BOOK REVIEW

INFRINGEMENT CONFLATION

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INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU. By John Tehranian.† New York, N.Y.: Oxford University Press. 2011. xxx + 289 pp. $50.00.

Following the most tumultuous decade in copyright history, John Tehranian's recent book—Infringement Nation: Copyright 2.0 and You—promises a broad-ranging account of the complexities of copyright infringement in the Internet Age. There can be little doubt that copyright infringement has exploded since Napster ushered in Web 2.0 a little more than a decade ago. On the positive side of the ledger, millions of ordinary netizens create, distribute, and share countless new and original user-generated works on a daily basis. There is also little doubt, however, that a massive volume of clearly infringing user-uploaded professional content courses through the Internet.

This Review critically analyzes Tehranian's selective account of the "infringement nation." While jammed with historical tidbits, intriguing anecdotes, and illustrations of overenforcement by copyright owners, Infringement Nation barely mentions the effects of unauthorized distribution of copyrighted works on composers, recording artists, film producers, screenwriters, novelists, or journalists. What little Infringement Nation has to say about Internet piracy centers on the risk of crushing liability that copyright law imposes on file-sharers. This distorted infringement "census" leads to misdirected policy recommendations.

After exposing the limitations of Infringement Nation's lens, this Review fills in important missing regions from the census—the content industries that have been struggling to deal with rampant unauthorized distribution of their works. With this fuller picture of the infringement landscape in mind, the Review closes by exploring the challenge of channeling consumers back into the content marketplace.

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INTRODUCTION

Following the most tumultuous decade in copyright history,[1] John Tehranian's *Infringement Nation: Copyright 2.0 and You*[2] promises a broad-ranging account of the complexities of copyright infringement in the Internet Age. Dramatic advances in content-distribution platforms in the 1990s enabled all those connected to the Internet to reach vast audiences at the touch of their keyboards or mobile devices. These innovations have greatly enhanced access to all manner of creative works with and without authorization of the copyright owner—which is the Internet's great virtue for consumers, and great challenge for creators and publishers.

Prior to the Internet, anyone seeking to reach a large audience had to go through content industry producers and intermediaries. The film, television, radio, recording, publishing, and broadcasting industries controlled distribution and acted as gatekeepers—licensing in copyrighted works and screening out unauthorized works, typically with a cautious bent. Custom and practice often boiled down to "when in doubt, leave it out."

Due to the relatively limited distribution channels (e.g., theaters, licensed broadcasters, bookstores, record stores), copyright owners could detect and ferret out unauthorized content relatively easily. Noncommercial infringement—such as home copying—was also limited for much of copyright history because of the "natural" protection afforded by the underlying media (e.g., vinyl, cellu-

1. *See generally* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 164-85 (Stanford Univ. Press rev. ed. 2003) (1994).

2. JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU (2011).

loid) in which copyrighted works were embodied.[3] Even after analog copying technologies emerged—such as photocopying machines, tape recorders, and videocassette recorders—noncommercial piracy remained controllable. Such technologies degraded the quality of reproduction, entailed significant media and reproduction costs, often necessitated greater distribution costs than authorized goods, and exposed distributors to infringement liability. Furthermore, noncommercial analog reproduction did not "scale." Photocopied books never presented a serious threat to published books. Pirated cassettes never made much of a dent in record industry revenues.[4]

Digital technology and the Internet changed all of that in the 1990s. Computers and rewritable media virtually eliminated the costs of reproducing works because bits do not require any significant tangible resources. Web 1.0—based on client-server functionality—put Internet service providers in the role of content distributors. Web 2.0—encompassing peer-to-peer, YouTube, social networking, and related technologies—put that power into the hands of netizens.[5] The positive side of this evolution is that authors, recording artists, filmmakers, bloggers, and social critics can now reach large audiences easily and instantly. The downside, however, is that pirates can do the same. Noncommercial file-sharing of MP3s has made a tremendous dent in record sales. BitTorrent[6] and cyberlockers[7] make even large digital files—such as high-definition feature films—relatively easy to find and transmit across the Internet. Advances in digital-book-reader technology have made reading text on a machine enjoyable, engaging, and more convenient than reading print media, bringing file-sharing of books into vogue.

Although the concept of "infringement" raises some definitional questions,[8] there can be little doubt that copyright infringement has exploded since Napster ushered in Web 2.0 a little more than a decade ago. On the positive side of the ledger, millions of ordinary netizens create, distribute, and share countless new and original works on a daily basis. Much of this content does not infringe copyrighted works of others, although there can be little question, based on the ease of copying and pasting and the sheer volume of such works moving across the Internet, that some "user-generated content" crosses the infringement line. There is also little doubt, however, that a massive volume of

3. *See* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 105-06 (2002).

4. *See* OFFICE OF TECH. ASSESSMENT, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 11 (1989).

5. "Netizens" are people who have taken up at least partial residence in cyberspace.

6. *See BitTorrent*, WIKIPEDIA, http://en.wikipedia.org/wiki/BitTorrent_%28protocol%29 (last visited June 13, 2012).

7. A cyberlocker is an Internet hosting service specifically designed to host user files. *See File Hosting Service*, WIKIPEDIA, http://en.wikipedia.org/wiki/File_hosting_service (last visited June 13, 2012).

8. *See* David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 263, 266.

clearly infringing "user-uploaded content"—from the latest Lady Gaga sound recording, to the film *The Matrix*, to the Harry Potter novels—courses through the Internet.

Thus, two principal infringement-related problems have emerged in the Internet Age. First, some copyright owners have sought to throttle the flow of content—including works that do not or should not be seen to cross the infringement line. Second, the vast volume of user-uploaded content of clearly infringing copies of popular sound recordings, films, television shows, and books has seriously disrupted and undermined the principal creative industries.[9]

Infringement Nation explores the ramifications of this new era for the hundreds of millions of netizens. The structure of *Infringement Nation* offers a promising framework for gauging the level and effects of infringing activity in the Internet Age. Tehranian organizes the chapters around the roles that individuals play in the creative and social processes affecting the copyright system: infringer, transformer, consumer, creator, and reformer. Could this be the book that comprehensively and forthrightly confronts the legal and policy challenges facing the copyright system in the Internet Age?

Alas, *Infringement Nation* is not that book. Any semblance of balance, comprehensiveness, or empirical rigor quickly veers off into zealous, selective accounts of one side of the tired minimalist-versus-maximalist copyright debate. While jammed with historical tidbits, intriguing anecdotes, and illustrations of overenforcement by copyright owners, *Infringement Nation* barely mentions the effects of unauthorized distribution of copyrighted works on composers, recording artists, film producers, screenwriters, novelists, or journalists. What little *Infringement Nation* has to say about Internet piracy centers on the risk of crushing liability that copyright law imposes on file-sharers. This distorted infringement "census" leads to misdirected policy recommendations.

In placing so much emphasis on the first of the two principal Internet Age infringement problems, *Infringement Nation* conflates distinct regions of the "nation" with the entire population. This Review seeks to provide a more comprehensive and balanced account of the modern infringement landscape and more fruitful directions for policy reform. Part I highlights how *Infringement Nation* distorts the infringement "census" by exaggerating justifiable concerns about squelching noninfringing user-*generated* content while ignoring the serious problems posed by rampant infringing user-*uploaded* content in the Web 2.0 era. Part II fills in important regions of the infringement nation. Building on this foundation, Part III critiques *Infringement Nation*'s policy prescriptions and sketches an alternative agenda for tailoring copyright for the Internet Age.

9. *See infra* Part II.

I. INFRINGEMENT CONFLATION

Infringement Nation divides into two principal parts: Chapters 1 through 4, which aim to describe the "State of the [Infringement] Union," and Chapter 5 and the conclusion, which offer policy prescriptions and philosophical ruminations building upon the descriptive foundation. This Part examines *Infringement Nation*'s descriptive foundation. As with any edifice, the strength of the foundation is critical to what is built on top—in this case, normative prescriptions. A solid foundation requires thorough evaluation of the terrain and careful framing. A good census of infringement patterns should ensure that all of the key societal constituents are considered and that the effects of copyright law on these communities are properly characterized. We are ultimately interested not just in copyright law on the books, but in how copyright law functions in the real world.

Infringement Nation surveys its subject through a series of lenses—from the role of individuals as infringers, transformers, consumers, and creators—in an effort to capture the social, economic, creative, and political impacts of the copyright system in the Internet Age. Unfortunately, *Infringement Nation* does not provide a particularly broad or balanced assessment of these roles. Through selective characterization, it omits important elements of society from the census. *Infringement Nation* compounds this error by misrepresenting the contours of the law on the books and in practice. The net result is infringement conflation.

A. *The Individual as Infringer*

Infringement Nation begins with the perspective of the individual as infringer. Rather than gauging the types, frequency, and impacts of copyright infringement through empirical means, Tehranian instead poses a "worst case analysis" of a day in the life of a hypothetical law professor named "Professor John."

