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Cover Page Footnote

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NOTES

Operation Blackbeard: Is Government Prioritization Enough to Deter Intellectual Property Criminals?

Lauren E. Abolsky*

INTRODUCTION

Intellectual property is one of the biggest contributors to American economic growth,¹ and the protection of copyrights, trademarks, and patents encourages people to spend time and resources developing new ideas.² At the same time, the full profit potential of intellectual property remains unrealized because of domestic and international infringement and theft.³ The federal

* J.D. Candidate, Fordham University School of Law, May 2004; B.A., Communications, University of Michigan, 1998. The author would like to thank Professor Daniel Richman for his support and guidance in the writing of this Note. She would also like to thank the editors and staff of the *Fordham Intellectual Property, Media & Entertainment Law Journal* for their assistance in publishing this Note. Finally, the author would like to thank her family and friends for their unconditional support.

¹ See Press Release, International Intellectual Property Alliance, IIPA Economic Study Reveals Copyright Industries Remain a Driving Force in the U.S. Economy (Apr. 22, 2002) [hereinafter IIPA Release], available at <http://www.iipa.com/pressrel.html> (last visited Jan. 12, 2004). The U.S. copyright industries—which include theatrical films, television programs, home video, DVDs, software, books, music and sound recordings—account for more than five percent of the U.S. gross domestic product and over \$88 billion in foreign sales. *Id.*

² International Chamber of Commerce, *Intellectual Property Explained*, at http://www.iccwbo.org/home/intellectual_property/presentation/wwh.asp (last visited Jan. 15, 2004).

³ See Press Release, International AntiCounterfeiting Coalition, IACC White Paper Press Release (June 5, 2003) [hereinafter IACC Release], available at <http://www.iacc.org/whitepaper/whitepaper.html>.

government has implemented criminal sanctions for intellectual property theft and infringement in order to curb this behavior, prevent loss to the nation's economy, and change permissive attitudes toward theft.⁴ Until recently, however, the government did not regularly prosecute the perpetrators of these crimes.⁵ This recent surge in enforcement can be attributed to a variety of factors, including cooperation between government agencies and assistance from the private sector.⁶ To justify the federal government's focus in this area, however, there should be substantial proof that these crimes will decrease in frequency and that prevention and punishment will restore the loss to the nation's economy caused by the theft.⁷ And while greater enforcement might yield increased profits for owners, the government also may need to institute programs with the private sector to reshape societal attitudes about intellectual property theft.⁸

This Note will explore the inception of intellectual property crimes and survey current criminal penalties. It will focus on why the federal government has recently prioritized this area and is now prosecuting offenders. Part I will present the basics of intellectual property law and examine the relevant statutes. Part II will detail the recent prioritization of these crimes and the reasons behind the sudden interest in enforcement. Finally, Part III of this Note will

www.iacc.org/teampublish/109_467_1832.cfm (last visited Jan. 12, 2004). This release states that the International AntiCounterfeiting Coalition ("IACC") member investigation firms in 2002 "seized over 7.6 million counterfeit and pirated" goods, which would have been worth over \$330 million if they were genuine. *Id.*

⁴ See *infra* Part I.B (discussing recent criminal legislation to combat intellectual property infringement).

⁵ See Dep't of Justice, *Intellectual Property Cases*, at <http://www.usdoj.gov/criminal/cybercrime/ipcases.htm> (last updated Jan. 13, 2004) [hereinafter *Intellectual Property Cases*]. This chart, although not exhaustive, notes only one federal criminal prosecution for intellectual property crimes in 1998 but more than forty prosecutions in 2003. *Id.*; see also Karen J. Bernstein, Note, *Net Zero: The Evisceration of the Sentencing Guidelines Under the No Electronic Theft Act*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 57, 58 (2001) (arguing that "[i]t is an enigma that prosecutors are not aggressively pursuing jail time for non-commercial infringers" under the No Electronic Theft Act ("NET Act")).

⁶ See *infra* Part II.B (discussing the rise in intellectual property prosecutions).

⁷ See *infra* Part III (discussing the effects of the rise in government enforcement actions).

⁸ See *infra* text accompanying notes 261–72.

discuss whether prosecution is enough to effectively deter this crime wave.

I. THE ABCS OF INTELLECTUAL PROPERTY

Intellectual property is similar to real and personal property.⁹ The most notable distinction is that intellectual property is intangible.¹⁰ In other words, “it cannot be defined or identified by its own physical parameters.”¹¹ It can only be protected if it has a discernible representation completely separate from it.¹² This representation bestows a grant of protection to the owner, whereby he or she receives exclusive rights to his or her property.¹³ There are four distinct categories of intellectual property: copyright, trademark, patent, and trade secret.¹⁴ All forms are protected under federal law,¹⁵ and some additionally have state protection.¹⁶

A. *What Exactly Is Intellectual Property?*

The U.S. Constitution gives Congress the right to protect and encourage constant creation and production in the sciences and useful arts by bestowing “for limited Times” upon authors and inventors exclusive rights to their work.¹⁷ Copyright protection is given for original works of authorship and is grounded in the Copyright Act of 1976 (as amended).¹⁸ The Patent Act protects nonobvious, novel, and useful inventions.¹⁹ The Trademark Act of 1946, known as the Lanham Act, protects trademarks—any word,

⁹ Laurence R. Hefter & Robert D. Litowitz, *What Is Intellectual Property?*, U.S. Dep’t of State, at <http://usinfo.state.gov/products/pubs/intelprp> (last visited Jan. 15, 2004).

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*

¹³ *See id.*

¹⁴ Howard M. Eisenberg, *Patent Law You Can Use: Types of Intellectual Property*, Chernoff, Vilhauer, McClung & Stenzel, LLP, at <http://www.chernofflaw.com/-patent1.htm> (last visited Jan. 15, 2004).

¹⁵ *See Hefter & Litowitz, supra* note 9.

¹⁶ *See Michael Coblenz, Intellectual Property Crimes*, 9 ALB. L.J. SCI. & TECH. 235, 285–86 (1999) (describing state protection of trade secrets through criminal statutes).

¹⁷ U.S. CONST. art. I, § 8, cl. 8.

¹⁸ 17 U.S.C. §§ 101–1332 (2000).

¹⁹ 35 U.S.C. §§ 101–103 (2000).

name, symbol, or device that identifies or distinguishes goods or services of one manufacturer or merchant from those of another.²⁰ Trade secret law protects disclosure of any reasonably well-kept secret formula, device, or compilation of information that is used in one's business and provides an advantage over one's competitors.²¹

The length of protection varies for each type of intellectual property, but each protection generally confers upon the owner exclusive rights to produce, distribute, display, adapt, import, export, and exploit his or her product for a certain period of time.²² The owner may bring an action against any person who infringes upon this exclusive right because it is a form of "theft" of his or her rights.²³ Although no physical property is actually stolen, what is stolen is the benefit of or credit for the words and ideas.²⁴ The rightful owner can bring the infringer to court for relief, but sometimes the civil action does not give full restitution to the intellectual property owner or even deter future infringement.²⁵ In

²⁰ 15 U.S.C. §§ 1051–1129 (2000).

²¹ See *supra* Part I.B.2; see also Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, pt. II, § 7, 33 I.L.M. 81, 98 (1994) [hereinafter TRIPS Agreement].

²² See Hefter & Litowitz, *supra* note 9.

²³ See Aaron M. Bailey, Comment, *A Nation of Felons?: Napster, the NET Act, and the Criminal Prosecution of File-Sharing*, 50 AM. U. L. REV. 473, 488–89 (2000).

²⁴ Several authors have examined the question of what harm is caused, or what is being "stolen," in different types of intellectual property theft. See Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 218–19 (2002) (arguing that plagiarists steal "credit," rather than words, language, or plot); Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 752–64 (2003) (considering the harm of infringing copyright); Bailey, *supra* note 23, at 488 (stating that the illegal downloading of music can be characterized as the "theft" of one or more of the copyright owner's exclusive rights).

²⁵ See Bryan M. Otake, *The Continuing Viability of the Deterrence Rationale in Trademark Infringement Accounting*, 5 UCLA ENT. L. REV. 221, 229–30 (1998) (noting that it is often difficult for a trademark holder to procure sufficient evidence to show injury and recover monetary damages).

2004] *DETECTING INTELLECTUAL PROPERTY CRIMINALS* 571

fact, some infringers perceive these suits as simply a “cost of doing business.”²⁶

B. New Challenges, New Solutions: The Recent Statutes

Intellectual property theft grew as the nation moved into the Information Age,²⁷ costing owners over an estimated \$300 billion in 1997 alone.²⁸ By the year 2000, intellectual property theft cost American companies more than \$1 trillion.²⁹

This increase in intellectual property crimes, along with the lack of deterrence offered by civil mechanisms, led the federal government to enact new criminal punishments for the theft of intellectual property rights.³⁰ These new laws, it has been noted, “affect everyone from the average home-computer user to organized crime syndicates.”³¹

1. Trademark Law

The first significant federal criminal intellectual property legislation Congress enacted was the Trademark Counterfeiting Act of 1984 (“TCA”),³² which criminalized the act of intentional trafficking of counterfeit goods and services.³³ By the 1990s,

²⁶ Randy Gidseg et al., *Intellectual Property Crimes*, 36 AM. CRIM. L. REV. 835, 836 (1999).

²⁷ See Deputy Attorney General Eric H. Holder, Jr., Announcing the Intellectual Property Rights Initiative, at <http://www.cybercrime.gov/dagipini.htm> (July 23, 1999) (announcing an inter-agency plan to combat “the growing surge” in intellectual property theft).

²⁸ See Gidseg et al., *supra* note 26, at 836.

²⁹ Megan K. Maher & Jon Michael Thompson, *Intellectual Property Crimes*, 39 AM. CRIM. L. REV. 763, 765 (2002).

