Reconciling Social Norms and Copyright Law: Strategies for Persuading People to Pay for Recorded Music

Mark F. Schultz
Southern Illinois University School of Law

Follow this and additional works at: https://digitalcommons.law.uga.edu/jipl
Part of the Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uga.edu/jipl/vol17/iss1/6

This Article is brought to you for free and open access by Digital Commons @ Georgia Law. It has been accepted for inclusion in Journal of Intellectual Property Law by an authorized editor of Digital Commons @ Georgia Law. Please share how you have benefited from this access. For more information, please contact tstriepe@uga.edu.
RECONCILING SOCIAL NORMS AND COPYRIGHT LAW: STRATEGIES FOR PERSUADING PEOPLE TO PAY FOR RECORDED MUSIC

Mark F. Schultz

INTRODUCTION ................................................. 60

I. WHEN IS SURRENDER THE RIGHT OPTION? CHANGING THE LAW OR ABANDONING ENFORCEMENT ............................................. 62
   A. HOW NORMS OVERCOME LAWS .................................. 63
   B. DETERMINING WHEN TO CHOOSE THE SURRENDER STRATEGY . 63
   C. THE SURRENDER STRATEGY AND THE MUSIC BUSINESS .......... 68

II. SURVEYING THE ALTERNATE STRATEGIES ............................ 70
   A. DETERRENCE: RAMPING UP ENFORCEMENT AND PENALTIES ... 70
      1. Deterrence Strategies in General ....................... 70
      2. The Recording Industry and Deterrence Strategies ....... 72
   B. ADAPTATION: FINDING OTHER WAYS TO COMBAT A LAW-NORMS DIVERGENCE ............................................. 73
      1. The Adaptation Strategy in General ..................... 74
      2. The Recording Industry and Adaptation Strategies ....... 76
   C. PERSUASION: CHANGING NORMS ................................. 81
      1. The Persuasion Strategy in General ..................... 81
      2. Persuasive Strategies and the Music Industry .......... 83

III. RECOMMENDATIONS FOR RECONCILING COPYRIGHT LAW AND COPYNORMS FOR RECORDED MUSIC .................................. 86

IV. CONCLUSION ................................................ 87

* Associate Professor, Southern Illinois University School of Law. The author thanks his colleagues Paul McGreal and other participants at an internal faculty workshop at Southern Illinois University School of Law for their comments.

Published by Digital Commons @ Georgia Law, 2009
INTRODUCTION

Should the music industry forget about convincing consumers to comply with copyright law? Anyone moved to despair over the possibility can be forgiven. As massive and persistent filesharing signals, people—at least a substantial proportion of people—no longer feel obligated to obey copyright law. Social norms followed by large numbers of people apparently clash with copyright law.

Faced with a law-norms clash, the easiest solution may seem to be to change the law. The process for amending a statute is known and the steps are clear, although the politics of changing any law of consequence are challenging. As the Schoolhouse Rock! series demonstrated, the entire process can be explained to children via a catchy song illustrated with a cartoon. By contrast, there is no procedural manual for changing social norms and certainly no cute song or cartoon. Indeed, the invitation to this Symposium implied that legislative change was in order as it invited the authors to write about how the law might evolve to resolve "the disconnect between 20th Century laws and 21st Century attitudes" regarding copyright.

This Article contends that when laws and social norms clash, the law need not necessarily change. A significant law-norms clash signals that a problem exists, but its existence does not dictate the strategy for addressing it. There are actually several strategies for resolving a law-norms clash, and acceding to norms by changing the law is only one of several strategies. This Article surveys and assesses the potential strategies and contends that strategies that persuade people to comply with the law are likely still more practicable than sweeping changes to the law itself.

While nobody contends that law must always yield to norms, persuading people to respect the copyright of musical recordings seems like a lost cause to many. There is ample reason to be pessimistic that a law can be salvaged when mass numbers of people disregard laws of general applicability. Some of the most prominent instances of similar law-norms clashes end with norms overcoming law. The case of Prohibition comes to mind most prominently, where people's

---

1 At this point in an article on law and social norms, it is obligatory to define social norms. Richard McAdams says: social norms are "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of fear of external non-legal sanctions, or both." Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 Mich. L. Rev. 338, 340 (1997).


inclination to drink led to the only repeal of a Constitutional Amendment. Indeed, earlier this year, Lawrence Lessig invoked the example of Prohibition in calling for an end to the peer-to-peer (P2P) wars through sweeping changes to copyright law.4

Other familiar examples of norms overcoming law abound. The repeal, invalidation, or non-enforcement of most laws regulating consensual sexual relations is one. Even where laws that clash with norms remain in place, they often seem somewhat futile and lacking in moral force. For example, driving on most U.S. highways demonstrates that few people have qualms about disregarding speed limits. Finally, where social norms have yielded to law, it has sometimes first required a difficult, even violent struggle—for example, court orders and laws that guaranteed civil rights for African Americans sometimes required the intervention of armed troops to quell mass resistance.