Professor John's day appears to unfold innocently: (1) replying to twenty e-mails; (2) distributing to his Constitutional Law class copies of three newly published Internet articles analyzing a Supreme Court opinion announced hours before class; (3) doodling a rendition of an architectural work while bored at a faculty meeting; (4) reading a poem to his Law & Literature class; (5) posting five photographs on Facebook taken by a friend; (6) revealing a tattoo featuring a copyrighted work while swimming at a public pool; (7) singing "Happy Birthday to You" at a restaurant while recording it on an iPhone (and inci-

dentally capturing a copyrighted painting in the background); and (8) receiving a "zine"[10] containing fifty notes and drawings discarded in public places.[11]

By Tehranian's reckoning, Professor John is "plausibly" liable for eighty-three acts of copyright infringement, which—using a damage measure of $150,000 per work[12]—amounts to $12.45 million in potential copyright exposure. Assuming that this day is typical, Tehranian concludes that Professor John incurs $4.544 billion in potential liability every year merely by doing mundane activities. That is a shocking tally, rivaling the gross revenue of the U.S. recording industry.[13] *Infringement Nation*'s point is that modern technology and the expansion of copyright protections have "enabled ordinary Americans to become mass copyright infringers with spectacular ease," illustrating the "wide chasm separating our norms (which guide our daily activities) and our laws."[14]

Unlike millions of less scrupulous Internet users, Professor John runs up this extraordinary bill without downloading or sharing popular copyrighted sound recordings, movies, or books. When multiplied by the tens of millions of file-sharers who do, the collective annual copyright infringement tab dwarfs global gross domestic product (GDP). It likely exceeds the sum of all GDP since Caesar's reign—*on an annual basis*. According to Tehranian, copyright law has turned everyone into "grand larcenists."[15]

Can this possibly be true? Probably less so than the assertion that drivers accumulate billions of dollars of hypothetical speeding violations every day. At least in that case, the law would be violated. Tehranian seriously misleads the reader as to the scope of copyright liability. There is almost certainly an implied license to reply to e-mails with the original message appended and to post pictures on Facebook taken by friends.[16] Fair use provides leeway for educa-

10. A "zine," an abbreviation of "fanzine" or "magazine," is "most commonly a small circulation publication of original or appropriated texts and images." *Zine*, WIKIPEDIA, http://en.wikipedia.org/wiki/Zine (last visited June 13, 2012).

11. TEHRANIAN, *supra* note 2, at 2-4.

12. The Copyright Act allows copyright owners who have registered their works prior to infringement (or within a narrow grace period) to recover up to $150,000 per work in the case of willful infringement. *See* 17 U.S.C. § 412 (2006 & Supp. II 2008); *id.* § 504(c)(2) (2006 & Supp. IV 2010).

13. The Recording Industry Association of America (RIAA) reported gross revenues from all sources in 2010 of $6.85 billion. *See RIAA Year-End Shipment Statistics*, RECORDING INDUSTRY ASS'N AM., http://www.riaa.com/keystatistics.php?content_selector=research-shipment-database-overview (last visited June 13, 2012) [hereinafter *RIAA Statistics*] (subscription required).

14. *See* TEHRANIAN, *supra* note 2, at 1-2.

15. *See id.* at 93.

16. I was unable to find cases alleging copyright infringement based upon replying to and forwarding e-mails—presumably because no one would be foolish enough to bring such a case. But other cases suggest that the e-mail author would lose such a lawsuit under the implied license doctrine. *See, e.g.*, Wilchcombe v. Teevee Toons, Inc., 515 F. Supp. 2d 1297, 1299, 1304 (N.D. Ga. 2007), *aff'd*, 555 F.3d 949 (11th Cir. 2009) (holding a freelance

tors to reproduce occasional articles where "[t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission."[17] None of Professor John's activities are ones where enforcement would be even remotely likely.[18] And even if the owner were to prevail, it is unlikely that the recovery would cover litigation costs, not to mention the wasted time and social/consumer backlash. Those who send e-mails rarely register such literary works with the U.S. Copyright Office, which is a precondition for recovering statutory damages and attorneys' fees.[19] And even if someone did—perhaps as a trap—it seems unlikely that a court would award more than the minimum statutory damages amount; more likely, the court would penalize such opportunism.[20] Pursuing Professor John's other "transgressions" would similarly cost the copyright owners more than they could ex-

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musician who procured marijuana for a recording session and then spontaneously sung a hook about a "weedman" to have implicitly licensed his contribution to the song *The Weedman* in exchange for his name being listed in the album credits). Similarly, an analysis of other situations in which courts have found implied licenses suggests that tattoo artists also implicitly license public display of their works. *See, e.g.*, Effects Assocs. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990) ("A nonexclusive license may be granted orally, or may even be implied from conduct" (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03[A], at 10-36 (1989))); Oddo v. Ries, 743 F.2d 630, 634 (9th Cir. 1984) (finding that an author who prepares a manuscript based on his preexisting articles as part of his partnership duties implicitly licenses the partnership use of such articles insofar as they were incorporated in the manuscript).

17. U.S. COPYRIGHT OFFICE, CIRCULAR 21: REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS 6 (2009).

18. While "Happy Birthday to You" does continue to bring in astounding royalties despite doubts as to its protection, *see* Robert Brauneis, *Copyright and the World's Most Popular Song*, 56 J. COPYRIGHT SOC'Y U.S.A. 335, 358-60 (2009), there is no indication that the copyright owner pursues individuals, as opposed to organizations and filmmakers. *See, e.g.*, Lisa Bannon, *The Birds May Sing, but Campers Can't Unless They Pay Up*, WALL ST. J., Aug. 21, 1996, at A1 (reporting that the American Society of Composers, Authors, and Publishers (ASCAP) demanded public performance rights from the Girl Scouts for singing "Happy Birthday"). *See generally* PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2004) (exploring the copyright-clearance challenges faced by documentary filmmakers).

19. *See* 17 U.S.C. § 412 (2006 & Supp. II 2008) (providing that registration of a work, prior to infringement, constitutes a condition precedent to the right to recover statutory damages).

20. *Cf.* Righthaven LLC v. Wolf, 813 F. Supp. 2d 1265, 1273 (D. Colo. 2011) (granting summary judgment for lack of standing and ordering the plaintiff to reimburse defendant for full costs of defending the action in order to discourage the abuse of statutory remedies for copyright infringement); Parker v. Google, Inc., 422 F. Supp. 2d 492, 504 (E.D. Pa. 2006), *aff'd*, 242 F. App'x 833 (3d Cir. 2007) (dismissing copyright claims and other causes of action where plaintiff sought large damage awards based on indexing of web content); Field v. Google Inc., 412 F. Supp. 2d 1106, 1116-17 (D. Nev. 2006) (holding that author granted operator implied license to display "cached" links to web pages containing his copyrighted works and was estopped from asserting copyright infringement claim).

pect to recover. For that reason, Professor John can continue his daily routines without fear of crushing liability.

Strangely, the chapter on the "individual as infringer" entirely sidesteps the role of peer-to-peer technology in distributing popular sound recordings, films, and books without authorization. While this chapter raises the specter of excessive exposure to copyright liability for mundane activities, there is little reason to believe (or evidence to suggest) that copyright law is chilling people from replying to e-mails (with copied messages), posting photographs on Facebook taken by their friends, doodling copyrighted images, using their portable cameras, getting all manner of tattoos and fearlessly displaying them, and receiving zines. Nor do professors appear to be chilled from distributing spontaneous news articles to their classes and reciting poems, nor families and friends from singing "Happy Birthday to You." To the contrary, these activities are alive and well notwithstanding copyright's provisions.

More significantly, *Infringement Nation* overlooks the rampant transgressions affecting professional creators and the creative industries. Rather than explicate the role of individuals as infringers, Chapter 1 conflates the entirety of copyright-infringing activity with a speculative, alarmist assertion about excessive exposure of mundane activities to crushing copyright liability. This precludes any sound basis for analyzing copyright law's utilization of statutory damages as a "deterrent against numerous small, erosive violations of a copyright owner's rights."[21] Copyright law incorporates various safety valves—most notably, the requirement of registration of copyrighted works prior to infringement[22] and judicial discretion[23]—to temper the harshness of these remedies. Through this design, copyright law arguably deters violations without imposing frequent, disproportionate penalties through a form of "acoustic separation," whereby the public perceives harsher remedies than officials actually impose.[24] Whether the undesirable chilling effects of such a regime outweigh the enforcement benefits is well worth considering, but *Infringement Na-*

21. *See* H. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 137 (Comm. Print 1965) [hereinafter SUPPLEMENTARY REPORT OF THE REGISTER]; *see also* H. COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 102-03 (Comm. Print 1961) [hereinafter REPORT OF THE REGISTER] (discussing the principle of statutory damages).

22. *See* 17 U.S.C. § 412.

23. *See* REPORT OF THE REGISTER, *supra* note 21, at 105 (observing that "the danger of exorbitant awards in multiple infringement cases is more theoretical than real" and that courts should, as they did under prior law, take into account "the number of works infringed, the number of infringing acts, [and] the size of the audience reached by the infringements" among other factors in determining statutory damages; and emphasizing that "in no case should the courts be compelled, because multiple infringements are involved, to award more than they consider reasonable").

24. *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (exploring the distinction between how rules are perceived by the general public and how they are actually applied).

tion lacks the theoretical or empirical basis necessary for confronting this question.

B. *The Individual as Transformer*

Chapter 2 turns to the role of the individual as "transformer" of copyrighted works. Although individuals have always drawn upon the work of others in developing new works, the ease with which works can be manipulated, combined, and disseminated widely in the digital age thrusts the growing class of remixers into the spotlight.[25] In the wake of YouTube's meteoric rise, *Time* magazine proclaimed "You"—the individuals who "control the Information Age"—as "Person of the Year" in 2006.[26]

Infringement Nation offers little more than anecdotal information about the emerging class of transformers, the importance of the works they create, or the ramifications for the creation of underlying and derivative works of privileging transformative uses. *Infringement Nation* instead asserts that essentially all user-generated content is "accretive to progress in the arts"[27] and hence deserving of immunity from copyright liability.

Tehranian contends that the utilitarian foundation of copyright law—reflected in the Intellectual Property Clause of the Constitution ("[t]o promote the [p]rogress" of the arts)[28] and "epitomized by early cases that refused to forbid the unauthorized translation or abridgement of a copyrighted work"[29]—appropriately limits the scope of copyright protection to the literal copying of a work. In his view, promoting progress in the arts demands that subsequent creators be allowed to make "use" of copyrighted works in new works—including faithful translations and abridgments—without regard to how such accretions affect the original author's ability to appropriate a return on his or her investment. And because of what Tehranian refers to as an early wrong turn in copyright jurisprudence—Justice Story's "radical transformation"[30] of copyright from the original utilitarian conception to a natural rights orientation in *Folsom v. Marsh*[31] (the origin of the fair use doctrine)—copyright has improperly "focused more on what *was taken from* a copyrighted work than what *use was made of* the copyrighted work."[32] In Tehranian's view, just about any alteration of a work constitutes a new *use* and hence should be deemed

25. *See generally* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

26. *See* Lev Grossman, *Person of the Year: You*, TIME, Dec. 25, 2006, at 38, *available at* http://www.time.com/time/magazine/article/0,9171,1570810,00.html.