³⁰ See *id.*; see also David Goldstone, *Deciding Whether to Prosecute an Intellectual Property Case*, UNITED STATES ATTORNEYS’ USA BULLETIN (Dep’t of Justice, Wash., D.C.), Mar. 2001, at 2 (noting that intellectual property rights are in part created by federal law and administered by federal agencies and are thus of special federal interest), available at http://www.usdoj.gov/criminal/cybercrime/usamarch2001_1.htm (last updated Feb. 6, 2003).

³¹ Craig Holden, *IP Crimes*, California Lawyer, at <http://www.dailyjournal.com/cal-Lawyer/index.cfm?sid=&tkn=&eid=479295&evid=1&mcle=Y&number=2> (last visited Jan. 15, 2004).

³² Pub. L. No. 98-473, §§ 1501–02, 98 Stat. 2178 (codified as amended at 18 U.S.C. § 2320 (2000)).

³³ See Maher & Thompson, *supra* note 29, at 780.

advancements in manufacturing allowed mass trademark counterfeiting to reach unprecedented levels,³⁴ causing an estimated \$200 billion annual loss to U.S. companies.³⁵ Counterfeiters were no longer copying only high-end designer goods;³⁶ they were copying machinery, medicines, and even baby food.³⁷ Finding in the mid-1990s that existing federal law was not adequate to protect consumers and businesses from counterfeiting trademarked products,³⁸ Congress passed additional anti-counterfeiting legislation.³⁹

In its present form, the TCA provides criminal sanctions⁴⁰ and civil remedies, such as the foreign seizure and confiscation of the counterfeit goods.⁴¹ To prove a criminal violation, the government must establish that: (1) the defendant trafficked or attempted to traffic in goods or services; (2) such trafficking, or the attempt to traffic, was intentional; (3) the defendant used a counterfeit mark on or in connection with such goods or services; and (4) the defendant knew the mark was counterfeit.⁴²

In a criminal prosecution, courts have focused on whether the counterfeit mark created a “likelihood of confusion” in the marketplace between it and the registered mark.⁴³ The marks need not be identical for a court to find an offense under the TCA.⁴⁴

³⁴ See Holden, *supra* note 31.

³⁵ See Maher & Thompson, *supra* note 29, at 780 (citing H.R. REP. NO. 104-556, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 1074, 1075).

³⁶ See Holden, *supra* note 31.

³⁷ *Id.*

³⁸ See S. REP. NO. 104-177, at 1 (1995), reprinted in 1996 U.S.C.C.A.N. 1074, 1074.

³⁹ See David J. Goldstone & Peter J. Toren, *The Criminalization of Trademark Counterfeiting*, 31 CONN. L. REV. 1, 10–11 (1998) (noting the passage of further anti-counterfeiting legislation during the 1990s).

⁴⁰ See 18 U.S.C. § 2320 (2000) (providing up to \$2 million in fines and up to ten years in prison for individuals convicted of intentionally trafficking in counterfeit goods, as well as up to \$5 million in fines for companies convicted of intentional trafficking in counterfeit goods).

⁴¹ See 15 U.S.C. § 1116(d)(1)(a) (2000).

⁴² See *United States v. Sultan*, 115 F.3d 321, 325 (5th Cir. 1997) (setting out the elements necessary for prosecuting criminal trademark counterfeiting offenses).

⁴³ Holden, *supra* note 31. Likelihood of confusion is one of the three elements of the Trademark Counterfeiting Act of 1984’s (“TCA”) definition of “counterfeit mark.” See 18 U.S.C. § 2320 (e)(1)(A)(iii).

⁴⁴ Holden, *supra* note 31.

Indeed, the counterfeit mark's inferior quality will not help the defendant, as courts almost never accept this defense for disproving a likelihood of confusion.⁴⁵ In addition, the prosecution does not have to prove that the defendant had criminal intent.⁴⁶ It need only be established that the defendant intentionally dealt in goods and knowingly used a counterfeit mark in connection with those goods.⁴⁷ As the Fifth Circuit held in *United States v. Baker*, the statute's plain language and its legislative history demonstrate that Congress never required the defendant to know that the infringing behavior was criminal.⁴⁸ In addition, the statute does not require a threshold minimum retail value for this felony.⁴⁹ Because of its structure and the case law decided after it, the TCA is an easier statute for federal prosecutors to actually use for successful criminal prosecutions.

2. Trade Secret Protection

Congress took another major step in 1996 by enacting the Economic Espionage Act ("EEA"),⁵⁰ which extended protection to trade secret owners for the theft of trade secrets.⁵¹ Congress justified passage of the EEA because of the uselessness of civil remedies to trade secret owners in preventing theft, the inability of prosecutors to use other federal criminal statutes effectively, and the continuing efforts of foreign governments to acquire the trade secrets of American businesses.⁵²

The general criminal statutes that were used prior to the passage of the EEA, such as the National Stolen Property Act ("NSPA")⁵³ and the federal mail and wire fraud statutes,⁵⁴ were not

⁴⁵ *See id.*

⁴⁶ *See* Maher & Thompson, *supra* note 29, at 781 (citing *United States v. Baker*, 807 F.2d 427, 428 (5th Cir. 1986)).

⁴⁷ *See Baker*, 807 F.2d at 428.

⁴⁸ *See id.* at 428–29; *see also* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:14, § 25:25 (4th ed. 2002) ("Ignorance of the fact that selling counterfeit goods is a crime is no defense.").

⁴⁹ Holden, *supra* note 31.

⁵⁰ Economic Espionage Act, Pub. L. No. 104-294, 110 Stat. 3488 (1996) (codified as amended at 18 U.S.C. §§ 1831–39 (2000)).

⁵¹ *See* Holden, *supra* note 31 (discussing the Economic Espionage Act ("EEA")).

⁵² Gidseg et al., *supra* note 26, at 837.

⁵³ 18 U.S.C. §§ 2314–15.

always appropriate.⁵⁵ The NSPA requires a physical theft,⁵⁶ and the federal mail and wire fraud statutes fraud requires the perpetrator to use mail or wire services.⁵⁷ Compounding the problem further, the Internet was beginning to pose new susceptibility to businesses to the theft of confidential trade secrets.⁵⁸ Congress enacted the EEA to help alleviate these concerns.⁵⁹

The EEA consists of two criminal provisions under which the government can prosecute trade secret theft.⁶⁰ The first provision, 18 U.S.C. § 1831, covers economic espionage and bans the theft of U.S. trade secrets for the benefit of foreign governments, agents, or instrumentalities.⁶¹ The second, 18 U.S.C. § 1832, is broader in scope, making the theft of all trade secrets related to products with a nexus to interstate commerce a ten-year felony, if the defendant acted for the economic benefit of someone other than the trade

⁵⁴ 18 U.S.C. §§ 1341, 1343.

⁵⁵ See Holden, *supra* note 31.

⁵⁶ Maher & Thompson, *supra* note 29, at 775.

⁵⁷ *Id.* at 776.

⁵⁸ Holden, *supra* note 31.

⁵⁹ *Id.*

⁶⁰ See John K. Markey & James F. Boyle, *New Crimes of the Information Age*, BOSTON B.J., May/June 1999, at 10, 24.

⁶¹ Markey & Boyle, *supra* note 60, at 24. The statute provides:

(a) In general.—Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly—

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret;

(3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in any of paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

shall, except as provided in subsection (b), be fined not more than \$500,000 or imprisoned not more than 15 years, or both.

(b) Organizations.—Any organization that commits any offense described in subsection (a) shall be fined not more than \$10,000,000.

18 U.S.C. § 1831 (2000).

secret owner and with intent to injure the owner.⁶² The *sine qua non* of a criminal action under the EEA is the existence of a legally cognizable trade secret.⁶³ “Trade secret” is defined in the EEA as:

[A]ll forms and types of financial, business, scientific, technical, economic or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing⁶⁴

Under this definition, the EEA will protect such information if the owner has taken “reasonable measures” to keep it secret, and the information derives actual or potential “independent economic value” from “not being generally known to, and not being readily ascertainable through proper means by, the public.”⁶⁵ This definition of trade secret is similar to that found in the civil

⁶² Markey & Boyle, *supra* note 60, at 24. The statute provides:

(a) Whoever, with intent to convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly—

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;

(3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

shall, except as provided in subsection (b), be fined under this title or imprisoned not more than 10 years, or both.

(b) Any organization that commits any offense described in subsection (a) shall be fined not more than \$5,000,000.

18 U.S.C. § 1832 (2000).

⁶³ Markey & Boyle, *supra* note 60, at 24.

⁶⁴ 18 U.S.C. § 1839(3) (2000).

⁶⁵ See 18 U.S.C. § 1839(3)(a)–(b).

Uniform Trade Secrets Act (“UTSA”);⁶⁶ however, the EEA definition is broader, “in an effort to modernize the law and ‘keep pace with growing technology, especially in the computer and information storage sectors.’”⁶⁷

The EEA, one expert commented, links the United States’ economic prosperity to its national security interests—validating the longstanding argument that theft of a company’s proprietary information ultimately threatens the health and competitiveness of the American economy and, consequently, the country’s security.⁶⁸

In recognition of security concerns, the EEA has an “extremely broad” territorial reach.⁶⁹ Along with acts conducted entirely in the United States, the law extends to foreign schemes if the offender is a U.S. citizen or organization, or if an act in furtherance of the offense was committed in the United States.⁷⁰ This is consistent with the aim of reaching foreign espionage, much of which occurs outside America.⁷¹

The EEA, as one commentator observed, has “raised the stakes in the business of protecting trade secrets.”⁷² Yet the law may create new uncertainty, given the complicated nature of trade secrets and the high level of self-help needed to obtain court protection.⁷³

⁶⁶ UNIF. TRADE SECRETS ACT § 1, 14 U.L.A. 437 (1996).

⁶⁷ Gidseg et al., *supra* note 26, at 838 (quoting Gerald J. Mossinghoff et al., *The Economic Espionage Act: A New Federal Regime of Trade Secret Protection*, 79 J. PAT. & TRADEMARK OFF. SOC’Y 191, 197 (1997)).

