁶⁹ Stephen J. Davidow & Gabriel Holloway, *Protecting Trade Secrets in an Open Source Environment*, 23 THE COMPUTER & INTERNET LAWYER 1 (Jan. 2006), available at LEXIS, News Library.

⁷⁰ The Free Software Foundation, at <http://www.fsf.org/> (last visited July 21, 2006).

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of open source software, then they are ostracized by the rest of the community.⁷¹

The Norms of Librarians. Librarians have a very strong set of social norms inculcated through professional training.⁷² These norms include "information to the people," the right of users to read, the right of access to ideas, the right of unfettered access to information that has been purchased by and placed in a library, and belief in a strong public domain.⁷³ These values often put librarians at odds with publishers who would prefer to restrict copying and find ways to maximize revenue—for example, by charging for access. Since librarians' norms also embrace ethical, professional behavior, their norms encourage testing the limits of copyright law, but not violating it. Nevertheless, their strongly held norms and status in the community make them persistent and effective lobbyists for changes in existing copyright law.⁷⁴

The Norms of Hackers. In contrast to librarians, who seek to change the copyright system from within, hackers seek to undermine it by violating it and enabling others to violate it. Researchers have chronicled the normative beliefs that motivate hacker culture.⁷⁵ These norms include the belief that access to computers and anything else that could teach one about the way the world works should be free; that information should be free; and a mistrust of authority.⁷⁶ These norms have clashed with copyright law, leading hackers to crack encryption on DVDs and other technological protection measures intended to protect copyrighted

⁷¹ See, e.g., Sarah Lacy, *An Open-Source Lightning Rod; Marc Fleury Has Taken JBoss to the Top, but He Has Alienated Many along the Way*, BUSINESS WEEK, Apr. 10, 2006, at 66, available at LEXIS, News Library (Marc Fleury was formerly a prominent member of the open-source community, but now runs his own company that develops open-source software for profit and is regarded as greedy by the open-source community. According to one of Fleury's competitors from a traditional software company, "Marc Fleury has really exploited the open-source hype for his own personal financial gain." *Id.*).

⁷² See Gasaway, *supra* note 12.

⁷³ See *id.*

⁷⁴ See American Library Association – Issues and Advocacy – Copyright, <http://www.ala.org/ala/washoff/WOissues/copyrightb/copyright.htm> (last visited July 21, 2006).

⁷⁵ See STEVEN LEVY, HACKERS: HEROES OF THE COMPUTER REVOLUTION (Penguin 2001).

⁷⁶ *Id.*

works.⁷⁷ The norms of the small hacker subculture are significant because they drive hackers to create tools that enable people outside their subculture to infringe. The injunctive copynorms of hackers thus affect society and its norms by enabling widespread infringement, thus leading to descriptive copynorms that support infringement.⁷⁸

The Norms of Warez Traders. Warez traders, like hackers, have norms that contravene copyright law. Warez are illegal copies of copyrighted works, usually computer software.⁷⁹ Warez traders take pride in being the first to freely distribute a cracked copy of a recently released computer program, game, or other copyrighted work. In his study of warez trading, Professor Eric Goldman concluded that warez traders are difficult to deter because they define themselves in opposition to the law. “Almost all warez traders believe software should be free, and they view themselves as technology liberators and benefactors for the oppressed, like an Internet Robin Hood.”⁸⁰ Like hackers, the norms of warez traders are significant because the actions of this subculture have an inordinate effect on society as a whole. While hackers supply cracking tools, warez traders are in some cases the ones who master and use those tools to procure the infringing copies that eventually circulate to the public.

2. *Some Examples of Descriptive Copynorms.* The following examples of descriptive copynorms show how the actions of people, often unconscious, snowball into social norms that dramatically diverge from the default rules set by copyright law. In each of these cases, a norm has developed through the actions of millions rather than through conscious design or advocacy. These norms at least arguably and sometimes clearly depart from the rules copyright law allows creators to enforce or requires users to follow.

⁷⁷ See Hector Postigo, *Toward a Philosophical and Sociological Understanding of Copyright Violation on the Internet* 15 – 20 (2003), unpublished manuscript available at <http://www.rpi.edu/~postih/Sharon%27s%20Paper%20Final.pdf> (last visited July 21, 2006) (published in part previously as Hector Postigo, *Copyright Law On the Internet: The Gap Between the Law and the Individual*, SCIENCE, TECHNOLOGY AND SOCIETY NEXUS 14, Fall 2003, available at <http://www.rpi.edu/~postih/Nexus.pdf> (last visited July 21, 2006)).

⁷⁸ See *id.*

⁷⁹ Eric Goldman, *The Challenges of Regulating Warez Trading*, 23 SOC. SCI. COMPUTER REV. 24 (2005).

⁸⁰ *Id.*

Search Engine Indexing and Archiving. Some of the practices most essential to the function of the World Wide Web arguably raise copyright issues, but are almost never challenged. For example, each time a search engine indexes a Web page, the search engine creates an index of the page that is essentially an unauthorized copy of the original page. Many commentators contend that this practice takes place under an implied license or constitute fair use. This analysis seems reasonable, but it is not unassailable. As Fred von Lohmann, a leading copyright attorney who works for the Electronic Frontier Foundation, noted a few years ago: "Many of us copyright lawyers have been waiting for this issue to come up: Google is making copies of all the Web sites they index and they're not asking permission. . . . From a strict copyright standpoint, it violates copyright."⁸¹ Nevertheless, this issue has rarely been tested in court, despite the litigiousness of our society and of copyright owners in particular.

The Internet Archive, which hosts the Wayback Machine,⁸² takes search engine indexing a step further by maintaining a chronological archive of the entire world wide web. The Wayback Machine is thus a series of permanently maintained and accessible snapshots of the entire World Wide Web. One commentator described the Wayback Machine as "the biggest copyright infringement in the world."⁸³ He noted, however, "it is done in a way 'that almost nobody cares about. . . . That's the thing about rights, you have to exercise them.'"⁸⁴

Descriptive norms are often taken for granted, and people follow them with little thought and react with surprise when they are challenged. The lack of controversy regarding indexing over the years thus has been typical of a descriptive norm. People have largely not been surprised at the acceptance of indexing, but rather have been surprised and alarmed

⁸¹ Stefanie Olsen, *Google Cache Raises Copyright Concerns*, CNET News.com http://news.com.com/2100-1038_3-1024234.html (July 9, 2003).

