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MODERN-DAY PIRATES: EXAMINING THE LEGAL DIFFICULTIES OF COPYRIGHT ENFORCEMENT

James L. Martherus

I. INTRODUCTION

HBO’s Game of Thrones is widely touted as the most pirated show in history, with a recent episode registering over 1.5 million downloads within 12 hours of its initial airing. With this volume of illegal downloads, content producers are justifiably concerned. The Motion Picture Association released a letter claiming “$58 billion is lost to the U.S. economy annually due to content theft.” There are those who refute this figure, but the fact that millions of files are downloaded every year is virtually indisputable. Far from indisputable, however, is how these copyright infringements should be treated. Until recently, most online piracy cases involved prosecuting those who facilitate illegal content downloads like Nap-
Lately, however, these facilitators have developed evasion measures that make it even more difficult to prosecute them.

The obvious solution is to start targeting actual infringers rather than the facilitators. However, this approach has its own set of challenges. Economically, suing individuals for copyright infringement is not nearly as effective as suing the facilitators. For each case, the IP address of the offender must be obtained, and a long, expensive trial follows. The time and expense of these cases make them unattractive to copyright holders. When copyright holders do choose to prosecute individuals, they seek extremely high statutory damages, making copyright infringement sort of like Russian roulette; either you walk away unscathed or your life is ruined.

Further difficulties arise when one considers privacy laws that make it difficult to actually catch infringers. Sometimes, when infringers download copyrighted content, their IP address is available, meaning it is possible to identify which network the infringing party used. However, newer methods of pirating content are constantly created, and some of these methods are virtually impossible to detect.

The bottom line is that neither content producers nor lawmakers have come up with an effective plan to protect copyrighted material online. This essay proposes that the current copyright system is incapable of preventing online infringement and must be restructured if it is to curb online piracy. Part 1 discusses the history of U.S. copyright law, especially as it relates to online copyright infringement. Further, we will discuss the backlash against online regulation and the “hacker ethic” that causes many of the problems in online infringement. Part 2 examines recent cases relating to pirates who download content for personal use and why the current law is unequipped to deal with these cases. Finally, part 3 proscribes a new method for enforcing copyright restrictions against “casual infringers.” This restructuring will include a new branch of the United States Copyright Office that aids in the prosecution of casual

4 See A&M Records Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
ModErn-day PiratEs

copyright infringers. As more and more of these casual infringers are caught, the penalties would be drastically reduced. Copyright infringement would bear a stricter liability, making it harder for the infringer to refute. Thus copyright infringement becomes more like a strict liability misdemeanor than a felony. We argue that this will decelerate the rate of online piracy without preventing the free flow of information.

II. HistoRy of u.S. coPyrIght Law

Although the first copyright laws established on the American continent predate the Constitution, modern copyright law in the United States stems from the copyright clause of the Constitution. “Congress shall have power . . . to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

As the copyright clause makes clear, the original goal of issuing copyrights was to promote intellectual progress. Copyrights grant content producers exclusive rights to make and sell copies of their content. Without copyrights, artists and others would not be able to make a living producing content, thus stifling innovation and growth. The clause requires that these copyrights be limited in time, though the time limit has gradually extended from 14 years after publication to 70 years after the author’s death.

Over time, the range of content covered by copyright law also became more extensive. At first, only maps, charts, and books were covered. In fact, only the rights of the first publishing were guaranteed under the copyright act of 1790, subsequent editions were subject to reproduction. Eligible content eventually extended to in-

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6 U.S. Const. art. XIII, § 1.1.
7 Copyright Act of 1790 U.S.C. 1 Statutes at Large 124.
8 Copyright Term Extension Act of 1998 U.S.C.
clude any “original works of authorship”\textsuperscript{10}, namely; literary, musical, dramatic, artistic, and other intellectual works.

In addition to expanding the breadth of content protected under copyright law, penalties for copyright infringement have increased dramatically. The Copyright act of 1790 stipulated payment of $.50 (about $13.10 in 2013 dollars\textsuperscript{11}) per page of copyrighted material found in the infringer’s possession.\textsuperscript{6} Today, copyright infringers can be charged from $200 to $300,000 for each work copied. Even in the case of “innocent infringement” (where no copyright notice is given), the infringer can be charged as much as $200,000 per work.\textsuperscript{12}