⁶⁸ John A. Nolan, III, *Economic Espionage, Proprietary Information Protection: The Government Is Here to Help You—Seriously*, SECURITY TECH. & DESIGN, Jan./Feb. 1997, available at <http://www.intellpros.com/lib/econ.html> (last visited Jan. 15, 2004).

⁶⁹ See James H.A. Pooley et al., *Understanding the Economic Espionage Act of 1996*, 5 TEX. INTELL. PROP. L.J. 177, 204 (1997) (discussing the territorial scope of the EEA).

⁷⁰ The EEA provides:

This chapter [18 U.S.C. §§ 1831 et seq.] also applies to conduct occurring outside the United States if—

(1) the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or a State or political subdivision thereof; or

(2) an act in furtherance of the offense was committed in the United States.

18 U.S.C. § 1837 (2000).

⁷¹ Pooley, *supra* note 69, at 204.

⁷² *Id.* at 228.

⁷³ See *id.* at 205.

3. Patents

No statute under the Patent Act criminalizes patent infringement.⁷⁴ One reason for the lack of criminal penalties in patent laws may be that the United States considers the continuing development of technology and the sciences highly important, and encourages inventors to create, improve, and exploit the patented technologies.⁷⁵ Any criminal sanction may have the effect of suppressing constant legitimate innovation.⁷⁶ Although patents can be infringed, patent owners do not have the same protections as holders of other types of intellectual property.⁷⁷ Also, only 1.1 percent of patent infringement claims go to trial,⁷⁸ and success is not guaranteed.⁷⁹

Criminal statutes do exist for false markings.⁸⁰ Under the statute, the false affixing, marking, or use of the following

⁷⁴ Holden, *supra* note 31. The Patent Act provides a *qui tam* action under which the penalty, a fine up to \$500 for each offense, can be imposed and divided between person bringing suit and the government. 35 U.S.C. § 292 (2000). But in *Filmon Process Corp. v. Spell-Right Corp.*, 404 F.2d 1351, 1355 (D.C. Cir. 1968), the D.C. Circuit Court of Appeals held that although the false marking statute is penal in nature, it is not criminal statute. See also text accompanying notes 81–84 (discussing the cause of action for false marking and similar offenses).

⁷⁵ See Holden, *supra* note 31.

⁷⁶ *Id.* It is also possible that the short duration of patent protection may make many patent holders more concerned with other issues, such as compulsory licensing, the mandatory licensing required of the patented product in order for other countries to have its benefit. See generally Pearl Patent Enforcement & Royalties Ltd., *Patent Infringement Lawsuits: By the Numbers* (showing that royalties from licensing in the United States increased from \$3 billion to \$110 billion between 1980 and 1999), at http://www.pearlltd.com/content/pat_inf_law.html (last modified Oct. 8, 2002).

⁷⁷ See generally Pearl Patent Enforcement & Royalties Ltd., *supra* note 76. With only 183,000 U.S. patents issued in 2001, any loss in this area will not drain as much from the economy as other areas of intellectual property that have a greater amount of production. *Id.* Thus, protections awarded each year in those areas carry longer periods of protection. *Id.*

⁷⁸ See *id.*

⁷⁹ *Id.* (showing that only one-half to two-thirds of trials will result in a verdict in favor of the patent holder, and almost a quarter of the appealed suits will be overturned).

⁸⁰ See 35 U.S.C. § 292 (2000) (providing a *qui tam* action under which the penalty, a fine up to \$500 for each offense, can be imposed and divided between person bringing suit and the government). But see *Filmon Process Corp. v. Spell-Right Corp.*, 404 F.2d

constitutes false marking if done in connection to sales or advertising: “(1) ‘the name or any imitation of the name of the patentee,’ (2) the patent number, or (3) the words ‘patent’ or ‘patentee.’”⁸¹ It is also criminal to “falsely represent that a product is patented or subject to a pending patent application.”⁸² Additionally, Congress has imposed criminal liability for forging letters patents,⁸³ which demonstrates the government’s grant of protection.⁸⁴

Civil infringement actions are difficult for patent owners to maintain.⁸⁵ The process is expensive and lengthy,⁸⁶ making it inefficient for patent holders to police all infringers of their patented innovations in court.⁸⁷ For these reasons, civil sanctions are unlikely to occur in every instance of patent infringement.

4. Copyright

The most protective legislation Congress passed concerns copyright infringement.⁸⁸ Congressional power to legislate in the field of copyright is granted under the Constitution.⁸⁹ Although the United States criminalized copyright infringement in the Act of January 6, 1897,⁹⁰ criminal liability under the act required a mens rea of “willfulness” and a showing that the infringement was “for

1351, 1355 (D.C. Cir. 1968) (holding that although 35 U.S.C. § 292(b) is penal in nature, it is “not a criminal statute”).

⁸¹ Maher & Thompson, *supra* note 29, at 800 (quoting 35 U.S.C. § 292(a) (2000)) (quotation marks altered).

⁸² Holden, *supra* note 31 (citing 35 U.S.C. §292).

⁸³ See 18 U.S.C. § 497 (2000).

⁸⁴ See Gidseg et al., *supra* note 26, at 865.

⁸⁵ See Holden, *supra* note 31.

⁸⁶ *Id.*

⁸⁷ See Gregg A. Paradise, *Arbitration Of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 FORDHAM L. REV. 247, 251 (stating that the federal court system is generally inefficient at resolving complex disputes and that the nature of patent infringement disputes “exacerbates these inefficiencies”).

⁸⁸ See *infra* notes 90, 102, 120 and 131.

⁸⁹ U.S. CONST. art. I, § 8, cl. 8 (Congress shall have the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

⁹⁰ See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481–82.

profit.”⁹¹ In the nearly ninety years that followed, Congress stiffened the penalties for criminal infringement,⁹² but did not significantly modify the actus reus and mens rea requirements.⁹³ Under § 506 of the 1976 Copyright Act, a profit motive remains an essential element to criminal infringement.⁹⁴

The 1970s saw corporate copyright owners make considerable efforts for harsher laws to protect their interests.⁹⁵ In the latter half of the decade, the Motion Picture Association of America, Inc. (“MPAA”)⁹⁶ and the Recording Industry Association of America, Inc. (“RIAA”)⁹⁷ banded together to persuade Congress to raise the criminal penalties for film and recording copyright infringement.⁹⁸ These industries argued that civil action was no deterrent to the sophisticated criminals who profited from piracy.⁹⁹ In addition, there was no felony copyright infringement statute for prosecutors to use against the infringers.¹⁰⁰ In 1982, persuaded by lobbying from the motion picture and music industries, Congress began reforming the criminal copyright laws by raising certain criminal copyright infringements from misdemeanor to felony charges.¹⁰¹

⁹¹ Bailey, *supra* note 23, at 490. The 1976 Act did ease the mens rea requirement for criminal copyright infringement by eliminating the burden of proving that an infringer acted “for profit,” requiring instead only that the infringement be conducted “willfully and for purposes of commercial advantage or private financial gain.” *United States v. LaMacchia*, 871 F. Supp. 535, 539 (D. Mass. 1994) (citing 17 U.S.C. § 506(a)).

⁹² *Id.*; see also Mary Jane Saunders, Note, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 *DENV. U. L. REV.* 671, 673–77 (1994) (discussing the evolution of criminal copyright infringement sanctions).

⁹³ Bailey, *supra* note 23, at 490.

⁹⁴ *Id.* (citing 17 U.S.C. § 506 (1994 & Supp. V 1999)).

⁹⁵ See Saunders, *supra* note 92, at 674–77.

⁹⁶ The Motion Picture Association of America is a trade association representing the American motion picture, home video, and television industries. See Motion Picture Ass’n of Am., *About the MPA, MPAA*, at <http://www.mpa.org/about> (last visited Jan. 8, 2004).

⁹⁷ The Recording Industry Association of America (“RIAA”) is a trade association representing the U.S. recording industry; its members create, manufacture, and/or distribute approximately ninety percent of all legitimate sound recordings produced and sold in the United States. See Recording Industry Association of America, *About Us*, at <http://www.riaa.com/about/default.asp> (last visited Jan. 8, 2004).

⁹⁸ See Saunders, *supra* note 92, at 675.

⁹⁹ *Id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 675–76.

A significant result of this lobbying was the Copyright Felony Act,¹⁰² passed by Congress in 1992. The law amended the criminal sanctions but did not remove or modify the “profit motive” requirement.¹⁰³

Soon after the act passed, the Massachusetts federal district court ruling in *United States v. LaMacchia*¹⁰⁴ demonstrated the limits of then then-existing law and moved Congress to revise the criminal copyright provisions once more.¹⁰⁵ The defendant in the case, David LaMacchia, a Massachusetts Institute of Technology (“MIT”) student, set up an electronic bulletin board on which he encouraged other students to upload popular software programs and computer games.¹⁰⁶ LaMacchia transferred this software to a second encrypted address, from which other users could download the programs and games.¹⁰⁷ Copyright owners lost over an \$1 million over a six-week period as a result of LaMacchia’s acts, according to the indictment.¹⁰⁸

Prosecutors charged LaMacchia under the federal wire fraud statute,¹⁰⁹ alleging that LaMacchia sought to facilitate the “illegal

¹⁰² Pub. L. No. 102-561, 106 Stat. 4233 (1992) (codified as amended at 18 U.S.C. § 2319 (2000)).

¹⁰³ 18 U.S.C. § 1; *see also* Saunders, *supra* note 92, at 680; Dep’t of Justice, *Copyright Felony Act Legislative History*, at <http://www.usdoj.gov/criminal/cybercrime/CFA-leghist.htm> (last updated Jan. 12, 2001).

¹⁰⁴ 871 F. Supp. 535 (D. Mass. 1994); *see also* Dowling v. United States, 473 U.S. 207 (1985) (holding that the National Stolen Property Act, which imposes criminal penalties for interstate transportation of stolen property, does not reach the interstate transportation of goods infringing on another’s copyright if no actual physical removal or theft of the property has taken place).