⁸² Wayback Machine, <http://www.archive.org/web/web.php>

⁸³ Joe Mandak, *Internet Archive's Value, Legality Debated In Copyright Suit*, SAN JOSE MERCURY NEWS, March 31, 2006, http://www.mercurynews.com/mld/mercurynews/news/local/states/california/northern_california/14234638.htm (last visited July 21, 2006).

⁸⁴ *Id.* Although there are always exceptions, as the Internet Archive has been sued and threatened, *see id.*, largely by plaintiffs who objected to the continuing availability of suppressed material rather than the original copying.

when the practice was challenged. The strength of the indexing norm was demonstrated when a plaintiff recently unsuccessfully challenged Google's practice of indexing websites.⁸⁵ The lawsuit was met with scorn and derision by commentators, and the judge in rejecting the claim dismissively described the plaintiff's action as an attempt to make money by "manufactur[ing] a claim."⁸⁶ Google did suffer a setback recently, however, with respect to its image search, which stores thumbnail copies of images on Google's service.⁸⁷ Although the decision was only at the preliminary injunction stage, it was met with concern and alarm. People come to rely on descriptive norms, and challenges to them can be quite disturbing.

Norms that excuse behavior in one situation—like indexing—do not always apply by analogy to a different situation. That was certainly what Google found when it recently proposed to scan and index a vast number of print books.⁸⁸ Google might have been excused if it was surprised at the vigor of the challenge to its book project. In many ways, its book project was just the next step beyond its generally accepted indexing of web sites. However, both the economics and norms of the online publishing world differ from those of the print world. Book publishers were not willing to accept a practice that most web site publishers take for granted.

E-mail Replying and Forwarding. Another internet norm that is taken for granted is the propriety of quoting other people's e-mails in responses to discussion lists and in replies and forwarded messages. Although the copyright implications of this practice were often discussed

⁸⁵ *Field v. Google, Inc.*, 412 F.Supp.2d 1106 (D. Nev. 2006) (holding Google cache is fair use).

⁸⁶ *Id.*

⁸⁷ *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828 (C.D. Cal. 2006).

⁸⁸ See Alorie Gilbert, *Publishers Sue Google Over Book Search Project*, C-NET NEWS.COM, Oct. 19, 2005, at http://news.com.com/Publishers+sue+Google+over+book+search+project/2100-1030_3-5902115.html?tag=nl (last visited July 21, 2006) (Book publishers sued over Google's plan to scan and create a digital index of major library collections). See also Greg Sandoval, *Newspapers Want Search Engines To Pay*, C-NET NEWS.COM, Jan. 31, 2006, at http://news.com.com/2100-1025_3-6033574.html (last visited July 21, 2006) (Newspapers claim Google exploits their work without compensation by collecting their headlines and photos for its news website).

in the early days of the internet,⁸⁹ people now give the matter little thought. In many cases, quoting e-mails could easily be defended as fair use or impliedly licensed.⁹⁰ Nevertheless, millions and millions of messages a day probably do not qualify so certainly for such legal defenses. For example, people endlessly forward jokes via e-mail without giving a moment's consideration for the right of the original author to control copying, distribution, and transmission. Similarly, e-mail discussion list postings often include a long trail of irrelevant previous messages on which the writer does not comment. Although such copying and distribution would seem to be too trivial and costly to pursue, it is nevertheless remarkable that such practices occur on a massive scale every day in an allegedly litigious society with almost no complaint or comment. The rules regarding e-mail copying and distribution seem to fall more in the realm of etiquette than copyright law. Indeed, an e-mail author who objected that a common use of her e-mail was copyright infringement likely would more likely be seen as the transgressor of norms than the person she accused of infringement.

Internet copynorms like those regarding search engine indexing and the use of e-mail quietly and efficiently disregard copyright law to allow the World Wide Web to function effectively. This largely unheralded story demonstrates the ability of copynorms to moderate the effect of copyright law and of copyright law and copyright owners to accommodate copynorms.

Blogger Norms. Another, newer example of Internet copynorms that encourage copying appears to be arising among bloggers. Bloggers often post entire articles or large parts of them and employ images⁹¹ lifted off other websites without permission. These uses are at least

⁸⁹ See, e.g., John Young, *Citing E-mail*, Oct. 3, 1994, at <http://www.greatcircle.com/list-managers/mhonarc/list-managers.199410/msg00000.html> (last visited July 21, 2006).

⁹⁰ For example, quoting another's message and commenting on the quoted material would likely qualify as fair use for purposes of "criticism [or] comment" under Section 107 of the Copyright Act. A copy of an e-mail that asks a question that is included in the reply e-mail would seem to be impliedly licensed.

⁹¹ Vauhini Vara, *Photo Agencies Scour the Web for Copyright Violations*, THE WALL STREET JOURNAL ONLINE, Oct. 15, 2005, at http://online.wsj.com/public/article/SB112897424251164666-0mFu92_5xrCHDRrqLE9YeCOfoNI_20061015.html?mod=tff_main_tff_top (last visited July 21, 2006).

questionable and often most likely infringing. And yet bloggers appear unconcerned.

Daniel J. Solove, an associate professor of law at George Washington University Law School, discussed this phenomenon on his blog *Concurring Opinions*:

[I]t is a fair generalization to say that the use of copyrighted material is much more liberal in the blogosphere than in regular print publications. If I were writing something in print, for example, I would be much more cautious about the extent to which I'm quoting and using images. But I feel more emboldened on the Internet. Why?

The reason is that the blogosphere has developed a set of copyright norms in an area where there is very little enforcement. These norms about the use of copyrighted material are probably at odds with existing copyright law. The mainstream media and other websites have not been going after bloggers for copyright violations all that much.⁹²

Blogging copynorms appear to be descriptive norms. Nobody is consciously advocating that bloggers disregard copyright law or that copyright owners disregard the infringement of bloggers. Instead, these descriptive norms arise from both the widespread perception that copying is simply something that bloggers do and the perception that mainstream copyright holders do not appear to care much.

