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## The Future of Criminal Enforcement of Copyright: The Promise of Civil Enforcement

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*Abstract. This Article will consider the intersection of copyright and criminal law, exploring the complexity of using criminal penalties to enforce intellectual-property laws. It will review how criminal law has been applied in the field of copyright and demonstrate that criminal enforcement of copyright law suffers from inherent deficiencies. Meanwhile, civil-enforcement mechanisms targeting copyright infringement have developed significantly in the last two decades, providing new frameworks aimed at addressing the emerging challenges of the digital environment. Enhanced civil mechanisms adapted to the digital age offer an alternative to criminal procedures, the use of which has steadily declined. While it is questionable whether the civil enforcement frameworks have accomplished their goals of promoting deterrence and efficient redress, they contribute to a powerful package, alongside new business models and educational efforts, that replaces the need for public enforcement via criminal law. This Article will discuss a few notable civil-enforcement measures and schemes: the notice-and-takedown procedure, algorithmic enforcement by platforms, statutory damages, and the newly established copyrights small claims court.*

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## Introduction

Copyright law has been in crisis over the past two decades, especially since the emergence of digital technologies.<sup>1</sup> Both rights holders and users of copyrighted materials have criticized the current regime, demanding changes adapted to the digital environment.<sup>2</sup> Enforcement is a critical piece of the puzzle, with rights holders seeking more effective measures to contend with massive infringements on online platforms.<sup>3</sup>

One of the law's main functions is to regulate individuals' behavior by incentivizing or disincentivizing certain conduct. Copyright law incentivizes creative activities by granting authors proprietary rights in their original works, while criminal laws impose sanctions and penalties to disincentivize certain conduct. Given the constant struggle to fight copyright infringement and to enrich creativity and expression, the criminalization of copyright violations may seem intuitive—criminalizing copyright infringement would deter potential infringers, thus enhancing the protection of copyrighted works. But while such measures may seem appealing at first glance, the criminalization of copyright infringement is far more complex.

This Article illuminates and explores the complexities surrounding the criminal enforcement of copyright while reconsidering the justifications for—and the practicality of—imposing criminal sanctions in this context. This Article argues that criminal penalties are an unjustified and ineffective means of preventing copyright infringement and that civil enforcement measures should be considered sufficient. This conclusion is based on a normative analysis of the justifications, rationales, and goals of both copyright and criminal law. In addition, this Article reviews practical applications of past and current criminal enforcement measures and observes a constant decline in the use of criminal sanctions against copyright infringers. This decline can be attributed to the inefficiency of criminal law as a means of enforcing copyright, the existence of more effective civil enforcement measures, and the rise in new business models that make content easily and legally accessible to the public at low cost.

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<sup>1</sup> See, e.g., Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004); WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (2009); Pamela Samuelson, Jon A. Baumgarten, Michael W. Carroll, Julie E. Cohen, Troy Dow, Brian Fitzgerald, Laura Gasaway, Daniel Gervais, Terry Ilardi, Jessica Litman, Lydia Pallas Loren, Glynn Lunney, Tyler Ochoa, R. Anthony Reese, Jule Sigall, Kate Spelman, Christopher Sprigman, Michael Traynor, Tara Wheatland & Jeremy Williams, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175 (2010); Peter K. Yu, *A Hater's Guide to Geoblocking*, 25 B.U. J. SCI. & TECH. L. 503 (2019).

<sup>2</sup> Samuelson et al., *supra* note 1, at 1177–78; DANIEL J. GERVAIS, (RE)STRUCTURING COPYRIGHT: A COMPREHENSIVE PATH TO INTERNATIONAL COPYRIGHT REFORM 1–8 (2017).

<sup>3</sup> Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 3–4 (2010).

This Article proceeds as follows: Part I presents a discussion of the complexities surrounding the criminal enforcement of intellectual-property rights in general—and the criminal enforcement of copyright in particular—focusing on the justifications, rationales, and policy considerations relevant to each legal regime. Part II then reviews the legal framework of copyright law's criminal enforcement measures and explores their implementation and effects. Part III explores civil enforcement measures applied in the copyright context and the rise in their use in the digital era. Finally, Part IV offers an in-depth normative discussion highlighting the need to reconsider the use of criminal sanctions to enforce copyright protections and decrease infringement. This Part also provides insights on the reconstruction of copyright enforcement policy.

## I. Copyright Infringement as a Criminal Offense

Criminal law has rapidly made its way into the realm of intellectual property as a means of enforcement.<sup>4</sup> Considering the significant role that intellectual property plays in the global economy,<sup>5</sup> and in the American economy specifically<sup>6</sup>—especially in the modern, information-driven era—criminal law unsurprisingly plays a prominent role in this realm too. Yet, because of the unique characteristics of copyright as intellectual property, including intangibility, nonexcludability, and nonrivalry, many commentators have questioned whether criminal penalties are an appropriate or effective means of enforcement in this domain.<sup>7</sup>

### A. General Complexities of Imposing Criminal Sanctions for Infringement of Intellectual Property Rights

The use of criminal penalties to enforce intellectual property rights raises many questions. Is it appropriate, a priori, to regard the infringement of intellectual property rights as a criminal offense? Should criminal penalties be imposed when civil remedies already exist to deter and

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<sup>4</sup> 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.J. 167, 235–36 (2002).

<sup>5</sup> Wen Chen & Ying Wu, *Does Intellectual Property Protection Stimulate Digital Economy Development?*, 25 J. APPLIED ECON. 723, 728 (2022).

<sup>6</sup> See U.S. DEP'T OF JUST., PROSECUTING INTELLECTUAL PROPERTY CRIMES 1 (2006).

<sup>7</sup> See Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 733, 735, 760–61, 779–80 (2003); Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J. L. & TECH. 469, 514–17 (2011); Grace Pyun, *The 2008 Pro-IP Act: The Inadequacy of the Property Paradigm in Criminal Intellectual Property Law and its Effect on Prosecutorial Boundaries*, 19 DEPAUL J. ART TECH. & INTELL. PROP. L. 355, 379 (2009).

sanction the violation of intellectual property rights? Although the theoretical discourse addressing these questions is scant, it nevertheless raises controversies. There are many notable differences between the infringement of intellectual property rights and most other crimes. Intellectual property infringement typically does not involve violence, for example,<sup>8</sup> and the harm it causes is inherently difficult to assess.<sup>9</sup> Furthermore, the victims of infringement may be difficult to identify.<sup>10</sup> It can also be difficult to determine who should be held accountable for infringement.<sup>11</sup> In many cases, the circumstances leading to intellectual property infringement involve creative activities that are considered socially positive and productive.<sup>12</sup> These unique features have led some scholars to describe intellectual property infringement as “morally ambiguous.”<sup>13</sup> This moral ambiguity has in turn raised questions about whether the criminalization of intellectual property infringement is ever justified.<sup>14</sup>

Infringement of intellectual property rights has become widespread and common in the past two decades.<sup>15</sup> Despite a notable rise in intellectual property violations, some commentators continue to urge caution in the use of criminal measures as a deterrent.<sup>16</sup> One major argument is that neither civil nor criminal sanctions are effective at preventing intellectual property infringement, largely because much of the public does not view infringement as morally wrong.<sup>17</sup> The discussion around the criminalization of intellectual property infringement often likens intellectual property infringement to the theft of tangible property, but there are inherent difficulties in this comparison.<sup>18</sup> For any criminal law to achieve its goal, the public must trust that it has a moral justification and was enacted by a publicly elected and trusted authority.<sup>19</sup> The vast majority of the public abides by laws prohibiting murder, rape, or theft, for example, not only out of a fear of criminal sanctions, but also because most individuals have

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<sup>8</sup> Manta, *supra* note 7, at 475.

<sup>9</sup> Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 509–10 (2004).

<sup>10</sup> *Id.* at 509.

<sup>11</sup> *Id.* at 510.

<sup>12</sup> *Id.* at 513; *see also, e.g.*, Richard J. Gilbert & Michael L. Katz, *When Good Value Chains Go Bad: The Economics of Indirect Liability for Copyright Infringement*, 52 HASTINGS L.J. 961, 971 (2001).

<sup>13</sup> Green, *supra* note 9, at 502–03, 508.

<sup>14</sup> *Id.* at 508–510; Moohr, *supra* note 7, *passim*.

<sup>15</sup> Samuelson et al., *supra* note 1, at 1193–94.

<sup>16</sup> *See* Green, *supra* note 9, at 510–11.

<sup>17</sup> I. Trotter Hardy, *Criminal Copyright Infringement*, 11 WM. & MARY BILL RTS. J. 305, 329–34 (2002).

<sup>18</sup> *See infra* notes 42–45 and accompanying text.

<sup>19</sup> Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 225 (1996); *see also* Green, *supra* note 4, at 237–38.

internalized the ethical norms that proscribe such conduct.<sup>20</sup> Accordingly, commentators have argued that penalties for intellectual property violations must be consistent with public perceptions of these offenses.<sup>21</sup> Many thus view civil sanctions as sufficient to redress the injuries that intellectual property infringement causes, which are typically monetary in nature.<sup>22</sup>

Nevertheless, some commentators argue that given the importance of intellectual property rights in the American and global economies,<sup>23</sup> civil remedies are insufficient to deter infringement.<sup>24</sup> Others argue that sanctions should be enhanced in response to the growing involvement of criminal organizations in intellectual property infringement and should be used specifically to target such violations.<sup>25</sup> This argument rests on the observation that criminal organizations engage in systematic infringement of intellectual property, which threatens the public order and justifies more severe criminal sanctions.<sup>26</sup>

#### B. *Theoretical Inconsistencies Involved in the Criminal Enforcement of Copyright Law*

Criminal enforcement of copyright law entails a range of specific complexities. The rise in infringement of a wide variety of copyrighted works, such as movies, music, and computer programs, particularly in the digital sphere, has resulted in pressure to criminalize infringing activities and to impose increasingly severe criminal sanctions.<sup>27</sup> While originally intended to lead to economic stability, to encourage employment in the “creative” industries, and to provide economic incentives for creative activities,<sup>28</sup>

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<sup>20</sup> Green, *supra* note 4, at 238; Pyun, *supra* note 7, at 391.

<sup>21</sup> Pyun, *supra* note 7, at 391, 393; Green, *supra* note 4, at 237–38; Tyler, *supra* note 19, at 225; Hardy, *supra* note 17 at 329–34.

<sup>22</sup> Geraldine Szott Moohr, *The Problematic Role of Criminal Law in Regulating Use of Information: The Case of the Economic Espionage Act*, 80 N.C. L. REV. 853, 918–19 (2002).

<sup>23</sup> See *supra* notes 5–6.

<sup>24</sup> John R. Grimm, Stephen F. Guzzi & Kathleen Elizabeth Rupp, *Intellectual Property Crimes*, 47 AM. CRIM. L. REV. 741, 743 (2010).