¹⁰⁵ *See* Frank P. Andreano, *The Evolution of Federal Computer Crime Policy: The Ad Hoc Approach to an Ever-Changing Problem*, 27 AM. J. CRIM. L. 81, 93 (1999) (noting that Congress passed the NET Act as a “direct result” of the court’s ruling in *LaMacchia*); *see also* 141 CONG. REC. 22219–20 (1995) (statement of Sen. Leahy).

¹⁰⁶ *LaMacchia*, 871 F. Supp. at 536.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 536–37.

¹⁰⁹ *Id.* at 536. The federal wire fraud statute states:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purposes of executing such scheme or artifice, shall be fined under this title or imprisoned

copying and distribution of copyrighted software” without paying licensing fees and royalties.¹¹⁰ The indictment did not claim that LaMacchia sought or derived any personal benefit from the scheme.¹¹¹ For this reason, the prosecution did not charge him under the criminal copyright statute, which at that time required proof that the defendant tried to personally profit.¹¹²

LaMacchia moved to dismiss the charges, arguing that the government had improperly sought to expand the scope of the wire fraud statute in order to enforce copyrights.¹¹³ The district court agreed and granted LaMacchia’s motion to dismiss.¹¹⁴ Analyzing copyright history and relevant case law, Judge Richard G. Stearns found that the government could not use the wire fraud statute to convert LaMacchia’s non-criminal acts of copyright infringement into a criminal offense.¹¹⁵ Quoting Professor David Nimmer’s treatise on copyright, the court agreed that “copyright prosecutions should be limited to Section 506 of the Act, and other incidental statutes that explicitly refer to copyright and copyrighted works.”¹¹⁶ Judge Stearns added that the law could be changed to permit criminal prosecutions for this type of copyright

not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 (2000). The wire fraud statute was enacted in 1952. *LaMacchia*, 871 F. Supp. at 540.

¹¹⁰ *LaMacchia*, 871 F. Supp. at 536.

¹¹¹ *Id.* at 537.

¹¹² *Id.* at 541–42 (citing *United States v. Silvano*, 812 F.2d 754, 759–60 (1st Cir.1987)). Through case law, prosecutors developed a theory of intangible rights as being a type of property which can come under the federal wire fraud statute. *See LaMacchia*, 871 F. Supp. at 543. The government pointed to *Carpenter v. United States*, 484 U.S. 19 (1987), which held that intangible as well as tangible property interests are protected by the mail and wire fraud statutes. Prosecutors then argued that nothing in *Carpenter* “distinguishes intangible rights to copy, distribute and license computer software from other intangible property interests.” *LaMacchia*, 871 F. Supp. at 543 (citing the government’s memorandum at 13).

¹¹³ *Id.* at 537.

¹¹⁴ *Id.* at 545.

¹¹⁵ *See id.* at 540–45.

¹¹⁶ *Id.* at 545 (quoting 4-15 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 15.05 (1993)).

infringement, but “[i]t is the legislature, not the Court which is to define a crime, and ordain its punishment.”¹¹⁷

Shortly thereafter, both the House and the Senate began considering amendments to criminal copyright law.¹¹⁸ After two years of debating different approaches, Congress passed a compromise bill,¹¹⁹ the No Electronic Theft (“NET”) Act,¹²⁰ in late 1997, and President Bill Clinton signed it into law.¹²¹ The NET Act allows for federal criminal prosecution of large-scale, willful copyright infringement even when the infringer is not seeking commercial benefit—closing the loophole revealed by the *LaMacchia* decision.¹²² Reflecting its acronym, the statute sweeps broadly to redefine criminal copyright and applies to any means used to appropriate copyrights.¹²³ Congress’s motives behind the NET Act were two-fold. First, Congress aimed to criminalize “*LaMacchia*-like behavior”—that is, “misappropriation in which the infringer does not realize a direct financial benefit but whose actions nonetheless substantially damage the market for copyrighted works.”¹²⁴ Secondly Congress wanted to “eliminat[e] the government’s burden to prove ‘commercial motive’ in criminal prosecutions.”¹²⁵ In doing so, the NET Act makes willfulness the only distinction between civil and criminal copyright infringement.¹²⁶ This sends a strong warning to naïve users who believe they can safely download copyrighted music, software, or games without paying for them.¹²⁷ The only threshold that must be

¹¹⁷ *Id.* (quoting *Dowling v. United States*, 473 U.S. 207, 214 (1985) (quoting *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820))).

¹¹⁸ See Bernstein, *supra* note 5, at 70–72 (2001) (discussing the passage of the NET Act, beginning with the President’s Council on the National Information Infrastructure Task Force through the compromise bill passed by both houses).

¹¹⁹ See *id.*

¹²⁰ Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended in scattered sections of 17 and 18 U.S.C.).

¹²¹ Shawn D. Sentilles & Michael A. Cromwell, *Recent Developments: Intellectual Property Law*, 45 LA. B.J. 556, 556 (1998).

¹²² Markey & Boyle, *supra* note 60, at 10.

¹²³ Holden, *supra* note 34.

¹²⁴ H.R. REP. NO. 105-339, at 8 (1997).

¹²⁵ Ting Ting Wu, Comment, *The New Criminal Copyright Sanctions: A Toothless Tiger?*, 39 IDEA 527, 531 (1998).

¹²⁶ See Holden, *supra* note 31.

¹²⁷ *Id.*

2004] *DETECTING INTELLECTUAL PROPERTY CRIMINALS* 583

met now is the retail value of the infringed work.¹²⁸ For misdemeanor charges, the infringer needs only to upload or download a value of more than \$1,000 within a 180-day period.¹²⁹ In addition, felony charges can be brought if the government establishes that the infringement included in a 180-day period at least 10 copies with a total retail value in excess of \$2,500.¹³⁰

Congress in 1998 enacted the Digital Millennium Copyright Act (“DMCA”),¹³¹ which includes a provision authorizing criminal prosecutions for solving or attempting to solve the encryption technology designed to prevent unauthorized copying of copyrighted works.¹³² The growth of encryption technology on copyrighted works shows that intellectual property owners are developing “self-policing efforts” to combat infringement.¹³³ The DMCA aims, in part, to assist such efforts.¹³⁴

Specifically, the DMCA makes it a crime to (1) circumvent a technical measure such as an encryption lock that copyright owners use to control access to their works or prevent copying of their works, (2) make or distribute a tool that circumvents access controls, or (3) make or distribute a tool that bypasses other technical measures used by copyright owners to protect rights in copyrighted works.¹³⁵

II. WHAT NOW?: MAKING IP ENFORCEMENT A PRIORITY

Despite the considerable Congressional attention paid to intellectual property issues during the 1990s, the U.S. Department of Justice (“Justice Department”) was slow to pursue criminal

¹²⁸ See Bailey, *supra* note 23, at 490 (noting that section 506 of the Copyright Act currently differentiates criminal infringement liability from civil liability by either the presence of a profit motive or a retail value of infringed works exceeding \$1,000).

¹²⁹ See 17 U.S.C. § 506(a)(2) (2000); 18 U.S.C. § 2319(c) (2000).

¹³⁰ See Holden, *supra* note 31 (citing 18 U.S.C. § 2319(b)(1)).

¹³¹ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

¹³² See Holden, *supra* note 31.

¹³³ See *id.*

¹³⁴ *Id.*

¹³⁵ *Id.* (citing 17 U.S.C. §§ 1201, 1204).

infringers.¹³⁶ In the few cases where prosecutors charged criminal behavior, the prosecutions resulted in no jail time.¹³⁷ Meanwhile, rising infringement caused increasing loss to the economy.¹³⁸

A. New Laws Enacted, but Prosecutions Are Slow

The first case under the NET Act came about two years after its enactment. It involved Jeffrey Gerard Levy, a University of Oregon student who posted software, music, and movies on his Web site,¹³⁹ which was on the university's network.¹⁴⁰ Campus computer operators tracked the transfer of over 1.7 gigabytes of information from the site in less than two hours.¹⁴¹ This powerful digital connection could have allowed Levy to reach the criminal threshold of \$1,000 (roughly 625 songs) in less than three hours.¹⁴² The university alerted federal law enforcement, which led to the student's indictment.¹⁴³ Levy eventually pleaded guilty to

¹³⁶ The Web site of the Justice Department's Computer Crime and Intellectual Property Section, which provides a representative sample of the Intellectual Property cases being prosecuted in the United States, shows only one case brought in late 1998 and no surge in cases until recently. See Dep't of Justice, Computer Crime and Intellectual Property Section, *Intellectual Property Cases*, at <http://www.usdoj.gov/criminal/cybercrime/ipcases.htm> (last updated Dec. 30, 2003).

¹³⁷ *Id.* The Web site includes press releases providing greater detail on many cases. See *id.* The press releases demonstrate that it was not until recently that many perpetrators were given jail time as part of their punishment, and that early defendants received insignificant sentences in relation to the estimated loss of money. See *id.*

¹³⁸ See generally source cited *supra* note 3.

¹³⁹ See *UO Student Sentenced for Internet Piracy*, PORTLAND OREGONIAN, Nov. 24, 1999, available at 1999 WL 28278337.

¹⁴⁰ Andy Patrizio, *DOJ Cracks Down on MP3 Pirate*, Wired News, at <http://www.wired.com/news/politics/0,1283,21391,00.html> (Aug. 23, 1999).

¹⁴¹ *Id.*

¹⁴² Bailey, *supra* note 23, at 521.

