

Problems with the Enforcement of Copyright Law: Is there a Social Norm Backlash?

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ABSTRACT *As a result of technological changes, copyright norms have developed in opposition to existing copyright law. In this article we examine how copyright enforcement efforts, mainly lawsuits against private copying, may induce further copyright disobedience by reinforcing the moral and social beliefs against conventional copyright law. In this paper we review recent theoretical and empirical studies and assess the hypothesis of countervailing copyright norm effects from copyright enforcement.*

Key Words: Copyright Law; Expressive Law; Social Norms; Enforcement.

JEL Classifications: K10, K11, K33, K42, D70.

1. Introduction

Digital technology and broadband networks present an unprecedented challenge for copyright law enforcement. Decentralized technology, such as peer-to-peer (P2P) file sharing software, significantly reduces the role of commercial intermediaries in copyright offences, and necessitates action against private users of P2P file sharing programs. While in the past copyright enforcement sufficed with enforcement against commercial piracy, the recording industry has currently sued more than 3,400 users of P2P file sharing technology in the United States.¹ Despite the media attention, lawsuits against private users have not succeeded in banning P2P file swapping. According to several studies, downloading activities have increased.² Other reports indicate that file sharing has moved to alternative platforms that are not accounted for in most surveys.³ Meanwhile, the music and film industry announces that it will intensify its litigation activities.

This paper examines the nature and causes of the copyright enforcement problem from the perspective of social norms.⁴ When legal sanctions violate the subjective conception of behaviour that is being punished, individuals respond

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differently than when enforcement coincides with pre-existing notions of what is just or appropriate. When legal rules depart from existing opinion, enforcement may trigger opposition and protest, which might reinforce underlying contrary social opinion.

In this article we collect recent theoretical and empirical studies and assess the hypothesis of countervailing copyright norm effects as a result of enforcement efforts against file-swappers.

2. The Interplay between Norms and Legal Rules

It is generally accepted that legal rules and law enforcement efforts are most effective when legal norms are aligned with existing social values. A number of empirical studies on tax compliance emphasize the role of norms and beliefs for determining conduct. These studies indicate that beliefs of legitimacy are often stronger determinants for behaviour than deterrence (e.g., Lasheras, & Mayo, 1994; McClelland & Schulze, 1999; Wenzel 2004). Indeed, when there is a general perception that legal rules are aligned with social norms and ethical values, individuals tend to comply with the law even when it is not in their direct self-interest (Tyler, 1990; Tyler & Huo, 2002). Similarly, literature on the economics of law enforcement has recently integrated findings from sociology and psychology which suggests that the effectiveness of law enforcement is influenced by pre-existing beliefs and norms, as well as the private costs and benefits of the behaviour itself (Bachman *et al.*, 1992; Grasmick and Green, 1980; Jolls, 2004; Simpson, 2002).

How should law enforcers take into account social and personal norms?⁵ The interplay of legal rules, law enforcement and norms is complicated. On one hand, legal rules may have a positive effect on social norms. When legal rules are not remote from existing morality, legal rules might be internalized as norms, because for many citizens 'obeying law is a requirement of morality' due to which people align their morality with new laws (Cooter, 2000b: 20; see also Adler, 1999; Cooter, 1998; Funk, 2002; McAdams 2000;). In a different vein, legal rules and enforcement may also engender cooperation by operating as focal points or by increasing the perceived rate of detection (Cooter, 2000b; on the respective roles of expressive versus focal point effect of legal rules, see Cooter and Bohnet, 2004). On the other hand, legal rules may unintentionally destroy benign social norms. By providing incentives, either through reward or punishment, legal rules can be perceived as a cue that other individuals are not inclined to cooperate voluntarily, which might create a reciprocal disposition to withhold voluntary cooperation. In this manner legal rules may 'crowd out' voluntary cooperation (Bohnet *et al.*, 2001; Frey and Oberholzer-Gee, 1997; Gneezy & Rustichini, 2000a, 2000b).

In other instances, legal rules may have the unintended effect of strengthening the very social norms they aim to contest. This might occur when the legitimacy of the lawmaking authority or substantive content of the law is inadequate (i.e., no independent belief exists that either law making authorities or the legal rules are entitled to deference) (Sunshine and Tyler, 2003; Tyler, 2000). Here we review evidence which suggests that such a counterproductive norm effect might be at work with digital copyright enforcement. Due to technological changes, copyright norms have developed in opposition to existing copyright law. Several studies document the emergence of anti-copyright culture and the strong norm-proponent of downloading and file-sharing (Gervais, 2004; Strahilevitz, 2003).