27. *See* TEHRANIAN, *supra* note 2, at 51.

28. *See* U.S. CONST. art. I, § 8, cl. 8.

29. *See* TEHRANIAN, *supra* note 2, at 16.

30. *See id*.

31. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

32. *See* TEHRANIAN, *supra* note 2, at 16.

noninfringing on the grounds that it is "utilitarian." He laments the expansion of copyright protection to translations in the Copyright Act of 1870,[33] and questions the protection of the right to prepare derivative works.[34]

Chapter 2 concludes with a selection of anecdotes—ranging from court decisions holding digital sampling to infringe the underlying sampled works, to Shepard Fairey's appropriation of an Associated Press photograph to create the Obama "Hope" poster, to Nirvana's possible borrowing from Thomas Pynchon's *Gravity's Rainbow* to compose the iconic rock anthem "Smells Like Teen Spirit." Tehranian asserts that these examples prove that "modern courts have largely eviscerated transformative use and progress in the arts from the infringement calculus."[35]

Tehranian's analysis rests on a narrow, static conception of legislative power and a peculiar understanding of the utilitarian foundation of copyright protection. As a matter of constitutional interpretation, it seems unlikely that the Founders intended to dictate the precise formulation of copyright protection.[36] Furthermore, the common-law-oriented jurisprudential philosophy of the nineteenth century supported having jurists flesh out the contours of the tersely worded copyright statute in common law fashion.[37]

That leaves the philosophical argument that affording authors the right to prepare derivative works (subject to a fair use defense) undermines progress in the arts. Harkening back to early nineteenth-century cases, Tehranian laments the recognition of authors' rights in translations and abridgments of their original works.[38] But a robust fair use doctrine affords transformers broad leeway to engage in parody, news reporting, social commentary, and various other forms of cumulative creativity. At the same time, depriving authors of rights to translations, sequels, and other slavish derivative works would substantially cut into their ability to appropriate significant aspects of the value that their creativity produces.[39] It could also lead to excessive imitation relative to truly original creative effort. There are only so many storylines for Indiana Jones, Rocky, and Jack Bauer. Society may well be better off letting George Lucas, Sylvester Stallone, and Kiefer Sutherland (along with co-creators Joel Surnow and Robert Cochran) manage those projects, thereby encouraging other creators to in-

33. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212.

34. *See* TEHRANIAN, *supra* note 2, at 32-33.

35. *See id.* at 35.

36. *See* Eldred v. Ashcroft, 537 U.S. 186, 212 (2003) ("[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.").

37. *See* Peter S. Menell, *The Mixed Heritage of Federal Intellectual Property Law and Ramifications for Statutory Interpretation*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW (Shyam Balganesh ed., forthcoming 2012).

38. *See* TEHRANIAN, *supra* note 2, at 22-25.

39. *See* Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 209-11 (1982); Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 940-66 (1999) (arguing in favor of the stability of cultural icons to benefit audiences).

vent and develop other stories and characters. There is obviously a tradeoff involved. But there are sound reasons for allocating the right to prepare nontransformative adaptations of copyrighted works to authors rather than imitators.

To explore the tradeoffs, suppose that Professor John considers leaving academia to become a novelist. This is a risky career move, as relatively few novelists succeed commercially. Under Tehranian's view, the upside potential would be that much more limited if Professor John and prospective publishers were not able to appropriate significant revenues for foreign language sales. Professor John could, of course, publish his own translations simultaneously, but that seems like a tall order—especially if he did not have a good sense of how the novel would sell. But if he waited until the book succeeded, he would likely encounter competition from unauthorized translators.

A utilitarian would want Professor John to pursue his novelist dream if the expected present value from the marketing of his books exceeded the cost to him of writing the books (inclusive of opportunity cost—such as giving up or curtailing his academic career). By reducing the upside potential, we have decreased Professor John's incentives to pursue the novelist path.

On the other side of the ledger, what would society gain from eliminating the author's right over translations? At first blush, it might appear that we would gain faster translation of economically successful books and possibly lower prices for such translations. Yet good translations require effort, and it is not obvious why anyone would put in the effort if facing potential competition from other translators. And those translations that did come about might be of relatively low quality. Any reduction in price from unauthorized translations would come directly at Professor John's expense—which might tip the balance against pursuing the novelist path in the first place. Similarly, the chaos surrounding translations of successful books would likely result in wasteful competition—what economists call rent dissipation.[40] So we wind up with potential underinvestment in translations of books that might have significant demand in foreign language markets, and possibly excessive competition to translate successful novels. Yet if a translation right existed, Professor John would be motivated to license the right to translate his book. On balance, allowing Professor John control over faithful translations seems more consistent with promoting progress in the arts.

But what about other types of derivative works, such as those using the ideas contained in a work to create another story or using digital snippets from a work in another work? Three sets of factors diminish the concerns that

40. *Cf.* Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 316 (1992) (characterizing rent dissipations as "the idea that the benefit to society of an invention is dissipated when there are redundant development efforts"); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 278 (1977) (emphasizing the problem of duplicative development).

Infringement Nation raises: copyright law's limiting doctrines, the role of licensing institutions in promoting the expressive arts, and the growing importance of "tolerated use" in the Internet Age.

1. *Limiting doctrines*

Copyright law excludes ideas, facts, and functional elements from the scope of copyright protection and affords follow-on creators a fair use privilege. As a result of the idea/expression dichotomy, creators can freely use ideas derived from copyright-protected works. When a new genre of musical expression (e.g., metal, punk, hip-hop), novel (e.g., wizards), film (e.g., intergalactic warfare), or television series (e.g., shows about nothing) takes off, other creators and producers can and do jump in. Copyright law allows wide berth for imitation of formats, genres, styles, and even plot ideas.[41] It draws the line at more detailed levels of expression, such as distinct storylines and particularized character development. The derivative work right prevents others from developing unauthorized sequels, although the fair use doctrine partially helps here. Others are free to poke fun at and comment on the original.

These doctrines have not yet fully adapted to the new age of digital sampling and collage, although the outlook is rosier than *Infringement Nation* portrays. Following Judge Leval's lead,[42] a discernible trend toward affording greater flexibility for remix artists and radical improvers has emerged.[43] This is not to suggest that the boundaries are perfectly calibrated or clearly delineated.[44] But Tehranian has not carried the burden of proving that the derivative work right should be abolished or significantly scaled back beyond what limit-

41. *See* 17 U.S.C. § 102(b) (2006); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). *See generally* R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1003-10 (2003) ("[E]ven fully 'propertized' intellectual goods will nonetheless contribute, perhaps significantly, to the growth of open information.").

42. *See generally* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (emphasizing the transformativeness of the defendant's use).

43. *See* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 715 (2011) ("[S]ince 2005 the transformative use paradigm has come overwhelmingly to dominate fair use doctrine . . . ."); *see, e.g.*, Blanch v. Koons, 467 F.3d 244, 246 (2d Cir. 2006) (affirming summary judgment of noninfringement on the grounds that use of a photograph as part of a collage constituted fair use); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 606-07 (2d Cir. 2006) (holding use of reproductions of copyrighted graphic works on ticket stubs and posters in a collage anthology to be fair use); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276-77 (11th Cir. 2001) (vacating a preliminary injunction awarded to the owners of the copyright in *Gone with the Wind* on the ground that a retelling of that story from the perspective of slaves on the plantation would likely be determined to be fair use); *cf.* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1077-83 (1997) (advocating a rethinking of copyright's fair use doctrine to favor radical improvers).

44. Dennis Karjala offers an interesting assessment. *See* Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17 (2006).

ing doctrines, as they are currently evolving, already accomplish. To the extent that Tehranian is merely advocating that courts liberalize fair use to give more weight to what *use was made* of the copyrighted work,[45] that is already happening.

2. *Licensing markets*

Infringement Nation takes little notice of the ability of licensing and licensing institutions to promote creativity.[46] Had the United States followed the path a century ago that *Infringement Nation* appears to advocate now, it might have helped the radio industry get a more rapid start, but it might also have resulted in a suboptimal infrastructure for promoting creativity in the long term. The establishment of robust and enforceable performance rights in musical compositions supported the development of collective rights organizations such as the American Society for Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) that developed efficient systems for supporting songwriters and composers.[47] These institutions played a substantial role in the flourishing of musical creativity as well as broadcasting over the past century.[48] By sharing in the value that their music created, popular songwriters could devote their full attention to writing and developing their careers.

Such institutions can also be supported through legislation. The mechanical (or "cover") license, established in 1909[49] and perpetuated in the 1976 Act,[50] has spurred tremendous cumulative creativity while at the same time returning significant revenue to songwriters. Unfortunately, this mechanism was not sufficiently flexible to fully support the burgeoning rap and hip-hop genres.[51] Alt-

45. *See* Lemley, *supra* note 43, at 1077-83.

46. *See* Paul Goldstein, *Copyright on a Clean Slate*, 48 HOUS. L. REV. 691, 692 (2011) ("Copyright law should promote copyright commerce."); Peter S. Menell & Suzanne Scotchmer, *Intellectual Property Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1473, 1500-03 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (explaining that the efficacy of intellectual property systems depends critically on the fluidity of licensing markets).