¹⁴³ Ashbel S. Green,

Net Piracy Law Gets First Conviction: UO Student, PORTLAND OREGONIAN, Aug. 21, 1999, available at 1999 WL 5367412.

violating the NET Act,¹⁴⁴ and was sentenced in November 1999 to two years of probation with conditions.¹⁴⁵

The DMCA's anti-circumvention provision faced its first criminal jury trial in December 2002,¹⁴⁶ even though Congress enacted the statute nearly five years earlier.¹⁴⁷ Similarly, the first trial with any foreign impact under the EEA was in 1999, three years after Congress passed the act.¹⁴⁸ In addition, major trademark counterfeiting cases were resulting in high restitution payments without prison time.¹⁴⁹ In sum, an array of laws was in place to prevent these crimes, but the government was slow to prioritize these issues and mount the necessary prosecutions. What kind of motivation did it need?

B. Why Did the Department of Justice Finally Focus on Intellectual Property Theft?

The near absence of prosecutions under the new intellectual property criminal laws has changed drastically over the past few years, as U.S. Attorneys' offices have begun focusing efforts and resources on intellectual property crimes.¹⁵⁰

¹⁴⁴ Patrizio, *supra* note 140. Because of the electronic crime was so new at that time of Levy's indictment, the U.S. Attorney's Office in Oregon did not have the resources to fully search his computer for information that might connect Levy to a pirate group, or to find out how many songs, programs, and games he had distributed. *Id.*; *see also* Bernstein, *supra* note 5, at 63 (discussing plea negotiations with Levy).

¹⁴⁵ *See* Press Release, Dep't of Justice, Defendant Sentenced for First Criminal Copyright Conviction Under the "No Electronic Theft" (NET) Act for Unlawful Distribution of Software on the Internet (Nov. 23, 1999), *available at* <http://www.usdoj.gov/criminal/cybercrime/levy2rls.htm> (last updated Dec. 1, 2000).

¹⁴⁶ Shannon Lefferty, *Copyright Criminal Trial Opens*, NAT'L L. J., Dec. 9, 2002, at A14; *see also* United States v. Elcom Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

¹⁴⁷ *See supra* text accompanying notes 131-35.

¹⁴⁸ *See* Dep't of Justice, *Sixth Circuit Affirms Convictions and Remands for Resentencing on First Jury Trial Under the EEA*, at <http://www.usdoj.gov/criminal/cybercrime/eea.html#VIIIb> (last updated March 22, 2002); *see also* United States v. Yang, 281 F.3d 534 (6th Cir. 2002).

¹⁴⁹ *See, e.g.*, Press Release, Dep't of Justice, Violation of I.B.M. Trademark Results in \$3.3 Million Fine and Restitution for Chicago Area Company (Nov. 19, 1998), *available at* <http://www.usdoj.gov/criminal/cybercrime/desktop.htm> (last visited Jan. 11, 2004). According to the press release, the defendant company made a plea agreement to pay fines and restitution for distributing computer memory boards in counterfeit IBM boxes; however, no jail time was apparently imposed on company officials. *See id.*

¹⁵⁰ *See* sources cited *supra* note 5.

One might speculate that the loss to the nation's economy was a major factor, and corporations were demanding help to solve this problem.¹⁵¹ A second reason is that the Justice Department's Criminal Division created the Computer Crime and Intellectual Property Section to devote attention to this area of law.¹⁵² A key aspect of this new push involved working with other agencies and corporate America.¹⁵³ Another possible factor is the government's efforts to comply with the treaties and bilateral intellectual property agreements that the United States had previously signed in order to ensure protection and cooperation from other countries.¹⁵⁴ In addition, the sentencing guidelines were amended in May 2000, establishing uniform standards for intellectual property categories, which may lead to a greater likelihood of prison time with predictable sentences handed down.¹⁵⁵ Finally, the differing policies of the Bush administration, as compared to the Clinton administration, may account for the surge in prosecutions.¹⁵⁶ Most likely, the increased enforcement results from a combination of these factors; however, each needs to be examined to see its individual effect.

1. The Economic Loss

In the post-industrial age, the information industries have become critically important to the U.S. economy,¹⁵⁷ and the ability to protect intellectual property has been linked to America's future success.¹⁵⁸ In June 1998, the Department of Commerce released figures showing that copyright and trademark industries were the second fastest growing sector of the U.S. economy, behind Internet-related electronic commerce.¹⁵⁹ In 2001, the copyright

¹⁵¹ See *supra* Part II.B.1.

¹⁵² See *supra* Part II.B.2.

¹⁵³ See *supra* Part II.B.2-3.

¹⁵⁴ See *supra* Part II.B.4.

¹⁵⁵ See *supra* Part II.B.6.

¹⁵⁶ See *id.*

¹⁵⁷ See MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 1 (2d ed. 1995).

¹⁵⁸ See Bruce P. Mehlman, Commerce Dep't Assistant Sec'y for Tech. Policy, Address to the to the Licensing Executives Society (July 31, 2002), at http://www.technology.gov/Speeches/p_BPM_020731_NatlWealth.htm.

¹⁵⁹ See Press Release, Dep't of Justice, FBI and Customs Service to Combat Intellectual Property Crime (July 23, 1999) [hereinafter Initiative to Combat Piracy Release].

industries alone accounted for 5.24 percent of GDP, or \$535.1 billion.¹⁶⁰ In addition, foreign sales of core American copyright industries totaled over \$60 billion in 1996.¹⁶¹ By 2001, exports increased to almost \$89 billion in foreign revenues, surpassing all other sectors including automobiles and agriculture.¹⁶²

The rising contribution of intellectual property industries to the economy has been accompanied by a surge in theft.¹⁶³ Theft of intellectual property costs U.S. companies more than \$300 billion in 1997, and in 2000 American companies lost more than \$1 trillion overall.¹⁶⁴ Intellectual property piracy in 1998 cost an estimated 109,000 jobs and \$991 million in uncollected taxes.¹⁶⁵ Moreover, a 1999 study estimated that piracy costs the software industry more than \$11 billion a year.¹⁶⁶ By 2001, the motion picture industry lost \$3 billion worldwide in potential revenue because of intellectual property crimes, most specifically piracy, while the recording industry lost \$4.3 billion.¹⁶⁷

These numbers indicate the level of importance of intellectual property, demonstrating that transfer of information has become an expanding part of international trade and the “centerpiece” of U.S. competitiveness.¹⁶⁸ The United States is the world’s largest net exporter of intellectual property.¹⁶⁹ Because of the high volume of intellectual property created and disseminated around the world, U.S. artists, inventors, etc. are vulnerable to piracy, expropriation abroad, and inadequate protection of their rights.¹⁷⁰ In 2002, the

¹⁶⁰ See IIPA Release, *supra* note 1.

¹⁶¹ Stephen Siwek & Gale Mosteller, International Intellectual Property Alliance, *Copyright Industries in the US Economy: The 1998 Report*, May 1998.

¹⁶² IIPA Release, *supra* note 1.

¹⁶³ See Deputy Attorney General Eric H. Holder, Jr., Remarks at Press Conference Announcing the Intellectual Property Rights Initiative (July 23, 1999) [hereinafter Holder Remarks], at <http://www.cybercrime.gov/dagipini.htm> (last updated Jan. 15, 2003).

¹⁶⁴ See Maher & Thompson, *supra* note 29, at 765.

¹⁶⁵ Am. Bar Ass’n Section of Intell. Prop. Law, *Chair’s Bulletin*, Nov. 1999, available at <http://www.abanet.org/intelprop/nov99chair.html> (last visited Jan. 12, 2004).

¹⁶⁶ See Molly Masland, *Software Piracy a Booming Net Trade*, MSNBC, at <http://www.msnbc.com/news/177396.asp?cp1=1> (July 23, 1999).

¹⁶⁷ 148 CONG. REC. E1178 (daily ed. June 28, 2002) (statement of Rep. Smith).

¹⁶⁸ See LEAFFER, *supra* note 161, at 2.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

International AntiCounterfeiting Coalition seized over 7.6 million counterfeit or pirated goods, which would have been worth over \$330 million dollars had they been genuine.¹⁷¹ The black market drains millions of dollars from the tax base, which causes Americans to pay higher taxes to compensate for the lost revenue.¹⁷² Thus, intellectual property crimes are not only detrimental to private business and the economy as a whole, but also to individual Americans.

These economic effects, on their own, were enough to warrant prioritization of intellectual property protection. The revenue, jobs, and taxes lost to piracy made greater government action a necessity.

2. Agencies Prioritize and Come Together

Incorporating some of the above figures in their strategic plan, the government took a major step on July 23, 1999, when Deputy Attorney General Eric Holder announced the Justice Department's new initiative to combat intellectual property piracy.¹⁷³ The initiative made intellectual property crimes a "major law enforcement priority."¹⁷⁴ At the announcement, Holder noted:

As the world moves from the Industrial Age to the Information Age, the United States' economy is increasingly dependent on the production and distribution of intellectual property (IP). Currently the U.S. leads the world in the creation and export of intellectual property and IP-related products

¹⁷¹ IACC Release, *supra* note 3.

¹⁷² Nichole Christian, *On the Beat with the Purse Police*, LADIES' HOME J., Sept. 2003, at 84 (profile of Barbara Kolsun, an attorney for several prominent designers).

¹⁷³ See Holder Remarks, *supra* note 163.

¹⁷⁴ *Id.* The *U.S. Attorney's Manual* states: "[F]rom time to time the Department establishes national investigative and prosecutorial priorities. These priorities are designed to focus Federal law enforcement efforts on those matters within the Federal jurisdiction that are most deserving of Federal attention and are most likely to be handled effectively at the Federal level." U.S. ATTORNEY'S MANUAL § 9-27.230(B)(1), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.-230 (last visited Jan. 12, 2004).