<sup>25</sup> Maureen Walterbach, Note, *International Illicit Convergence: The Growing Problem of Transnational Organized Crime Groups' Involvement in Intellectual Property Rights Violations*, 34 FLA. ST. U. L. REV. 591 *passim* (2007).

<sup>26</sup> *Id.* at 596–97.

<sup>27</sup> Michael M. DuBose, *Criminal Enforcement of Intellectual Property Laws in the Twenty-First Century*, 29 COLUM. J.L. & ARTS 481, 484, 486–89 (2006).

<sup>28</sup> Robin Andrews, Note, *Copyright Infringement and the Internet: An Economic Analysis of Crime*, 11 B.U. J. SCI. & TECH. L. 256, 256 (2005) (first citing Karen J. Bernstein, *Net Zero: The Evisceration of the Sentencing Guidelines Under the No Electronic Theft Act*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 57,

criminal enforcement has received much criticism. This Article discusses, below, some of the main complexities that arise from the application of criminal sanctions in cases of copyright infringement.<sup>29</sup>

### 1. Moral Wrongness and Copyright Infringement

A core principle of criminal law is the notion that morally reprehensible conduct justifies punishment.<sup>30</sup> But the question of moral wrongness is complex in the context of copyright infringement<sup>31</sup>: Does copyright infringement constitute a morally wrong or harmful act that justifies its criminalization? Professor Geraldine Moohr explains that the basis on which conduct may be characterized as moral or immoral is inherently unclear and “may rest on community norms or on principles derived from conceptions of what is right and good.”<sup>32</sup> Applying this rationale in the context of copyright infringement reveals certain “gaps” and difficulties. For example, while most communities would agree upon the moral wrongness of stealing—which serves as a justification for its criminalization—the same is not true of copyright infringement. Accordingly, if moral wrongness is derived from community norms or public perception of “what is right and good,”<sup>33</sup> it is problematic to view copyright infringement as deserving of criminal punishment.<sup>34</sup>

Yet, this rationale may be criticized as tautological. The public perception of copyright infringement as morally acceptable may result from many infringements going unpunished, leading to a social norm that does not equate copyright infringement with moral wrongness.<sup>35</sup> Indeed, behavioral economists point out that when individuals observe violations of

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59–62 (2001); and then citing Don E. Tomlison, *Intellectual Property in the Digital Age: The Piracy/Counterfeiting Problem and Antipiracy and Anticounterfeiting Measures*, 8 CURRENTS: INT’L TRADE L. J. 3, 3 (1999)).

<sup>29</sup> It is important to note that the criminal copyright enforcement provisions relate to commercial infringement. Commercial infringement typically involves conduct motivated by profit or commercial gain that competes with the original copyrighted work. Conversely, infringement for private or personal use usually does not generate profit or commercial gain. The discussion regarding the criminalization of copyright infringement generally questions the criminalization of personal use infringement and not the criminalization of commercial infringement. See Moohr, *supra* note 7, at 755–57.

<sup>30</sup> *Id.* at 747–52.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 749.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 773–74.

<sup>35</sup> Andrews, *supra* note 28, at 278–81; 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, 662–63 (2006).

a law going unpunished, they become less likely to view the conduct the law proscribes as immoral. Those individuals are then less likely to abide by the law, leading to an increase in violations.<sup>36</sup> Additionally, some commentators have argued that efforts to influence public perception concerning the morality of certain conduct through criminal legislation may cause a direct clash between the public and the government, undermining the purpose of the legislation and its intended goals and values.<sup>37</sup>

A more nuanced analysis of how the public views copyright infringement considers the scale and purpose of the infringing conduct.<sup>38</sup> While the public may view large scale infringement for commercial gain as morally wrong and deserving of punishment,<sup>39</sup> the public more likely perceives smaller scale infringement that does not result in financial gain and is motivated by good intentions (such as to further and promote education or creativity) as morally acceptable.<sup>40</sup> Commercial motivation, therefore, is decisive.<sup>41</sup>

Another significant factor affecting public perceptions regarding the morality of copyright infringement involves the nature of copyrighted works as intangible assets.<sup>42</sup> Equating tangible property theft to intellectual property infringement is not intuitive because copyrighted works are perceived as a “public good” based on characteristics such as nonexcludability (the difficulty in preventing their use by others) and nonrivalry (one individual’s use of a copyrighted work does not detract from another’s).<sup>43</sup> Comparing copyright infringement to theft of chattels, therefore, seems less natural.<sup>44</sup> Moreover, many commentators have observed that important and salient social norms support the view that works containing information and knowledge, including copyrighted works, should be accessible to all.<sup>45</sup> In short, there is no consensus on the appropriateness of criminalizing copyright infringement.

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<sup>36</sup> Andrews, *supra* note 28, at 278–81; Schultz, *supra* note 35, at 662–63.

<sup>37</sup> Geoffrey Neri, Note, *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms*, 93 GEO. L.J. 733, 746–48 (2005).

<sup>38</sup> Hardy, *supra* note 17, at 326–27.

<sup>39</sup> *Id.* at 327.

<sup>40</sup> *Id.* at 327–28.

<sup>41</sup> *Id.* at 326.

<sup>42</sup> Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 852–53, 856–60 (1999).

<sup>43</sup> Neri, *supra* note 37, at 739–42.

<sup>44</sup> *Id.* at 739–41.

<sup>45</sup> *Id.* at 739.

## 2. Harm and Copyright Infringement

Another major justification for criminalizing certain conduct rests on the harm it causes.<sup>46</sup> Yet, the criminalization of harmful acts should be attentive to some key considerations, such as whether less punitive alternatives are available and effective,<sup>47</sup> and whether the conduct undermines an important social interest or social norm.<sup>48</sup> Moreover, criminal sanctions should be imposed only if their benefits outweigh their costs.<sup>49</sup>

Criminalizing copyright infringement is thus justified if the infringement causes harm that satisfies the foregoing criteria. Nevertheless, some commentators object to criminalization based on a perception that copyright owners' damages claims for infringement are exaggerated.<sup>50</sup> On a more fundamental level, many believe that the harm caused by infringing conduct that is intended for personal use does not justify criminal enforcement.<sup>51</sup> Moreover, some important social interests and values, such as the encouragement of creativity and expression, are consistent with copyright infringement, such as where the infringement results in increased public access to works that are needed for creative activity.<sup>52</sup> In such cases, infringement lacks the required antisocial factor that justifies criminalization.<sup>53</sup>

Finally, unlike the direct and obvious harm caused by the theft or interference with tangible property rights, the damage caused by copyright infringement is indirect and not obvious to the public. Digital technologies exacerbate this problem, since the harm caused by online copyright infringement is difficult to quantify.<sup>54</sup> Because the public seemingly tends to assign moral wrongness to acts that cause clear and immediate damage, the harm caused by copyright infringement is not generally perceived as immoral.<sup>55</sup>

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<sup>46</sup> Moohr, *supra* note 7, at 749–53.

<sup>47</sup> *Id.* at 752.

<sup>48</sup> *Id.* at 752–53.

<sup>49</sup> *Id.* at 753; Lori A. Morea, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195, 227–29 (2006).

<sup>50</sup> Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369, 426–32 (2003); Neri, *supra* note 37, at 741–42; Lucille M. Ponte, *Coming Attractions: Opportunities and Challenges in Thwarting Global Movie Piracy*, 45 AM. BUS. L.J. 331, 335 (2008).

<sup>51</sup> Moohr, *supra* note 7, at 753–57.

<sup>52</sup> *Id.* at 757–64.

<sup>53</sup> *Id.*

<sup>54</sup> Hardy, *supra* note 17, at 336–39.

<sup>55</sup> *Id.* at 334–39; see also Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 769 (2010).



### 3. Copyright Policy Concerns

Copyright law aims to promote the progress of science and the arts for the public good.<sup>56</sup> Accordingly, the use of criminal penalties to deter and punish copyright infringement should serve this overarching goal.<sup>57</sup> While the criminalization of copyright infringement may provide copyright owners with greater protection and a seemingly greater incentive to create, criminal sanctions may also suppress creative uses of copyrighted works, thus undermining copyright law's primary objective of enriching expression in our society.<sup>58</sup> In other words, the criminalization of copyright infringement may enhance the "chilling effect" copyright law already has on freedom of speech with respect to creative use of copyrighted works.<sup>59</sup> In this context, the function of the fair use doctrine raises particular concerns. Risk averse users will avoid using copyrighted works, despite their good-faith belief that the use is permitted as fair, out of fear of the consequences of a legal mistake that could subject them not only to civil liability but also to a criminal charge.<sup>60</sup>

A cost-benefit analysis of the application of criminal law to violations of copyright leads to additional interesting insights. Criminal enforcement requires a variety of unavoidable costs, such as those involved in the detection and identification of infringers, their interrogation, and the costs of their prosecution.<sup>61</sup> Other social costs that should be considered include the "chilling effect" noted above, which may ultimately thwart copyright law's essential objectives.<sup>62</sup> Legislators should thus be cautious about criminalizing violations of copyright law to avoid overly burdening rights protected by the First Amendment and constraining public access to expressions.<sup>63</sup>

In summary, criminalizing copyright infringement is problematic for a variety of reasons. The moral ambiguity involved in copyright infringement for private or personal use and the difficulty of calculating the damages it may cause raise doubts about the appropriateness of criminal enforcement.

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<sup>56</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>57</sup> Diane L. Kilpatrick-Lee, *Criminal Copyright Law: Preventing a Clear Danger to the U.S. Economy or Clearly Preventing the Original Purpose of Copyright Law?*, 14 U. BALT. INTELL. PROP. L.J. 87, 117–18 (2005); Loren, *supra* note 42, at 836; Morea, *supra* note 49, at 227.

<sup>58</sup> Kilpatrick-Lee, *supra* note 57, at 117–18.

<sup>59</sup> Brian P. Heneghan, *The NET Act, Fair Use, and Willfulness – Is Congress Making a Scarecrow of the Law?*, 1 J. HIGH TECH. L. 27, 35–39 (2002).

<sup>60</sup> *Id.*

<sup>61</sup> Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 801 (2005).

<sup>62</sup> *Id.* at 801–04.

<sup>63</sup> Loren, *supra* note 42, at 861.

Much of the difficulty stems from social norms, which do not view copyright infringement as morally wrong.<sup>64</sup> Furthermore, justifications for criminal penalties for copyright violations, grounded in rationales that equate tangible property rights with intellectual property rights are problematic. The criminalization of copyright infringement may also have a chilling effect on free speech, place economic burdens on society, and ultimately harm the very interests and goals that copyright law seeks to promote. In view of these difficulties, criminal enforcement of copyright law should be approached with careful consideration of its efficacy and benefits. The following Part summarizes the legal framework of copyright law's criminal enforcement provisions and examines their application and the effect they have had in practice.