Critics of copyright law note that copyright can be used to chill speech. It can and is so used, but it does not *have* to be. The case of

⁹² Daniel J. Solove, *What If Copyright Law Were Strongly Enforced in the Blogosphere?*, *Concurring Opinions*, Dec. 15, 2005, http://www.concurringopinions.com/archives/2005/12/what_if_copyrig.html (last visited July 21, 2006); *see also* Jerry Brito.com, <http://www.jerrybrito.com/archives/001018.shtml> (Mar. 27, 2006) ("To me the conflict over copying on the net is a case of clashing norms. It's a widely accepted practice on the net to use pictures you find elsewhere on the net to illustrate your blog, etc., even though doing so is clearly copyright infringement. The norm in the physical world is just the opposite; copying is not accepted."). *See also* Michelle Jones, *How Much Can You Protect Your Photographs on the Internet?*, *EXPOSURE*, Mar. 21, 2006, http://michellejones.newsvine.net/exposure/2006/03/how_much_can_you_protect_your.php (last visited July 21, 2006).

blogging shows that copynorms that support discourse and the free flow of information can create a great deal of space for free speech.

Consumer Home Recording. Consumers have long had copynorms that sanctioned the recording of works of entertainment at home, although their actions often were of dubious legality. Many VCR (and now digital video recorder) owners use the recording capabilities not only for time-shifting purposes,⁹³ but also to archive a library of their favorite television programs or movies that appeared on broadcast networks.⁹⁴ Creating cassettes that contained mixes or entire albums of music for one's self or friends was also widely considered to be ordinary, acceptable behavior.⁹⁵ Although record labels groused about the practice of home recording, they did not seem inclined to challenge it aggressively and the Audio Home Recording Act in 1992 confirmed the legality of this widespread practice.⁹⁶

Copynorms have thus developed among consumers encouraging small scale, home audio recording and archival recording of favorite TV shows on VCRs and digital video recorders. This norm was reinforced by the vast numbers of people doing it as well as the lack of enforcement against it by the entertainment industry. It likely served as a safety valve in the copyright system, allowing people access to works they could not otherwise afford and in any event reducing friction between fans and companies over issues like pricing. The major difficulty with copynorms supporting home recording was that they likely set the stage for

⁹³ The Supreme Court held that time shifting is fair use in *Sony Corp. of America v. Universal City Studios*, 464 US 417 (1984).

⁹⁴ Richard Zoglin, *VCRs: Coming On Strong; Santa's Hottest Gift is a Magic Box That Revolutionizes Home Viewing*, *TIME*, Dec. 24, 1984, at 44, available at LEXIS, News Library (discussing some consumers who have developed a collection of "favorite TV series, classic movies, big sports events, or simply stray moments of video ephemera" that consist of thousands of videotapes). See also Bill Keveney, *VCRs Allow Viewers Time to Pause and Reflect*, *PITTSBURGH POST-GAZETTE*, Apr. 21, 1996, at G5, available at LEXIS, News Library ("Some VCR owners, including science-fiction fans, immortalize their favorite shows in home libraries.").

⁹⁵ In 1978, a study found that 21% of the population copied recordings at home, and in the early 1980s, 45% of consumers admitted that they taped recordings to avoid purchasing them. Geoffrey Hull, *The Audio Home Recording Act of 1992: A Digital Dead Duck, or Finally Coming Home to Roost?*, 2 *MEIEA Journal* 76 (2002), available at http://www.meiea.org/Journal/html_ver/Vol02_No01/Vol_2_No_1_A4.html (last visited July 21, 2006).

⁹⁶ See *id.*

copynorms that sanctioned file-sharing. Consumers became accustomed to acquiring music and video for free on a small scale, with no countervailing norm to persuade them that wide scale distribution and unlimited access was normatively different in kind.

File-sharing. Commentators agree that there is a wide gap between copyright law and copynorms with respect to file-sharing.⁹⁷ When asked, many people indicate that they do not think file-sharing is wrong. Moreover, they are demonstrating their beliefs with their actions, as millions are file-sharing. File-sharing appears to be an example of a particularly potent descriptive norm, as the widespread, notorious prevalence of file-sharing apparently reinforces the strength of the norm.

Lior Strahilevitz has theorized that file-sharing software is particularly effective at reinforcing descriptive norms, as it creates the perception that unauthorized file-sharing and distribution is a common behavior, even more prevalent than it actually is.⁹⁸ For this reason, he describes file-sharing software as “charismatic code.”⁹⁹ Similarly, as noted previously, the RIAA’s descriptive message regarding millions of file-sharers destroying the music industry may be counterproductive.¹⁰⁰ It informs people that unauthorized file-sharing is, in actuality, a well-entrenched norm, notwithstanding the condemnation the RIAA’s message intends to convey.

Not all copynorms support file-sharing. In a previous article, I documented how one significant community of music fans has developed copynorms that support artists and condemn unauthorized copying.¹⁰¹ This community follows bands known as jambands (e.g., the Grateful Dead, Phish, and their successors). A number of mechanisms, particularly reciprocity, appear to have fostered and sustained these norms. The copynorms of the jamband community provide a focal point for a vital, thriving community and ways of doing business that function far more effectively than mainstream business models in the digital environment.

⁹⁷ See, e.g., Yuval Feldman & Janice Nadler, *Expressive Law and File Sharing Norms*, Northwestern Public Law Research Paper No. 05-18, 6 (2005), available at <http://ssrn.com/abstract=799364> (collecting studies); Schultz, *supra* note 27 (same).

⁹⁸ See Strahilevitz, *Charismatic Code*, *supra* note 27, at 542-543.

⁹⁹ *Id.*

¹⁰⁰ See Schultz, *supra* note 27.