Perhaps lawsuits induce copyright disobedience and reinforce the moral and social beliefs contrary to the law and enforcement thereof. In what follows we first review a number of theoretical contributions that examine the interplay between legal innovation and social norms, before reviewing empirical evidence of such effects in the context of file swapping on P2P networks. This literature suggests that copyright enforcement encounters social norm backlash and provides preliminary evidence that effective copyright enforcement is best served by proceeding in gradual fashion rather than with heavy-handed enforcement.

3. Social Norm Dynamics and Countervailing Effects

In a recent model Parisi and von Wangenheim (2004) examine the way in which the law can have a positive or negative influence on social norms. They view the interaction between law and norms as part of a wider opinion formation process. Because in many cases, 'individuals do not have strong prior beliefs on whether any given law is fair or unfair [...] observation of other people's reaction to the law (e.g., support, compliance, protest or civil disobedience) conveys some information that may create, reinforce or modify their beliefs on the matter' (Parisi and von Wangenheim, 2004: 9). When a new law is met with strong opposition and disobedience from individuals whose internal values are so different from the law that they are willing to incur the costs of protest, individual observers can infer that the law is not aligned with a common sense of justice. This might undermine the law's authority in the minds of the observing public and ultimately strengthen the social norms by persuading others that the new law is unjust.

A crucial aspect of the effect of legal rules and social norms is the value-distance between the legal rule and the social norm held by most individuals. If the gap is wide – the law proscribes something that is widely perceived as legitimate and acceptable or prescribes something that is perceived as unfair – the law may find some resistance under the form of open opposition or ostensible lack of compliance. With the addition of opinion formation processes, the model aligns with existing tax compliance literature, which suggests that enforcement can be counterproductive when it creates the general perception that others are widely engaging in legal disobedience. As social-psychological literature suggests, perceiving general disobedience might dissipate individuals' inclination to cooperate with the law (reciprocity) or might have the effect of 'validating' disobedience (social validation) (Cialdini, 1989).

The results of this literature allow for two important inferences. First, legal innovation that departs substantially from existing social beliefs may need to proceed in gradual fashion in order to change social norms in the desired direction (Parisi and von Wangenheim, 2004: 2, 16). In this regard, the model by Parisi and von Wangenheim provides a theoretical foundation for earlier work that suggests that lawmakers apply 'gentle nudges' rather than 'hard shoves' when enforcing laws that attack widespread social norms (Kahan, 2000). Gradual enforcement reduces the gap between innovation and existing norms and might prevent acts of disobedience and protest that reinforce underlying norms. Second, when gradual adjustment of substantive laws is not possible, continuity can be achieved by varying the level of enforcement: the initial phase of enforcement, for example, could be accompanied with higher enforcement rates in the initial phase. This would reduce the availability of frequent signals of public disobedience that undermine the authority and acceptance of the enforced rule.

These theoretical findings do not bode well for the effectiveness of digital copyright enforcement. The scale of file swapping activities and the difficulty of prosecuting individual offences necessarily limit the certainty of sanctions. Because the enforcement rate is necessarily low, the visibility of illegal actions remains high, engendering anti-copyright norms. Raising the severity of sanctions for copyright violations is not an attractive alternative because it might widen the gap between the legal environment and current personal and social beliefs, further reducing the legitimacy of copyright law. Next, we review recent studies that address these issues in an applied setting.