The case for cautious optimism in the face of a law-norms clash thus requires considerable and careful explanation. Despite reasonable pessimism when laws of general application clash with social norms, policy makers are not always obliged to either surrender to the inevitability of norms or fight a titanic battle to impose the law. The menu of policy options is flexible and varied, and prospects are more encouraging than they may seem at first glance. Experience and logic show that there are primarily four choices for resolving a norms-law clash:

1. **Surrender: Changing the Law or Abandoning Enforcement.** As discussed thus far, changing laws in light of mass resistance to them is indeed one option. Sometimes the triumph of social norms over existing law is achieved by repealing or altering the law. In other instances, the law is no longer enforced and may be virtually forgotten (e.g., laws against adultery).

2. **Deterrence: Ramping Up Enforcement and Penalties.** In some instances, those who enforce the law are not inclined to surrender to social norms that run counter to the law. Instead, they increase enforcement or seek harsher penalties in order to deter wrongdoing.

3. **Adaptation: Finding Other Ways to Combat the Problem.** Two somewhat contradictory clichés serve to describe the two faces of this strategy: “There’s more than one way to skin a cat,” and, “If you can’t beat ‘em, join ‘em.” Sometimes law need not be abandoned nor enforced more aggressively, but rather, different approaches to achieve the same goal can be tried.5 In other

---

5 Such adaptive approaches can be as simple as fences and locks or as complex as community
instances, officials or private rights holders may acquiesce to norms while directing those norms toward more beneficial outcomes.  

4. **Persuasion: Changing Norms.** Sometimes, when law and social norms clash, it is norms that eventually give way to the law. In some instances, concerted action by officials or civil society can bring social norms into line with the law.

Choosing among the four options for addressing a clash between law and social norms requires addressing practical and normative questions that stand apart from the fact that a particular behavior is common or deemed acceptable by most or a significant number of people. In some instances, clinging to a law that defies norms is too costly or unacceptably impinges on people's freedoms. In other instances, however, the interests at stake are too important—financially or normatively—to surrender.

Part I of this Article considers the pros and cons of surrendering to social norms by reforming a law. This decision typically requires consideration of cost-benefit analyses, normative principles, and practical politics. The decision is thus never dictated merely by the existence of a disconnect between law and norms, nor by the size of the disconnect. When applied to the case of copyright in musical recordings, these considerations—particularly the practical ones—likely require resort to other options. Part II then surveys the other options in detail, first considering each one in general, and then in light of the specific challenges facing the music industry. Each strategy has its virtues and limitations. Part III offers a few recommendations for reconciling copyright law and social norms by combining the best aspects of each alternate strategy.

**I. WHEN IS SURRENDER THE RIGHT OPTION? CHANGING THE LAW OR ABANDONING ENFORCEMENT**

The question of whether a law-norms clash justifies capitulation to norms rarely yields an easy answer. First, one must consider the costs and benefits of maintaining the status quo compared to changing the law. The cost of enforcing a law that contradicts norms can be high indeed, given the essential role that norms play in securing compliance with law. One must also consider moral and pragmatic questions. In applying these considerations to the clash between policing. In either instance, the illegal behavior is attacked indirectly. See *infra* notes 58–62 and accompanying text.

6. In other words, an owner might change her business model.
copyright law and social norms, it appears that the case for changing law is not clear cut, and in any event, may not be practical.

A. HOW NORMS OVERCOME LAWS

Norms overcome law in two situations. First, laws are repealed or substantially altered in light of changing social norms. The example of the Twenty-first Amendment's repeal of Prohibition is one of the more famous examples of such a change. Other examples are laws criminalizing consensual sexual conduct. These were repealed over the years in many states, and are now considered likely to be invalid in light of Lawrence v. Texas. In these instances, the new social norm is formally recognized in law through legislative or judicial action.

Sometimes, however, norms overcome law in less clear-cut ways, as the laws are not repealed, but instead are no longer enforced. Police and prosecutors sometimes decline to enforce laws or are not allocated the resources necessary to do so. In some of these instances, the clash between norms remains controversial. For example, the pornography industry, which once was constrained by obscenity laws, has grown exponentially. Although many political leaders continued to condemn pornography, obscenity prosecutions declined and virtually disappeared throughout the presidential administrations of Bill Clinton and George W. Bush as the pornography industry vastly expanded. As one prosecutor observed: "When there are porn films in Holiday Inn or the Hilton, what do you expect?"