47. *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1328-35 (1996) ("ASCAP's rise paralleled the growth of radio, and later television. From its original 9 members, the membership grew to 1,000 composers in 1941, 3,000 in 1958, 17,800 composers and 4,800 publishers in 1977, and over 31,000 composers and approximately 24,000 publishers [by 1996]." (footnotes omitted)).

48. *See generally* RUSSELL SANJEK & DAVID SANJEK, PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY (1996).

49. *See* Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075-76 (repealed 1976).

50. *See* 17 U.S.C. § 115 (2006 & Supp. IV 2010).

51. The compulsory license only allows such changes as are necessary "to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work." 17 U.S.C. § 115(a)(2). Moreover, the compulsory license is poorly crafted to deal with remixes involv-

hough record labels and publishers eventually came to see that reusing back catalog provided valuable revenue streams for legacy artists and new artists alike, the transaction costs of licensing inhibited this new form of collage art.[52]

3. *Tolerated use*

The Internet provides remix artists of all types the ability to reach mass audiences without going through content industry gatekeepers. This has liberated remix artists from the clearance culture that governs traditional publishers and record labels. As a result, the latest generation of remixers has been able to develop and release their works without prior clearance. And contrary to the thrust of *Infringement Nation*, the result has not been massive litigation and crushing liability. Rather, notwithstanding legal rulings indicating that digital sampling violates copyright law,[53] which *Infringement Nation* emphasizes, copyright owners have largely stayed their hand, enabling radical remix artists such as Greg Gillis (known professionally as Girl Talk) and Danger Mouse (creator of *The Grey Album*) to release highly derivative (and transformative) works.[54] In many respects, this illustrates Tim Wu's concept of "tolerated use."[55]

Ironically, Wu's theory was in part inspired by an earlier version of Tehranian's ideas.[56] Yet *Infringement Nation* pays little attention to the role, growing importance, and ramifications of tolerated use in the Internet Age. Although the uncertainty surrounding collage art is not ideal, there is a growing reality that copyright owners will not pursue technical violations—partly due to economics (the return from such litigation is likely to be less than the cost) and partly due to the recognition that such uses actually contribute to their other revenue streams and reputation. Take, for example, the new genre of "literal music videos," in which famous music videos are recast with lyrics that narrate

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ing multiple works. *Cf.* KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 27 (2011) (quoting a journalist associated with the rap group Public Enemy estimating that it would have cost $159 in royalties per CD if publishers making claims for 100 percent of their compositions had to be paid).

52. *See* MCLEOD & DICOLA, *supra* note 51, at 28 ("By the 1990s, high costs, difficulties negotiating licenses, and outright refusals made it effectively impossible for certain kinds of music to be made legally, especially albums containing hundreds of fragments . . . ."); *id.* at 181 (suggesting the infeasibility of licensing the hundreds of songs sampled in GIRL TALK, NIGHT RIPPER (Illegal Art 2006) and GIRL TALK, FEED THE ANIMALS (Illegal Art 2008)).

53. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 795 (6th Cir. 2005); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

54. *See* MCLEOD & DICOLA, *supra* note 51, at 1-3, 147, 176-80, 232.

55. *See* Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008).

56. *See id.* at 617-18 & n.2 (citing John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543-47).

the bizarre video footage accompanying the sound recording.[57] Many of these videos go unchallenged. In some cases, the original artists even praise and promote the videos. And although some major record companies have issued takedown notices to YouTube, they have not pursued more aggressive action (such as suing for copyright infringement), and the videos typically reappear on other websites shortly after being removed from YouTube.[58]

* * *

Infringement Nation overlooks the benefits of derivative work rights for primary creative incentives and fails to adequately acknowledge the substantial berth for transformative creativity afforded by copyright law's limiting doctrines, the potentially productive role of licensing institutions, the practical realities of enforcement, and the growing extent of tolerated use.[59] As a result, *Infringement Nation* misses the inherent tradeoff that animates the derivative work right and copyright's limiting doctrines: balancing primary incentives and cumulative creativity.[60]

C. *The Individual as Consumer*

In Chapter 3, *Infringement Nation* contends that copyright law neglects the role that copyrighted works play in the personal development of consumers. *Infringement Nation* advocates reshaping copyright law to promote consumer autonomy, communication, and self-expression by, for example, allowing consumers to customize their use of copyrighted works. While integrating these interests into copyright policy analysis makes eminent sense,[61] *Infringement Nation* overlooks the many respects in which these interests are already reflected in copyright law and takes these concerns to extremes rivaling the travails of Professor John in Chapter 1. Much of Chapter 3 winds through tenuous, hyper-

57. *See Literal Music Video*, WIKIPEDIA, http://en.wikipedia.org/wiki/Literal_music_video (last visited June 13, 2012).

58. *See id.*

59. *Cf.* Wagner, *supra* note 41, at 1033 ("[T]here are a number of significant limitations on the exercise of intellectual property rights, such as market discipline, enforcement costs, and normative considerations, that temper the appropriability of rights in information.").

60. *See* Menell & Scotchmer, *supra* note 46, at 1476-78, 1499-511.

61. Tehranian builds off of several insightful scholars. *See* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003); Madhavi Sunder, *IP*^{3}, 59 STAN. L. REV. 257 (2006); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004). In more recent work, Sunder offers a fuller argument relating to copyright's effects on cultural participation. *See* MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (2012).

bolic examples and thought experiments—such as national and state flags being copyrighted,[62] millions of worshipers being denied solace and comfort due to copyright protection of prayers,[63] and HIV and AIDS spreading as a result of copyright protection for medical documents[64]—to argue that copyright law poses grave threats to consumer interests. On this basis, *Infringement Nation* advocates overturning or substantially altering indirect copyright liability and the anticircumvention provisions of the Digital Millenium Copyright Act (DMCA), and rejects calls for expanded enforcement of copyright protections.

Even if its illustrations were representative or credible, *Infringement Nation* fails to provide a balanced account of the consumer. Although initially acknowledging the consumer interest in "passive[ly] receiv[ing]" (and presumably enjoying) copyrighted content,[65] *Infringement Nation* never returns to this important dimension of the consumer. Yet many, and arguably most, consumers of copyrighted works care primarily about the quality, cost, and availability of the art. They are inspired by a riveting movie, uplifted by a catchy song, and engrossed by a good book. That is not to detract from the worthy goals of consumer autonomy, communication, and self-expression. But it does highlight the mistake of conflating these limited interests with the entirety of consumers' interests. *Infringement Nation* loses sight of the simple truth that girls (and boys) often "just want to have fun."[66]

Second, *Infringement Nation* overlooks the particular reasons for what may at first blush seem like overreaching restrictions on consumer use of copyrighted works. Congress enacted the DMCA for two principal reasons: (1) to encourage copyright owners to move their works onto the Internet notwithstanding the looming enforcement concerns at the dawn of the Internet Age; and (2) to promote the development of online resources by shielding Internet service providers from potentially crushing liability as a result of users' activities.[67] It crafted the anticircumvention and online service provider provisions to "appropriately balance[] the interests of content owners, on-line and other service providers, and *information users* in a way that will foster the continued development of electronic commerce and the growth of the Internet."[68] Several safeguards—including a "fail-safe" provision authorizing the Librarian of Congress to exempt certain users from the anticircumvention provision should it become

62. *See* TEHRANIAN, *supra* note 2, at 65-68.

63. *See id.* at 68-71.

64. *See id.* at 78-79.

65. *See id.* at 52; *see also* Hughes, *supra* note 39, at 940-66.

66. *See* CYNDI LAUPER, *Girls Just Want to Have Fun*, *on* SHE'S SO UNUSUAL (Portrait Records 1983).

67. *See* S. REP. NO. 105-190, at 8 (1998).

68. *See* H.R. REP. NO. 105-551, pt. 2, at 21 (1998) (emphasis added).

evident the statute is adversely affecting fair use of copyrighted works[69]—provide flexibility as technology evolves.[70]

In contrast to the anticonsumer downward spiral portrayed in *Infringement Nation*, consumers today have far greater access to copyrighted works and greater effective ability to customize, communicate, and express themselves using copyrighted works than ever before.[71] As with prior chapters, Chapter 3 badly mischaracterizes the law on the books and the law in practice. The first sale doctrine,[72] and the infeasibility (and undesirability) of enforcement, afford consumers tremendous leeway to customize copyrighted works, engage in all manner of communication, and build fan websites. The explosion of fan fiction[73] could not have occurred absent the relatively low incidence of copyright enforcement and the modest sanctions imposed (typically takedown requests).

This situation reflects several considerations. Contrary to *Infringement Nation*'s hyperbolic thought experiment in Chapter 1, enforcing copyright protection is often a money-losing endeavor that alienates fans. Second, copyright owners have come to see greater economic return from embracing fan engagement with their content[74] so long as it does not displace content and merchandise revenue streams. With copyright owners now in a position to profit from

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69. *See* 17 U.S.C. § 1201(a)(1)(C), (D) (2006); H.R. REP. NO. 105-551, pt. 2, at 36 ("This mechanism would . . . allow the [waiver of the anticircumvention provisions], for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.").

70. *See* Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889 (2010) (discussing how remix "vidders" can use the rulemaking process to expand their opportunities to use copyrighted works in their art); Arielle Singh, Note, *Agency Regulation in Copyright Law: Rulemaking Under the DMCA and Its Broader Implications*, 26 BERKELEY TECH. L.J. 527 (2011) (summarizing the fourth round of the triennial rulemaking process).

71. *Cf.* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 256-59 (2011) (describing nonenforcement and the effective expansion of user rights in the Internet Age).

72. *See* 17 U.S.C. § 109 (2006 & Supp. II 2008); Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 349-50 (1908). This doctrine, however, can be limited through contract with regard to digital goods. *See* Vernor v. Autodesk, Inc., 621 F.3d 1102, 1116 (9th Cir. 2010); Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1290 (2001); Christian H. Nadan, *Software Licensing in the 21st Century: Are Software "Licenses" Really Sales, and How Will the Software Industry Respond?*, 32 AIPLA Q.J. 555, 566 (2004); R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 614 (2003).