¹⁰¹ See *id.*

While all of the examples discussed in this subsection merit further consideration, the dilemma presented by file-sharing demands the most urgent attention. File-sharing is generating tremendous controversy regarding copyright law. It drives ever-escalating enforcement and increasing demands for legislative solutions from both the record labels and their critics. Part II of this Chapter looks to research regarding social norms to gain fresh insights into better ways to resolve the file-sharing problem.

II. Copynorms and Compliance: Legal Deterrence vs. Social Norms¹⁰²

Digital copying and the Internet have transformed copyright piracy from an enforcement problem confined to a handful of commercial pirates to a widespread social problem. The willingness of vast numbers of people to violate copyright law by using file-sharing software presents a tremendous challenge to copyright owners and the authorities that enforce copyright law. If a small part of the population is willing to break a law, then authorities may hope to devote resources to enforcement and punishment sufficient to deter most. If tens of millions are willing to violate a law, however, the task of credibly deterring so many becomes nearly impossible.

Copyright law, like most laws, can only work if most people obey it willingly. While legal enforcement and sanctions are important, they are not sufficient alone. Enforcement tactics that once worked for a handful of pirates who made bootlegs for commercial gain do not scale up well to a vast populace downloading for pleasure. This Part first examines the significance of the fact that copyright compliance is now a problem among the general population, and then reviews research examining the relative effectiveness of deterrence and normative strategies for securing compliance with law among the general population. Research indicates that although legal enforcement is not wholly ineffective, social norms are the most significant factor in securing compliance with law. Copynorms are thus essential to any complete strategy for persuading people to comply with copyright law.

¹⁰² Portions of this Part II have been adapted, with significant revisions, updates and additions, from portions of my earlier article, *Fear and Norms and Rock & Roll*, *supra* note 27.

A. The Changed Nature of the Copyright Enforcement Problem

Until relatively recently, Copyright compliance was not really a matter of voluntary choice for consumers of popular entertainment, and thus not a social norms problem. In the past, average people had little choice but to comply with copyright law if they wanted to possess a quality copy of an audio or video recording or book, because effective copying and distribution was too expensive and difficult for most people.¹⁰³ Only people with access to fairly expensive equipment and illicit distribution channels could engage in significant piracy of consumer works.¹⁰⁴ For consumers, music, movies, and books were effectively chattels, locked onto LPs, videotapes, or paper books. Copyright owners were thus primarily concerned with deterring unauthorized copying and distribution of their work by commercial rivals—people who were in it for the money. Worrying about social norms regarding copying consumer entertainment was mostly beside the point.

Cheaper and more sophisticated technology and communications have changed the rules of the game drastically and quickly for both consumers and the entertainment industry. Beginning slowly in the 1970s with VCRs and audio tape and escalating decisively with the widespread adoption of digital technology and the internet in the 1990s, technology has transformed recorded entertainment into something akin to what economists call a “public good.” Consumers can now make and distribute infringing copies easily, profligately, and at virtually no cost. Although a file-sharer may or may not deprive somebody of the chance to be paid for the music, she can make and distribute an endless number of copies

¹⁰³ Until the mid 1990s, the number of Internet users was small and making a digital music file was challenging. Michael Meyer & Anne Underwood, *Crimes of the ‘Net’*, NEWSWEEK, Nov. 14, 1994, at 46 (noting then-current difficulty of “pirating a digital version [of a single song because it] can require anywhere from 30 minutes to several hours, depending on your equipment.”). While a consumer might have been able to borrow an LP and make an adequate, but not very high, quality cassette tape of it, he did not possess the means to make copies with ease or of a quantity and quality sufficient to create commercial harm.

¹⁰⁴ Since consumer grade CD-recorders had not yet hit the market, copying required expensive professional equipment. See Kathleen O’Steen, *Little Disc Sparks Big Problems for Studios*, VARIETY, Nov. 7, 1994, at 7.

without ever depriving the owner of possession. These characteristics define what the economics literature calls a public good. A public good is non-rivalrous in consumption and non-excludable, meaning that (a) one consumer's use or enjoyment of the good has no appreciable affect on another consumer's opportunity to use or enjoy the good and (b) the owner of the good finds it impossible or extremely difficult to charge for or prevent use.¹⁰⁵ File-sharing has made recorded entertainment a public good for consumers by creating an easy to access, hard to stop, inexhaustible supply of unrestricted copies. This phenomenon has resulted in the primary ill that producers associate with public goods: With the notable exceptions of oxygen bars and bottled water, it is exceedingly hard to persuade people to pay for public goods.

It is often said that intellectual property law exists to solve such public goods problems,¹⁰⁶ but it has never tackled a public goods problem quite like this one. Copyright law addresses the public goods problem by granting the creator of an expressive work the legal right to prohibit what he could not otherwise practically prevent: the unauthorized copying, distribution, public display, and/or public performance of his work.¹⁰⁷ As a result of copyright law, the creator can get paid for his work and thus has an incentive to produce it. In theory, these rights can be enforced against all users; in practice, copyright owners have focused enforcement efforts mostly on commercial rivals. Although the average individual has always been able to write out a memorized poem or sing a song she has learned, the inability to exclude ordinary consumers from such uses largely did not worry copyright owners because they were not commercially significant. In retrospect, the now-vanished option to disregard consumer copying made copyright law and enforcement far simpler. Solving the public goods problem became vastly more challenging once recorded works of entertainment became public goods for tens of millions of consumers rather than for a relatively small number of people with significant resources.

¹⁰⁵ See Robert Merges et al., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 11-12 (3d ed. 2003).

¹⁰⁶ See *id.* (describing public goods problem as an economic justification for intellectual property protection).

¹⁰⁷ Subject, of course, to any defense or privilege the purported infringer may have, particularly the fair use defense. See 17 U.S.C. § 107 (2004).

When an act is physically difficult and expensive, and thus accessible to only a few, the task of enforcing laws concerning that act is easier than it is with respect to more widely applicable laws. Target the handful of people with the means to do it, make sure they know the law, and create a credible threat of enforcement combined with sanctions sufficient to make the behavior more costly than it is worth.¹⁰⁸ In such circumstances, relying mostly on enforcement and punishment is reasonable, since the resources required to identify and sanction potential perpetrators are probably attainable. Indeed, for a brief moment in the early 1990s, the entertainment industry expressed optimism that it could beat the copyright piracy problem of piracy as several countries known for piracy agreed to enforce intellectual property laws more strictly in exchange for trade concessions.¹⁰⁹ Of course, those hopes were quickly dashed.