## II. Criminal Enforcement of Copyright Law in Practice

Criminal penalties have been a tool of copyright enforcement in U.S. law for over 100 years,<sup>65</sup> evolving and changing over the years to adapt to emerging technological and cultural developments.<sup>66</sup> This Part presents a brief overview of some of the major developments in criminal enforcement of U.S. copyright law over the past two decades. This overview reveals constant expansion of criminal enforcement measures in copyright law. This Part then examines how these measures have been applied in practice. A brief review of existing data on criminal penalties for copyright offenses in the United States reveals another clear trend of constant decline in the imposition of such penalties. The juxtaposition of these two trends—the expansion of criminal sanctions available for copyright infringement on the one hand and the decline in the application of such sanctions on the other—indicates that criminal enforcement has not been effective at combating copyright infringement.<sup>67</sup> This conclusion supports the argument that criminal enforcement, in its current state, is an inadequate tool for deterring copyright infringement and should therefore be reconsidered.

### A. *The Legal Framework of Criminal Enforcement of U.S. Copyright Law*

Enacted in 1897, the U.S. Copyright Act Amendment of January 6 was the first piece of legislation to include criminal enforcement of copyright

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<sup>64</sup> Neri, *supra* note 37, at 734–35, 745.

<sup>65</sup> Hardy, *supra* note 17, at 315.

<sup>66</sup> See Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705, 1712–19 (1999).

<sup>67</sup> See Christopher Buccafusco & Jonathan S. Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. CAL. L. REV. 275, 319–20 (2014).

protections.<sup>68</sup> The Act made public representations and performances of copyrighted dramatic and musical works a misdemeanor when the infringing conduct was “willful and for profit.”<sup>69</sup> Congress enacted this law in response to copyright holders’ complaints that their rights were unenforceable due to an increase in the performance of their works in places that were difficult to locate.<sup>70</sup> Copyright law’s criminal provisions have been amended over time, with some violations now characterized as felonies.<sup>71</sup>

In the early 1990s, the rapid growth of the software industry and a significant increase in large-scale copyright infringement<sup>72</sup> led Congress to enact the Copyright Felony Act of 1992.<sup>73</sup> The 1992 Act broadened the scope of works whose infringement could qualify as felonies to include not only sound recordings, motion pictures, and audiovisual works, but all copyrighted works.<sup>74</sup> The next significant milestone in the criminalization of copyright infringement, the No Electronic Theft Act (“NET Act”) of 1997, was a direct reaction to growing concerns about massive copyright infringement in the digital sphere.<sup>75</sup> The NET Act further broadened the criminalization of copyright infringement by authorizing “the prosecution of individuals who willfully violated copyright laws without apparent profit objectives under felony provisions of the Copyright Act.”<sup>76</sup> The NET Act was therefore aimed at addressing the growing problem of massive online infringement by end users.<sup>77</sup> The Digital Millennium Copyright Act, enacted in 1998, marked another big step in the criminalization of copyright infringement.<sup>78</sup> This Act expanded the reach of criminal penalties for infringement-related conduct by criminalizing the use and trafficking of technologies used to circumvent access controls installed in some copyrighted works.<sup>79</sup>

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<sup>68</sup> Law of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481–82.

<sup>69</sup> *Id.*

<sup>70</sup> Hardy, *supra* note 17, at 315.

<sup>71</sup> See, e.g., Note, *supra* note 66, at 1707; Lanier Saperstein, Comment, *Copyrights, Criminal Sanctions and Economic Rents: Applying the Rent Seeking Model to the Criminal Law Formulation Process*, 87 J. CRIM. L. & CRIMINOLOGY 1470, 1480–81 (1997); Mary Jane Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 DENV. U. L. REV. 671, 674 (1994); Sound Recording Act of 1971, Pub. L. No. 92–140, 85 Stat. 391; 17 U.S.C. § 506(a).

<sup>72</sup> Saperstein, *supra* note 71, at 1480–81; Note, *supra* note 66, at 1711.

<sup>73</sup> Note, *supra* note 66, at 1710–12; Copyright Felony Act, Pub. L. No. 102–561, 106 Stat. 4233 (codified at 18 U.S.C. § 2319).

<sup>74</sup> Grimm et al., *supra* note 24, at 763.

<sup>75</sup> No Electronic Theft Act, Pub. L. No. 105–147, 111 Stat. 2678 (1997).

<sup>76</sup> Morea, *supra* note 49, at 216.

<sup>77</sup> *Id.* at 215.

<sup>78</sup> Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998).

<sup>79</sup> Hardy, *supra* note 17, at 320–22.

The criminalization trend continued with the Anti-counterfeiting Amendments Act of 2004, which criminalizes the trafficking of counterfeit and illicit labels attached to copyrighted works;<sup>80</sup> the Family Entertainment Act of 2005, which imposes criminal penalties on anyone who uses audiovisual recording devices in movie theatres;<sup>81</sup> and the Prioritizing Resources and Organization for Intellectual Property Act (“PRO-IP Act”) of 2008,<sup>82</sup> which “designates criminal copyright infringement ‘a felony,’ replacing the more ambiguous term of ‘offense,’ effectively eliminating IP misdemeanors.”<sup>83</sup>

Criminal penalties for copyright infringement have continued to increase. As recently as December 2020, the Protecting Lawful Streaming Act (“PLSA”) classified copyright infringement conducted via streaming as a felony and significantly increased the criminal penalties for such infringement to include heavy fines, imprisonment for up to five years (and up to ten years for second-time offenders), or both.<sup>84</sup> While in the first decade of the digital age companies across several industries attempted to combat infringement conducted by file-sharing technologies, in recent years the focus has shifted to infringement via streaming platforms.<sup>85</sup> The most recent legislation targets infringement in this context. Senator Thom Tillis, who introduced the legislation, stated, “[t]he shift toward streaming content online has resulted in criminal streaming services illegally distributing copyrighted material that costs the U.S. economy nearly \$30 billion every year, and discourages the production of creative content that Americans enjoy.”<sup>86</sup> The PLSA therefore aims to mitigate copyright infringement conducted via streaming by increasing the severity of the penalties for such infringement.<sup>87</sup>

This brief review of the criminal provisions that have been incorporated into copyright law reflects a clear trend of constant expansion in the criminalization of copyright infringement. Not only has criminal

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<sup>80</sup> Anti-Counterfeiting Amendments Act of 2004, Pub. L. No. 108-482, 118 Stat. 3912; *see also* Grimm et al., *supra* note 24, at 766.

<sup>81</sup> Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218; *see also* Grimm et al., *supra* note 24, at 764.

<sup>82</sup> Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256.

<sup>83</sup> Pyun, *supra* note 7, at 376–78.

<sup>84</sup> Consolidated Appropriations Act, Pub. L. No. 116–260, 134 Stat. 2175 (2020) (to be codified at 18 U.S.C. 2319C).

<sup>85</sup> *See* John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 CARDOZO L. REV. 1821, 1827–30 (2013).

<sup>86</sup> Press Release, U.S. Sen. Thom Tillis, Tillis Releases Text of Bipartisan Legislation to Fight Illegal Streaming by Criminal Organizations (Dec. 10, 2020), <https://perma.cc/9Q24-2EUB>.

<sup>87</sup> *Id.*

enforcement expanded to include all types of copyrighted works, but it has also elevated the severity of sanctions and expanded the penalties available for criminal copyright offenses. In addition, the scope of conduct subject to criminal penalties has expanded to include “complementary” activities, no longer criminalizing only the actions of the infringers themselves.<sup>88</sup>

B. *Practical Use and Effect of Criminal Copyright Enforcement in the U.S.*

Despite the ever-expanding criminal provisions of copyright law, their effectiveness is questionable, and their use remains low. Statistics reflect these trends.<sup>89</sup>

Accurately assessing the effectiveness of criminal copyright enforcement is a difficult task. In particular, the deterrent effect of criminal penalties and, in turn, their effectiveness at decreasing infringement are difficult to measure.<sup>90</sup> Nevertheless, studies conducted on the topic have indicated that criminal enforcement of copyright infringement has not had a particularly positive effect in deterring potential copyright infringers or in lowering the number of violations.<sup>91</sup> For criminal enforcement of copyright infringement to be effective as a deterrent, it must be implemented on a significant scale.<sup>92</sup> Yet, criminal enforcement of copyright laws is uncommon.<sup>93</sup> It has become increasingly difficult to target copyright infringers due to the ease with which infringers can use technology to hide their identities and prevent their detection and identification.<sup>94</sup> These difficulties lead to high costs in indicting and prosecuting copyright

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<sup>88</sup> Consolidated Appropriations Act, Pub. L. No. 116–260, 134 Stat. 2175 (2020) (to be codified at 18 U.S.C. 2319C).

<sup>89</sup> See, e.g., Kim F. Natividad, Note, *Stepping It up and Taking It to the Streets: Changing Civil & Criminal Copyright Enforcement Tactics*, 23 BERKELEY TECH. L.J. 469, 480 (2008) (citing JOHN GANTZ & JACK B. ROCHESTER, *THE PIRATES OF THE DIGITAL MILLENNIUM* 207–08 (2005)); João Pedro Quintais & Joost Poort, *The Decline of Online Piracy: How Markets - Not Enforcement - Drive Down Copyright Infringement*, 34 AM. U. INT’L L. REV. 807 *passim* (2019).

<sup>90</sup> See Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1517–18 (1974).

<sup>91</sup> See, e.g., Buccafusco & Masur, *supra* note 67; see also Quintais & Poort, *supra* note 89.

<sup>92</sup> See Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 199 (2004).

<sup>93</sup> Natividad, *supra* note 89, at 480.

<sup>94</sup> See, e.g., *infra* note 155 and accompanying text; Sharon Bar-Ziv & Niva Elkin-Koren, *Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown*, 50 CONN. L. REV. 339, 346 (2018).

infringers.<sup>95</sup> The challenges in the criminal enforcement of copyright protections in the digital age are discussed extensively in the literature.<sup>96</sup>

A review of recent statistics published by the U.S. Department of Justice and the U.S. Sentencing Commission regarding the criminal enforcement of copyright laws shows a steady decline in the number of criminal investigations into copyright infringement, the number of indictments, and the number of convictions.<sup>97</sup> Exemplifying the general decrease in the criminal enforcement of intellectual property rights, the data show that the number of new criminal charges filed for copyright- and trademark-infringement declined by around 60% between 2007 and 2012 (from 110 cases against 140 defendants in 2007 to 40 cases against 59 defendants in 2012).<sup>98</sup> Criminal convictions show enforcement has continued to decline dramatically from 2012 to 2020 (from 197 convicted offenders in 2012 to under 40 in 2020).<sup>99</sup> Another source indicates that the majority of those cases targeted trademark infringement, and that the number of criminal copyright infringement cases was a mere 10 cases or fewer annually for many of those years.<sup>100</sup> With respect to copyright alone, the annual number of cases charged seems to decrease from year to year—from 45 in 2014,<sup>101</sup> to 12 in 2017,<sup>102</sup> to only 7 cases charged in 2020.<sup>103</sup> Despite a slight increase in cases charging criminal copyright infringement in 2019, the low and decreasing overall number of cases indicates a decline in criminal prosecution for copyright infringement.<sup>104</sup>

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<sup>95</sup> See Natividad, *supra* note 89, at 470.