73. *See* Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1461; Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 653 (1997); Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497, 503 (2008).

74. *See, e.g.*, *StarWars.com Selects Eyespot to Help Usher in the Next 30 Years of "Star Wars" Entertainment*, PR WEB (May 24, 2007), http://www.prweb.com/releases/Star/Wars/prweb528752.htm (announcing resources and tools for fans to "express themselves through 'Star Wars'").

user-generated content on the YouTube platform,[75] market-driven waivers of rights are becoming the norm for many content owners. Creative Commons licenses enable creators to easily dedicate and locate works for remixing.[76]

This is not to say that there are not policy reforms that could improve the copyright balance among consumers, creators, and distribution-platform innovators. But policy analysis advocating consumer interests should take a balanced view of consumer interests. It should also recognize the inherent tension between affording consumers carte blanche to customize and share, and discouraging unauthorized distribution of copyrighted works. *Infringement Nation*'s limited perspective would create massive enforcement loopholes that would undermine consumers' interest in a robust ecosystem for creativity.

D. *The Individual as Creator*

Chapter 4 examines the individual's role as creator of copyrighted expression. In egalitarian fashion, *Infringement Nation* sees every member of society as a producer of content[77] and proceeds to take aim at what Tehranian perceives to be a grave imbalance in the effective availability of copyright protection: copyright formalities privilege "repeat, sophisticated, and monied rightsholders" over unsophisticated creators, as the latter often fail to obtain meaningful remedies because they fail to register their works prior to infringements.[78]

This chapter parallels the selective characterization of roles in previous chapters. Recall that Chapter 1 focused on the "individual as infringer" without addressing unauthorized file-sharing of popular sound recordings, films, and books. Chapter 3 focused on the "individual as consumer" without discussing the consumer interest in the supply of high-quality content. In Chapter 4, *Infringement Nation* focuses on the "individual as creator" without characterizing, distinguishing, or addressing a vital subset of creators: professionals. *Infringement Nation* conflates amateur and relatively undistinguished creators with the entire domain of creators. But the greatest social and economic value from the arts comes from the leading talents.[79]

While recognizing that the distinction between amateurs and professionals is not always clear, I don't understand how professional creators—who play such a central role in the creative ecosystem—would not deserve serious attention in a book about the ramifications of an "infringement nation." Most con-

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75. *See YouTube AudioID & YouTube VideoID: Block, Monetize, or Track Viewing Metrics—It's Automated, and It's Free*, YOUTUBE, http://www.youtube.com/t/contentid (last visited June 13, 2012).

76. *See* CREATIVE COMMONS, http://creativecommons.org (last visited June 13, 2012).

77. *See* TEHRANIAN, *supra* note 2, at 93.

78. *Id*. at 95.

79. *See* Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845, 854 (1981).

sumers overwhelmingly favor professionally produced creativity. Such content inspires and engages. And although every professional began his or her career as an amateur—with the possible exception of the "King of Pop"[80]—most of the social, economic, and political benefits of the copyright system writ large flow from the joy, enlightenment, and inspiration derived from those unique, talented, and hardworking individuals and collaborative teams that are able to capture a sizeable share of the public's imagination. Every generation has its standouts. It would seem central to the analysis of copyright policy for the Internet Age to consider how the changing technological, economic, and social landscape will affect the next generation's J.K. Rowlings, Tom Friedmans, Steven Spielbergs, Red Hot Chili Peppers, Eminems, and Pixars. Even though technology has lowered the costs of creation, many valuable works require substantial labor and capital investment. An ideal system would seek to promote both copyright-independent (mostly amateur) and copyright-dependent (mostly professional and some amateur) creativity.

By focusing exclusively on relatively marginal creators—such as the artist whose illustration is used on the packaging of a pharmaceutical company's new male-enhancement drug without authorization[81]—*Infringement Nation* goes off the rails entirely. We learn about the problems that Tehranian has encountered representing "small guys"—like the paparazzi who "caught Britney *in flagrante commando*"[82]—who don't get to threaten exorbitant statutory damages like the hypothetical opportunists from Chapter 1. But we learn nothing about the creators who most inspire us. The vast majority of successful authors and artists support effective enforcement of copyright protection as a means of promoting creativity.[83]

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80. Michael Jackson began performing professionally at the tender age of six years old. *See Michael Jackson*, WIKIPEDIA, http://en.wikipedia.org/wiki/Michael_Jackson (last visited June 13, 2012).

81. TEHRANIAN, *supra* note 2, at 99.

82. *Id.* at 110-14.

83. *See, e.g.*, Brief of the American Federation of Musicians of the United States & Canada et al. as Amici Curiae in Support of Petitioners at 5-8, MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), 2005 WL 189888 (arguing on behalf of leading directors, actors, and authors, that Grokster and related peer-to-peer services adversely affect creative artists); Brief of the American Society of Composers, Authors & Publishers et al. as Amici Curiae in Support of Petitioners at 5-6, *Grokster*, 545 U.S. 913 (No. 04-480), 2005 WL 239104 (arguing the same on behalf of leading songwriters); Brief of Amici Curiae National Academy of Recording Arts & Sciences et al. in Support of Petitioners at 5-7, *Grokster*, 545 U.S. 913 (No. 04-480), 2005 WL 218022 (arguing the same on behalf of leading recording artists). *But see* Brief of Amici Curiae Sovereign Artists on Behalf of Ann Wilson & Nancy Wilson (Heart) et al. in Support of Respondents at 11-12, *Grokster*, 545 U.S. 913 (2005) (No. 04-480), 2005 WL 508103 (arguing, on behalf of a small number of fledgling or faded recording artists and composers, in favor of Grokster).

A reader of *Infringement Nation* who was unfamiliar with the events of the past decade would come to believe that copyright law: (1) exposes anyone who uses e-mail or surfs the Internet to billions of dollars of potential liability for copyright infringement; (2) suffocates expression and creativity; (3) squelches personal development and identity formation; (4) undermines national identity; (5) disrupts spiritual and religious exploration; (6) tramples civil rights; (7) contributes to the spread of HIV and AIDS; and (8) subjects everyone to palpable risk of banishment and "identity execution." At the same time, the reader would learn little about unauthorized distribution of the most popular and valuable copyrighted works beyond the risk of crushing liability that copyright law imposes on all Internet users. *Infringement Nation* provides no insight into the economic determinants of content production and unauthorized distribution, which are central to promoting progress in expressive creativity. The following Part fills in some of that void.

II. ADDING DIGITAL PIRACY TO THE INFRINGEMENT CENSUS

Prior to the mid-1990s, unauthorized distribution exerted relatively little effect on the major content industries; content industry gatekeepers blocked unauthorized copies, and "natural" protections inherent in the media and manner in which content was disseminated limited reproduction and distribution of those copies that reached the public.[84] Vinyl records could not be copied easily or without substantial loss of fidelity. Films were exhibited, not distributed to the public, for much of the twentieth century. Even after the diffusion of videocassette technology in the late 1970s, home taping was time-consuming and costly.

In the space of a few years at the turn of the millennium, unauthorized distribution of copyrighted works went from a minor issue to the central issue for the sound recording industry. It is now a significant and growing concern for film and television producers and book publishers (and the many professionals creating works for distribution in these industries). By the middle of 2000, less than a year after Napster's release, its user base had likely distributed more music than the entire record industry from its inception.[85] There can be little question that the emergence and rapid deployment of peer-to-peer platforms, darknets,[86] warez sites,[87] leech sites,[88] cyberlockers,[89] and other means[90] to

84. *See* Menell, *supra* note 3, at 104-08.

85. *See* JOSEPH MENN, ALL THE RAVE: THE RISE AND FALL OF SHAWN FANNING'S NAPSTER 161 (2003) (quoting a venture capitalist's back-of-the-envelope calculation that Napster had "distributed more music than the whole record industry has since it came into existence").

86. Darknets refer to closed file-sharing networks. They are sometimes referred to as friend-to-friend networks because they only connect trusted friends. *See Darknet (File Sharing)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Darknet_(file_sharing) (last visited June 13, 2012).

distribute copyrighted content without authorization have dramatically changed the creative ecosystems.

Not all of the changes have been deleterious. As *Infringement Nation* suggests, the ability of anyone to reach a wide audience has unquestionably brought new creators to the table. But it has also diminished the ability of many professional creators (and the studios, record labels, and publishers that support them) to collect appropriate returns for their efforts and investments.

File-sharing has resulted in an extraordinary number of unauthorized downloads of copyrighted works. Various surveys show that the overwhelming majority of files available on BitTorrent—on the order of 97% to 99%—are "likely infringing."[91] Approximately a quarter of all Internet traffic involves infringing material.[92] This data, however, must be interpreted cautiously. It would be a mistake to infer that each illegal download of a copyrighted work results in a lost sale. Not every downloader would have purchased the record.[93]

With more than a decade of experience since the emergence of Web 2.0, there is a good deal of evidence on the effects of file-sharing and other new platform technologies on major content marketplaces. This Part surveys data and studies relating to sound recordings, films, and publishing content.

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87. Warez websites release unauthorized versions of content. They often seed leech sites. *See Warez*, WIKIPEDIA, http://en.wikipedia.org/wiki/Warez (last visited June 13, 2012).

88. After unauthorized content has been uploaded to a user-generated content website with an innocuous file name, leech websites provide a directory of what is contained at that location along with a link. *See generally Leech (Computing*), WIKIPEDIA, http://en.wikipedia.org/wiki/Leech_(computing) (last visited June 13, 2012).

89. *See* ENVISIONAL LTD., TECHNICAL REPORT: AN ESTIMATE OF INFRINGING USE OF THE INTERNET 15-18 (2011), *available at* http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf.