The first major change made to copyright law as a result of the Internet age was the enactment of the Copyright Felony Act. During the 80s and 90s, the computer industry boomed, creating a new platform for piracy: software. Software piracy is incredibly simple because of the intangible nature of the pirated material. Infringers can make dozens or even hundreds of copies in minutes. This quickly became a significant bane to the industry, costing upwards of $2.4 billion in revenue in 1990.\textsuperscript{13} Congress responded by passing Senate Bill 893, which protects software with criminal sanctions.\textsuperscript{14} Eventually, the bill was amended to make any sort of copyright infringement a felony if it was willful, profit-motivated, and exceeded a set number of copies.\textsuperscript{15}

The second major change came as a reaction to “hacker culture,” which promotes freedom of information online and is not motivated by any form of monetary gain. This non-monetary motivation created a major problem for lawmakers and content producers because previous copyright law required the infringer to have made a profit or to have had the intention to make a profit as a result of their in-

\begin{itemize}
\item \textsuperscript{10} 17 U.S.C. § 102
\item \textsuperscript{11} MeasuringWorth.com, http://www.measuringworth.com/uscompare/ (last visited March 10, 2015).
\item \textsuperscript{12} 17 U.S.C. § 402(d).
\item \textsuperscript{13} See Hearing on S. 893, supra note 7, at 27.
\item \textsuperscript{14} See S. 893, 102d Cong. (1992).
\item \textsuperscript{15} See Saunders, supra note 17, at 679-80.
\end{itemize}
These laws were insufficient to prosecute the new pirates unconcerned with financial gain. The problem came to a head in United States v. LaMacchia. The defendant, David LaMacchia, had set up a website encouraging others to upload copies of their software, specifically Microsoft Excel and Sim City 2000. Since LaMacchia did not seek monetary gain and was therefore exempt from the criminal copyright infringement provision, the government’s only option was to charge him with “conspiring with ‘persons unknown to violate . . . the wire fraud statute.’” The court eventually dismissed the case because that “interpretation of the wire fraud statute would serve to criminalize . . . the myriad of home computer users who succumb to the temptation to copy even a single software program for private use.” The judge himself noted the ineffectiveness of the current law and suggested that “criminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer.”

Partly as a result of this case, Congress passed the No Electronic Theft (NET) Act, closing the so-called “LaMacchia loophole” which allowed people like LaMacchia to avoid conviction by claiming no commercial gain. The NET Act made two major changes to copyright law. First, the act changed the definition of financial gain to include “receipt of anything of value, including the receipt of other copyrighted works.” Second, the act allowed for criminal liability “based on the commercial impact on the copyright owner rather than the commercial purpose of the infringer.” The bill was controversial.

16 17 U.S.C. § 506(a) (1976). Also See United States v. Cross, 816 F.2d 297, 301 (7th Cir. 1987)
18 See id. At 536.
21 See id. At 545.
23 See id.
Opponents argued that such measures opened the door for criminal cases against minor infringers.\textsuperscript{24} The penalties stipulated in the NET Act were also a source of contention, with maximum penalties of $250,000 fines and five years in jail. Many observers saw these penalties as extreme punishment for what is a relatively harmless, if irresponsible action.

The next major development in copyright enforcement came shortly after in the Digital Millennium Copyright Act (DMCA). The primary change brought about by the legislation was a ban placed on any and all technology that “is primarily designed . . . for the purpose of circumventing protection . . . that effectively protects a right of the copyright owner.”\textsuperscript{25} Further, the DMCA imposes even stiffer penalties for infringers, raising the maximum penalty for first-time offenders to $500,000 and five years in jail. Repeat offenders can be fined up to $1,000,000 and 10 years in jail.\textsuperscript{26}

The arguments against the DMCA are similar to those raised against the NET Act. One of the more interesting criticisms is the rampant misuse of the DMCA takedown notice. The DMCA protects Internet and other service providers from liability for illegal activity carried out by their users provided they comply with several conditions. One of these conditions is that the provider “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing.”\textsuperscript{27} To comply with this condition, for example, Google must remove links to sites that allegedly contain infringing material. However, Google released a statement claiming that 57 percent of all takedown notices were businesses trying to harm competitors and 37 percent of all notices were not actually “valid copyright claims.”\textsuperscript{28}

\textsuperscript{26} See 17 U.S.C.A. § 1204(a)(I-II)
\textsuperscript{27} See 17 U.S.C §512(c)(1).
Opponents would argue that this is far from the worst consequence of the DMCA.

III. OPPOSITION AND THE “HACKER ETHIC”

Those who oppose legislation that makes it easier to enforce copyrights have three basic arguments. First, opponents argue that increasingly harsh punishments for infringers will stifle free speech. Second, opponents argue that such laws jeopardize the legitimacy of the fair use principle. Finally, opponents argue that these laws violate privacy rights of individuals.