B. DETERMINE WHEN TO CHOOSE THE SURRENDER STRATEGY

The decision whether to alter a law when it clashes with norms requires consideration of several factors. First, the direct costs of enforcement, in light of norms of non-compliance must be weighed against the potential benefits if


\[9\] Congress has repeatedly attempted to regulate both obscenity and indecency on the internet, although their success has been tempered by the Supreme Court's partial invalidation of these laws on First Amendment grounds. President Bush's first Attorney General, John Ashcroft, declared obscenity prosecution to be a priority, but not much came of it. See Tim Wu, American Lawbreaking: How Laws Die, SLATE, Oct. 15, 2007, http://www.slate.com/id/2175730/entry/2175743/.

\[10\] Id.

\[11\] Id.
compliance is secured. A second consideration is the indirect costs that arise from either changing the law or continuing to enforce a law that defies norms. A third consideration is the political challenge of changing the law. Finally, moral principles are essential to consider and may ultimately be determinative.

Enforcing a law that clashes with social norms may simply prove too costly. An historical example is Prohibition. Because a large number of people continued to drink, bootlegging, smuggling, and selling alcohol were profitable illegal businesses. Defiance of the law was pervasive, and criminal enterprises thrived and spread. Prohibition thus enriched and strengthened organized crime while simultaneously over-taxing law enforcement resources. With no end in sight, and waning popular support for the law, it ultimately was repealed. In the end, one reason for repeal was that the costs were deemed to outweigh the benefits.

The historical example of Prohibition illustrates a more general principle: efficient and affordable law enforcement requires that most people comply with the law voluntarily, either because they prefer to behave legally in general or because they respect the specific law in question. If people were to comply with a law only because they believe that they will get caught and punished, then in most cases authorities would need to expend a lot of resources to convince them this is so. In fact, researchers contend that homicide is the rare instance of a law where authorities dedicate enough resources to enforcement to generate a perception of credible deterrence (the chance of getting arrested is 67%). Fortunately, studies show that most people do indeed voluntarily comply with law for normative reasons rather than only because of fear of punishment.

---


13 Another reason was that many saw nothing wrong with drinking (a preference revealed by their behavior), and objected to the interference with their conduct.

14 Voluntary support for the law might arise from internal motivations—what people believe is moral—or external motivations—a desire for approval by others. See Robert B. Cialdini et al., A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior, 24 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 201 (1991). In either event, the fear of detection and punishment by authorities is not the primary motivation for compliance. Id.


17 TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990) (reviewing studies); Robinson &
When surveyed, people are most likely to claim they obey the law for moral reasons. More important, their actions appear to confirm this assertion. Studies of people's behavior have found that social norms appear to have the most influence on compliance.

The downside of the influence of social norms is that if social norms run counter to the law, then disobedience is more likely and enforcement is more costly. Sociologist Tom Tyler found that research indicated that about 20% of the variance in compliance with law is "explained by differences in judgments about the morality of the law." Moreover, if people's behavior is only restrained by their belief that they are likely to get caught and punished, then enforcement requires a lot more resources. In some instances (e.g., Prohibition), society will deem that expenditure of resources too costly (with the lack of support for the law increasing the likelihood of that outcome).

In addition to the direct cost of enforcing a law that runs counter to social norms, policy makers need to consider the indirect effects of laws that clash with social norms. On the one hand, a common objection to changing laws that conflict with norms is that such laws may have positive effects on social norms. This effect is known as the law's "expressive function." Repeal could send the wrong message by sanctioning the undesirable conduct in addition to legalizing it. Laws that contradict social norms, however, also can produce harmful secondary effects. As sociologist Tom Tyler documented in his landmark study

---


19 TYLER, supra note 17, at 36–37. See also Robinson & Darley, Utility of Desert, supra note 15, at 468–71 (surveying research).

20 TYLER, supra note 17, at 37.

21 The problem is that a potential offender must be informed of the rule, he must be made to believe that enforcement is likely, and he must believe the cost of the violation is greater than the perceived benefit. Robinson & Darley, Role of Deterrence, supra note 15, at 953. As discussed earlier, it is costly to generate a credible threat, especially given the information costs and people's tendency toward undue optimism regarding their own prospects. Id. at 954–55.

"Why People Obey the Law," people’s perceptions of the law’s fairness and justice are informed in large part by their beliefs about the morality of the law. At the extremes, the government’s legitimacy and the stability of society can be undermined by strict enforcement of laws that contradict social norms. Less dramatic but also important, enforcing laws that are perceived as unjust increases the likelihood of disobedience of both the law in question and law generally, and support for those who break the law.