4. Evidence of Backlash Effect from Copyright Enforcement

Although several studies have investigated the interaction between deterrence and norms, mainly with regard to tax evasion (Caroll, 1978; Smith 1990), the hypothesis of countervailing norm effects is contested (Lederman, 2003; Alan *et al.*, 1999).⁶ In a recent study, Depoorter *et al.* (2005) examined anti-copyright norms among file-swappers and the effect of copyright enforcement on underlying norms. In a two-stage experiment with six hundred undergraduate students, potential copyright offenders were presented with varying enforcement regimes. In a second part, subjects were asked whether they will resume downloading after novel developments in information technology reduces the probability of detection to zero. In both studies the participants evaluated the enforcement of copyright law on a 7-point Likert scale with regard to fourteen items (e.g. 'These new developments are gradually making me realize that illegally downloading music is not ethical'; 'I think that most people will continue to take the risk involved with downloading music through the Internet'). The results of the study indicate that severity and probability of sanctions have counterproductive effects on download behaviour, behavioural adjustment and the expectations of others' adjustments in downloading (Depoorter *et al.*, 2005: 10–15) In particular, students that had faced heavy sanctions in the first stage of the scenario reported that they would download more and expected others to download more in general relative to those users that were subject to more moderate sanctions in the prior stage of the experiment. Students resorted to a higher level of file-swapping when previously subjected to a tough enforcement regime, and they think others will do the same. Especially, when enforcement raises the level of detection and increases punishment, anti-copyright sentiments are bolstered (Depoorter *et al.*, 2005: 12–13). Raising the level of enforcement on both severity and certainty produces a powerful counterproductive effect on copyright norm adjustment.

Moreover, systematic differences appeared between students that admitted to downloading music on P2P networks on a regular basis and students that only occasionally downloaded music (Depoorter *et al.*, 2005: 10–12). Countervailing effects of sanctions occur most strongly with regard to frequent users of P2P technology, while the norms of occasional users are not so easily influenced by sanctions. The authors point to existing research on possible underlying psychological processes, such as psychological accounts of cognitive dissonance, the false consensus effect, and ex-post rationalizations of self-interested anti-social conduct (Depoorter *et al.*, 2005: 13). An alternative explanation lies with group identification. Perhaps, as users become more accustomed to using file sharing technology, they identify themselves with the anti-copyright sub-culture, internalizing the norms and ethics of the relevant community (Wenzel, 2004a). For both explana-

tions, these preliminary findings bring to mind a tipping point: at a certain activity levels the evaluation of that behaviour is internalized (Cooter, 2000a; 2000b). As a result, the norm becomes more robust (also referred to as the 'stickiness' of norms) and legal enforcement efforts are further challenged by norm effects.

In a related study, Depoorter and Vanneste (2005) analyze the effect of copyright enforcement on the norms of individuals who have never used P2P technology and who are most likely not to have strong prior beliefs on file sharing. Because such individuals 'on the fence,' are generally more susceptible to persuasion, their reactions to enforcement efforts will be crucial for the outcome of the enforcement of copyright law. Copyright enforcement and, media coverage thereof, may direct individual beliefs towards copyright law (creating a critical mass necessary to create a self-reinforcing norm) or, on the contrary, generate sympathy for the targeted class of violators generating further social support for tolerance of P2P file sharing and related uses of copyrighted content. Two hundred and eighty undergraduate students were subjected to different ranges of certainty and severity of sanctions for downloaded songs on P2P networks. Students were asked to what extent they agree with a number of statements such as: 'These new developments are gradually making me realize that illegally downloading music is not ethical', 'These developments lead me to adjust my norms regarding the illegal exchanges of music'.

Different effects appear for students that download music on P2P networks and students that have never engaged in file sharing activities. First, although none of the students report a significant norm change, individuals without file sharing experience indicate more strongly that they will change their download norms than respondents with file sharing experience (Depoorter and Vanneste, 2005: 26). An interesting difference obtained with regard to the effect of punishment on the norms of individuals with and without file sharing experience. When subjected to severe sanctions, file-sharers justify their behaviour more so than when they are subjected to more modest sanctions. By contrast, in high severity conditions individuals without file-sharing experience believe that downloading music is unethical and unjust when tough sanctions apply, more so than when the punishment for copyright offences is in the low severity range (Depoorter and Vanneste, 2005: 37). In other words, steep penalties for copyright offences have opposite effects for downloaders and non-downloaders: it emboldens the former into a justification of downloading as just, while it fosters pro-copyright sentiments for the latter.

From the social norm perspective, both users and non-users obtain very different effects. The results of this study indicate that anti-copyright norms of users of P2P technology are stable. Irrespective of the level of punishment, there is no norm change towards the pro-copyright positions among experienced users of P2P technology. In contrast, the norms of students that have not yet been exposed to P2P software are more sensitive to the degree and type of copyright enforcement. These results suggest a tipping point: at a certain level of activity, the evaluation of that behaviour is internalized (Depoorter and Vanneste, 2005: 30–31). As a result, the norm becomes robust – also referred to as the 'stickiness' of social norms – and presents a more ardent challenge to legal enforcement efforts (see Figure 1).