<sup>96</sup> See, e.g., Eldar Haber, *The Criminal Copyright Gap*, 18 STAN. TECH. L. REV. 247 *passim* (2015); Ioana Vasii & Lucian Vasii, *Criminal Copyright Infringement: Forms, Extent, and Prosecution in the United States*, 4 U. BOLOGNA L. REV. 229, 256–58 (2019).

<sup>97</sup> See U.S. DEP'T OF JUST., FY 2010 PERFORMANCE AND ACCOUNTABILITY REP. app. E, at 6.

<sup>98</sup> U.S. DEP'T OF JUST., FY 2007 PERFORMANCE AND ACCOUNTABILITY REP. app. F, at 2; U.S. DEP'T OF JUST., FY 2012 PERFORMANCE AND ACCOUNTABILITY REP. app. D, at 3.

<sup>99</sup> *Quick Facts: Copyright and Trademark Offenses*, U.S. SENT'G COMM'N (2020), <https://perma.cc/DUF8-3QQG>; *Quick Facts: Copyright and Trademark Infringement Offenses*, U.S. SENT'G COMM'N (2016), <https://perma.cc/X3MJ-886J>.

<sup>100</sup> The number of criminal copyright infringement charges (alone and without including trademark infringement cases) was under 10 in 2016, 8 in 2017, and 4 in 2018—pointing again toward a decline in the actual application of criminal enforcement measures against copyright infringement. See Vasii & Vasii, *supra* note 96, at 256–57 (citing U.S. INTELL. PROP. ENF'T COORDINATOR, ANN. INTELL. PROP. REP. TO CONG. 106 (2019); U.S. INTELL. PROP. ENF'T COORDINATOR, ANN. INTELL. PROP. REP. TO CONG. 90–91 (2018); U.S. INTELL. PROP. ENF'T COORDINATOR, 2016 U.S. INTELL. PROP. ENF'T COORDINATOR ANN. REP. ON INTELL. PROP. ENF'T 80).

<sup>101</sup> U.S. DEP'T OF JUST., PRO IP ACT ANN. REP. FY2014, at 30–31.

<sup>102</sup> U.S. INTELL. PROP. ENF'T COORDINATOR, ANN. INTELL. PROP. REP. TO CONG. 90–91 (2018).

<sup>103</sup> U.S. DEP'T OF JUST., PRO IP ACT ANN. REP. FY 2020, at 39.

<sup>104</sup> For example, the Department of Justice's reports indicate that 45 cases were charged in 2014, 36 in 2015, 12 in 2017, 4 in 2018, 17 in 2019, and only 7 cases were charged in 2020. See U.S. DEP'T OF JUST., *supra* note 101, at 30–31; U.S. DEP'T OF JUST., PRO IP ACT ANN. REP. FY 2015, at 29; U.S. INTELL. PROP. ENF'T

Moreover, there has been a decrease in the severity of the sentences for criminal infringement over the years.<sup>105</sup> Between 2011 and 2020, the average sentence decreased from roughly fourteen months of imprisonment between 2011 and 2016 to only eleven months between 2016 and 2020.<sup>106</sup> Interestingly, average sentences in the last ten years were consistently below the average minimum guidelines of the United States Sentencing Commission, which actually increased from around twenty-four months in 2011 all the way up to thirty-one months in 2020.<sup>107</sup>

Another study on the state of enforcement targeting online copyright infringement across thirteen different countries presents a noteworthy finding.<sup>108</sup> This study found that “despite the abundance of enforcement measures, their perceived effectiveness is uncertain,”<sup>109</sup> and concluded that “[c]riminal measures are less popular” than all other copyright enforcement measures.<sup>110</sup> Other studies have also pointed out that “[a]lthough the massive increase of criminal copyright legislation should have led to more enforcement, the current reality is that criminal prosecutions are scant.”<sup>111</sup> While these figures represent only a small sample size and do not present a definitive conclusion as to the effectiveness of criminal copyright enforcement, when considered in light of ever-expanding criminal legislation, they certainly raise questions about the efficacy of criminal sanctions in the copyright context, warranting further study and analysis based on additional data.

Recent legislation expanding criminal penalties for copyright infringement and related conduct also seems not to have had a major effect on copyright infringement and enforcement.

\* The NET Act: The NET Act raised significant concerns that indictments would be brought against small-scale and underage infringers; that the fair-use doctrine would become irrelevant; and that educational institutions would have to invest time to remove content that may be deemed infringing.<sup>112</sup> These concerns have not been borne out, however, as the

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COORDINATOR, *supra* note 102, at 90–91; U.S. INTELL. PROP. ENF’T COORDINATOR, ANN. INTELL. PROP. REP. TO CONG. 106 (2019); U.S. DEP’T OF JUST., PRO IP ACT ANN. REP. FY 2019, at 43; U.S. DEP’T OF JUST., PRO IP ACT ANN. REP. FY 2020, at 39.

<sup>105</sup> *Supra* note 99.

<sup>106</sup> *Supra* note 99.

<sup>107</sup> *Supra* note 99.

<sup>108</sup> Quintais & Poort, *supra* note 89, at 848–64.

<sup>109</sup> *Id.* at 863.

<sup>110</sup> *Id.*

<sup>111</sup> Haber, *supra* note 96, at 248–49.

<sup>112</sup> Goldman, *supra* note 50, at 393–96; *see also* Heneghan, *supra* note 59, at 35–39; Loren, *supra* note 42, at 861–71; Neri, *supra* note 37, at 755–57.

Department of Justice has continued to focus enforcement efforts on commercial or “systematic” infringers.<sup>113</sup> Indeed, Professor Eric Goldman argues that the Act has had no actual impact on the amount of copyright infringement.<sup>114</sup> According to Goldman, the main reason for the act’s ineffectiveness is the government’s failure to implement or enforce it in a serious manner.<sup>115</sup> Additionally, budgetary restrictions and the public’s limited knowledge about the Act have contributed to its ineffectiveness.<sup>116</sup> These circumstances, when paired with the low likelihood of detection and social norms and behaviors that facilitate copyright infringement, have led to notably low levels of public compliance with the Act.<sup>117</sup>

\* The DMCA: Another example of specific legislation that further expanded the criminalization of copyright infringement but has failed to curtail infringement in practice is the Digital Millennium Copyright Act (“DMCA”).<sup>118</sup> A report by the Electronic Frontier Foundation found the DMCA to be a threat to the freedom of speech, scientific research and advancement, the fair-use doctrine, and competition and innovation.<sup>119</sup> The report cites a collection of court cases that enumerate the negative effects that the enforcement provisions of the DMCA—both criminal and civil—have had in these areas.<sup>120</sup> As discussed below, the effects of the DMCA’s civil enforcement measures are also controversial. Yet, from a criminal law perspective, the DMCA has been described as ineffective in preventing copyright infringement, and very few criminal charges have been brought under its criminal enforcement provisions.<sup>121</sup>

\* The ProIP Act: The ProIP Act<sup>122</sup> has been heavily criticized for its clear preference of industry rights over other important social norms, which has

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<sup>113</sup> Goldman, *supra* note 50, at 392.

<sup>114</sup> *Id.* at 396–99.

<sup>115</sup> *Id.* at 399–400.

<sup>116</sup> *Id.* at 400–02.

<sup>117</sup> *Id.*

<sup>118</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 & 28 U.S.C.).

<sup>119</sup> *Unintended Consequences: Twelve Years Under the DMCA*, ELEC. FRONTIER FOUND. (Mar. 3, 2010), <https://perma.cc/G96Y-SC8Y>.

<sup>120</sup> *Id.*

<sup>121</sup> John B. Clark, Note, *Copyright Law and the Digital Millennium Copyright Act: Do the Penalties Fit the Crime?*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 373, 374 (2006); John T. Holland, Note, *Making Money Instead of Excuses: A Market-Based Alternative to the Digital Millennium Copyright Act that Protects Copyrights Without Diminishing Expression*, 7 GEO. J.L. & PUB. POL’Y 279, 292–95 (2009).

<sup>122</sup> Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110–403, 122 Stat. 4256.



led to a difficult outcome—the prosecution of conduct that society does not perceive as criminal.<sup>123</sup> Grace Pyun has argued that such legislation further deepens the gap between the public and the legislator.<sup>124</sup> These types of legislation force law enforcement officials to implement and enforce laws that strike an incorrect balance between the rights of copyright owners, on the one hand, and the rights and interests of individual citizens on the other.<sup>125</sup>

### III. Rise of Civil Enforcement Frameworks in the Digital Age

Civil copyright enforcement mechanisms have developed extensively in the last two decades, providing new frameworks to confront emerging challenges and adapting traditional remedies to the needs of the digital age. Much attention has been paid to the role of online intermediaries that may serve as gatekeepers to the digital environment, such as internet service providers and digital platforms.<sup>126</sup> Legal discourse has focused on turning these noninfringing third parties into enforcement agents and has considered the limits of their liability.<sup>127</sup> Various measures have been developed to promote deterrence and efficient redress, but it is unclear to what extent their goals have been accomplished.<sup>128</sup> Commentators have noted that “[i]n reality, copyright infringement online is a complex phenomenon to which many factors contribute[.]”<sup>129</sup> Nevertheless, civil enforcement is on the rise.<sup>130</sup> A similar trend of even greater magnitude has

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<sup>123</sup> Pyun, *supra* note 7, at 390–91.

<sup>124</sup> *Id.* at 391.

<sup>125</sup> *Id.*

<sup>126</sup> See, e.g., Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 470–71 (2020); Thomas E. Kadri, *Digital Gatekeepers*, 99 TEX. L. REV. 951, 965 (2021).

<sup>127</sup> The online intermediaries’ liability is extensively discussed in the literature. See, e.g., Giancarlo Frosio, *Mapping Online Intermediary Liability*, in THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 2, 2–33 (Giancarlo Frosio ed., 2020); see also Niva Elkin-Koren, *After Twenty Years: Revisiting Copyright Liability of Online Intermediaries*, in THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE 29, 29–51 (Susy Frankel & Daniel Gervais eds., 2014).

<sup>128</sup> See, e.g., Yu, *supra* note 3, at 4; Imke Reimers, *Can Private Copyright Protection Be Effective? Evidence from Book Publishing*, 59 J.L. & ECON. 411, 413 (2016); Brett Danaher, Michael D. Smith & Rahul Telang, *Copyright Enforcement in the Digital Age: Empirical Evidence and Policy Implications*, COMM’NS ACM 02/2017, at 68, 70; Luis Aguiar, Jörg Claussen & Christian Peukert, *Catch Me if You Can: Effectiveness and Consequences of Online Copyright Enforcement*, 29 INFO. SYS. RSCH. 656, 656–58 (2018).

<sup>129</sup> INTELL. PROP. OFF., INTERNATIONAL COMPARISON OF APPROACHES TO ONLINE COPYRIGHT INFRINGEMENT: FINAL REPORT 1 (2015).