There are two main groups of people concerned about the stifling of free speech caused by laws like the DMCA: hackers and academics. The term hackers in this case does not refer to that group of individuals who use computer programs to infiltrate private networks, rather it refers to the group of individuals who adhere to what has become known as the “hacker ethic”. The hacker ethic was born at MIT during the 50s and 60s, and basically rests on the principle that access to information should be free and unlimited.29 The LaMacchia case is a perfect example of someone acting by the hacker ethic. Opponents of copyright expansion argue that when everyone has the opportunity to access software, they can make improvements that the original writers never would have developed. The free flow of information is the best way to make progress as a society. Copyright laws prevent this sort of progress by making it illegal and extremely dangerous to access this information without paying for it. The second group concerned with the stifling of free speech and progress are academics and scientists concerned about the implications for the fair use doctrine.

The fair use doctrine grants exceptions to the exclusive rights of content producers. Specifically, fair use grants copyright exception “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.” 30 For some cases, such as quoting an

author’s work in an academic paper, fair use is almost universally recognized. In many other cases, however, it is ambiguous. The Supreme Court described fair use as an affirmative defense, meaning the burden of proof is on the defendant.31

Furthermore, application of the fair use doctrine has been less than consistent.32 What this means is that researchers and academics not only face the risk of being charged with copyright infringement, but they have no way to know how a judge will define what constitutes fair use. They are guilty until proven innocent.

Further concerns are generated over how privacy rights will be addressed in copyright infringement cases. The modern conception of the right to privacy stems mainly from an article written in the Harvard Law Review in 1890.33 The authors of the article argue that greater legal protection is needed for the privacy of thoughts, emotions, personal letters, etc.34 Since then, the Supreme Court has asserted the right to privacy on many occasions.35 The right to privacy online is a fairly new topic and the courts have not ruled on whether such a right exists. This lack of explicit protection makes stronger copyright punishments even more alarming because it is unclear how much information is available to law enforcement or even third-parties. Until online privacy is better protected, stronger copyright enforcement is sort of a wild card.

IV. THE INADEQUACIES OF CURRENT LAW


34 See Id.

35 See, for example, Roe v. Wade, Lawrence v. Texas, and Griswold v. Connecticut.
The current law governing copyright infringement is inadequate to deal with copyright issues online. There are three essential problems with the current law. First, it is too expensive to prosecute individual infringers. Second, the penalties for copyright infringement are extremely high. Finally, the current law fails to stem the tide of illegal downloading.

The current system of enforcing copyrights lends itself to prosecuting the big fish, the Napsters and Pirate Bays of copyright infringement, but individuals are virtually ignored. For each individual to be prosecuted, copyright holders must gather evidence, open a case, hire a lawyer, and hope that the court rules in their favor. This process is expensive and the return on investment is small. The Recording Industry Association of America (RIAA) learned this the hard way when at one point they decided to launch a “legal blitz” designed to educate the public of copyright laws and catch a large number of individual infringers at once.36 The plan backfired with a tremendous public backlash. The en masse prosecution led to numerous embarrassments including the prosecution of a dead woman,37 prosecuting a Mac user for using software only available on Windows,38 and telling a college student to drop out of school to pay her fine.39 Adding insult to injury, the RIAA ended up spending $64 million to win $1.36 million.40 The current system is too burdensome and must be streamlined if copyright holders are to prosecute

37 Andrew Orlowski, RIAA Sues the Dead, Feb. 5 (2005) http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/.
individuals. The expense of the current system leads to the second problem with copyright laws, exorbitant penalties.

As discussed in our history of copyright law, maximum penalties have skyrocketed from $10 per page to up to $200,000 per copyrighted work. Many have criticized these penalties as excessive.41 Nowhere is this more evident than in the case of Joel Tenenbaum.42 Tenenbaum was a student at Boston University when he was accused of sharing 30 songs online. After various attempts to settle the case out of court, the case went to trial in 2009.43 Tenenbaum made several arguments, including a failed fair use defense before being convicted and ordered to pay the plaintiffs $22,500 per song, totaling $675,000. Almost a year later, Judge Gertner reduced the fine to $67,500, citing the unconstitutionality and excessive nature of the original sum.44 The judge further criticized the “potential for injustice” inherent in the Copyright Act, saying the court “urges — no, implores — Congress to amend the statute to reflect the realities of file sharing. There is something wrong with a law that routinely threatens teenagers and students with astronomical penalties for an activity whose implications they may not have fully understood. The injury to the copyright holder may be real, and even substantial, but, under the statute, the record companies do not even have to prove actual damage.”45 Unfortunately for Tenenbaum, the first circuit overturned the fine reduction during the appeals process, forcing


Tenenbaum to pay the full $675,000.\textsuperscript{46} The ruling was highly controversial, and many see the case as proof of the need for a change in copyright law dealing with online content.\textsuperscript{47} Penalties for small-scale copyright infringement are much too high.