Also, when asked whether they thought that 'most people will continue to take the risk involved with downloading music through the Internet, participants believed that high severity and certainty would result in more downloading as compared to students subjected to enforcement on the low ranges of severity and

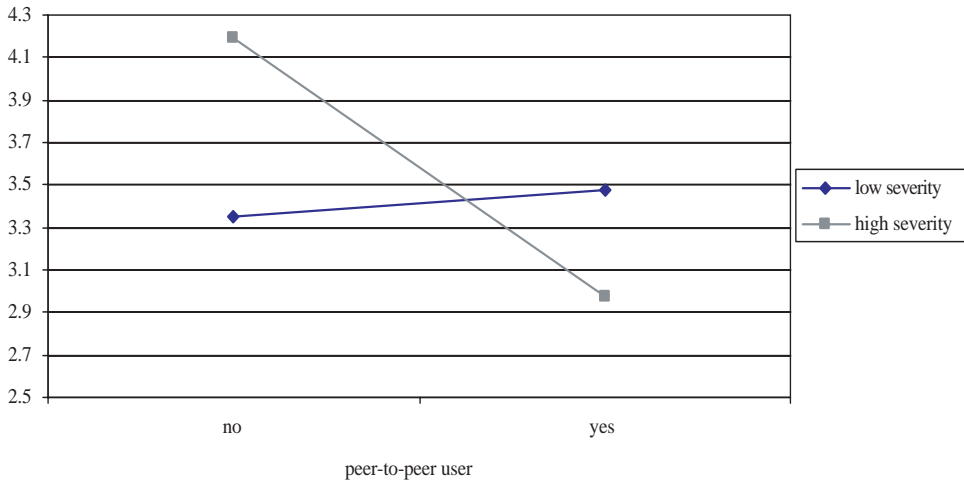


Figure 1. Type of user and severity.

certainty. Most interestingly, results show an interaction effect between the type of respondent and the severity of punishment (Depoorter and Vanneste, 2005: 20–22). Students that do not download (or more accurately, report that they do not engage in download activities) have a different expectancy of downloading behaviour than people that download (or report that they do). Regardless of variations copyright policy, along the lines of severity, the latter remain stable in their positive expectancy that others will continue to download, while the formers view varies with the degree of enforcement. Subjects without any file sharing experience believe more than others who will continue downloading when a heavy fine (higher severity) is imposed (see Figure 2).

These questions measured the perception of the expected effect that actual and potential users of file sharing technology have regarding file sharing under different degrees of copyright enforcement. This perception matters because it

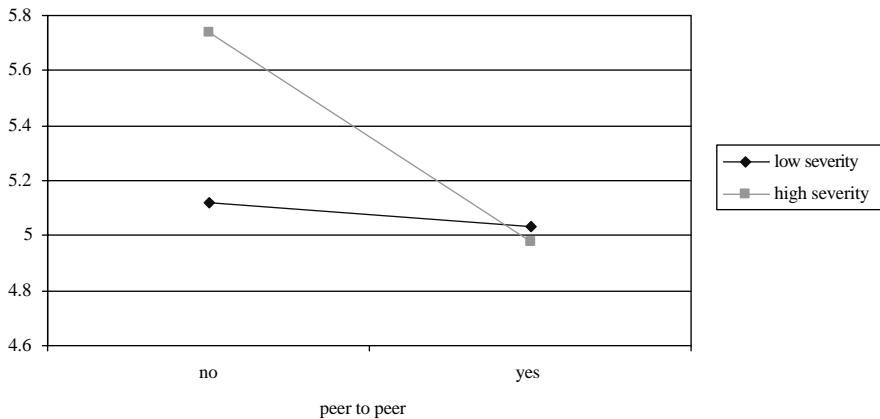


Figure 2. Perception of downloading activities: type of student and severity of punishment.

may serve as an indirect measure or proxy of the behaviour of potential and present P2P users under different copyright modalities. Social psychology literature has amply demonstrated that individuals often base their decision-making on the (subjective) perception of what others are doing. If this is true, the effect of different degrees of copyright enforcement (more private suits initiated by the record industry, higher settlement amounts) might affect people's perception of what another will do and, consequently, have an impact on their own decision with regard to P2P file activities. From the results, it appears that litigation provides little in the way of deterrence. In general, students believe that others will continue to download regardless of the enforcement policy. In this sense, the results of the survey paint a pessimistic picture for the industry: according to people in their target group, nothing will stop their peers from downloading. Not even in the high severity of punishment groups (10.000 euros per downloaded CD) do students think that downloading will come to a stop (Depoorter and Vanneste, 2005: 20, 25–27).