At the same time that our information economy is soaring, so is intellectual property theft.¹⁷⁵

Holder added that the Internet has complicated enforcement efforts.¹⁷⁶ While it has revolutionized distribution for licensed digital products, it has also facilitated piracy by allowing digital products to be “reproduced almost instantaneously, surreptitiously, repeatedly, and inexpensively.”¹⁷⁷ He emphasized, however, that intellectual property theft “is theft, pure and simple,” and that those who stole intellectual property would be prosecuted.¹⁷⁸

The initiative teamed the Justice Department’s Computer Crime and Intellectual Property Section, the U.S. Attorneys’ Offices, the Federal Bureau of Investigation (FBI), and the U.S. Customs Service together.¹⁷⁹ Working together and targeting seven federal districts,¹⁸⁰ these departments have vastly increased their enforcement.¹⁸¹ In addition, the initiative drew on the assistance of trade agencies—including the Office of the U.S. Trade Representative, the Commerce Department’s Patent and Trademark Office, and the Copyright Office—to assist with the technical training of the enforcement plan.¹⁸²

Sam Banks, Customs Service Deputy Commissioner, reported that Customs and other law enforcement officials are concerned about the increasing involvement of organized crime in high-volume counterfeiting.¹⁸³ He added that because record amounts of counterfeited products were being seized, “a more focused, coordinated approach is necessary to enhance [the] ability to

¹⁷⁵ Holder Remarks, *supra* note 163. As another Justice Department official later observed, it is especially appropriate that investigation and prosecution of intellectual property crimes be a federal law enforcement priority, because such theft undermines the copyright and trademark systems based in federal law. *See* Goldstone, *supra* note 30, at 3.

¹⁷⁶ Holder Remarks, *supra* note 163.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See* Initiative to Combat Piracy Release, *supra* note 159.

¹⁸⁰ *Id.*

¹⁸¹ *See* sources cited *supra* note 5.

¹⁸² *See* Initiative to Combat Piracy Release, *supra* note 159. The initiative also includes an increase in specialized training courses for investigators and prosecutors and developing training programs for state and local officials in conjunction with the National Cybercrime Training Partnership. *See id.*

¹⁸³ *Id.*

identity and apprehend” the perpetrators of these crimes,¹⁸⁴ “which cut[] at the core of American business and ingenuity.”¹⁸⁵

FBI Assistant Director, Criminal Investigative Division, Thomas J. Pickard echoed this concern, noting that intellectual property criminals are organized, well-funded, and adept at using technology.¹⁸⁶ He said government agencies need to “outmatch the criminals” by integrating federal resources with those of the private sector.¹⁸⁷ Consistent with this spirit of cooperation, the FBI Mission Statement on Intellectual Property Crimes sets out a strategy to promote productive liaisons with other agencies to ensure the joint effort to combat intellectual property crimes will continue.¹⁸⁸

3. Corporate America Aids Enforcement

Resolved to devote more attention to intellectual property prosecutions, government officials asked corporations for their help in enforcing U.S. intellectual property laws.¹⁸⁹ The Justice Department requested that companies refer any matters of intellectual property crimes for investigation and prosecution, especially if they involve threats to public health and safety, offenses believed to be linked to organized crime, or other high volume or consequential intellectual property crimes.¹⁹⁰

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See FBI, *About Intellectual Property*, at http://www.fbi.gov/hq/cid/fc/fifu/about/-about_ipc.htm (last visited Jan. 12, 2004).

¹⁸⁹ See Holder Remarks, *supra* note 163. Announcing the initiative, Deputy Attorney General Holder said government agencies need to enhance the “already strong relationship” with the copyright and trademark industries. *Id.* He added:

We need to enhance our already strong relationship with the U.S. copyright and trademark industries. There is much that industry can do on its own to prevent or reduce this threat. They can employ technological measures to defeat illegal copying. They can bring suits in the civil courts. And, very importantly, they can increase public awareness about the dangers associated with piracy and counterfeiting as well as the staggering economic losses we suffer.

Id.

¹⁹⁰ See Initiative to Combat Piracy Release, *supra* note 159.

By looking to the victim companies for assistance, the government can better ensure cooperation in locating and subsequently prosecuting the criminals, because the companies will want to be protected in order to maintain their operations, livelihood, and control.¹⁹¹ Indeed, it was the industries that had initially lobbied Congress to strengthen criminal intellectual property laws.¹⁹²

There are signs that U.S. businesses and organizations have heeded the government's plea, committing resources to see that laws are enforced and speaking out about what intellectual property theft does to their businesses. For example, IBM reported that, in the first half of 1996, it had spent \$2.68 million on lobbying efforts for various issues, specifying the Economic Espionage Act¹⁹³ among them.¹⁹⁴ Also, although the *Napster* case¹⁹⁵ involved only a civil action, the U.S. government filed an amicus curiae brief to support the record companies and artists in their appeal.¹⁹⁶ By taking a stance, the record companies showed potential infringers that they would suffer consequences, even if only civil, if they chose to infringe copyrights, and that the government would investigate such infringement on the criminal level.¹⁹⁷

On February 24, 2003, Jack Valenti, president and chief executive officer of the MPAA, spoke at Duke University School of Law and urged the audience to delete all illegally-downloaded

¹⁹¹ See, e.g., sources cited *infra* notes 226, 231 (Congressional testimony of information industry representatives, seeking stronger criminal intellectual property laws and better enforcement).

¹⁹² See Saunders, *supra* note 92, at 675–80 (discussing efforts of music, film, and software industries to pursue stronger copyright protections).

¹⁹³ See *supra* Part I.B.2.

¹⁹⁴ See Nolan, *supra* note 68.

¹⁹⁵ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

¹⁹⁶ Brief for the United States as Amicus Curiae, *Napster* (Nos. 00-16401, 00-16403).

¹⁹⁷ The RIAA recently launched a wave of lawsuits against people accused of infringing copyrights by distributing music from file sharing Web sites, with the number of files being offered as the RIAA's only criteria for bringing suit. Katie Dean, *RIAA Legal Landslide Begins*, *Wired News*, at <http://www.wired.com/news/digiwood/0,1412,60345,00.html> (Sept. 8, 2003).

movies and songs from their computers.¹⁹⁸ He further called upon universities to develop a code of conduct for their Internet-using students to end peer-to-peer file sharing.¹⁹⁹ Noting that college students are a major portion of the file-sharing population, Valenti said that the illegal downloading of music and movies runs contrary to basic American moral tenets.²⁰⁰ Observing that most students would never physically steal a DVD from a video store, he asked why attitudes toward “digital shoplifting” should be any different.²⁰¹ Valenti also warned that given the growth of high-speed Internet connections, illegal downloading of movies could cripple Hollywood in the near future.²⁰²

Corporations have also been aiding enforcement agencies by conducting their own investigations. For instance, the Avery Dennison Corporation of Pasadena, California, helped the FBI bring to trial the first case involving foreign individuals accused of violating the EEA.²⁰³ In fact, it was Avery Dennison that first discovered, through its own investigation, evidence of trade secret theft,²⁰⁴ which it later turned over to the FBI.²⁰⁵

The MPAA made a similar contribution, following an August 1998 complaint alleging that pirated videotapes were being sold from a storeroom in Manhattan.²⁰⁶ The MPAA began its own investigation, which led to FBI involvement, the discovery of a

¹⁹⁸ See Alex Garinger, *Valenti Denounces File-Sharing*, CHRON. ONLINE (Feb. 25, 2003), at <http://www.chronicle.duke.edu/vnews/display.v/ART/2003/02/25/3e5b75-afbd2a5>.

¹⁹⁹ See *id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See Press Release, Dep’t of Justice, Four Pillars, P.Y. Yang and Sally Yang Convicted of Violating the Economic Espionage Act of 1996 (Apr. 28, 1999) [hereinafter Four Pillars Press Release], available at <http://www.usdoj.gov/criminal/cybercrime/-avery.htm> (last visited Jan. 16, 2004); see also *United States v. Yang*, 281 F.3d 534, 540–41 (6th Cir. 2002).

²⁰⁴ Four Pillars Press Release, *supra* note 203.

²⁰⁵ See *id.* Announcing the conviction, FBI Director Louis J. Freeh stated that the outcome demonstrated the value of law enforcement and industry working in partnership. *Id.*

²⁰⁶ See Press Release, Dep’t of Justice, Leader of Massive Video Piracy Ring Sentenced in Manhattan Federal Court (Apr. 16, 2003), available at <http://www.usdoj.gov/criminal/cybercrime/bahSent.htm> (last visited Jan. 16, 2004).

“massive” piracy operation, and the indictment of two of the operation’s leaders.²⁰⁷ The two were eventually convicted and each sentenced to forty-six months in prison.²⁰⁸

4. The Protocol of International Agreements

Another reason behind the recent surge in prosecutions is that the United States has signed many recent international agreements for intellectual property rights.²⁰⁹ As a member of these treaties, the United States must now protect both U.S. companies and foreign rights holders from domestic infringement.²¹⁰ The United States was a major proponent of these treaties because it had grown dissatisfied by the mid-1980s with the weak levels of protection under existing conventions²¹¹ of the World Intellectual Property Organization (“WIPO”).²¹² The United States argued that stronger enforcement and dispute settlement procedures were necessary in order to eliminate piracy.²¹³ Years of negotiations culminated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”),²¹⁴ which came into force in January 1995.²¹⁵

²⁰⁷ *Id.*

²⁰⁸ *Id.* According to the Justice Department, the leaders of this piracy ring were first indicted in November 1999 but subsequently fled to Georgia, where they were captured and returned to the Southern District of New York. *Id.* They pled guilty to the charges in late 2002. *Id.*

²⁰⁹ See generally JAY DRATLER, JR., *INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY* § 1.09[e], at I-97 to I-99 (discussing modern international agreements on intellectual property).

²¹⁰ See DEP’T OF JUSTICE PROSECUTING INTELLECTUAL PROPERTY CRIMES MANUAL § I.C.

²¹¹ See Susan A. Mort, *The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 173, 180–83 (1997).

²¹² Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3 [hereinafter WIPO Treaty]. The World Intellectual Property Organization (“WIPO”) is a Geneva-based international organization dedicated to promoting the use and protection of intellectual property. WIPO, *About WIPO*, at <http://www.wipo.int/about-wipo/en/overview.html> (last visited Jan. 14, 2004). WIPO administers 23 international treaties dealing with different aspects of intellectual property protection and counts 179 nations as member states. *Id.*

²¹³ Mort, *supra* note 211, at 180.