90. Digital content can also be shared through more conventional Internet functionality, such as file transfer protocol (FTP), web servers, Internet Relay Chat (IRC), and Usenet.

91. *See* Ed Felten, *Census of Files Available via BitTorrent*, FREEDOM TO TINKER (Jan. 29, 2010), https://freedom-to-tinker.com/blog/felten/census-files-available-bittorrent (sampling a random group of files available on BitTorrent and finding all of the 476 movies and television shows to be likely infringing, 141 of 148 games and software programs to be likely infringing, 144 of 145 pornography files to be likely infringing, and all of the 98 music files to be likely infringing); *see also* ROBERT LAYTON & PAUL A. WATTERS, INTERNET COMMERCE SEC. LAB., UNIV. OF BALLARAT, DETERMINING INFRINGING CONTENT ON BITTORRENT NETWORKS: ENHANCING SAMPLING AND DETECTING FAKE FILES 2, 21, 25 (2011), *available at* http://www.icsl.com.au/files/Report_August2011_final.pdf (finding that 97.2% of the most popular "real" (i.e., not faked) files on BitTorrent are copyright infringing).

92. ENVISIONAL LTD., *supra* note 89, at 2.

93. *See* Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 737 n.37 (2005) (listing studies that measure the effect of downloading on sales); Rafael Rob & Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, 49 J.L. & ECON. 29, 30 (2006) (finding in a study of college students' purchasing and downloading behavior that one downloaded album reduced music purchases by approximately one-fifth of an album).

A. *Sound Recordings*

Music industry data in conjunction with empirical research indicates that file-sharing has caused a dramatic decline in music industry revenues. After steadily rising from $7.5 billion in 1990 to $14.6 billion in 1999, sound recording sales and licensing revenues declined steeply after Napster's emergence in June 1999.[94] Napster quickly attracted twenty-five million users, and although it was shut down two years later under the pressure of copyright infringement litigation, other file-sharing services had already emerged.[95] Annual sound recording revenues fell by 53% in nominal dollars (and by nearly two-thirds in constant, inflation-adjusted dollars) between 1999 and 2010.[96] Total sound recording revenues declined by 45% in constant dollars between 1990 and 2010, despite a 35% rise in inflation-adjusted GDP and a 20% rise in population over this time period. Although digital revenues from download singles, albums, music videos, mobile (e.g., ringtones), subscription, and digital performance royalties came to represent nearly 50% of total record industry revenues by 2010, they have not come close to offsetting the decline in traditional media.[97]

Given that the most significant demographic groups historically associated with music sales—teenagers and young adults—are also prime users of the Internet, there is good reason to believe that the emergence of peer-to-peer technology in 1999 caused the sharp decline in record sales.[98] Most empirical studies indicate that much of the decline in sound recording sales can be explained by illegal file-sharing.[99]

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94. Record sales data come from the RIAA. *See RIAA Statistics*, *supra* note 13.

95. *See Napster*, WIKIPEDIA, http://en.wikipedia.org/wiki/Napster (last visited June 13, 2012).

96. *See RIAA Statistics*, *supra* note 13.

97. *See id.* In 2000, seven albums sold more than five million units and eighty-eight albums sold more than one million units. Only four albums have sold more than five million units in all years combined since 2000 and no record has exceeded the five million mark since 2004. Only thirteen albums sold more than one million units in 2010, although digital album sales have taken up a modest amount of the slack. E-mail from Joshua P. Friedlander, Vice President, Research & Strategic Analysis, Recording Indus. Ass'n of Am., to author (Sept. 13, 2011) (on file with author) (citing statistics tracked by Soundscan).

98. Several other economic and psychological factors also suggest that teenagers and young adults are more prone to seek lower-cost ways of accessing content. They tend to have lower disposable income (if any, in the case of many teenagers and college students), relatively more available time, and fewer moral qualms about self-interested behavior. *See* David Brooks, *If It Feels Right . . .*, N.Y. TIMES, Sept. 13, 2011, at A31 (discussing psychological research indicating that younger people were skeptical of objective or societal notions of morality).

99. *See* STAN J. LIEBOWITZ, THE METRIC IS THE MESSAGE: HOW MUCH OF THE DECLINE IN SOUND RECORDING SALES IS DUE TO FILE-SHARING? 9 (2011), *available at* http://jindal.utdallas.edu/files/filesharing-metrics-11-2.pdf (reviewing the major studies to date). The one study to contradict these findings, Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File-Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007), has been shown to have serious empirical flaws. *See* STAN J. LIEBOWITZ, THE KEY INSTRUMENT

The implications of this decline are complicated to gauge. Although the fall in revenue has reduced the investment by record labels in existing and new acts, the costs of recording, promoting, and distributing records have substantially fallen over the past dozen years as a result of technological advances. Furthermore, file-sharing might spur other revenue streams for artists, such as ticket and merchandise sales. Based on music sales, radio airplay, and an index of critics' rankings of top sound recordings, Joel Waldfogel finds that the quality of music has not declined since Napster's emergence.[100] This would indicate that although the industry may have been substantially altered by file-sharing, progress in the arts has not been adversely affected. But as Waldfogel notes, it is possible that absent rampant file-sharing, music quality would have increased substantially during the past dozen years as a result of reductions in recording, promotion, and distribution costs. Furthermore, it is not at all clear that this finding carries over to other creative industries, such as motion pictures, that entail much higher investment.

B. *Motion Pictures*

The film industry was not immediately affected by the first wave of peer-to-peer systems because these protocols and Internet-bandwidth limitations at the time did not allow easy sharing of the large files associated with motion pictures. That changed with the advent of BitTorrent (and other swarming file-sharing protocols) and the build-out of broadband capacity. File-sharing of feature-length films became feasible for a growing portion of Internet users by 2006 and has exploded since that time. It is now estimated that BitTorrent represents 43% to 70% of all Internet traffic (depending on location) and that a hundred million people use BitTorrent for sharing files.[101] BitTorrent consumes more network bandwidth than Netflix and Hulu combined.[102] At any given moment, BitTorrent has more active users than YouTube and Facebook combined.[103] Much of this usage raises no copyright infringement issues. For example, copyright owners—such as video game vendors, broadcasters, and social networking sites—use BitTorrent for all manner of file transfers. Nonetheless, BitTorrent and related protocols have enabled Internet users to make

IN THE OBERHOLZER-GEE AND STRUMPF FILE-SHARING PAPER IS DEFECTIVE 1 (2010), *available at* http://jindal.utdallas.edu/files/laugh-09-03.pdf.

100. Joel Waldfogel, *Copyright Protection, Technological Change, and the Quality of New Products: Evidence from Recorded Music Since Napster* (Nat'l Bureau of Econ. Research, Working Paper No. 17,503, 2011), *available at* http://www.nber.org/papers/w17503. *But see* JARON LANIER, YOU ARE NOT A GADGET (2010) (criticizing the "hive mind" of Web 2.0 for retarding progress by glorifying the collective at the expense of the individual and destroying opportunities for the middle class to finance content creation).

101. *BitTorrent*, *supra* note 6.

102. *See id.*

103. *Id.*

the leap from sharing sound recordings to sharing high-definition, feature-length motion pictures.

Notwithstanding these patterns, total box office gross revenues have grown modestly from $9.47 billion in 2000 to $10.47 billion in 2010.[104] Home video product sales (DVD and now Blu-Ray), the largest film industry revenue source, have fallen nearly 40% from $18.8 billion in 2005 to $11.0 billion in 2010.[105] This likely reflects both Internet piracy and the emergence of authorized streaming sites, such as Netflix, Amazon, and Hulu.

Motion picture studios maintain substantial control of their products during the theatrical release window. Nonetheless, leakage of a film onto the Internet prior to or during theatrical release can disrupt this important revenue stream, as occurred with *The Hurt Locker*.[106] Once films reach the home product market, Internet piracy becomes very difficult to prevent. Studios can limit the damage, however, by putting their films into legitimate streaming channels more quickly and charging lower prices, although both of these changes reduce their ability to appropriate a return on their investment. Independent films, many of which go directly to home video and streaming channels, are especially susceptible to Internet piracy.[107]

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104. *US Movie Market Summary 1995 to 2012*, NUMBERS, http://www.the-numbers.com/market (last visited June 13, 2012) (converted to 2010 dollars using a GDP deflator).

105. E-mail from Bruce Nash, Nash Info. Servs., LLC, to author (Oct. 10, 2011) (on file with author) (converted to 2010 dollars using a GDP deflator); *see also* Janko Roettgers, *The Death of the Korean DVD Industry: A Sign of Things to Come in the U.S.?*, GIGAOM (Sept. 3, 2008, 2:49 PM), http://gigaom.com/video/the-death-of-the-korean-dvd-industry-a-sign-of-things-to-come-in-the-us (attributing a drop in South Korean DVD sales from $673 million in 2002 to $285 million in 2008 to "rampant piracy" and reporting a survey finding that half of Korea's Internet users download movies illegally, typically one a week).

106. *See* Eriq Gardner, *"Hurt Locker" Lawsuit Target Pirates*, HOLLYWOOD REP. (Oct. 14, 2010, 3:08 AM), http://www.hollywoodreporter.com/news/hurt-locker-lawsuit-target-pirates-23474 (noting that *The Hurt Locker* brought in only $16 million at the domestic box office, despite garnering many awards, including the Academy Award for best picture). *The Hurt Locker* might not have fared so poorly and been so heavily downloaded had the DVD been available following its Academy Award nominations. According to the Motion Picture Association of America (MPAA), the 2010 Academy Award-nominated film *127 Hours* also experienced extensive illegal downloading. *See* MOTION PICTURE ASS'N OF AM., THE COST OF CONTENT THEFT BY THE NUMBERS (2011), *available at* http://www.mpaa.org/Resources/8c33fb87-1ceb-456f-9a6e-f897759b9b44.pdf (estimating that 6.6 million illegal downloads of the film occurred through August 2011, rivaling the 9.4 million theatrical ticket sales).