A law that contradicts social norms can thus be costly to enforce, requiring more resources to enforce than a comparable law that enjoys normative support. Enforcement may also have the perverse effect of increasing law-breaking. All these considerations dictate in favor of repealing or not enforcing laws that contradict social norms.

However, the benefit side of the cost-benefit analysis must be considered before repealing a law. Quite often, there was a good reason for enacting the law in the first place despite the existence of social norms that defied the law among part or most of the population. Take an example that raises some of the same problems raised by Prohibition: drunk driving. People insist on drinking, and, in the past, it was common and at least somewhat socially acceptable for people to drive home after drinking. At first, enforcement campaigns against drunk driving were not successful. Both the subjects of these laws—the general populace—and the enforcers—police, judges, and juries—proved uncooperative. If the inevitability of drinking, and social norms regarding it, were the sole determinant, then drunk driving laws would have gone the way of Prohibition.

The difficulty is that the undesirable behavior regulated by the law can be costly too. Drunk driving harms other people. It leads to lost lives, injuries and resulting medical bills, property damage, and increased insurance costs. There were thus good reasons to persist and to overcome normative resistance to the law.

Moreover, the decision about what to do about a social norms-law clash usually involves considerations beyond cost-benefit analysis—it has a moral dimension. Drunk driving was not just unacceptably costly in pecuniary terms. It also caused moral outrage. This outrage animated and gave moral authority to groups like Mothers Against Drunk Driving (MADD). MADD kept the pressure

---

23 Cf. Tyler, supra note 17; see also Kahan, supra note 8, at 619; Robinson & Darley, Role of Deterrence, supra note 15, at 985–87.
24 Tyler, supra note 17, at 23.
25 See Kahan, supra note 8, at 619; Robinson & Darley, Role of Deterrence, supra note 15, at 985–87.
26 Moral considerations are, in a sense, part of the cost-benefit analysis as they affect the utility assigned to particular outcomes. However, because rational choice analysis often defaults to pecuniary considerations, it is worth pointing out that moral considerations often trump pecuniary ones.
on policy makers to continue the enforcement campaign and it eventually enjoyed some success. 27

A more shocking example further illustrates that widespread resistance to a law does not dictate abandoning the law, provided that the moral stakes are sufficiently high. Earlier this year, South Africa’s Medical Research Council conducted a survey that showed that a substantial minority of men surveyed in two provinces of the Republic of South Africa (RSA) had committed rape. 28 Twenty-five percent of those surveyed admitted to having committed rape, with nearly half that number admitting to more than one assault. 29 Five percent admitted to a rape in the previous year. 30 The report said “practices such as gang rape were common because they were considered a form of male bonding.” 31 Understandably and predictably, nobody responded with the assertion that the RSA should legalize rape. The comment of Professor Rachel Jewkes, who conducted the research, was illustrative: “The absolute imperative is we have to change the underlying social attitudes that in a way have created a norm that coercing women into sex is on some level acceptable.” 32 This is not a problem that allows for surrender to social norms, adaptation, or much consideration of cost-benefit analysis (at least with regard to whether to act).

This author hastens to make it clear that filesharing or any other kind of consumer copyright piracy is not equivalent to drunk driving and certainly not to rape. That sort of distinction, however, is exactly the point of this discussion. Sometimes norms can be allowed to prevail, but sometimes not. The answer to whether to repeal the law is not dictated merely by the existence of resistance to the law, and not even necessarily by a pecuniary cost-benefit analysis. Ultimately, one must consider morality.

Finally, repealing or changing the law can prove to be politically impracticable. Reliance on the current law and entrenched interests can generate opposition to change. The American political system with its checks and balances tends to be biased against change. Laws that enshrine an ideal can be hard for a politician to oppose, even if they contradict people’s behavior or his own. As the old maxim goes, “Hypocrisy is the tribute that vice plays to virtue.”33 Thus, even if laws

29 Id.
30 Id.
31 Id.
32 Id.
33 Usually attributed to the Duc de La Rochefoucauld (“L’hypocrisie est un hommage que le
against adultery or drug use are outmoded, no politician wants to be known for making it safer to cheat on one's spouse or use drugs.

C. THE SURRENDER STRATEGY AND THE MUSIC BUSINESS

Surrender is not a likely option in the clash between law and social norms arising from filesharing and other digital copying. In reverse order from the considerations set forth in the previous part, politics cuts strongly against legalized filesharing; moral arguments and cost-benefit analyses also do not cry out for repeal of copyright protections for recorded music.

Wholesale reform of copyright is an infamously hard task. The last major revision, which resulted in the 1976 Copyright Act, was decades in the making. Moreover, many provisions of the Copyright Act enshrine specific industry arrangements and the interests of particular players. Much of the Copyright Act and many recent amendments were drafted after negotiation among the affected parties. All this adds up to the fact that any radical change would face a tremendous uphill battle against firmly entrenched interests that have a history of protecting their positions. Political controversy would thus at least long delay any effort to conform copyright law to permissive norms.