²¹⁴ See *supra* note 21 and accompanying text.

²¹⁵ Mort, *supra* note 211, at 183.

The TRIPS Agreement established a “symbiotic arrangement,” under which the World Trade Organization (“WTO”) ²¹⁶ incorporated by reference some of the international conventions administered by WIPO and made them subject to the WTO’s dispute settlement procedures.²¹⁷ This effort aimed to strengthen international protection of intellectual property by providing it with a strong, effective system of dispute resolution.²¹⁸ One particular TRIPS provision, part III, section 4, lays out an important role for the customs authorities in each member nation to aid in preventing illegal goods from passing between countries.²¹⁹

Since the signing of these treaties, both the federal government and international bodies have worked toward better enforcement. In 1999, WIPO conducted a workshop on the role of government authorities in the enforcement of intellectual property rights.²²⁰ The workshop urged governments of countries with a significant risk of intellectual property infringement to bring criminal prosecutions.²²¹ Specifically, the workshop materials stated that only when prosecutions have largely eliminated street-level piracy, and intellectual property has become widely viewed “as a permanent feature of the state’s legal order,” that civil litigation, as opposed to criminal prosecution, will become the norm in intellectual property matters.²²² Similarly, former Attorney General Janet Reno urged all countries committed to “robust enforcement” of intellectual property laws to develop a joint

²¹⁶ The World Trade Organization came into existence on January 1, 1995, culminating more than seven years of multilateral trade negotiations known as the Uruguay Round. Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT’L ECON. L. 851, 851 n.1 (1990). The Uruguay Round was the most ambitious and most complex trade negotiation ever undertaken. *See id.*

²¹⁷ Mort, *supra* note 211, at 176

²¹⁸ *Id.* at 176–77.

²¹⁹ TRIPS Agreement, *supra* note 21.

²²⁰ *See* ALASTAIR HIRST, THE ROLE OF THE GOVERNMENT AUTHORITIES IN THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (Dec. 7, 1999) (prepared for the WIPO Workshop on the Enforcement of Intellectual Property Rights for Judges), available at <http://www.wipo.org/sme/en/documents/index.htm> (last visited Jan. 14, 2004).

²²¹ *Id.* ¶ 6.

²²² *Id.*

program of legal assistance and extradition arrangements.²²³ Reno added that when multinational enforcement efforts “form a network” to combat these crimes, “IP criminals will learn that no country is a safe haven.”²²⁴

5. Amending the Sentencing Guidelines

Another likely factor contributing to increased prosecutions is the passage in May 2000 of amended sentencing guidelines for certain intellectual property crimes.²²⁵ Previous U.S. sentencing guidelines were viewed as inadequate because they made it unlikely that an intellectual property pirate would serve jail time, thus making prosecutors hesitant to pursue this type of prosecution.²²⁶

The NET Act²²⁷ mandated that the U.S. Sentencing Commission enact sentencing guidelines “sufficiently stringent to deter” criminal intellectual property infringement.²²⁸ Because of various delays, however, the Sentencing Commission did not recommend the guidelines to Congress until 1999.²²⁹ The commission eventually proposed three options for amendments to the guidelines.²³⁰

At Sentencing Commission hearings for the proposed new guidelines, Robert M. Kruger of the Business Software Alliance articulated the need to achieve compliance with the laws, and how education, civil enforcement, and other techniques were not

²²³ See Attorney General Janet Reno, Speech Before the Symposium of the Americas (Sept. 12, 2000) [hereinafter Reno Speech], available at <http://www.usdoj.gov/criminal/cybercrime/ipsymposium.htm> (last updated Sept. 25, 2000).

²²⁴ *Id.*

²²⁵ See Dep’t of Justice, *Criminal Intellectual Property Laws*, at <http://www.usdoj.gov/criminal/cybercrime/iplaws.htm> (last visited Jan. 14, 2004).

²²⁶ See *Intellectual Property Rights: Before the House International Relations Subcommittee on International Economic Policy and Trade*, 106th Cong. 60, 66–67 (1999) (statement of Jeremy Salesin, Senior V.P. and General Counsel for LucasArts Entertainment, testifying on behalf of Interactive Digital Software Association), available at 1999 WL 27595602.

²²⁷ See *supra* notes 119–30 and accompanying text.

²²⁸ No Electronic Theft Act, Pub. L. No. 105-147, § 2, 111 Stat. 2678, 2680 (1997).

²²⁹ See Bernstein, *supra* note 5, at 72–81 (discussing the process of enacting the Sentencing Guidelines under the NET Act).

²³⁰ *Id.* at 79–80.

enough.²³¹ Kruger testified that “the public must understand and expect that meaningful sanctions will be imposed against those who engage in activities that rise to the level of criminal violations of the law.”²³²

A presidential task force considered the issue as well, issuing a report in early 2000 on the legal and policy issues surrounding the use of the Internet to commit unlawful acts.²³³ The report concluded that sentencing guidelines concerning intellectual property crimes needed to be updated to guarantee that law enforcement agencies and federal prosecutors commit the effort and funding in the prosecution of these cases.²³⁴

The sanctions that may be sought from a criminal conviction in an intellectual property case now include imprisonment, restitution, and forfeiture.²³⁵ Under the revised guidelines, the offense level is related to the “infringement amount.”²³⁶ The infringement amount, in turn, is calculated in many intellectual property cases based on the retail value of the infringed (legitimate) item, a calculation that can significantly enhance the sentence in an intellectual property case.²³⁷ Other factors—such as

²³¹ Robert M. Kruger, Testimony Before the United States Sentencing Commission (Mar. 23, 2000), available at http://www.ussc.gov/AGENDAS/3_23_00/test03_00.htm (last visited Jan. 16, 2004). Kruger, vice president of enforcement at the Business Software Alliance, also testified on behalf of the Interactive Digital Software Association, the Motion Picture Association of America, the Recording Industry Association of America, and the Software and Information Industry Association. *Id.*

²³² *Id.*

²³³ PRESIDENT’S WORKING GROUP ON UNLAWFUL CONDUCT ON THE INTERNET, THE ELECTRONIC FRONTIER: THE CHALLENGE OF UNLAWFUL CONDUCT INVOLVING THE USE OF THE INTERNET (2000) [hereinafter WORKING GROUP REPORT], available at <http://www.usdoj.gov/criminal/cybercrime/unlawful.htm> (last updated Aug. 6, 2000); see also Bernstein, *supra* note 5, at 81 n.205 (discussing the group’s genesis and its responsibilities).

²³⁴ See WORKING GROUP REPORT, *supra* note 233, pt. II.D.1.

²³⁵ See Goldstone, *supra* note 30, at 5.

²³⁶ *Id.*

²³⁷ *Id.* Goldstone provides an example of how this calculation could affect a sentence: [I]f a defendant sold, for five dollars each, 100 pirated CDs each containing 20 pirated software programs worth one hundred dollars each, that defendant may have profited only \$500. Nevertheless, for sentencing purposes in such a case, the loss would probably be measured by the value of the intellectual property infringed upon by the defendant, which is \$2,000 per CD for a total of \$200,000.

commercial gain by the defendant, risk of bodily injury, or whether there was circumvention of a security device—can also affect the offense level.²³⁸ As one Justice Department lawyer observed, these revised guidelines more accurately reflect the loss caused by an intellectual property crime and thus allow for a punishment that is “more appropriate to the crime.”²³⁹

6. A New President Arrives in Washington

The change in presidential administration is a final, obvious factor in the rise in prosecutions of intellectual property crimes. Although President Clinton was a staunch supporter of the creative industries, his administration did not take a vocal stance on combating intellectual property infringement until late 1999, when his term as president was almost over.²⁴⁰ The Bush administration does not appear to have lowered the priority of investigating and prosecuting intellectual property infringement, as Attorney General John Ashcroft is pursuing these crimes vigorously.²⁴¹ The Justice Department under Ashcroft has seen the culmination of successful, large-scale undercover investigations,²⁴² and Ashcroft himself has announced new significant efforts to combat Internet crime.²⁴³ Moreover, the Justice Department has planned for increased prosecution of Internet-related cases of securities fraud, consumer fraud, and identity theft.²⁴⁴

Id.

²³⁸ *Id.*

²³⁹ *Id.* at 8.

²⁴⁰ See *supra* Part II.B.4 (detailing the plans for the federal government to prioritize these crimes and begin prevention tactics); see also Reno Speech, *supra* note 223 (discussing the need to increase protection of intellectual property specifically by strengthening domestic responsibility and international cooperation).

²⁴¹ See sources cited *supra* note 5.

²⁴² See, e.g., Press Release, Dep't of Justice, Federal Law Enforcement Targets International Internet Piracy Syndicates (Dec. 11, 2001), available at <http://www.cybercrime.gov/warezoperations.htm> (last updated June 18, 2002).

²⁴³ See, e.g., Attorney General John Ashcroft, Cybercrime Announcement (July 20, 2001) (announcing the formation of ten highly specialized prosecutorial units dedicated to fighting crime in cyberspace), available at <http://www.cybercrime.gov/chipagsp.htm> (last updated Dec. 9, 2002).

²⁴⁴ See DEP'T OF JUSTICE FISCAL YEAR 2002 PERFORMANCE REPORT § 2.4D, available at <http://www.usdoj.gov/ag/annualreports/pr2002/Section02.htm> (last visited Jan. 16, 2004).

III. RECENT GOVERNMENT EFFORTS: TOO LITTLE TOO LATE, OR THE END OF INTELLECTUAL PROPERTY INFRINGEMENT?

Congress was persuaded to amend the intellectual property statutes to criminalize theft of intellectual property, because copyright owners were losing large amounts of revenue.²⁴⁵ Federal prosecutors, while slow to bring enforcement actions for much of the 1990s, eventually made such crimes a priority.²⁴⁶ Prosecutions have since soared, with more violators serving jail time as well as paying restitution.²⁴⁷

The government and the private sector must continue to work together to convince the public that it cannot continue to infringe these rights. A recent study by the Pew Internet & American Life Project found thirty-five million U.S. adults downloaded files from the Internet and twenty-six million participated in file sharing online,²⁴⁸ indicating that many Americans see nothing wrong with this behavior. It is only through prosecutions and education that those views will change.