The main argument for these high penalties is that they will serve to reduce the amount of online piracy taking place. In reality, it is difficult to gauge levels of online piracy. Most research suggests that for the period immediately following the RIAA “legal blitz”, illegal file sharing continued to increase.\textsuperscript{48} Since 2012 there has been a marked decrease in illegal file sharing, although many attribute this to the advent of services like Spotify that provide a legal alternative to downloading content.\textsuperscript{49} Streaming services like Netflix and Spotify have caused a decrease in illegal file sharing, but millions of people still use illegal methods to obtain content.

V. THE SOLUTION: Felony to Fine

Current copyright law does not provide the inexpensive, quick turnaround necessary to allow copyright holders to protect their works. The process needs to be more streamlined, less expensive, and equitable to both copyright holders and infringers. The solution is a process that functions less like a lawsuit and more like a dispute settlement. This type of system is not unprecedented. The Internet Corporation for Assigned Names and Numbers (ICANN) moderates disputes through the Uniform Domain-Name Dispute-Resolution Policy (UDRP). If an individual registers a domain name that is the same or confusingly similar to one held by a trademark owner, that

\begin{itemize}
  \item \textsuperscript{46} Sony BMG Music Entertainment v. Tenenbaum, 660 F.3d 487 – Court of Appeals, 1\textsuperscript{st} Cir. 2011.
  \item \textsuperscript{49} The NPD Group. 2012. Music file sharing declined significantly in 2012.
\end{itemize}
trademark owner can file a complaint with ICANN. ICANN then forms an administrative panel that determines whether the domain name was registered in bad faith or in violation of the trademark. If the panel rules in favor of the complainant, they award ownership of the challenged domain to the trademark owner. UDRP has been very successful, mediating over 6000 cases in its first five years.

Two notable articles have proposed just such a system. In 2004, Mark A. Lemley and R. Anthony Reese argued for a change in the copyright statute to allow copyright owners to either file a formal lawsuit or pursue a dispute resolution option.\(^5\) This option would presumably allow copyright owners to quickly settle cases where there is clear precedent and little possibility of a legal defense. Additionally, each case would have to meet a damages threshold of $25,000. This alternate system would consist of submitting evidence online and presenting it to a Copyright Office administrative judge.\(^5\) Three pieces of evidence would be necessary: proof that the plaintiff owns the copyright, proof that the work was downloadable from a specific IP address at a certain time, and proof that the IP address was assigned to the defendant at the time.\(^5\) If the defendant is unable to provide a compelling defense, Lemley and Reese suggest that they should be fined $250 per work.\(^7\) The system would also allow for non-monetary awards to the plaintiff, such as officially labeling the defendant a “copyright infringer”.\(^8\)

Six years later in 2010, Will Moseley wrote an article in the Berkeley Technology Law Journal discussing some possible improvements to the system proposed by Lemley and Reese.\(^9\) First, Moseley proposes that the reach of this dispute resolution system

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51 *Id.* at 1411-12, also at 1417-18.

52 *Id.* at 1414.

53 *Id.* at 1418.

54 *Id.* at 1420-22.

be extended from peer-to-peer networks to other content sharing methods including use of BitTorrent protocols.\textsuperscript{56} Second, Moseley sees the fixed penalty of $250 per work as ineffective. Someone who downloads a few songs worth 99 cents should not be punished more than someone who downloads a piece of software worth several hundreds of dollars. Moseley proposes that fines be based on a multiple of the retail value of the work.\textsuperscript{57} For example, if the penalty were set at 50 times the value of the content, someone who downloads 50 songs worth 99 cents apiece would pay a penalty of $2,500.

The Lemley and Reese approach and Moseley’s adjusted approach make a lot of sense. They would bring costs down for content providers, and bring damages down from their astronomical level. Moseley’s approach in particular would make copyright infringement cases move more quickly, and it is flexible enough to handle everything from inexpensive songs to high-end software. However, the inclusion of the minimum damages award is counter-productive, and I argue that it should be eliminated for two reasons. First, it eliminates the possibility of prosecuting most casual infringers. Second, it is unnecessary because copyright holders will not pursue a case if the potential damages award is “too low”.