Moreover, while filesharing does not elicit the moral outrage reserved for greater wrongdoing it also hardly elicits moral support. The moral debate in copyright lies elsewhere. Copyright law has numerous, passionate critics, but they largely contend that copyright has expanded beyond justification in scope, duration, and effects on the liberty of others. They are particularly concerned that others are impeded in their ability to engage in further expressive, transformative uses of earlier works. Others have criticized filesharing lawsuits...
and judgments as impractical and punitive, but at best they usually have few words to say in support of filesharing itself. There is also an extensive literature regarding the moral justification for copyright, some of which argues for a narrower scope of copyright. Nevertheless, while many seek to restrain copyright's reach and effect, very few would advocate shrinking it so much as to allow unrestrained filesharing.

Prominent proposals to transform copyright law have been motivated by pragmatic instead of moral considerations, at least as concerns filesharing. The most well-known proposals, advocated most notably by William Fisher and Neil Netanel, would allow users to download recordings and other works freely. Copyright owners would be compensated from a pool of money accrued via taxes or levies on recording media or equipment. Proponents of these proposals were motivated by beliefs that filesharing was too pervasive and elusive to stop, rather than moral justification of filesharing.

Despite several years of publicity, these blanket license proposals have never gained much, if any, traction with legislators. Perhaps this shows that political resistance to change is too strong, as suggested earlier. Perhaps instead, it merely shows that the time for change has not quite yet arrived.

In any event, copyright law is unlikely to be transformed any time soon. It is worth considering, as the remainder of this Article does, other options for resolving the apparent clash between copyright law and social norms. Instead of

---

40 See, e.g., Lessig, supra note 4.
42 See, e.g., DRAHOS, supra note 41; Gordon, supra note 41; Palmer, supra note 41.
43 But see MICHELE BOLDRINE & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY (Cambridge Univ. Press 2008) (arguing that intellectual property grants an unwarranted and inefficient monopoly, the aims of which could be better served through first mover advantage and other alternatives).
45 See FISHER, supra note 44, at 217–23; Gervais, supra note 3, at 47; Ku, supra note 44, at 311–22.
reconciling the law to social norms, it may be possible, and perhaps desirable, to try to reconcile social norms to the law. The results are likely to be imperfect, and the results quite "leaky"—copying will not ever stop entirely. Nevertheless, much more can be done than many seem to think.

II. SURVEYING THE ALTERNATE STRATEGIES

Instead of surrendering to social norms, authorities and private rights holders might choose to continue the fight by employing other strategies: increasing deterrence; adaptive strategies that indirectly fight or exploit the norm; and persuasion. This Part reviews each of those strategies and considers their application to the music business.

A. DETERRENCE: RAMPING UP ENFORCEMENT AND PENALTIES

In some instances, those who enforce the law are not inclined to surrender to social norms that run counter to the law. Instead, they increase enforcement or seek harsher penalties in order to deter wrongdoing.

1. Deterrence Strategies in General. The recording industry’s suits against file-sharers are one well-known example directly relevant to this discussion, but other (probably more successful) examples abound. Drunk driving has become both less common and less socially acceptable as legislatures have increased penalties and lowered thresholds for intoxication over the past few decades. The battle against drunk driving thus represents a victory for the deterrence strategy, although as discussed later, the drunk driving story also counsels that deterrence strategies may need to be ratcheted up in steps in some instances and accompanied by persuasion.46

Deterrence strategies enjoy several advantages: they are clear, direct, and rely on existing laws. Authorities need only enforce a law that already exists instead of persuading legislators to adopt the law, or using persuasion or indirect means to change people's behavior. Even where proponents must persuade legislators to increase penalties, the task is a bit harder but at least it focuses on a law that likely has existing support (or it would not be a law in the first place). Moreover, the strategy relies on variables that are amenable to direct manipulation: enforcement and penalties. Authorities also can clearly communicate changes in these variables to potential offenders.

These characteristics of the deterrence strategy have garnered it great support in both practice and theory. The model is intuitively appealing: compliance with

---

46 See infra notes 52–54 and accompanying text.
the law is a function of enforcement and penalties. People are more likely to comply with a law as the perceived chance of getting caught increases and as the negative consequences increase. As a folk model, it is the one most commonly relied upon by legislators and law enforcement. As a formal model, it has long been embraced by rational choice theorists.

