

Rightsizing Criminal Infringement Liability



ANNEMARIE BRIDY
UNIVERSITY OF IDAHO
COLLEGE OF LAW



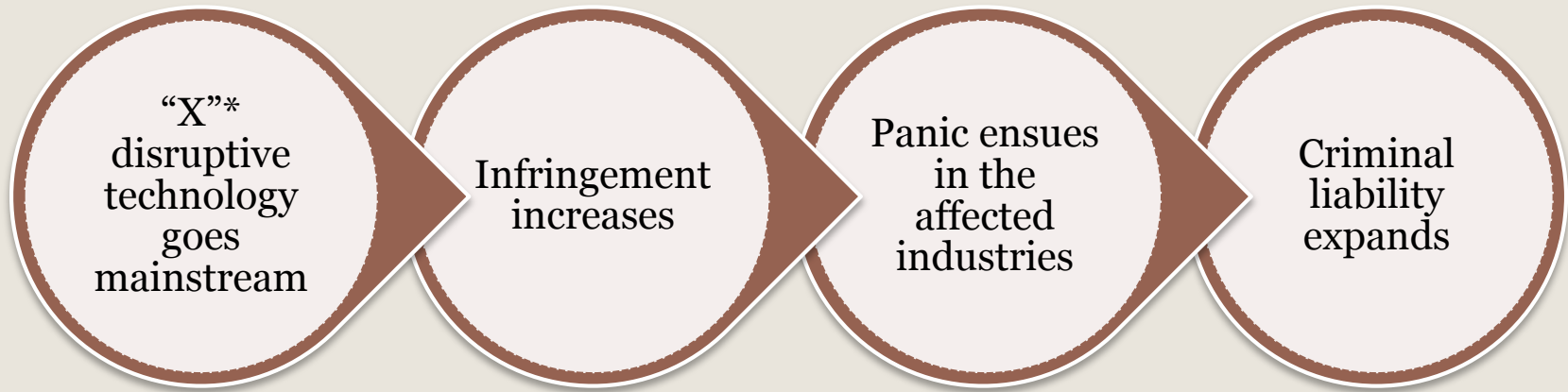
**BCLT SYMPOSIUM:
THE NEXT GREAT COPYRIGHT ACT
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Animating Policy Logic



- **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 = 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
 - H.R. 3261 – The Stop Online Piracy Act (2011) (not enacted)
 - 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?

Adjustable Scope: 2 Dimensions, 3 Variables



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.