Rightsizing Criminal Infringement Liability

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BCLT SYMPOSIUM:
THE NEXT GREAT COPYRIGHT ACT
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Animating Policy Logic

**Present:** “More (liability) is better”
- More severe penalties for IP infringers will get us more deterrence, less infringement, and more IP

**Future:** “More (proportionality) is better”
- More proportionate penalties for infringers will get us more deterrence, less infringement, and more IP
- Less expansive criminalization will decrease public costs of enforcement
The One-Way Ratchet of Criminalization

“X”* disruptive technology goes mainstream

Infringement increases

Panic ensues in the affected industries

Criminal liability expands

*X = E.g., Home audio tape recorders, VCR, PC, CD-RW, MP3, DeCSS, camcorder, P2P, streaming audio & video (?)
History of Criminal Infringement

- From 1790 to 1897 – Civil infringement only
- From 1897 to 1976 – Criminal infringement, but only misdemeanor penalties
- 1976 – Felony penalties, but only for repeat offenders
- 1982 – Felony penalties extended to some first-time offenses, but not for all types of works
- 1992 – Felony penalties extended to all types of works
History of Criminal Infringement

- **No Electronic Theft Act (1997)**
  - Eliminated the requirement of commercial motive for some infringements of the reproduction and distribution rights

- **Pro-IP Act (2008)**
  - Mandated the creation (and ongoing taxpayer funding) of an administrative bureaucracy (OIPEC) dedicated to oversight of IP enforcement
History of Criminal Infringement

The impulse to continue expanding criminal liability to new technologies remains powerful among policy makers

- S. 978 – The Commercial Felony Streaming Act of 2011 (not enacted)
Adjustable Scope: 2 Dimensions, 3 Variables

1. **Criminally Actionable Conduct**
   - Required mental state of infringer
     - Willfulness?
     - Underlying commercial purpose?
   - Nature of infringement (qualitative)
     - Which § 106 rights?
     - Which types of works?
   - Amount of infringement (quantitative)
     - How much more than *de minimis* is required?
     - In what amount of time?
2. Criminal Penalties
   ○ Fines
     ▪ How big?
   ○ Prison
     ▪ How long?
   ○ Asset forfeiture (civil and criminal)
     ▪ What types of property are subject to seizure/forfeiture?
     ▪ How much due process protection for property owners?
Costs of Expansive Criminalization

- **Non-economic costs**
  - Public perception that the law is misaligned with social norms concerning small-scale, non-commercial infringement undermines deterrence/compliance/legitimacy
  - Broad criminal laws reduce public access to copyrighted works and may cause chilling effects on lawful uses

- **Economic costs**
  - “Forced riding” – increased costs of enforcement fall on all taxpayers, but the benefits of enforcement accrue overwhelmingly to well-healed private property owners
  - Costs of investigation and prosecution plus $21,000/year to incarcerate a prisoner in minimum security federal prison vs. as little as $2,500 of economic harm
Recommendations

- Restore the requirement of commercial motive for all criminal infringements and limit liability to larger-scale infringements to better align the law with social norms
  - Survey filed cases (about 50-60 a year from 2009-2013) to test the hypothesis that commercial motive and large scale are operating *de facto* as prerequisites for criminal prosecutions

- Be mindful that every expansion of criminal liability represents a cost shift from private rights owners to taxpayers
  - Through funding for OIPEC and increased enforcement spending across government agencies within OIPEC’s purview, taxpayers since 2009 have been footing a larger-than-ever bill for IP enforcement.