Most casual infringers will not cross the $25,000 damages threshold unless the damages are calculated with an extremely high multiple of the retail value. Moseley suggests beginning with damages of 100 times the retail value of the infringed material.\textsuperscript{58} At this level an individual would need to download 250 songs or 17 movies within a 30-day period, much more than a casual infringer would download. In fact, the high–profile cases litigated during the RIAA’s “legal blitz” wouldn’t even qualify for this new system. Tenenbaum downloaded only 31 songs, putting his potential damages at $3,100.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{56} Id. at 340-41.
\item \textsuperscript{57} Id. at 341-42.
\item \textsuperscript{58} Id. at 342.
\end{itemize}
Jammie Thomas-Rasset downloaded only 24 songs. Obviously, the RIAA felt that these individuals were worth pursuing, despite the low volume of their infringement. Under the new system, only those who are regularly downloading large amounts of copyrighted material are eligible to be prosecuted using this system. This perpetuates an ineffective practice of prosecuting only a small segment of the pirating community. In fact, it eliminates the very segment of the population for which the system is most equipped to handle. If the damages threshold were eliminated, copyright holders would have more flexibility with which to use the new system.

Finally, the damages threshold is simply unnecessary. While the proposed system would certainly cut the costs of prosecution, there will always be a modest cost associated with enforcing a copyright claim. Copyright holders will self-enforce thresholds that seem appropriate to them. This would give the same flexibility afforded by Moseley’s damages multiplier to the process of choosing which individuals to prosecute. For example, software companies may choose to pursue those who upload 10 or more copies of their software, but a record label may wish to pursue only individuals who upload more than 50 songs. Regardless, the decision should be in the hands of the copyright owners, not the court.

To illustrate how this system might work, I now present a simple example. John Doe uploads approximately 150 songs to a file sharing website, Pirate Bay. Lawyers from the RIAA happen to be looking for copyright infringers and extract John Doe’s IP address as he uploads the songs. The lawyers gather additional evidence, including screenshots of the alleged infringement and evidence that others have been downloading the songs that Mr. Doe has uploaded. These lawyers then send an application to an administrative judge, who quickly determines whether the case is valid. If the case were valid, the administrative court would communicate with the defendant and ask for any evidence that they did not infringe the copyright. The judge would then make a quick decision, deciding, for the sake of our example, that the defendant is guilty. Assuming the current mul-

tiplier for music is 25, the defendant would be charged 25 times the value of the songs, or $3750. Part of this penalty would pay for the court’s time, but most would go to the copyright holder.

VI. POTENTIAL COUNTER-ARGUMENTS

While I believe this system would dramatically improve copyright enforcement, many people will have legitimate doubts. I attempt to address these doubts below.

One possible argument is that copyright holders have little incentive to use the proposed system if they feel they could make more money in traditional litigation. This concern is also valid; especially since the alternate resolution system is designed for cases where little to no options exist for a valid defense. This can be remedied by giving the defendant the option to choose the dispute resolution system before litigation begins. Most copyright holders would choose the alternate system in any case, since copyright cases against individuals have been known to cause serious reputational harm.51

Another possible argument against eliminating the damages threshold is that copyright holders are only interested in those who heavily abuse their copyrights. While this argument is valid for large record labels and production studios, it fails to recognize the plight of smaller labels and studios. Many independent artists are affected by copyright infringement, but their work may not be uploaded often enough to take advantage of the proposed system. Eliminating the threshold allows these smaller artists to pursue claims against their copyrights.

Overall, the proposed system is not without flaws, but many of these flaws can be remedied as they are discovered.

VII. CONCLUSION

51 See, for example, Benson, Michael. 2010. ISPs and Music in the US: The Warning was on Your Desktop. MUSIC BUSINESS JOURNAL. Berklee College of Music.
Copyright laws in the United States are woefully outdated. They were written at a time when copyright infringement meant expensive equipment and very specific intent to benefit financially from the intellectual property of others. Modern copyright infringers are much different, they infringe for wide-ranging reasons, many of which are innocuous and virtually none of which are for profit. The laws must be changed to reflect this paradigm shift. By developing a dispute resolution system that is cheap, easy, and quick, we can ensure that copyright holders have incentive to keep creating without obfuscating the original purpose of the copyright, “to promote the progress of science and useful arts”.

I believe the system proposed by Lemley and Reese, and improved by Moseley, has the potential to do just that. With a few minor changes, like eliminating the damages threshold, the proposed system could reduce online copyright infringement significantly.

62 U.S. Const. art. VIII, § 1.1.