The speed and force with which the file-sharing phenomenon has overtaken the institutions of copyright law is unprecedented for copyright and perhaps even for law more generally. Virtually overnight, a vast group of people—hundreds of millions—acquired the means to violate copyright law easily and conveniently. Just as important, they wanted to do so. Manifestly, people desire entertainment; presumably, they desire free entertainment even more. There was little in the experience of the average person to dissuade her from using file-sharing to fulfill this desire.

¹⁰⁸ See Robinson and Darley, state that there are three components to deterrence: “The potential offender must know of the rule; he must perceive the cost of violation as greater than the perceived benefit; and he must be able and willing to bring such knowledge to bear on his conduct decision at the time of the offense.” Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953 (2003) [hereinafter Robinson & Darley, *Role of Deterrence*].). Unfortunately, it is often the case that one or more of these conditions is not met. In particular, (a) people do not know or understand the law; and (b) the likelihood of getting caught is quite low, and they tend to discount it further. *Id.* at 954-55.

¹⁰⁹ See Judy Holland, *GATT is Good News for Music Industry*, STATES NEWS SERVICE, Nov. 30, 1994, available at LEXIS, News Library. One executive enthused that “[a] lot of countries will have meat in their enforcement now.” *Id.* See also Beth Knobel, *Association Announces War on Music Piracy in Russia*, L.A. TIMES, Dec. 6, 1994, at D5 (quoting executive claiming that new initiative would wipe out piracy in Russia); *Hong Kong Police Close CD Factories*, UNITED PRESS INT’L, Nov. 12, 1994, available at LEXIS, News Library (quoting officials in the People’s Republic of China who asserted that new regulations would “possibly wipe out the piracy activities from the root.”).

Most consumers had never before needed to *choose* whether to comply with copyright law and thus had little reason to consider whether compliance was the right thing to do. As discussed previously in Section I.C, there were copynorms supporting home recording. Thus, what were likely the most relevant norms encouraged copying. Moreover, the institutions of copyright—copyright law, policymakers, the music, entertainment, and publishing industries, and prosecutors—were not really oriented toward securing compliance from the general public.

Unsurprisingly, the entertainment industry has struggled to adapt its copyright enforcement strategy to this new world. Its first, and perhaps most natural, strategy was to try to restore the former status quo by instituting copy protection technology¹¹⁰ and by suing Napster, Grokster, and other providers of file-sharing services and software.¹¹¹ These initial tactics have met with limited success. Copy protection technology has been unpopular with customers and all too vulnerable to cracking.¹¹² The industry's suits against file-sharing technology providers have succeeded, but not as fully as they might have hoped. Although the courts have effectively shut down the file-sharing services that were the defendants in particular cases, the courts have not prohibited file-sharing technology *per se*.¹¹³ Regardless of any victory over a particular defendant, file-sharing software will thus likely remain available for the foreseeable future and its use for illicit purposes will persist.¹¹⁴ The good old days (from the

¹¹⁰ See, e.g., Laura M. Holson, *The Year Ahead: Giving an Audience What It Wants, but Not Giving It Away - Movies; Studios Fight Piracy With Education*, N.Y. TIMES, Dec. 29, 2003, § C (Bus. Fin. Desk), at 6 (describing copy protection measures).

¹¹¹ See, e.g., *A & M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Copyright.net Music Publ'g LLC v. MP3.com*, 256 F. Supp. 2d 214 (S.D.N.Y. 2003).

¹¹² See Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 721 - 28 (2005) (surveying ineffective efforts at copy protection).

¹¹³ The recent U.S. Supreme Court decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* may represent the high water mark for the industry in its legal battles against file-sharing. In *Grokster*, the Court developed the doctrine of “inducement,” which imposes liability for “distribut[ing] a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, Case No. 04-480 (June 27, 2005). Notably, distributing software that is capable of infringement, even the more notorious varieties of file-sharing software is likely not *per se* inducement. See Mark F. Schultz, *What Happens to BitTorrent After Grokster*, TECHNOLOGY AND MARKETING LAW BLOG, http://blog.ericgoldman.org/archives/2005/06/what_happens_to.htm (June 28, 2005).

¹¹⁴ See *id.*

standpoint of copyright enforcement) when violating copyright law was not an easy option for consumers appear to be gone forever.

Since it has failed to roll back consumers' capability to infringe, the entertainment industry has turned its focus to consumers themselves. If copyright law is to remain effective with respect to the mass copying and distribution of popular entertainment, the entertainment industry must now learn how to persuade consumers not only to choose its products, but also to pay for them. In general terms, there are two types of strategies for persuading people to obey the law: (a) deterrence strategies, which rely on enforcement and official sanction to convince people that the cost of breaking a law outweighs the benefit; and (b) normative strategies, which rely on social norms to convince people to comply either because compliance conforms to their personal morality or because they fear unofficial, social sanction. While copyright owners have made some efforts at education and moral persuasion, they have pursued deterrence strategies against the infringing public with greater vigor. The next subsections examine the limits of such deterrence strategies and why copyright owners would be well-advised to focus also on writing new copynorms onto the blank slate created by the technological revolution of the past decade.

B. The Limits of Deterrence-Based Strategies

In response to the phenomenon of pervasive disregard for copyright law, the entertainment industry has tried, with limited success, to deter consumers by using the same methods it has long used against commercial pirates. Since 2003, the RIAA has sued well over 15,000 people for distributing music through file-sharing networks.¹¹⁵

At this point, the success of the entertainment industry's consumer deterrence strategy seems limited. Research firm Big Champagne estimates that the number of people logged onto peer-to-peer networks worldwide more than doubled between 2003, around the time the RIAA suits commenced, and late 2005.¹¹⁶ Just as significantly people do not

¹¹⁵ See RIAA WATCH, <http://sharenomore.blogspot.com/> (July 21, 2005). See also Yu, *supra* note 112, 658 – 667 (detailing early history of RIAA suits).