5. Conclusion

As a general result, these preliminary findings suggest that the legal condemnation of file-sharing creates a backlash effect on norms and underlying behaviour. The backlash effect operates in at least two different ways. Imposing severe sanctions for copyright offences emboldens the anti-copyright norms of frequent users of P2P technology, which manifests itself in increased downloading whenever enforcement is temporarily suspended. In turn might increase the perception of non-downloaders that others are downloading, either by observing such behaviour (section 3, above) or by implying it indirectly because of the height of the sanction (section 4, above).

This has severe implications for copyright law. Because technological innovation is dynamic and cyclical, there are unavoidably lags in the enforcement of copyright. Technological advances in piracy are periodically undetected and new technology is often used while its legality awaits judicial evaluation. Within these enforcement voids, norms determine conduct. If sanctions have a countervailing effect, exclusive reliance on punishment might be unfortunate, especially when enforcement is temporarily suspended.

The results also indicate a differentiated effect between file-sharers and non-users of P2P technology. The counterproductive effect of heavy-handed copyright enforcement occurs most strongly with regard to experienced users of P2P technology. Ironically, non-users of P2P technology report lower intentions of downloading, when severe enforcement was imposed prior to a lag. In this vain, it appears that copyright policy would be well advised to apply a differentiated strategy to various target groups. That is, pushing hard against the existing norms of these users has the counterproductive effect of emboldening the pre-existing anti-copyright norms that enforcement intends to combat. For these copyright infringers, it is perhaps advisable to apply more moderate means of enforcement.

Today's struggle over control of copyrighted content and the legal treatment of downloading and file-sharing technologies can be understood as an attempt to influence the social meaning of downloading and sharing of copyrighted work. Consider in this regard the attempts by the music and film industries to associate file sharing with theft and stealing in recent advertising campaigns. If copyright litigation is to be understood as an instrument to change the social meaning of file

sharing, the literature on social norms suggest that counterproductive norms might be at work to undermine the legitimacy of copyright law.

Notes

1. Associated Press, 10 December 2004. Reported in File Sharing Goes to Court, Wired News, 10 December 2004, available at <http://www.wired.com/news/digiwood/0,1412,65995,00.html>.
2. File-sharing fell over the summer of 2003 but grew to an all time high (5.6 mio) in October. See John Borland, *RIAA Lawsuit Yields Mixed Results*, CNET NEWS.COM, 4 December 2003, at <http://news.com.com/2100-1027-5113188.html> (citing a study by Big Champagne). Other studies reported a 27% increase from December to April. The number of self-reported downloaded music files increased to 23 million in April, rising from 18 million between November and December according to a study released by the Pew Internet & American Life Project. See Dawn Kawamoto, *Downloads Rise as File Traders Seek New Venues*, CNET NEWS.COM, 26 April 2004, at <http://news.com.com/2102-1027-5199901.html>.
3. Studies report a move away from the most popular and most highly monitored file-sharing networks to low-profile platforms, such as iMesh, BitTorrent and eMule. See Dawn Kawamoto, *Downloads Rise as File Traders Seek New Venues*, CNET NEWS.COM, 26 April 2004, at <http://news.com.com/2102-1027-5199901.html>. (Observation: this substitution effect reduces the expected benefits of file sharing because of the reduced number of available files.)
4. We define social norm as a 'social regularity', a behaviour that is in fact widely adopted in society because it is not merely what people do but also because it corresponds with a normative conception within society, or a subgroup thereof, of what people should do (McAdams, 1997).
5. Differences between personal and social norms are important in examining the direction of the causal relations between beliefs, norms and enforcement (Wenzel, in press). Here we treat the internalization process as a black box and study the effect of enforcement on internalized personal and social norms in unitary fashion.
6. Lederman (2003) concludes: '...the speculation that sanctions for tax evasion will tend to undermine compliance does not seem to be supported by the evidence. In the experimental context the availability of sanctions for failure to cooperate increases cooperation. In the tax compliance context, audits increase even compliance of those not threatened with audit.'

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