<sup>130</sup> See *id.* at 3 (concluding that “[a] major structural difference between countries is whether enforcement is undertaken directly by agencies of the state (FR, IT, SP) or by private actors working together (NL, UK, U.S., and previously Canada)”).

been observed in the EU.<sup>131</sup> At the same time, users have voiced concerns about the chilling effect of current enforcement mechanisms on permitted uses of copyrighted materials.<sup>132</sup> Risk-averse users avoid making potentially permitted use of works due to the economic burden of disputing infringement claims and the high cost of litigation.<sup>133</sup> Consequently, criticism of the imbalances of copyright law has intensified.<sup>134</sup> At the same time, the availability of many civil enforcement efforts in the digital age offers an alternative to criminal proceedings, the use of which has steadily declined as noted above.

Two prominent frameworks demonstrate the strength of civil enforcement procedures in the digital era: notice-and-takedown mechanisms employed by automated systems and statutory damages. In addition, the recently established Copyright Claims Board within the U.S. Copyright Office provides an additional avenue for civil enforcement. Together, these mechanisms offer a powerful civil enforcement package

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<sup>131</sup> See Péter Mezei & István Harkai, *Enforcement of Copyrights over the Internet: A Review of the Recent ECJ Case Law*, 21 J. INTERNET L. 1, 23–25 (2017); Orit Fischman Afori, *Proportionality – A New Mega Standard in European Copyright Law*, 45 IIC INT'L REV. INTELL. PROP. & COMPETITION L. 889 (2014). A major step in imposing greater civil liability on online intermediaries in the EU was introduced by the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) (“CDSM Directive”). Article 17 to the CDSM Directive contains a series of obligations imposed on the “online content-sharing service providers,” including an obligation to obtain an authorization from rights holders with respect to any copyrighted work that is intended to be communicated by their services. 2019 O.J. (L 130) 119–21.

<sup>132</sup> See, e.g., Press Release, Elec. Frontier Found., Thousands Sign Petition Protesting Net Neutrality Loopholes for Copyright Enforcement (Mar. 4, 2010), <https://perma.cc/2XT5-FWZE>; *RightsCon: Upload Filters for Copyright Enforcement Take Over the World: Connecting Struggles in EU, US, and Latin America*, ELEC. FRONTIER FOUND., (June 7, 2021), <https://perma.cc/3VN4-X32V>.

<sup>133</sup> The chilling effect of copyright law is a phenomenon that has been extensively discussed. See, e.g., James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007).

<sup>134</sup> A prominent example of the outcome of the debate on copyright and other intellectual property rights enforcement is the Anti-Counterfeiting Trade Agreement (“ACTA”), adopted in October of 2011. ACTA introduced a series of mechanisms aimed at bolstering both enforcement and deterrence, yet it was criticized for its lack of transparency in the negotiation process and for its potentially severe ramifications for the integrity of the existing international intellectual property regime. See Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1, 16 (2011). ACTA ultimately did not enter into force. A similar outcry occurred in the EU following the proposed CDSM Directive. See *Europe-wide Protests over EU Copyright Reform*, DEUTSCHE WELLE (Mar. 23, 2019), <https://perma.cc/Z54X-XPKY>; Cory Doctorow, *The Worst Possible Version of the EU Copyright Directive has Sparked a German Uprising*, ELEC. FRONTIER FOUND. (Feb. 18, 2019), <https://perma.cc/MQ2A-CGU8>. Nevertheless, the CDSM Directive has been adopted by the EU Parliament, and was recently approved by the European Union Court of Justice (“EUCJ”) as consistent with fundamental rights and freedom of speech. Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297 (Apr. 26, 2022).

with a potential synergic effect that may replace the need for criminal enforcement. This Part reviews these civil frameworks below, stressing their effectiveness from the point of view of rights holders as well as criticisms raised by other stakeholders.

#### A. *Algorithmic Notice-and-Take Down Framework*

The hyper-dynamic digital environment introduced the digital information society in which a growing portion of human interactions and communications is conducted online. This thriving environment is supported by legislation that immunizes online platforms from civil liability for many harms caused by content uploaded by users.<sup>135</sup> But this safe harbor does not extend to liability for intellectual property infringement.<sup>136</sup> Accordingly, the DMCA includes a clause designed to achieve this effect.<sup>137</sup> Section 512 of the U.S. Copyright Act creates a safe harbor for some online intermediaries in cases of infringing conduct by users that occurs without the intermediary's knowledge.<sup>138</sup> This provision also establishes a notice-and-takedown mechanism for all internet intermediaries that governs the monitoring of copyrighted content.<sup>139</sup> Under these provisions, after receiving a qualified notification, the online platform must expeditiously remove or disable access to the allegedly infringing material; otherwise, the platform loses the protections of the statutory safe harbor and is exposed to possible liability.<sup>140</sup> The notice-and-takedown mechanism functions as a substitute for injunctive relief because it prevents further circulation of the allegedly infringing content, while the intermediary acts as a vehicle for enforcing copyright protections without the need for judicial intervention.<sup>141</sup> When

<sup>135</sup> 47 U.S.C. § 230.

<sup>136</sup> *Section 230 Protections*, ELEC. FRONTIER FOUND., <https://perma.cc/QR5S-DG5A>.

<sup>137</sup> 17 U.S.C. § 512.

<sup>138</sup> See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 29–32 (2d Cir. 2012). For the ramifications of this case and its extensive litigation prior to settlement, see John T. Williams & Craig W. Mandell, *Winning the Battle, but Losing the War: Why the Second Circuit's Decision in Viacom Int'l, Inc. v. YouTube, Inc. is a Landmark Victory for Internet Service Providers*, 41 AIPLA Q.J. 235, 245–61 (2013).

<sup>139</sup> *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, U.S. COPYRIGHT OFF., <https://perma.cc/VV38-SA57>.

<sup>140</sup> KEVIN J. HICKEY, CONG. RSCH. SERV., *DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA) SAFE HARBOR PROVISIONS FOR ONLINE SERVICE PROVIDERS: A LEGAL OVERVIEW* (2020), <https://perma.cc/K9RX-YC29>.

<sup>141</sup> In many European countries, a popular legal path for content monitoring is by “blocking orders,” which are injunctions usually granted against Internet Service Providers (“ISPs”), ordering them to block access to a certain website or specific source of content, or even directly ordering the removal of contents. See, e.g., *Case C-314/12, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, ECLI:EU:C:2013:781, ¶ 23 (Nov. 26, 2013). Along with the section 512 safe harbors regime in the United States, in two recent cases U.S. courts granted orders to block access to websites operated from outside the United States. Amended Permanent Injunction, *Am. Chem. Soc'y v. Sci-Hub*, No. 17-cv-0726 (E.D. Va.

Congress enacted section 512 of the Copyright Act, it was impossible to anticipate the massive growth of the internet or the importance of the notice-and-takedown mechanism to the copyright enforcement in the United States.<sup>142</sup> Debates about the effectiveness and fairness of this mechanism are ongoing, and the conflict between rights holders and users remains unabated.<sup>143</sup>

One aspect of the notice-and-takedown regime that has been discussed extensively is the mass and easy removal of allegedly copyright-infringing content, which has had a significant chilling effect on free speech.<sup>144</sup> Because intermediaries are risk-averse, they have an incentive to respond positively to all takedown requests, even if such requests may not hold up in court.<sup>145</sup> As uninvolved third parties in the dispute, intermediaries have no incentive to invest time and effort in a thorough legal assessment of requests.<sup>146</sup> The result is a massive and uncontrolled removal of content,<sup>147</sup> which is exacerbated by the absence of a countervailing “must carry” obligation to leave non-infringing content on the platforms. Therefore, the default strategy of the intermediaries is to remove or block all challenged content.<sup>148</sup> Although section 512 of the Copyright Act provides a remedy that allows users to contest improper notices through a “counter-notice” process, use

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June 23, 2017); *United King Film Distrib., Ltd. v. Does 1-10*, No. 21 Civ. 11024, 2022 WL 2473430 (S.D.N.Y. July 6, 2022).

<sup>142</sup> Jennifer M. Urban, Brianna L. Schofield & Joe Karaganis, *Takedown in Two Worlds: An Empirical Analysis*, 64 J. COPYRIGHT SOC'Y U.S.A. 483, 486–87 (2017) [hereinafter Urban et al., *An Empirical Analysis*]; Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. COPYRIGHT SOC'Y U.S.A. 371, 373–74 (2017) [hereinafter Urban et al., *Everyday Practice*].

<sup>143</sup> Urban et al., *An Empirical Analysis*, *supra* note 142, at 487.

<sup>144</sup> See, e.g., Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 1022–24 (2007); Urban et al., *Everyday Practice*, *supra* note 142, at 374, 385, 389–90; Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 8 (UC Berkeley Pub. L. Rsch. Paper No. 2755628, 2017), <https://perma.cc/KR3T-CYA6>; Daniel Etcovitch, Note, *DMCA § 512 Pain Points: Music and Technology Industry Perspectives in Juxtaposition*, 30 HARV. J.L. & TECH. 547, 559, 561, 563 (2017); Daphne Keller, *Internet Platforms: Observations on Speech, Danger, and Money* 18 (Aegis Series Paper No. 1807, 2018), <https://perma.cc/4WPW-6SR8>; Bar-Ziv & Elkin-Koren, *supra* note 94, at 359–62.

<sup>145</sup> See Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2314 (2014).

<sup>146</sup> Corynne McSherry, *Notice and Takedown Mechanisms: Risks for Freedom of Expression Online*, ELEC. FRONTIER FOUND. (Sept. 7, 2020), <https://perma.cc/D445-LK6K>.

<sup>147</sup> See, e.g., Jeffrey Cobia, Note, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J.L. SCI. & TECH. 387, 390–93 (2009) (noting abuses of current takedown practices, particularly highlighting the fact that content that does not constitute a copyright infringement is often taken down).

<sup>148</sup> Keller, *supra* note 144, at 1–3.

of the counter-notice by content uploaders has been extremely infrequent.<sup>149</sup>

New, evolving technologies in the business sector have aided the notice-and-takedown regime.<sup>150</sup> In the past few years, the use of computerized algorithmic technologies commonly referred to as artificial intelligence (“AI”) has been pervasive.<sup>151</sup> Rights holders use automated systems to monitor online platforms and send massive numbers of notices with takedown requests in a phenomenon that has been referred to as “bot enforcement.”<sup>152</sup> The intermediaries also employ AI systems to operate notice-and-takedown mechanisms because of their ability to handle large volumes of notices and to make decisions expeditiously.<sup>153</sup> The “content ID” system that YouTube applies voluntarily in the U.S., which implements content recognition technologies that actively take down uploaded content that the system identifies as infringing, is a prominent example.<sup>154</sup> The algorithmic notice-and-takedown mechanism has been effective to some extent at “cleaning” the platforms of infringing content, at least with respect to large industries such as the movie industry.<sup>155</sup> Yet, rights holders question the effectiveness of online enforcement because removed content often reappears quickly after takedown, and sophisticated users can circumvent the monitoring technologies.<sup>156</sup> Some have argued that any decrease in infringement is the result of improved business models and other market factors rather than enforcement efforts.<sup>157</sup> Nevertheless, the relative success of the automated systems in enforcing copyright in the digital environment led to their adoption as a mandatory model in the EU in 2019, and the

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<sup>149</sup> Urban et al., *Everyday Practice*, *supra* note 142, at 393–94.