107. *See* Schuyler Velasco, *Pop-Up Piracy: Indie Filmmaker Speaks Out*, BACK STAGE (July 26, 2010), http://www.backstage.com/bso/content_display/news-and-features/news/e3i172dfa7ecfd6ae96559231d9e2c27b2e; *see also Dirty Money*, POPUPPIRATES, http://popuppirates.com (last visited June 13, 2012) (describing the plight of the independently released 2009 film *And Then Came Lola*, which became available through more than 50,000 unauthorized links, online streams, and cyberlocker websites, many of which generated money for the uploaders).

The high cost of film production makes the film industry particularly vulnerable to piracy.[108] Illegal downloading has contributed to pressure upon producers to pursue product integration to fund their projects,[109] which distorts the types of works pursued and the artistic independence of the directors.

C. *Publishing*

Until the arrival of compelling e-book (tablet) technology just a few years ago, consumers were not drawn to digital books, and hence piracy did not present much of a problem. The book publishing industry is seeing both greater opportunities from the opening of e-book markets and greater risk. For example, within days of its release, fans had "shared" more than 100,000 copies of Dan Brown's latest novel, *The Lost Symbol*, on Rapidshare, BitTorrent, and other file-sharing sites.[110]

Although newspapers have more readers than ever, many have folded or are on the verge of collapse because so few readers pay for news reporting, and advertisers have gravitated to other media.[111] This is not necessarily a piracy problem, but it reflects ways in which the free flow of information can impair the production of news, investigative reporting, and news analysis. The decline of the Fourth Estate poses substantial societal risks and threatens to undermine the freedom of the press at a profound level—by undermining its economic sustainability.

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108. *Cf.* WILLIAM J. BAUMOL & WILLAM G. BOWEN, PERFORMING ARTS: THE ECONOMIC DILEMMA (1966) (explaining that the performing arts suffer from a productivity lag relative to other sectors of the economy due to their high labor intensivity and the more limited ways in which technological improvements can reduce unit costs).

109. *See* SCOTT DONATON, MADISON AND VINE: WHY THE ENTERTAINMENT AND ADVERTISING INDUSTRIES MUST CONVERGE TO SURVIVE (2005). *See generally* JEFFREY C. ULIN, THE BUSINESS OF MEDIA DISTRIBUTION: MONETIZING FILM, TV AND VIDEO CONTENT IN AN ONLINE WORLD (2010).

110. *See* Matt Frisch, *Digital Piracy Hits the E-book Industry*, CNN (Jan. 1, 2010), http://articles.cnn.com/2010-01-01/tech/ebook.piracy_1_e-books-digital-piracy-publishing-industry?_s=PM:TECH. *See generally* Motoko Rich, *Print Books Are Target of Pirates on the Web*, N.Y. TIMES, May 12, 2009, at B1 (describing the rise of e-book piracy).

111. *See* Brad A. Greenberg, *The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry—and Why Congress Should Promote It*, 59 UCLA L. REV. 414, 423 (2011) (citing a Pew Research Center Project for Excellence in Journalism report finding that "fewer than half of newspaper executives surveyed were confident their operations would survive another decade without substantial new sources of revenue [and n]early a third thought judgment day would occur within the next five years"); Walter Isaachson, *How to Save Your Newspaper*, TIME (Feb. 5, 2009), http://www.time.com/time/magazine/article/0,9171,1877402,00.html ("During the past few months, the crisis in journalism has reached meltdown proportions. It is now possible to contemplate a time when some major cities will no longer have a newspaper and when magazines and network-news operations will employ no more than a handful of reporters.").

III. RETHINKING COPYRIGHT POLICY FOR THE INTERNET AGE

With this fuller picture of the infringement landscape in mind, we are in a better position to assess *Infringement Nation*'s policy recommendations. Tehranian proposes to restore balance along three dimensions: users and creators; sophisticated and unsophisticated parties; and transformers and creators. Compared to its scathing critique of the copyright system in the first four chapters, *Infringement Nation*'s prescriptions tend toward the tepid end of the reform spectrum. While some of the recommendations offer modest improvements, several would exacerbate problems of the Internet Age. But most fundamentally, *Infringement Nation* sidesteps perhaps the most pronounced policy problem of the Internet Age: rampant unauthorized distribution of professionally created, copyrighted works. After reviewing *Infringement Nation*'s policy prescriptions, I will explore this challenge.

A. *Rebalancing Users and Creators*

As a means of addressing "copyright overreach," *Infringement Nation* advocates a series of reforms aimed at discouraging unwarranted and abusive measures that chill speech and cumulative creativity: lowering the threshold for obtaining sanctions for improper takedown notices; equalizing the awarding of attorneys' fees for plaintiffs and defendants; creating a cause of action for false copyright ownership; and establishing a true innocent-infringer defense. Although these proposals make good sense, *Infringement Nation* does not make a particularly compelling empirical case for their enactment and only addresses one side of the equation. *Infringement Nation* relies principally upon the *Lenz* case,[112] in which Universal Music Group improperly requested the takedown of a twenty-nine-second video of a toddler boogying to Prince's *Let's Go Crazy*.[113] This anecdote does not prove much beyond the shortsightedness of Prince and his record label.

Although an early study of the DMCA takedown process indicates some abuse,[114] there exists legitimate concern about the availability of copyrighted works on websites without authorization and the potential for abuse of the DMCA safe harbor by webhosts.[115] The DMCA did not anticipate the emergence of Web 2.0—including peer-to-peer technology and the extensive user-uploading possible on websites like YouTube, MegaUpload, Rapidshare, and Grooveshark, which have dramatically increased the potential for infringing

112. *See* TEHRANIAN, *supra* note 2, at 135-36.

113. Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008).

114. *See* Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006).

115. *See* Peter S. Menell, *Jumping the Grooveshark*, MEDIA INST. (Dec. 21, 2011), http://www.mediainstitute.org/IPI/2011/122111.php.

activity. Prior to implementation of its ContentID system, YouTube hosted tens of thousands of user-uploaded videos without authorization from the copyright owners.[116] Although content owners may well make errors in their takedown requests,[117] the policing challenge has grown substantially since the DMCA was enacted. By examining only one side of the issue through an extreme anecdote, *Infringement Nation* overlooks the fact that the major source of copyright enforcement—the takedown of full copyrighted works uploaded without authority—does not reflect overreach. Such enforcement responds to a serious infringement problem. *Infringement Nation* also overlooks the ramifications of the next-generation approaches and technologies being implemented to address the takedown challenge at the wholesale level. YouTube's ContentID and Partner Program, under which many copyright owners preclear and derive advertising revenue from the use of their content, seem like the most productive avenue for encouraging development of and expanding access to user-generated content. Nonetheless, YouTube could better balance first-generation creativity and cumulative creativity by allowing later-generation creators to share in the advertising revenue generated by subsequent creativity drawing from precleared materials. Furthermore, this filtering technology can result in erroneous blocking of fair use materials.

B. *Rebalancing Sophisticated and Unsophisticated Parties*

Infringement Nation's second bundle of recommendations calls for substantially reducing the range of statutory damages available against noncommercial infringers, and for eliminating the registration requirement (which would enable unsophisticated copyright owners to recover statutory damages and attorneys' fees).

Because it ignores the piracy problem, *Infringement Nation* lacks the necessary foundation for evaluating statutory damages policy. Congress adopted the statutory damages provision to provide a discretionary deterrent for difficult-to-detect infringements.[118] Congress was appropriately concerned about the erosive effects of even small, but potentially plentiful, copyright viola-

116. *See* Anne Broache & Greg Sandoval, *Viacom Sues Google over YouTube Clips*, CNET NEWS (Mar. 13, 2007, 6:35 PM), http://news.cnet.com/Viacom-sues-Google-over-YouTube-clips/2100-1030_3-6166668.html?tag=nw.10; Candace Lombardi, *Viacom to YouTube: Take Down Pirated Clips*, CNET NEWS (Feb. 2, 2007, 8:58 AM), http://news.cnet.com/2100-1026_3-6155771.html ("YouTube has subsequently agreed to remove more than 100,000 video clips produced by Viacom properties, including MTV Networks, Comedy Central, BET and VH-1 . . . .").

117. *See, e.g.*, Dennis Yang, *Viacom Still Not Getting It—Files Bogus Takedown and Kills Some Free Transformers Buzz*, TECH DIRT (May 14, 2010, 7:34 AM), http://www.techdirt.com/articles/20100513/2001309420.shtml.

118. *See* REPORT OF THE REGISTER, *supra* note 21, at 102-03.

tions.[119] The intention was to obviate enforcement actions through effective deterrence. There can be little doubt that the Internet Age has increased the problem of erosive infringements. And courts have engaged in the type of measured discretion that Congress envisioned.[120] Notwithstanding efforts by copyright owners to impose crushing sanctions against individual file-sharers and several large Internet platforms (such as YouTube), no court to date has awarded the crushing liability of which *Infringement Nation* warns. Unfortunately, there also has not been effective deterrence.

Illegal downloading has proven far more difficult to address than the types of erosive harms of the analog age, which were principally unlicensed performances of musical compositions.[121] The recording industry has come to recognize that mass enforcement is causing more harm to its business than good under current circumstances.[122] This may in part reflect the very difficult probproblems of identifying file-sharers[123] and judicial confusion over the scope of

119. *See id.* (noting problems of valuing the loss of infringement, the costliness of detecting violation and pursuing enforcement relative to actual damages, and the intention to deter infringement); SUPPLEMENTARY REPORT OF THE REGISTER, *supra* note 21, at 135-37 (noting the problem of small, erosive harms).