The difficulty with the deterrence strategy is that several factors other than enforcement and punishment affect people's decisions about complying with laws. These other factors may be more important than enforcement and punishment. First, people are more motivated by norms than law. This fact is generally quite fortunate, because law and norms are generally in harmony. Thus, with respect to most crimes, law enforcement need only concentrate resources on deterring the minority that is willing to defy both norms and law. The world would be a more frightening place and police would be far busier if most people were inclined to commit murder or robbery whenever they thought they could get away with it. However, the influence of norms cuts the other way when they run counter to the law. In such cases (e.g., Prohibition), policy makers and law enforcement find that the baseline for compliance is much lower than with respect to other laws, and thus they need to devote much greater resources to compliance.

Another factor that interferes with the effectiveness of the deterrence strategy is that authorities must persuade potential lawbreakers that they are likely to get caught. And the potential lawbreaker must find the punishment too costly to tolerate. However, people do not necessarily know about laws and tend to be overly optimistic about their chances of evading detection. The result of these problems is that marginal increases in enforcement or penalties do not necessarily directly increase compliance. Authorities may already be getting most of the compliance they can out of existing enforcement, and penalties and marginal increases may yield diminishing returns at best.


50 Id. at 954–55; Robinson & Darley, Utility of Desert, supra note 15, at 461–62.

Finally, penalties that are out of line with people's sense of fairness can be counter-productive. As Professor Dan Kahan has argued, the experience with drunk driving laws shows that norms may be influenced better by "gentle nudges" than "hard shoves."\(^{52}\) Initial attempts to dramatically increase enforcement and penalties were met with resistance by those charged with enforcing the law.\(^{53}\) Police, prosecutors, judges, and juries were reluctant to enforce laws that strongly contradicted their norms regarding drunk driving. The discretion in the system thus gave norms scope to reduce the likelihood the law would be enforced, given its divergence from norms. However, over time a different strategy worked. Norms were brought along slowly by a more gradual ratcheting up of penalties and enforcement, thus bringing us to the equilibrium we have today where fairly strict laws enjoy widespread normative support.\(^{54}\)

Nevertheless, deterrence strategies can be worthwhile. It simply depends on where enforcement and penalties are at the moment. Moving from zero or very low enforcement to a credible threat of enforcement would certainly yield an increase in compliance.\(^{55}\) First, there are likely boundary effects. As enforcement moves from none to some amount greater than zero, some people who are very risk averse or have a strong preference for obeying the law are likely to alter their behavior.\(^{56}\) Second, theorists contend that the law has "expressive effects" that influence social norms by signaling what is right.\(^{57}\) The existence of a completely unenforced law is unlikely to yield such effects. Until people are aware of a law and perceive enforcement and penalties as possible, few are likely to respond.

Deterrence strategies thus have their place. The challenge they present is in the potentially large gap between initial effects and marginal changes that yield significant increases in compliance. For most people to comply, they need to know what the law is and receive some signal that authorities actually intend to enforce it. However, once some enforcement and penalties are in place, it likely will take a lot more penalties and enforcement to convince those who are motivated mainly by those considerations. And if the penalties are too harsh, the increase may have counter-productive effects, undermining support for the law.

2. The Recording Industry and Deterrence Strategies. This analysis yields, I hope, a more balanced view of the recording industry's suits against filesharers than is sometimes presented. The RIAA lawsuits were not necessarily foolish, and, in fact, some sort of clear, visible act of enforcement was necessary. However, the

\(^{52}\) Kahan, \textit{supra} note 8, at 607, 619.

\(^{53}\) \textit{Id.}

\(^{54}\) \textit{Id.} at 634.


\(^{56}\) \textit{Id.} at 501, 503–04.

\(^{57}\) \textit{See supra} note 22 and accompanying text.
incomplete and modest success they achieved was about all anyone should have expected from them.

If the recording industry had failed to make some strong, visible move to enforce copyright, its inaction would have sent two unhelpful messages. First, the practical message would have been that there were no consequences from unauthorized distribution of recordings. Thus, there would have been no deterrent against filesharing. Even at the peak of the RIAA suits, filesharers were unlikely to get sued for filesharing. I calculated the odds several years ago; at the time one was slightly more likely to get sued for filesharing than to be struck by lightning, but the vanishingly small odds were comparable. Still, for some people, any risk is unacceptable. There likely are boundary effects here, where any non-zero risk is too much for some.

Moreover, failure to act would have sent the normative message that this conduct, while theoretically objectionable, was not taken seriously enough to warrant enforcement. When one considers the research that indicates most people obey the law for normative reasons, it seems likely that a message of non-condemnation would have exacerbated the filesharing problem greatly. As big as the problem has been, millions of people still pay for music. While proving a counter-factual is always difficult at best, the lack of normative condemnation could have moved millions more to fileshare.