<sup>150</sup> *Id.* at 374.

<sup>151</sup> See, e.g., COMM. ON TECH., EXEC. OFF. OF THE PRESIDENT, PREPARING FOR THE FUTURE OF ARTIFICIAL INTELLIGENCE 5–6 (2016), <https://perma.cc/865Y-SGJW>.

<sup>152</sup> Urban et al., *An Empirical Analysis*, *supra* note 142, at 487; Urban et al., *Everyday Practice*, *supra* note 142, at 374.

<sup>153</sup> Urban et al., *Everyday Practice*, *supra* note 142, at 379–83.

<sup>154</sup> YouTube Creators, *YouTube Content ID*, YOUTUBE (Sept. 28, 2010), <https://perma.cc/E2W6-Y2CR>.

<sup>155</sup> See, e.g., Joanne E. Gray & Nicolas P. Suzor, *Playing with Machines: Using Machine Learning to Understand Automated Copyright Enforcement at Scale*, BIG DATA & SOC’Y, Jan.–June 2020, at 1, 2, 6–7 (conducting an empirical study on the YouTube Content ID system, revealing that only 36% of videos that appear to be clearly infringing were available two weeks after they were first posted); *id.* at 7 (finding that “the primary types of content removed in this category were videos that purported to be full copies of feature films hosted on YouTube or videos that promoted links to third-party websites apparently hosting streams of full copies of feature films”); Urban et al., *Everyday Practice*, *supra* note 142, at 403 (conducting an empirical study on U.S. notice-and-takedown, concluding that “the original process set out in § 512 plays a central role in managing copyright online, and it is functioning well in some of its most basic features”).

<sup>156</sup> Gray & Suzor, *supra* note 155, at 6.

<sup>157</sup> See, e.g., Quintais & Poort, *supra* note 89, at 811; Holland, *supra* note 121, at 295.

Copyright in the Digital Single Market Directive requires online intermediaries to monitor copyright infringement proactively.<sup>158</sup> Indeed, the Directive includes an active “stay-down” obligation aimed at ensuring that there is no recurring upload of removed content.<sup>159</sup> This move in the EU is regarded as a significant step toward strengthening online copyright enforcement.<sup>160</sup> Enhanced measures of this type raise fears that rights-holder lobbies will demand changes in U.S. policy as well and advocate for the adoption of a similarly enhanced notice-and-takedown framework (“DMCA Plus”), jeopardizing the efficient and balanced enforcement regime of section 512 of the Copyright Act.<sup>161</sup>

Commentators have criticized the use of automated systems for amplifying the chilling effect of the notice-and-takedown mechanism due to their design, which blocks potentially permissible fair uses of copyrighted content.<sup>162</sup> Automated systems’ over-inclusive default settings inevitably produce false positives, systematically burdening free speech.<sup>163</sup> A YouTube transparency report, published in December 2021, reveals that over-blocking does occur, and that 60% of takedown notices issued in the first half of 2021 and disputed by users were resolved in favor of the user.<sup>164</sup> Had these users not filed disputes, the content would have been wrongly removed.<sup>165</sup> Thus, the algorithmic mechanisms currently used to detect and combat copyright

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<sup>158</sup> See Council Directive 2019/790, art. 17, 2019 O.J. (L 130) 119–21 (EU).

<sup>159</sup> See *id.* ¶ 4(c); see also Martin Husovec, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, 42 COLUM. J.L. & ARTS 53, 63–64 (2018).

<sup>160</sup> STEFAN KULK, INTERNET INTERMEDIARIES AND COPYRIGHT LAW: EU AND US PERSPECTIVES 61–62 (2019); Orit Fischman-Afori, *Online Rulers as Hybrid Bodies: The Case of Infringing Content Monitoring*, 23 U. PA. J. CONST. L. 351, 370–71 (2021).

<sup>161</sup> Urban et al., *Everyday Practice*, *supra* note 142, at 398–99; see also *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites (Part I & Part II): Hearing Before the Subcomm. on Intell. Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 205–06 (2011) (Google explaining that through the DMCA’s notice-and-takedown system Google has had to deny access to less than 1% of the millions of works Google provides access to).

<sup>162</sup> See, e.g., Taylor B. Bartholomew, Issue Brief, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 12 DUKE L. & TECH. REV. 66, 68 (2015); M.R.F. Senftleben, Christina Angelopoulos, Giancarlo Frosio, Valentina Moscon, Miquel Peguera & Ole-Andreas Rognstad, *The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform*, 40 EUR. INTELL. PROP. REV. 149, 159 (2018).

<sup>163</sup> Toni Lester & Dessislava Pachamanova, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation*, 24 UCLA ENT. L. REV. 51, 53–55 (2017).

<sup>164</sup> See YOUTUBE, *Copyright Transparency Report* 10–11 (2021), <https://perma.cc/YE5H-F6EB>.

<sup>165</sup> See Paul Keller, *YouTube Transparency Report: Overblocking is Real*, KLUWER COPYRIGHT BLOG (Dec. 9, 2021), <https://perma.cc/W6VD-5ZLM>.

infringement are imperfect,<sup>166</sup> and controversies regarding the imbalances of the copyright regime persist.

Although the notice-and-takedown mechanism offers a systematic framework for curtailing copyright infringement without the need for court intervention, it does not provide monetary relief, which rights holders may seek.<sup>167</sup> The most powerful monetary remedy is statutory damages.

### B. *Statutory Damages*

Under the current Copyright Act, at any time before a final judgment, plaintiffs may elect to seek statutory damages instead of actual damages and disgorgement of the defendant's profits.<sup>168</sup> Statutory damages are available for every type of copyright infringement.<sup>169</sup> The Act sets mandatory minimum and maximum limits for statutory damages, ranging from \$750 to \$30,000,<sup>170</sup> as amended in the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 ("Digital Theft Deterrence Act").<sup>171</sup> Damages can also be increased up to \$150,000 in the event of "willful" infringement conducted knowingly, and they can be decreased to \$200 in cases of innocent infringement (i.e., when the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright").<sup>172</sup> Thus, the infringer's mental state is decisive as to statutory damages. In addition, damages may be awarded on a per-infringement basis and multiplied by the number of infringing acts, potentially giving rise to significant monetary relief.<sup>173</sup> The amount of damages awarded is ultimately at the court's discretion, based on what the court deems just.<sup>174</sup>

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<sup>166</sup> See Niva Elkin-Koren & Maayan Perel, *Separation of Functions for AI: Restraining Speech Regulation by Online Platforms*, 24 LEWIS & CLARK L. REV. 857, 894, 896 (2020).

<sup>167</sup> Although some have noted that despite the lack of typical monetary relief, atypical monetary relief may be available by monetizing ads on an infringing video. YouTube Creators, *supra* note 154.

<sup>168</sup> See 17 U.S.C. § 504(c); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04[A] [hereinafter NIMMER].

<sup>169</sup> NIMMER, *supra* note 168, § 14.04[B][1][a].

<sup>170</sup> 17 U.S.C. § 504(c).

<sup>171</sup> Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 2, 113 Stat. 1774 (1999) (codified at 17 U.S.C. § 504(c)); NIMMER, *supra* note 168, § 14.04[B][1][b].

<sup>172</sup> 17 U.S.C. § 504(c)(2); NIMMER, *supra* note 168, § 14.04[B][1][a]–[b].

<sup>173</sup> NIMMER, *supra* note 168, § 14.04[E]; see Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy Is the Wrong*, 66 UCLA L. REV. 400, 404 (2019).

<sup>174</sup> NIMMER, *supra* note 168, § 14.04[B][1][a]. However, the defendant is entitled to a jury trial, if requested. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342 (1998).

The policy underlying the statutory damages remedy is to provide rights holders an effective enforcement tool that serves as a deterrent.<sup>175</sup> Raising the minimum and maximum damages available under the Digital Theft Deterrence Act aimed explicitly to adapt the statutory damages framework to the digital environment and strengthen deterrence in light of massive online copyright infringement. The court's discretion in awarding damages is guided by a broad range of considerations, including using statutory damages as a punitive remedy for infringement.<sup>176</sup> The availability of significant monetary damages is generally viewed as creating greater deterrence.<sup>177</sup> Commentators have observed that in most cases, courts are unmoved by requests to reduce damages based on an innocent infringer defense, and that in most cases, the awards are within the basic range for infringement.<sup>178</sup> At the same time, courts rarely grant enhanced damages for willful infringement.<sup>179</sup>

Another rationale for statutory damages is that, in many copyright cases, proving actual damages is a difficult undertaking. By contrast, statutory damages provide an alternative path for rights holders to obtain redress.<sup>180</sup> Thus, statutory damages are highly attractive to rights holders because they spare them the cost and complexity of proving actual damages, while providing both meaningful compensation and deterrence.<sup>181</sup>

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<sup>175</sup> See, e.g., *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1011 (9th Cir. 1994) (noting that one potential purpose of statutory damages under the Copyright Act is "to penalize the infringer and to deter future violations" (quoting *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1229–30 (7th Cir. 1991))); Pamela Samuelson & Ben Sheffner, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53, 58, 60 (2009) (Ben Sheffner explaining that "statutory damages are useful in deterring both the actual infringer and others from committing similar bad acts in the future").

<sup>176</sup> See NIMMER, *supra* note 168, § 14.04[B][1][a]; Samuelson & Sheffner, *supra* note 175, at 59; Pamela Samuelson, Phil Hill & Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, but for How Long?*, 60 J. COPYRIGHT SOC'Y U.S.A. 529, 548–49 (2013) (explaining that the main reason for rejecting the adoption of statutory damages schemes in many countries, including in the area of copyright law, stems from its function as a punitive measure).

<sup>177</sup> Oren Bracha & Talha Syed, *The Wrongs of Copyright's Statutory Damages*, 98 TEX. L. REV. 1219, 1236 (2020).

<sup>178</sup> NIMMER, *supra* note 168, § 14.04[B][1][a].

<sup>179</sup> Depoorter, *supra* note 173, at 407 (according to an empirical study "[p]laintiffs sought enhanced damages for willful infringement in 81 percent of all copyright disputes in the examined period, yet courts awarded enhanced damages in less than 2 percent of all cases that moved to verdict").

<sup>180</sup> Samuelson & Sheffner, *supra* note 175, at 58, 59 (Ben Sheffner explaining that there are two justifications for statutory damages—leveraging deterrence and compensating for injury in cases where it is difficult or impossible to prove actual damages).