Senator Norm Coleman, a Republican from Minnesota, has voiced concern about the recent surge of litigation brought by the RIAA.²⁴⁹ Coleman stated that although the recording industry has a legitimate interest, its response to the problem may be disproportionate.²⁵⁰ He was worried that people doing “little stuff” might get “swept up in a net.”²⁵¹ Coleman further stated that he was certain that his children have used file-sharing programs, and that even he has used Napster, though he no longer uses file-sharing programs.²⁵² This permissive attitude, coming from a U.S. senator, demonstrates why the prosecution and education is so vital.

²⁴⁵ See *supra* Part I.B.

²⁴⁶ See *supra* Part II.B.

²⁴⁷ See *Intellectual Property Cases*, *supra* note 5 (summary chart of recently prosecuted intellectual property cases, including which statutes were violated and the sentences given to each perpetrator).

²⁴⁸ See Katie Dean, *Senator Wants Answers from RIAA*, *Wired News*, at <http://www.wired.com/news/politics/0,1283,59862,00.html> (Aug. 1, 2003).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

The government cannot make all its citizens realize that intellectual property crimes are morally and legally equivalent to physical thefts because there will always be people committing these acts and believing they are doing nothing wrong.²⁵³ The government's more aggressive prosecution efforts will hopefully signal that theft of this kind will not be tolerated, however, and that those who steal intellectual property rights eventually will be caught, prosecuted, and punished. Furthermore, corporations and industries are now focusing litigation efforts on the "innocent" infringers who download music and movies onto their personal computers.²⁵⁴

A bipartisan group of congressmen asked Attorney General Ashcroft "to prosecute individuals who intentionally allow mass copying from their computer over peer-to-peer networks."²⁵⁵ Shortly after this request, the Justice Department responded, in a statement by Deputy Assistant Attorney General Malcolm, who oversees the copyright and computer crime cases.²⁵⁶ Malcolm said to expect more prosecutions of this type of piracy because "there does have to be some kind of public message that stealing is stealing."²⁵⁷

The effects of the government's efforts may not be seen for a few more years, when more prosecutions have taken place, thus deterring future scofflaws.²⁵⁸ The cooperation of the intellectual

²⁵³ See Saul Hansell, *Crackdown on Copyright Abuse May Send Music Traders into Software Underground*, N.Y. TIMES, Sept. 15, 2003, at C1 (stating that as a result of the RIAA suits, developers of software programs are racing to create new systems that allow people to continue downloading and swapping music hidden from the notice of the recording industry or authorities); see also Christian, *supra* note 172, at 84. Barbara Kolsun, a lawyer and one of fashion's best-known trademark protectors, observes that people see intellectual property theft as a victimless crime, but she argues that all taxpaying citizens are hurt by these crimes, because the black market in fake goods costs millions of lost tax revenue. *Id.*

²⁵⁴ See sources cited *infra* notes 261–62.

²⁵⁵ Declan McCullagh, Commentary, *Hey, You—The Unindicted Federal Felon*, ZDNet, at <http://zdnet.com.com/2100-1107-982171.html> (Jan. 27, 2003).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Stephen Lynch, *RIAA Suits Slow Kazaa Traffic*, N.Y. POST, Oct. 8, 2003, at 34 (stating that visits to Kazaa, the leading file-swapping program, have fallen thirty-five percent in the wake of lawsuits but noting that many users may simply be switching to lesser known file-sharing programs).

property industries with the Justice Department will help expedite this process. Because the corporate sector now has the government on its side, companies are willing to cooperate by giving up civil lawsuits and passing over any information to the federal agencies to protect their interests to the fullest extent.²⁵⁹ The combination of these two factors likely will not put an end to intellectual property crimes, but the intellectual property industries will continue to keep these crimes at the forefront of the government's agenda.²⁶⁰ The frequent prosecutions, in turn, will help curb the increasing loss to the economy and the rate at which intellectual property rights are stolen.

Education, specifically directed toward young people, will also help curb this infringement. Senator Coleman's statements demonstrate that many Americans do not view intellectual property crimes as wrong.²⁶¹ The RIAA's surge of civil lawsuits may motivate parents to take responsibility for their children's actions.²⁶² More than this publicity is necessary, however, to instill the notion that intellectual property crimes are wrong.²⁶³

Schools must implement programs to educate students about intellectual property rights. Lectures such as Jack Valenti's speech

²⁵⁹ See *supra* Part II.B.3 (detailing the intellectual property industries' support of the federal government in its prosecutions of criminals who infringe intellectual property).

²⁶⁰ See SENATOR JOSEPH R. BIDEN, JR., THEFT OF AMERICAN INTELLECTUAL PROPERTY: FIGHTING CRIME ABROAD AND AT HOME (2002), available at <http://-biden.senate.gov/issues.html> (last visited Jan. 14, 2004). Senator Biden's report discusses the impact of intellectual property crimes on the nation and calls on the intellectual property industries to continue to self-police and aid the government in prosecuting those who infringe on intellectual property rights. See *id.*

²⁶¹ See Lynch, *supra* note 258, at 34 (stating that a recent poll showed eighty-three percent of thirteen- to seventeen-year olds believe it is morally acceptable to download music).

²⁶² See Tim Arango, *Headlines Strike Right Chord with Recording Industry*, N.Y. POST, Sept. 10, 2003, at 21. Despite being criticized for its barrage of lawsuits, which included an action against a twelve-year old who lives in a housing project, the music industry is reportedly pleased by the publicity, hoping that the headlines will scare others away from illegal file-swapping. *Id.* As one music industry executive states: "[I]f kids are doing this, they have to stop. We are all for parental supervision of children who download music." *Id.*; see also Tim Arango et al., *Music-Thief Kid Sings Sorry Song*, N.Y. POST, Sept. 10, 2003, at 21.

²⁶³ See sources cited *supra* note 253.

at Duke University²⁶⁴ are just the beginning. Schools at all levels need to institute programs to teach the nation's youth about intellectual property and the rights that accompany creative expression. In addition, parents must become involved to show their children that the illegal taking of someone else's property is wrong—whether it comes in the form of music, movies, words, fashion, or business ideas.²⁶⁵

A program developed in the United Kingdom (UK) provides a model for American efforts to educate young people to respect intellectual property rights. The UK's Creative Industries Task Force teaches children ages twelve to eighteen about the consequences of downloading music or movie files, and even trading photographs of their favorite artists online.²⁶⁶ Targeting the misconceptions that many young people have about copyright, the task force developed a program, which includes an educational CD-ROM, aiming to improve teenagers' understanding of intellectual property, especially copyright.²⁶⁷ The task force seeks to teach students that "the taking of another's intellectual property is theft, even if the property in question is non-physical and appears to be easy to use without payment, such as an Internet download."²⁶⁸

Another way to educate Americans involves a more indirect approach. The MPAA, for instance, began an advertisement campaign in the movie theaters across the country.²⁶⁹ These ads

²⁶⁴ See Garinger, *supra* note 198.

²⁶⁵ See David J. Cieslak, *Parents Can Control Downloads*, ARIZ. REPUBLIC, Oct. 28, 2003, available at <http://www.azcentral.com/families/education/articles/1028ed-download28.html> (last visited Jan. 14, 2004).

²⁶⁶ Christian John Pantages, *Avast Ye, Hollywood! Digital Motion Picture Piracy Comes of Age*, 15 TRANSNAT'L LAW. 155, 182 (2002) (citing Alan Docherty, *Why Can't Johnny Respect Copyrights?*, Salon.com, at http://dir.salon.com/tech/feature/2001/07/16/abc_ip/index.html (July 16, 2001)). Creative Industries Intellectual Property Group, which created this program for Britain's schools to aid the fight against online piracy, is made up of representatives from the broadcast, music, and publishing industries. *Id.* at 182 n.222.

²⁶⁷ *Id.* at 182.

²⁶⁸ *Id.*

²⁶⁹ Brooks Boliek, *H'wood Steps Up Antipiracy Fight*, HOLLYWOOD REP., July 23, 2003, available at 2003 WL 57154157. The Motion Picture Association of America's ("MPAA") campaign, *Respect Copyrights*, can be viewed on the Internet at <http://www.respectcopyrights.org> (last visited Jan. 15, 2004).

feature people involved in the film business, who describe the harm of piracy on the thousands of workers “whose livelihoods depend on the exhibition of movies.”²⁷⁰ If Americans understand how many jobs were lost and innocent people were harmed because of piracy, they may realize that intellectual property infringement harms not only innocent people trying to make a living but their own lives as well. Since intellectual property theft leads to an estimated loss of \$1 trillion to the country’s economy,²⁷¹ the American public is clearly being harmed. The prices for buying a movie ticket, an authentic pair of jeans, or a compact disc are rising in order for these industries to recoup the losses they are facing from intellectual property theft.²⁷² Only when Americans recognize that they pay for theft will the rate of these crimes begin to drop.

CONCLUSION

The combination of the federal government rigorously prosecuting those who infringe intellectual property and educational programs to instill the harsh reality that this infringement is a form of theft will enable America to combat this crime wave. There will never be an absolute end to this type of crime. Nevertheless, efforts of the federal government along with the efforts of corporations and private businesses should cause the rate of infringement to decrease and also change societal norms about the concept of theft. Just because one cannot see intellectual property and its accompanying rights does not mean this property is less deserving of protection than physical property. Vigorous prosecution and education will help deter these crimes and bring the flow of money back to the rightful owners of creative works.

²⁷⁰ Boliek, *supra* note 269.

²⁷¹ See *supra* Part II.B.1 (detailing the economic loss to the United States caused by intellectual property infringement).

²⁷² See Christian, *supra* note 172.