¹¹⁶ *P2P Activity Doubles In Two Years*, PCPRO Oct. 11, 2005 <http://www.pcpro.co.uk/news/78525/p2p-activity-doubles-in-two-years.html> (last visited

seem to be impressed with enforcement efforts. One survey showed that 58% of those who download music did not care whether it was protected by copyright.¹¹⁷

Neither the music industry's reliance on lawsuits nor the limited success of this strategy is surprising. Like the music industry, lawmakers and enforcement authorities tend to rely almost exclusively on deterrence strategies.¹¹⁸ Deterrence strategies seek to secure compliance "by manipulating an individual's calculus regarding whether crime pays in the particular instance."¹¹⁹ The law and authorities thus attempt to create "a credible risk that [an offender] will be caught and punished . . ."¹²⁰ Such strategies are appealing because they appear to dictate intuitive and straightforward policy prescriptions: to increase compliance, increase enforcement and penalties. Unfortunately, fine tuning deterrence factors is not necessarily as easy and effective as one might assume.¹²¹ Many studies find very little or no deterrent effect at all from increasing the level of enforcement or penalties.¹²²

July 21, 2006) ("Big Champagne reports that in September the average number of people logged onto p2p networks worldwide was 9,284,558. In September 2003 the figure was 4,319,182. Moreover the increase in the number of users since the 2004 figure of 6,784,574 suggest that there is no slowing in the rate of growth.").

¹¹⁷ Lee Ranie, et al., Pew Internet Project and Comscore Media Metrix Data Memo April 2004, http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf (last visited 21 July, 2006) (The question asked was, "Do you care whether or not the music you download onto your computer is copyrighted, or isn't that something you care much about?").

¹¹⁸ See Robinson & Darley, *Role of Deterrence*, *supra* note 108, at 956-57.

¹¹⁹ Tracy L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 396 (2000).

¹²⁰ Tom Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. OF POL. & SOC. SCI. 84, 86 (2004) (quoting).

¹²¹ See, e.g., Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497, 501 (1993) [hereinafter MacCoun, *Drugs and the Law*] (summarizing and analyzing research regarding the effect of deterrence factors on drug use and concluding that "[c]ertainty and severity effects are quite modest in size, generally accounting for less than 5% of the variance in marijuana use reported in perceptual deterrence surveys").

¹²² COMM. TO REVIEW RESEARCH ON POLICE POLICY AND PRACTICES, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 295 (Wesley G. Skogan & Kathleen Frydl eds., 2004) [hereinafter FAIRNESS AND EFFECTIVENESS IN POLICING] at 295 (citing MacCoun, *Drugs and the Law*, *supra* note 121) ("The key factor limiting the value of deterrence strategies is the consistent finding that deterrence effects, when they are found, are small in magnitude. For example, in a review of studies of deterrence in the area of drug use, MacCoun . . . finds that around 5 percent of the measured variance in drug use

The problem with deterrence strategies is not that people disregard sanctions, but that it is hard to convince them that they are likely to suffer from these sanctions. There are a number of conditions that must be met to make deterrence effective. “The potential offender must know of the rule; he must perceive the cost of violation as greater than the perceived benefit; and he must be able and willing to bring such knowledge to bear on his conduct decision at the time of the offense.”¹²³

Meeting these challenges to effective deterrence can be difficult and resource intensive. In particular, it is hard to (a) ensure that people learn about and understand the law and (b) devote enough resources to enforcement to project a credible threat that offenders will be caught and punished.¹²⁴ Adding to these challenges is the tendency of people to be unrealistically optimistic about their chances of getting caught.¹²⁵ Many cite enforcement of laws against homicide as the rare instance where society devotes enough resources to generate a threat of deterrence perceived as credible, with the likelihood of getting caught at about seventy percent.¹²⁶ Enforcement of most laws falls far short of such necessarily high levels.¹²⁷ Resources devoted to file-sharing are certainly anemic relative to the magnitude of the problem. While the number of suits against file-sharers—over 15,000 as of this writing—certainly is substantial and even astounding, it pales compared to the number of people file-sharing at any given moment.

One might ask why anybody obeys the law if deterrence is so ineffective. One answer is that deterrence is never wholly ineffective. For many, the existence of a law that is enforced at all is enough to persuade them to comply.¹²⁸ Some are either unable to tolerate any risk of

behavior can be explained by variations in indicators of the expected likelihood or severity of punishment.”).

¹²³ Robinson & Darley, *Role of Deterrence*, *supra* note 108, at 953.

¹²⁴ See Robinson & Darley, *Role of Deterrence*, *supra* note 108, at 954-55.

¹²⁵ *Id.* at 954-55; Robinson & Darley, *Utility of Desert*, *supra* note 29, at 461-62.

¹²⁶ See Robinson & Darley, *Utility of Desert*, *supra* note 29, at 459.

¹²⁷ See *id.* at 458-64 (describing how actual apprehension and punishment of lawbreakers falls far short of the level needed to deter people effectively).

¹²⁸ See FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 122, at 294 (citing studies).

sanctions¹²⁹ or view illegality as a symbolic boundary that they will not cross.¹³⁰ Lawsuits against file-sharers thus have the important effect of creating a non-zero risk of getting caught and of informing and reminding the public that infringement is illegal. These effects are likely enough to persuade many risk averse and law abiding people to comply with copyright law.¹³¹

Nevertheless, deterrence strategies can only do so much before they reach the point of diminishing returns. Once a base of compliance is established, marginal increases in penalties or enforcement appear not to change behavior much or at all.¹³² Now that the entertainment industry has established and maintained the threat of suing infringing consumers, increasing enforcement or penalties may fail to have the desired effect.

Besides deterrent effects, the other reason people comply with the law is because it accords with social norms. Indeed, a large body of social psychology research says that social norms are perhaps the most influential reason for compliance with law. The next subsection discusses why social norms are likely to prove essential to any resolution to the file-sharing problem.