120. *See, e.g.*, Capitol Records, Inc. v. Thomas-Rasset, 799 F. Supp. 2d 999, 1012 (D. Minn. 2011) (holding that an award above three times the statutory damages minimum of $750 per work violates the Due Process Clause of the U.S. Constitution); Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85, 116-17 (D. Mass. 2010) (reducing jury statutory damage award of $22,500 per work down to $2,250 on the grounds that the jury award was grossly excessive in violation of the Due Process Clause), *aff'd in part*, *rev'd in part*, 660 F.3d 487 (1st Cir. 2011) (upholding the constitutionality of statutory damages for copyright violations and remanding for reconsideration of the remittitur motion), *cert. denied*, 80 U.S.L.W. 3495 (U.S. May 21, 2012).

121. *See* Ralph S. Brown, Jr. et al., *The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study* (1958), *in* STAFF OF S. SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES 22-25, at 59, 72-76 (Comm. Print 1960).

122. *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1, *available at* http://online.wsj.com/article/SB122966038836021137.html; *see also* Greg Sandoval, *Jammie Thomas Rejects RIAA's $25,000 Settlement Offer*, CNET NEWS (Jan. 27, 2010, 11:00 AM PST), http://news.cnet.com/8301-31001_3-10442482-261.html; *cf.* Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1283-89 (2011) (arguing that enforcement-based strategies seeking disproportionate sanctions are counterproductive for deterring file-sharing of copyrighted works).

123. *See, e.g.*, Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1231 (D.C. Cir. 2003) (holding that the DMCA's provision for streamlining enforcement under 17 U.S.C. § 512(h) does not apply to file-sharing, and, on this ground, reversing the lower court's enforcement of subpoenas to identify defendants); On the Cheap, LLC v. Does 1-5011, No. C10-4472 BZ, 2011 WL 4018258, at *1-5 (N.D. Cal. Sept. 6, 2011) (noting that plaintiff had to serve subpoenas on defendants' Internet service providers to uncover their identities, and that logistical issues around keeping their identities private mitigated against joinder).

the distribution right.[124] By failing to examine both under- and overenforcement, *Infringement Nation* provides little insight into how to promote a balanced ecosystem. Merely slashing or eliminating statutory damages for noncommercial infringers does not solve the broader problem.

Elimination of the registration requirement would likely exacerbate several of the concerns that *Infringement Nation* highlights. Authors, artists, and musicians seeking to incorporate prior works into their own ought to be able to identify the owners of these works. Reintroducing and strengthening formalities, including registration and renewal, can play a valuable role in improving public notice and reducing the risks of developing new works.[125]

C. *Rebalancing Transformers and Creators*

Drawing on its criticism of the adaptation right in Chapter 2, *Infringement Nation* proposes augmenting copyright's fair use defense with a broader transformative use defense.[126] To claim this defense, transformers would have to register their works with the Copyright Office under a new transformative work category. Transformers would thereby be authorized to exploit their works (e.g., a *Star Wars* sequel), subject to accounting to the owners of the underlying works for half of the net proceeds. Noncommercial users would be free to appropriate copyrighted works for transformative purposes. This proposal essentially converts the derivative work right into a liability rule with damages equal to half of the defendant's profits.

Because it fails to frame the proper utilitarian balance,[127] *Infringement Nation* has not demonstrated that the current derivative work structure is miscalibrated. While it is true that the current right structure might well discourage unauthorized sequels, it is not clear that society wants or needs more congestion of the most popular works. On the other hand, the mechanical license appears to have worked relatively well for covers of musical compositions. More significantly, the transformative use proposal faces substantial administrability problems—such as how to account for transformations involving multiple works, how to account for remixes of remixes, and the costs of dispute resolution, to name just a few. The existing system resolves these problems by allowing truly transformative fair uses to be pursued, tolerating most noncommercial (and even many commercial) imitations, and channeling nontransformative commercial sequels into licensing negotiations.[128] This re-

124. *See* Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y U.S.A. 1 (2011).

125. *See* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

126. *See* TEHRANIAN, *supra* note 2, at 155-66.

127. *See supra* text accompanying notes 28-55.

128. *See* MERGES, *supra* note 71, at 228-29.

gime is neither completely certain nor frictionless, but it may be less imperfect than many other options.

D. *The Glaring Omission: Internet Piracy*

What is most disconcerting about *Infringement Nation* is not the flaws in its proposals to address the permissions problem, but rather its blindness to the piracy problem. Tehranian uncritically accepts the simplistic notion that because copyright protections have been expanded to deal with the digital age, appropriability has expanded as well. As a result, he is far more troubled by the addition of twenty years to the end of the copyright term[129] than the effective loss of rights during the first twenty seconds of a work's release. As the economists' brief in the *Eldred* case stated,[130] that last twenty years does little to promote creativity. But the same discounting also means that the first twenty seconds—indeed, the first several years—are critical to promoting progress in the expressive arts.

When both the permissions problem and the piracy problem are recognized, the policy landscape broadens substantially. The goals and principles of the copyright system provide the compass. As Paul Goldstein has said:

> The correct cause for advocacy is copyright itself, a system whose genius is to measure each of these goods, one against the other, a system that takes as its balance wheel the need at once to promise authors protection for the product of their labors and to ensure them the freedom to borrow unprotected elements from the works of others. Copyright is not, to be sure, responsible for all of the cultural wealth we see and hear about us, but it is surely responsible for some, and if copyright imposes so relatively few constraints on users in return, that in my view is enough to make the case for copyright and author's right as a powerful and empowering force in the service of creativity, culture and ideas in the present century.[131]

The Internet has not altered this powerful insight about human nature and institutions. Rather, it has changed the ecosystem for effectuating these balances. Copyright's limiting doctrines have already begun to adapt to new modes of creativity and distribution. Its enforcement regime, however, has failed in channeling creators and consumers into competitive markets for content. Such markets must evolve as technology advances.[132] The digital revolution has dis-

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129. *See* TEHRANIAN, *supra* note 2, at xvii-xix, 32-33, 55-56.

130. *See* Brief for George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 2, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846.

131. Paul Goldstein, *Copyright's Commons*, 29 COLUM. J.L. & ARTS 1, 10 (2005).

132. The law augments these markets in various ways, as with the compulsory mechanical license and the anticircumvention rules (and exceptions). As noted previously, the DMCA incorporates a regulatory mechanism for adapting the law as technology evolves and regulators learn more about the impacts of the anticircumvention prohibitions. *See supra* note 69.

rupted that process. But that should not mean that we give up[133] or accept destructive piracy "norms" as the best solution.[134] Instead, it should inspire us to work harder to channel creators and consumers into better-functioning markets.[135]

After a decade of chaos, we are starting to see the signs of a productive symbiosis between Internet technology and content business models capable of luring consumers back into the marketplace.[136] YouTube's ContentID allows copyright owners to authorize user-generated content employing their work and uses the carrot of sharing advertising revenues. Spotify, Rdio, Pandora, and other music services offer legitimate, versatile, user-friendly, ubiquitous options for streaming music. Hulu and Netflix offer convenient platforms for accessing audiovisual content.

This is not to say that the market will best resolve the piracy problem without nuanced legal interpretations and appropriate reforms. Better-crafted indirect copyright liability rules can encourage the development of more symbiotic platforms and services without jeopardizing technological innovation.[137] The past decade has taught us that the high-fine, low-probability-of-detection approach to enforcement[138] does not by itself achieve effective deterrence of file-sharing. Thus, new institutions might be needed to bring consumers back into a legal marketplace and compensate creators.[139] Alternatively, subpoena, joinder, and jurisdiction reforms aimed at reducing the costs of detection could better deter infringing activity under the present enforcement regime. Public en-

133. *Cf.* John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUND. (Feb. 8, 1996), https://projects.eff.org/~barlow/Declaration-Final.html (advocating anarchy over political governance in cyberspace).

134. *See* TEHRANIAN, *supra* note 2, at 2 (lamenting the "wide chasm separating our norms (which guide our daily activities) and our laws"). *But see* Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) (challenging the preference for incorporating custom into intellectual property law).

135. *See* Mark F. Schultz, *Reconciling Social Norms and Copyright Law: Strategies for Persuading People to Pay for Recorded Music*, 17 J. INTELL. PROP. L. 59, 86-87 (2009).

136. *See* Peter S. Menell, *The Digital Music Cloud Dilemma: "Poker Face," "Go Your Own Way," and "Imagine,"* MEDIA INST. (May 13, 2011), http://www.mediainstitute.org/IPI/2011/051311.php; Peter S. Menell, *If Silicon Valley Builds Legal Celestial Jukeboxes, Will Music Fans Return to the Market?*, MEDIA INST. (July 26, 2011), http://www.mediainstitute.org/IPI/2011/072611.php.

137. *See* Peter S. Menell, *Indirect Copyright Liability and Technological Innovation*, 32 COLUM. J.L. & ARTS 375 (2009); Peter S. Menell & David Nimmer, *Unwinding* Sony, 95 CALIF. L. REV. 941 (2007).

138. *See* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (developing a classic model of law enforcement emphasizing the relationship between social harm and enforcement costs).

139. *See* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003).

forcement measures can reduce the availability of unauthorized content. Private enforcement measures, such as the graduated response system being developed by Internet service providers and content owners,[140] in conjunction with the growing availability of better devices and content-delivery services, might produce sufficient nudges[141] to bring file-sharers back into the market.

CONCLUSION

Just as a book about the contemporary American political landscape cannot ignore red or blue states and be true to its purported scope, a book about the "infringement nation" in the Internet Age cannot ignore file-sharing. By overlooking this critical region, *Infringement Nation*'s policy prescriptions miss the mark. Copyright policymakers and jurists need a complete infringement census if they are to take on the challenges of adapting copyright law for the Internet Age.

140. *See Copyright Alert System Fact Sheet*, CENTER FOR COPYRIGHT INFO., http://www.copyrightinformation.org/alerts (last visited June 13, 2012); *see also* Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 727-36 (2011).

141. *Cf.* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).