However, as necessary as some form of deterrent strategy may have been, it was unlikely to have turned the tide on its own. First, purely as a deterrent, it was not impressive. The number of lawsuits filed over the years was very large and highly publicized, but it paled in comparison to the number of people filesharing on any given day. Getting caught was simply very bad luck. One could rationally view the risks as small, and, given a sufficient appetite for risk, quite acceptable. Second, the normative messages have been mixed. One way in which people form a sense of norms is through observing the actions of others. The lawsuits increased publicity regarding the fact that millions of people were filesharing, thus countering the normative message produced through enforcement. Moreover, rationalizations and justifications for filesharing abounded among various communities. The cumulative result was that for a large number of people, filesharing remained normatively justified.

The music industry may have relied too much and too long on deterrence strategies. As discussed further, there were additional approaches that the industry could have tried, and is now trying with greater success.

B. ADAPTATION: FINDING OTHER WAYS TO COMBAT A LAW-NORMS DIVERGENCE

Two clichés serve to frame the description of this strategy: “There’s more than one way to skin a cat,” and, “If you can’t beat ‘em, join ‘em.” Sometimes law need
not be abandoned nor enforced more aggressively, but rather, different approaches need to be tried. Some of those approaches use indirect means to attack the undesirable behavior directly sanctioned by law. Other approaches essentially acquiesce to the undesired norm, while finding a way to mitigate its consequences. Sometimes acquiescence results in a win-win outcome, while in others it results merely in a standoff that mitigates the effects of the norm.

1. The Adaptation Strategy in General. Indirect strategies for combating undesirable behavior arising from unproductive social norms have proven effective in law enforcement in recent years. In such strategies, authorities still seek to achieve a goal embodied in a law that seems to clash with social norms, but find that other, less direct means of combating the behavior are more effective. For example, in some U.S. communities certain forms of unlawful behavior—open drug dealing and gang activity—had arguably become the norm by the late 1980s and early 1990s. While laws that targeted these behaviors have multiplied and penalties have increased, alternatives like community policing and other grassroots law-enforcement strategies have enjoyed some success. These alternative strategies undermined serious criminal behavior indirectly, by enforcing laws against petty crimes, cleaning up disorderly environments, and establishing a police presence in the communities. Unproductive social norms were thus overcome with indirect attacks.

In other instances, it proves too costly to combat a norm, whether directly or indirectly, and people instead adapt their behavior to mitigate the consequences. For private parties, who have neither the power nor resources of government, finding a way to live with the undesirable norm is often the only practical solution. In these instances, private parties typically use self-help to adapt to social norms that conflict with their legal rights.

In some instances, people can use self-help to turn an undesirable norm to their advantage. Take the hypothetical case of a beachfront inn located on a private strip of beach where the general public develops a norm of using the inn’s beachfront property. Although the trespass norm may disrupt and diminish the inn owner’s business, it may also prove too costly for her (or law enforcement) to

58 See Carolyn Y. Johnson, Breakthrough on Broken Windows, BOSTON GLOBE, Feb. 8, 2009, available at http://www.boston.com/news/local/massachusetts/articles/2009/02/08/breakthrough_on_broken_windows/ (summarizing recent practical field experiments, as well as some of the academic debate and controversy that has occurred about such strategies). These theories are widely implemented by police departments but not universally embraced by academic researchers.

59 This strategy can also be modeled without reference to norms as simple deterrence strategy, where criminal activity becomes more costly because of the police presence and general disruption of enforcement of petty crimes. I really have no quarrel with this explanation for purposes of the discussion here, as the point is that what seemed to be a norm that defied the law and standard enforcement efforts was overcome with an indirect strategy.
However, the norm also serves as a signal that the public values her beach. She might respond to that signal by starting a business that takes advantage of the crowds her beach draws. She thus might acquiesce to the use of her beach, abandon her inn business, and instead might start a paid parking lot or a snack stand.

In other instances, people cannot find a way to benefit from a norm and simply must adapt their behavior to try to avoid harmful consequences. In the beachfront property example above, if the owner cannot turn the trespassing crowds to her profit then she might simply try to keep them out by enclosing her property with a fence. This type of self-help, compelled by norms that support lawbreaking, is utterly familiar and commonplace. For example, as lawbreaking becomes widespread, people escalate their use of locks, fences, burglar bars, and other anti-theft devices. In crime-ridden parts of the world, high walls, razor wire, and glass shards embedded in walls are familiar sights. In some places, norms regarding legal compliance adapt to counter norms of lawbreaking—for example, in cities where people routinely run red lights to avoid carjacking.

Adaptive strategies certainly have their place in responding to undesirable social norms. In some instances, authorities may find that clever, indirect tactics for disrupting misconduct are more effective and less costly than directly combating the misconduct itself. In other instances, people might find that it is irrational to battle norms where one can actually benefit from them instead. In still other instances, necessary precautions may represent an unfortunate, but acceptable cost of a clash with social norms.