C. The Benefits of Normative Strategies

The problem of non-compliance with copyright would be so much easier to solve if only people could be convinced to comply voluntarily with copyright law, because they think it is the right thing to do. Although such an outcome may seem like a pipe dream, it would in fact accord with the way most legal compliance works. Most people, most of the time,

¹²⁹ See MacCoun, *Drugs and the Law*, *supra* note 121, at 501. MacCoun theorizes that there is a category boundary effect at the “transition from a zero to non-zero probability” of being caught and sanctioned. *Id.* Some people are averse to *any* nonzero risk or because they are unwilling to engage in illicit behavior for reasons of personal morality or social status. *Id.* at 501, 503-04. He distinguishes such effects from “relative deterrence”—the amount of additional deterrence gained from increasing enforcement and/or severity of punishment. *Id.* at 501.

¹³⁰ See *id.* at 505-507.

¹³¹ See Matthew Sag, *Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry’s File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 113 (2006) (contending that the RIAA might productively target heretofore un-targeted small time downloaders in order to create a credible deterrent for the typical downloader).

¹³² See MacCoun, *Drugs and the Law*, *supra* note 121, at 501; FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 122, at 295.

obey the law voluntarily. It would be hard for the legal system to function otherwise.¹³³

In a free society, it is difficult and inefficient to control people's behavior by relying solely on the coercive power of the legal system.¹³⁴ Tom Tyler described the problem in his seminal study on voluntary compliance with the law, aptly titled *Why People Obey the Law*. Coercive "leadership is impractical because government is obliged to produce benefits or exercise coercion every time it seeks to influence citizens' behavior. These strategies consume large amounts of public resources and such societies would be 'in constant peril of disequilibrium and instability.'"¹³⁵

People do indeed obey the law because they believe that it is the right thing to do. In fact, numerous studies show that people are more likely to comply with law for normative reasons rather than because of fear of legal consequences.¹³⁶ When surveyed, people were most likely to claim they obeyed the law for moral reasons.¹³⁷ Perhaps more important, studies of people's actual behavior measuring the effect of various influences on legal compliance have found that social norms have the greatest influence.¹³⁸ Tyler's review of the research on this topic found that about twenty percent of the variance in compliance with law is "explained by differences in judgments about the morality of law."¹³⁹

In fact, enforcement or sanctions that contradict social norms too much may actually increase non-compliance. Enforcement that treats people in a way they perceive as unjust generates "crimogenic effects," as

¹³³ See Lon L. Fuller, *Human Interaction and the Law* in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 211, 234 (Kenneth I. Winston, ed., Duke University Press 1981) ("The lawgiver must be able to anticipate that the citizenry as a whole will . . . generally observe a body of rules he has promulgated.").

¹³⁴ See TYLER, *supra* note 29, at 22 and authorities cited therein.

¹³⁵ *Id.* at 23.

¹³⁶ See TYLER, *supra* note 29, at 178 (reviewing studies); Robinson & Darley, *Utility of Desert*, *supra* note 29, at 468-71 (same).

¹³⁷ Catherine A. Sanderson & John M. Darley, "I Am Moral but You Are Deterred": Differential Attribution about Why People Obey the Law, 32 J. APPLIED SOC. PSYCHOL. 375, 375-88 (2002).

¹³⁸ See Robinson & Darley, *Utility of Desert*, *supra* note 29, at 468-71 (surveying research).

¹³⁹ TYLER, *supra* note 29, at 36-37.

people lose respect for the law and disobey it or support others who do so.¹⁴⁰

It is hard to say whether the RIAA suits have generated such effects. Although file-sharing has grown since the suits started, the growth has also coincided with increased adoption of bandwidth, cheaper and more capacious computers, and widespread popularity of digital music players. Nevertheless, the gap between social norms and enforcement appears to have generated tremendous controversy, making legislative and political initiatives more difficult.

In any event, copyright owners would benefit greatly from copynorms among consumers of recorded entertainment that were more supportive of copyright law. At the very least, their enforcement efforts would be more effective. At worst, their lawsuits against consumers produce unintended side effects. Copyright owners thus should consider how to persuade people that compliance with copyright law is the right thing to do. The next subsection discusses how they might do so.

D. Strategies for Shaping Norms

The challenge of shaping norms is that the factors that influence norms, as detailed earlier in Section I.B, are numerous and interact in very complex ways. Nevertheless, there are some indications as to how social norms are affecting or might affect the file-sharing problem. This subsection surveys several factors that may exacerbate or alleviate the file-sharing copynorms problem.

The entertainment industry's current normative strategy appears to consist largely of education and persuasive advertising. These messages are not a bad start, but care must be taken. The content of the message must confidently convey that compliance is not only the right thing to do, but is what most people are already doing.¹⁴¹ As I have contended before: "Portraying the music industry as a victim fighting an uphill battle against massive infringement is more likely to encourage noncompliance than engender sympathy. People need to know *both* that they are not alone in complying and that the music industry is vigorously pursuing

¹⁴⁰ See Kahan, *Gentle Nudges vs. Hard Shoves*, *supra* note 9, at 619; Robinson & Darley, *Role of Deterrence*, *supra* note 108, at 985-87.

¹⁴¹ See *supra* notes 31-35 and accompanying text.

infringers.”¹⁴² Otherwise, education and advertising will only reinforce the growing perception that file-sharing is the norm. Moreover, it may take more than persuasive messages to change norms.

Yuval Feldman and Janice Nadler conducted an experiment with students to determine the effect of various persuasive messages regarding file sharing on their intention to file-share, their perception of its morality, or their perceptions regarding what others would believe or do.¹⁴³ Feldman and Nadler exposed the students to messages about file-sharing. One group received information indicating that file-sharing was illegal and against university policy. This statement had no significant effect on any of the factors measured (intention to file-share, etc.).¹⁴⁴ Another group received a statement calculated to persuade them that file-sharing was immoral. This statement was also similarly ineffective, producing only a marginally significant difference in the perception of what others thought of file-sharing.¹⁴⁵

Feldman and Nadler found a significant effect on the intentions of the subjects to file-share only when the threat of sanctions was introduced. One group received a threat that file-sharers would receive an official sanction imposed by the university.¹⁴⁶ Another received a threat that file-sharers would receive an informal sanction by having their name posted on a public website.¹⁴⁷ These threats were the only ones that made people significantly more likely to state an intention not to file-share in the future.¹⁴⁸ One might conclude from this experiment that talk is cheap: Only the threat of sanctions, rather than mere statements about law or morality, made people likely to report a change in behavior.