<sup>181</sup> Depoorter, *supra* note 173, at 407, 413 (explaining that an empirical study revealed that "statutory damages claims are commonplace in virtually all areas of copyright law. Plaintiffs in copyright litigation request statutory damages in 90 percent of pleadings." (footnotes omitted)); see Pamela



The broad discretion and little guidance given to courts regarding the award of statutory damages, and the immense consequences of awarding multiplied damages in cases of online infringement, are the focus of a fierce debate. One common objection is that statutory damages generate overdeterrence because they function primarily as a punitive mechanism, with no correlation between the actual injury to rights holders and the amount of damages awarded.<sup>182</sup> Consider an example of unlicensed online file sharing: For the infringing use of twenty songs, the copyright owner may recover damages of up to \$600,000 under the basic track.<sup>183</sup> This award far exceeds what the owner would be entitled to recover in actual damages—even assuming the damages could be proven—which are generally calculated based on the licensing fees the owner could have charged for the use of those twenty songs.<sup>184</sup> This framework generates a windfall for rights holders, who are awarded damages that are disproportionate to their actual losses.<sup>185</sup> As a result, the incentive to file claims even in questionable cases has increased.<sup>186</sup> Commentators have thus argued that the availability of statutory damages heightens the chilling effect<sup>187</sup>: the specter of a significant damages award causes users to refrain from using copyrighted works in uncertain cases, even if fair use may be claimed.<sup>188</sup> To offset this chilling effect, Congress exempted typical risk-averse users such as librarians and educational institutions from liability for statutory damages, assuming they have reasonable grounds for believing that their infringing conduct

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Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 443 (2009) (observing deterring effect).

<sup>182</sup> See, e.g., Samuelson & Wheatland, *supra* note 181, at 443, 461; Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 267 (2009) (arguing that “statutory damages awarded against multi-use technologies, particularly digital technologies, for secondary liability may over-deter innovation of and investment in multi-use technologies”); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 526 (2004) (claiming that “[t]hese lawsuits illustrate that the punitive effect of even the minimum statutory damage award, when aggregated across a large number of similar acts, can grow so enormous that it becomes an unconstitutionally excessive punishment”).

<sup>183</sup> 17 U.S.C. § 504(c)(1) (twenty infringements of copyrighted songs multiplied with the cap of \$30,000 per infringement); see also NIMMER, *supra* note 168, § 14.04[E][1][a][ii]; Depoorter, *supra* note 173, at 404.

<sup>184</sup> See 17 U.S.C. § 504(d).

<sup>185</sup> See, e.g., Samuelson et al., *supra* note 176, at 530, 549; Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 355–57 (2013).

<sup>186</sup> Depoorter & Walker, *supra* note 185, at 355–57.

<sup>187</sup> Samuelson & Wheatland, *supra* note 181, at 443; Depoorter, *supra* note 173, at 408.

<sup>188</sup> Samuelson & Wheatland, *supra* note 181, at 459–60.

constitutes fair use.<sup>189</sup> Other good faith risk-averse users, however, remain exposed to statutory damages awards.

In addition, rising awards create pressure on defendants to settle claims by rights holders,<sup>190</sup> perpetuating a “settling culture” in which defendants prefer not to contest questionable claims to avoid the risks and costs of litigation.<sup>191</sup> Indeed, copyright plaintiffs allege willful infringement in the vast majority of copyright cases. Although most of these claims are rejected, they may strategically serve plaintiffs by exerting greater pressure on defendants to accept settlements.<sup>192</sup> One negative result of the settlement culture is that judicial decisions that would provide users with greater certainty regarding copyright infringement are scarce.<sup>193</sup> Another negative result is that it challenges basic principles of justice by allowing rights holders to recover—and defendants to pay—for meritless infringement claims.<sup>194</sup> For these reasons, some commentators have argued that the availability of statutory damages undermines the public interest and the rule of law.<sup>195</sup>

Debates about the justification for statutory damages and their effects on society reflect broader conflicts in copyright law, particularly in the digital age.<sup>196</sup> But the fact that this framework provides rights holders with a powerful tool for civil enforcement and deterrence is largely accepted.<sup>197</sup>

### C. Copyright Claims Board

A significant barrier to effective civil enforcement of copyright law is the high cost and lengthy process associated with filing a claim in federal

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<sup>189</sup> 17 U.S.C. § 504(c).

<sup>190</sup> Depoorter, *supra* note 173, at 402, 405–08; James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 97–102, 110 (2012).

<sup>191</sup> See Orit Fischman Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1 *passim* (2011) (discussing the “settling culture” particularly in copyright law). The settlement dynamic underlies the practice of “copyright trolling.” See Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105 *passim* (2015); see also Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1, 17 (2006).

<sup>192</sup> Depoorter, *supra* note 173, at 428–29, 440.

<sup>193</sup> Gibson, *supra* note 133, at 935–36 (discussing a similar negative effect of the “licensing culture,” leading to insufficient case-law and lack of clarification of uncertainties in copyright law).

<sup>194</sup> Bracha & Syed, *supra* note 177, at 1222.

<sup>195</sup> See Samuelson & Sheffner, *supra* note 175, at 57, 63–67; Samuelson et al., *supra* note 176, at 548–49; Barker, *supra* note 182, at 526.

<sup>196</sup> Samuelson et al., *supra* note 1, at 1176; Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 328–29 (2013).

<sup>197</sup> Samuelson & Sheffner, *supra* note 175, at 58–59.

courts.<sup>198</sup> In many cases involving online infringement, especially of rights held by individuals such as photographers and designers, the high cost of litigation prevents enforcement.<sup>199</sup> Various initiatives have been promoted to lower the costs and delays associated with civil proceedings.<sup>200</sup> One example is the recent launch of a tribunal for small copyright cases. In December 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement Act of 2020 (“CASE Act”),<sup>201</sup> which directed the U.S. Copyright Office to establish the Copyright Claims Board (“CCB”). The CCB, launched on June 16, 2022,<sup>202</sup> is a three-member tribunal with expertise in copyright matters that provides an alternative to federal courts for resolving copyright claims of up to \$30,000.<sup>203</sup> Its aim is to provide an efficient and less expensive venue for resolving copyright disputes of modest value.<sup>204</sup> An easily accessible system allows for the electronic filing of claims.<sup>205</sup> Respondents must answer within sixty days, indicating whether they wish to participate in, or to opt out of, CCB proceedings.<sup>206</sup> The advantages of participating in CCB proceedings are significant for both parties: the hearing is conducted online; discovery obligations are limited; the procedure is simple; and there is no need to hire attorneys. Parties who agree to participate in CCB proceedings are bound by their outcome, and opportunities for appeal are limited.<sup>207</sup> If the respondent opts out, however, the case may be filed in federal court. The CCB also includes a “smaller claims” track for plaintiffs seeking damages of up to \$5,000 with even more simplified procedures.<sup>208</sup> The CCB is not authorized to grant injunctions.<sup>209</sup>

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<sup>198</sup> See Ben Depoorter, *If You Build It, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process*, 33 BERKELEY TECH. L.J. 711 *passim* (2018).

<sup>199</sup> *Id.* at 712. The notice-and-takedown framework is not designed for small-scale copyright holders, see Urban et al., *Everyday Practice*, *supra* note 142, at 374.

<sup>200</sup> See, e.g., Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1009–12 (2008); NIMMER, *supra* note 168, § 16.01[B] (describing the efforts of the Copyright Office to promote a copyright small claims tribunal commencing in 2012).

<sup>201</sup> 17 U.S.C. §§ 1501–1511.

<sup>202</sup> See Shira Perlmutter, *A Conversation Between Copyright Alliance CEO Keith Kupferschmid and Register of Copyrights Shira Perlmutter About the Copyright Claims Board*, COPYRIGHT ALLIANCE (June 28, 2022), <https://perma.cc/7J5G-J8UC>.

<sup>203</sup> *About the Copyright Claims Board*, COPYRIGHT CLAIMS Bd., <https://perma.cc/KEG5-S5DD>.

<sup>204</sup> *Id.*

<sup>205</sup> *See id.*

<sup>206</sup> *See Respondent Information*, COPYRIGHT CLAIMS Bd., <https://perma.cc/YF5M-URHW>.

<sup>207</sup> *Id.*

<sup>208</sup> *See U.S. COPYRIGHT OFF., COPYRIGHT CLAIMS BOARD HANDBOOK – STARTING AN INFRINGEMENT CLAIM* 1, 5 (2022), <https://perma.cc/9WVW-L9T2>.

<sup>209</sup> *Id.* at 6.

Controversy surrounding the launch of the CCB reflects ongoing debates about imbalances in the domain of copyright. Those in favor of the CCB argue that it serves the interests of both rights holders and users.<sup>210</sup> Rights holders may use it as a fast and easily accessible remedy. The cost-effective framework may increase deterrence and reduce opportunistic copyright infringement, which flourishes in a low-enforcement environment.<sup>211</sup> Rational infringers acting in good faith have a strong incentive to consent to CCB proceedings rather than risk larger sanctions in federal court.<sup>212</sup> Users may also benefit from the new framework because it reduces the risk of using copyrighted work. Damages for small-scale use are capped at \$30,000, making it easier to take the risk of uncertain use.<sup>213</sup> Moreover, defendants' ability to contest questionable claims in CCB proceedings may reduce opportunistic behavior on the part of plaintiffs.<sup>214</sup> Finally, CCB decisions must be published, and while the CASE Act provides that CCB decisions may not be used as precedent in general litigation,<sup>215</sup> it remains to be seen whether this rule will be applied in practice.<sup>216</sup> Accordingly, the CCB framework may serve to develop and resolve uncertainties in copyright law.<sup>217</sup>

Advocates of the CCB underscore the advantages to both sides in terms of time and cost savings to resolve small copyright claims as compared to civil proceedings, possibly increasing access to justice.<sup>218</sup> By contrast, opponents stress that because defendants may elect to opt out of the CCB, it is unlikely that there will be any significant change in the level of copyright enforcement.<sup>219</sup> Opportunistic infringers who operate under the assumption that rights holders will not file claims in federal court are unlikely to agree to CCB proceedings.<sup>220</sup> In addition, some commentators posit that the CCB will encourage the filing of low-value infringement claims that would not have

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<sup>210</sup> See Perlmutter, *supra* note 202; see also Depoorter, *supra* note 198, at 721.

<sup>211</sup> Depoorter, *supra* note 198, at 721.

<sup>212</sup> NIMMER, *supra* note 168, § 16.10[C][4].

<sup>213</sup> See Perlmutter, *supra* note 202.

<sup>214</sup> Depoorter, *supra* note 198, at 721.

<sup>215</sup> 17 U.S.C. § 1507(a)(3); NIMMER, *supra* note 168, § 16.07[E][3].

<sup>216</sup> See NIMMER, *supra* note 168, § 16.10[B].

<sup>217</sup> See Fischman Afori, *supra* note 191; Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 551-53, 594, 596 (2008); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 3-4, 33-34 (2020).

<sup>218</sup> Depoorter, *supra* note 198, at 714-17.

<sup>219</sup> *Id.* at 724-27.