¹⁴² Schultz, *supra* note 27.

¹⁴³ See Feldman & Nadler, *supra* note 97.

¹⁴⁴ *Id.* at 29 – 30.

¹⁴⁵ *Id.* at 35.

¹⁴⁶ *Id.* at 29 – 30. Note that this threat likely meets the criteria for effective deterrence, as the university is in a position to monitor compliance—it owns the network—and its threat of sanction is credible—it can expel the student. See Robinson & Darley, *Role of Deterrence*, *supra* note 108.

¹⁴⁷ Feldman & Nadler, *supra* note 97, at 29 – 30. Note that this threat, like the threat of formal sanctions, is also quite credible since the university owns and monitors the network, knows who the students are, and is part of the same community.

¹⁴⁸ *Id.* at 37.

Feldman and Nadler's findings indicate that the RIAA's lawsuit strategy likely has caused most of whatever effects it is likely to cause, absent the threat of new sanctions.¹⁴⁹ The entertainment industry most likely believes that credible enforcement will send a message that infringement is wrong, thus influencing social norms to change. If so, this strategy is not entirely unsupported. As noted previously, laws can provide signals as to what is right and what others are likely to do.¹⁵⁰ The challenge for the RIAA at this point is that it is unlikely to change copynorms regarding file-sharing any more than it already has, because the RIAA's suits are well-publicized already. The lawsuits no longer impose a *new* threat; rather, they serve to inform people that the threat still exists. As Nadler and Feldman found, just providing people with information at this point seems unlikely to change behavior. Feldman and Nadler did not see any change in behavior until they introduced the possibility of a new, very credible sanction in addition to the one potentially imposed by copyright law.¹⁵¹ Laws can contribute to a social norm—but they cannot compel support for it.¹⁵²

Sending a message, whether it is a public service announcement or an exemplary lawsuit may not be enough to shape norms.¹⁵³ It may instead be necessary to try to change a number of contextual factors to make people more willing to adopt and sustain copynorms that support copyright law. In my earlier study of jambands, a number of factors appeared to make people more likely to cooperate with copyright owners and one another in complying with copyright law:

¹⁴⁹ Thus Professor Sag contends that the RIAA could make additional gains by targeting a new group—those who only download, as opposed to the currently-targeted uploaders. See Sag, *supra* note 131.

¹⁵⁰ See *supra* note 31 and accompanying text.

¹⁵¹ See *supra* notes 146-147 and accompanying text.

¹⁵² Robinson & Darley, *Utility of Desert*, *supra* note 29, at 473 (“Notice that we said that laws can contribute to the formation and change of community norms and individuals' moral reasoning; laws cannot themselves compel community acceptance.”).

¹⁵³ A recent empirical study by Ben Depoorter and Sven Vanneste on how litigation affected the attitudes of file-sharers and potential file-sharers led them to contend that “lawsuits against file sharers cannot simultaneously achieve deterrence and promote procopyright norms.” Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1128 (2005). Their study was based on a questionnaire that asked respondents to assess the likely attitudes and behavior of themselves and their peers in light of actual and proposed increases in enforcement and sanctions for file-sharing. They found that harsher enforcement led file sharers to report and predict norms that actually were more hostile toward copyright.

- Build communities based on sustained relationships.¹⁵⁴ Reducing the social distance between copyright owners and consumers appears to encourage the development of cooperative, pro-artist norms. Direct communication between fans and artists and long-term relationships are the keys to building such communities.
- Improve perceptions of fairness. People are spiteful.¹⁵⁵ They will go out of their way to punish somebody they perceive as unfair. Copyright owners, particularly those in the music industry, are often perceived as obnoxious and opportunistic. The fairness of such perceptions does not matter as much as the fact that they exist. Cooperative social norms are more likely to develop if copyright owners bolster perceptions of fairness.
- Give people a chance to comply.¹⁵⁶ File-sharing allows people to immediately satisfy a desire for music. When such hard-to-resist illegal options arise, some will inevitably choose them. As the numbers of people choosing the illegal option snowball, a descriptive norm is created. Copyright owners need to present people with legal options so that those who are inclined to cooperate can do so, and so through their good example inspire the development of pro-copyright copynorms. iTunes has proven to be a very good development in this respect.
- Involve the fans in enforcement.¹⁵⁷ If fans help to run their own fan communities, they may be inclined to sanction and discourage free riders who benefit unfairly by downloading music without paying.

While the task of shaping norms is difficult and uncertain, it is well worth the attempt. We now possess enough promising ideas about how norms work to attempt the project and to pursue further study. The importance of norms to shaping people's behavior makes the attempt worthwhile. Deterrence alone seems unlikely to do the job.

¹⁵⁴ See Schultz, *supra* note 27, at 721.

¹⁵⁵ See *id.* at 723.

¹⁵⁶ See *id.* at 726.

¹⁵⁷ See *id.* at 728.

Conclusion

Copynorms can help us to understand and perhaps even to resolve some of the biggest dilemmas in copyright law today. For example, we may find that copyright owners do not have the iron grip on culture and expression that some suppose, because copynorms either discourage owners from asserting control fully or encourage users to disregard such assertions of control. Or, it may be the case that copyright owners do assert too much control. If that is so, it may be essential for a movement like Creative Commons to propagate a copynorm that persuades people to give up some of their control.

The problem presented by file-sharing demonstrates another important reason for understanding the importance of norms. Deterrence strategies based on stepping up enforcement and securing greater penalties are unlikely to resolve the problem alone. Copynorms will be essential to any resolution.

Although our understanding of copynorms is in its infancy, this area of inquiry holds much promise. The literature on law and norms, especially as it now is drawing insight from social psychology and behavioral and experimental economics, is yielding great insights into the sources and influences of social norms. If we can apply these insights to copyright law and copynorms, we will have a far better understanding of how copyright really works.