<sup>220</sup> NIMMER, *supra* note 168, § 16.10[C][4]. The voluntary nature of the CCB was the result of constitutional complexities regarding the right to a jury trial. See *id.* § 16.09[C].

been filed in court in the first place.<sup>221</sup> In other words, the CCB may expand abusive copyright litigation by opportunistic plaintiffs, undermining the public good.<sup>222</sup>

In addition, some commentators have raised concerns about the lack of procedural safeguards for defendants in CCB proceedings<sup>223</sup> and the fact that only rights holders can elect to use the CCB framework.<sup>224</sup> For these reasons, the CCB may not significantly reduce copyright law's chilling effect, as it offers yet another enforcement framework available to rights holders.

Because the CCB was only recently established, its effect in practice is yet unknown. However, it is another tool in rights holders' powerful civil enforcement toolkit. The potential synergic effect of the automated notice-and-takedown regime, the statutory damages schemes, and the new CCB initiative in deterring infringement in the online environment should not be underestimated.

#### IV. Reconsidering Criminal Copyright Enforcement

This Article details a few clear trends in U.S. copyright law. While the criminal penalties for copyright violations have gradually expanded in terms of both their severity and the types of conduct for which they may be imposed, criminal sanctions are hardly applied in practice. The number of criminal charges for copyright violations has steadily decreased over the last two decades.<sup>225</sup> At the same time, however, civil enforcement measures have proliferated. These trends, which may reflect the many theoretical

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<sup>221</sup> See Depoorter, *supra* note 198, at 722–25; Mitch Stoltz & Corynne McSherry, *Congress Shouldn't Turn the Copyright Office into a Copyright Court*, ELEC. FRONTIER FOUND. (Nov. 29, 2017), <https://perma.cc/VA22-YLJ9> (arguing that “knowledgeable defendants will opt out of such proceedings, while legally unsophisticated targets, including ordinary Internet users, could find themselves committed to an unfair, accelerated process handing out largely unappealable \$5,000 copyright parking tickets”); Christian Helmers, Yassine Lefouili, Brian J. Love & Luke McDonagh, *Who Needs a Copyright Small Claims Court? Evidence from the U.K.'s IP Enterprise Court*, 2018 BERKLEY TECH. L.J. (COMMENT.) 1, 5 (stressing the ill consequences of a similar tribunal for small copyright cases in the UK, concluding that “our observations suggest to us that most copyright cases brought in the IPEC-SCT would likely not have [been] brought at all if the SCT did not exist”).

<sup>222</sup> See Depoorter, *supra* note 198, at 725; Stoltz & McSherry, *supra* note 221 (fearing that “[p]roceedings under this ‘small claims’ regime could be a boon for copyright trolls who pursue thousands of low-value settlements based on dubious claims of infringement, as it would give their efforts the imprimatur of a government body”); Helmers et al., *supra* note 221, at 7 (concluding that “there is reason to believe that a U.S. small claims court would naturally see a higher rate of abuse than the IPEC-SCT”).

<sup>223</sup> Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKLEY TECH. L.J. 689, 698–703 (2018); Stoltz & McSherry, *supra* note 221.

<sup>224</sup> See Depoorter, *supra* note 198, at 731.

<sup>225</sup> See *supra* notes 97–104 and accompanying text.

inconsistencies inherent in criminalizing copyright violations, force us to reconsider whether the criminalization of copyright infringement achieves the underlying goals of copyright law, and whether criminal penalties are ever justified in this context.

Two decades of experience with expanding criminal penalties for copyright infringement suggest that these increased penalties have not had a significant deterrent effect.<sup>226</sup> The severe criminal penalties now available for copyright infringement, including fines and jail time (or both) have not had a lasting impact on the incidence of copyright infringement.<sup>227</sup> A number of factors may contribute to this disappointing result, including the lack of both systematic enforcement and imposition of criminal penalties.<sup>228</sup> Due to the significant amount of online copyright infringement, effective deterrence requires a greater investment of resources into criminal enforcement than they currently receive. It is difficult to determine the optimal allocation of resources for copyright enforcement at any given time, especially in the digital age where copyright infringement is increasingly common and dynamic. Difficulties in tracing, identifying, and locating infringers in the online sphere, who frequently use sophisticated technological to avoid detection, make criminal enforcement in the digital age much more complicated.<sup>229</sup> Moreover, budgetary constraints may limit the extent to which effective copyright enforcement can be achieved through criminal prosecution.<sup>230</sup> In contrast, the private sector may be better equipped with the resources required to enforce copyright infringement through civil frameworks.

Compounding these difficulties is the public's general failure to perceive copyright infringement as morally wrong.<sup>231</sup> Together with the low likelihood that infringers will be caught and charged, these factors generate a vicious cycle that undermines the success of criminal enforcement measures.<sup>232</sup> Moreover, criminal enforcement of copyright—especially when it targets end users and noncommercial uses—may cause significant harm to the freedom of speech and deter the public from engaging in legitimate and positive uses of creative works.<sup>233</sup> A cost-benefit analysis may thus lead to the conclusion that criminal enforcement of at least some types of copyright

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<sup>226</sup> See *supra* note 91.

<sup>227</sup> *Supra* notes 97–125.

<sup>228</sup> *Supra* notes 91–96.

<sup>229</sup> *Supra* note 94.

<sup>230</sup> See Goldman, *supra* note 50, at 399–402.

<sup>231</sup> See Moohr, *supra* note 7, at 769, 771–73.

<sup>232</sup> Goldman, *supra* note 50, at 399–402.

<sup>233</sup> Heneghan, *supra* note 59, at 29, 39.

infringement is not justified from a public-interest perspective. For these reasons, reconsidering copyright criminal enforcement seems necessary.

In reexamining the role of criminal law in the copyright realm, special attention should be paid to newly introduced business models that have significantly reduced the consumption of infringing content online. Platforms such as Netflix, YouTube, Spotify, and Apple Music have created a major change in how viewers and listeners consume copyrightable content.<sup>234</sup> The number of users of these platforms has grown significantly in recent years, resulting in higher rates of legal consumption of copyrighted content and correspondingly lower rates of infringement,<sup>235</sup> arguably easing the need for criminal enforcement measures from a public-interest perspective.

It is time to reevaluate the role of criminal penalties in the enforcement of copyright, as well as whether copyright violations should be considered criminal offenses at all. Copyright law must strike an appropriate balance between incentivizing creators and protecting users' rights. *Realpolitik* dynamics would probably maintain existing avenues for criminal enforcement of copyright alongside the emerging and increasingly powerful civil enforcement package. Yet, to balance the interests at stake, the government should impose criminal sanctions only against large-scale, commercial infringers. The PLSA seems to reflect this balance, and indeed, the industries' hope is that the PLSA will result in a significant change in the use of criminal measures against copyright infringement.<sup>236</sup> Whether it does so in practice remains to be seen.

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<sup>234</sup> See, e.g., Irene Calboli, *Legal Perspectives on the Streaming Industry: The United States*, 70 AM. J. COMPAR. L. i220, i220–21 (2022).

<sup>235</sup> The significant growth in the number of users consuming copyrighted content legally can be seen across all of the above mentioned platforms: Netflix, growing from 21.5 million users in 2011 to 223.09 million users in 2022 (despite steady increases in the service's price). Daniel Ruby, *Netflix Subscribers 2023 – How Many Subscribers Does Netflix Have?*, DEMANDSAGE (Dec. 3, 2022), <https://perma.cc/G5YH-2ZCA>. YouTube, growing from 10 million paid subscribers in 2018 to 23.6 million in 2021. Salman Aslam, *YouTube by the Numbers: Stats, Demographics & Fun Facts*, OMINCORE (Jan. 6, 2023), <https://perma.cc/3S24-3DJD>. Spotify, growing from 77 million users in 2015 to 433 million in 2022. Mansoor Iqbal, *Spotify Revenue and Usage Statistics (2023)*, BUSINESSOFAPPS (Jan. 9, 2023), <https://perma.cc/3E6Z-3QLL>. Apple Music, growing from 11 million users in 2015 to 80 million users in 2021. David Curry, *Apple Music Revenue and Usage Statistics (2023)*, BUSINESSOFAPPS (Jan. 10, 2023), <https://perma.cc/XFF2-ZLFC>. Other platforms follow this trend as well: Disney Plus, growing from 33.5 million users in 2020 to 164.2 million users in 2022, and Hulu, growing from 1 million users in 2011 to 45 million users in 2022. See Julia Stoll, *Number of Disney Plus Subscribers Worldwide from 1st Quarter 2020 to 4th Quarter 2022*, STATISTA (Nov. 9, 2022), <https://perma.cc/2NE2-KK49>; David Curry, *Hulu Revenue and Usage Statistics (2023)*, BUSINESSOFAPPS (Jan. 9, 2023), <https://perma.cc/V2DB-P6BN>.

<sup>236</sup> See, e.g., Abigail Slater & Brad Watts, *The Dawn of a New Era for Copyright Online*, REGUL. REV. (Apr. 12, 2021), <https://perma.cc/6MHF-8MW3>.

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A more balanced design may lead to greater feelings of solidarity regarding enforcement of copyright and to a deeper internalization of the norms and values underlying copyright law, which may, in turn, lead to wider compliance. Instigating such a change is no small task, and educational and explanatory measures should be part of the general enforcement effort. Such measures, which are minimally invasive, have been successful at achieving social change in many other fields and situations, and they may have an important role to play in copyright enforcement as well.<sup>237</sup>

### Conclusion

For the past two decades, copyright law has faced a growing crisis. All of the relevant stakeholders are dissatisfied with the legal regime. On the one hand, users argue that copyright law does not promote a “fair” and “balanced” regime. Rights holders, on the other hand, complain about the regime’s inefficiency. The term “copyright wars,” coined in the 2000s, describes the ongoing clash between these complex interests. Policymakers have introduced various measures to resolve this crisis. One path focuses on reexamining the exceptions and limitations to copyrights as a vehicle for promoting fairness. Another focuses on remedies as an essential and pragmatic aspect of the legal regime. Enforcement is a key factor in this latter path.

While both criminal and civil remedies exist for copyright violations, criminal enforcement has declined, while civil enforcement remedies are thriving. Rights holders today have several civil enforcement measures at their disposal to address infringement in the current digital environment. While these remedies are controversial, they nevertheless provide a powerful enforcement package with synergistic deterrent effects. In addition, the digital era has introduced new business models that promote legal consumption of copyright works. These developments, as well as underlying theoretical inconsistencies inherent in the criminalization of copyright offenses, cause us to question whether criminal enforcement of copyright is necessary or appropriate. Given the inherently pragmatic nature of rights enforcement, current trends call for a reconsideration of criminal copyright enforcement.

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<sup>237</sup> A good example of the use of educational measures to create such a change is the effectiveness of the American anti-smoking movement. See U.S. DEP’T OF HEALTH & HUMAN SERVS., SMOKING CESSATION: A REPORT OF THE SURGEON GENERAL 4 (2020), <https://perma.cc/6JRP-8JKW>.