However, in other instances, adaptation may prove ineffective or too costly. Take the earlier example of the beachfront property owner. If the revenue from
beach users is insufficient to pay mortgage obligations, taxes, or maintenance on her property, then she cannot reach an accommodation with the norm of trespassing on her beach. Similarly, if disobedience of law becomes so common in a neighborhood that fences, locks, and other security measures do not suffice, then people will simply abandon the neighborhood.

In the end, adaptation strategies work only if they offer a viable way of coping with the problem. If they are too costly, then other strategies must be tried instead of or in concert with adaptation.

2. The Recording Industry and Adaptation Strategies. Although many people criticize the industry’s lack of creativity in responding to digital copying, it actually has attempted to employ a remarkable variety of adaptive strategies. The problem has been that many of the responses were too timid and too slow, particularly in light of the overwhelming challenge. In fact, the challenge was so great that it was probably inevitable that effective responses would be difficult to employ. In any event, effective adaptive responses were few and far between. This Part briefly surveys some of the many adaptive strategies tried by the music industry. The industry has tried all three—self-help through prevention or mitigation; indirect; and win-win.

One adaptive approach the recording industry tried without much success was to use self-help to prevent or mitigate the effect of copying through the use of digital rights management (DRM). This strategy was akin to adding burglar bars and better locks in a neighborhood where crime has increased. However, the music industry was never really able to lock the door. Instead, DRM mostly was an annoyance to paying customers and no barrier at all to filesharers. Most famously, Sony enraged customers by including software on music CDs in 2005 that installed copy protection on users’ computers without authorization. While the Sony incident was a fiasco in every way possible, other less infamous uses of DRM on CDs simply proved to be more trouble than they were worth. Similarly, DRM on legally-sold MP3 files from stores such as iTunes did little to help the music business, although it did serve the interests of hardware manufacturers by making it difficult for consumers to switch to other brands of MP3 players. By 2008, DRM on recorded music had virtually disappeared.

There were two primary problems with the DRM strategy: it was too late and it offered consumers nothing in return for putting up with the inconvenience it created. For a time, DRM was a cause célèbre among scholars and consumer

64 The incident is widely known as the “Sony Rootkit fiasco,” with that exact search string returning about 279,000 hits on Google as of August 2009.
groups, who waged a battle against its unfairness and oppressiveness. However, DRM seems to have failed on less philosophical and more practical grounds. Unlike DVDs and DVD players, CDs and CD players were originally released without a DRM scheme. DRM added inconvenience to digital music without any corresponding improvement (unlike the move from VCRs to DVD players). Moreover, DRM restrictions on MP3s were virtually useless as a security measure because the files could still be obtained from ripped CDs. In the end, music DRM as it functioned was utterly irrational because it impeded paying customers but not filesharers. It was like a jewelry shop that employed a locked door and buzzer system during business hours, but left the shop’s door propped open all night.

The recording industry has also employed indirect enforcement strategies to deter filesharers. Its earliest attempts were not promising. In 2002, it sought, by means of a bill sponsored by Representative Howard Berman and Representative Howard Coble, exemption from anti-hacking laws to attack the computers of filesharers. This proposed safe harbor for vigilantism was much discussed and protested, but never got far.

The industry’s lawsuits against Napster, Grokster, and other filesharing services were a somewhat more successful form of indirect enforcement. Their most effective aspect of the suits (from an enforcement standpoint) was that they interfered with consumers’ opportunity to engage in unauthorized downloading by disrupting and shutting down the most widely used, convenient services. Of course, the lawsuits against intermediaries were not a completely effective indirect enforcement strategy, as consumers still were able to look for and find other intermediaries such as ad hoc filesharing networks enabled by BitTorrent technology. Even given that limitation, however, the suits against intermediaries were a necessary and useful form of direct enforcement against competing illegitimate distributors like Napster.

The industry’s more recent efforts at indirect enforcement have begun to focus on links in the distribution chain that are a step more removed from directly confronting filesharers but that actually are more effective points to bring pressure to bear. In some ways, these efforts are reminiscent of the previously-discussed law enforcement strategies of the 1990s that attacked serious crimes by focusing on remote issues such as cleaning up neighborhoods and suppression of petty

The entertainment industry’s initial forays into indirect enforcement were to cooperate with universities to dissuade students from filesharing. University networks were overburdened with students using them for filesharing, so many universities were happy to threaten filesharers identified by the music industry with loss of network privileges and other academic sanctions. More controversially, the recording industry managed to enshrine this strategy in law with the Higher Education Opportunity Act of 2008. This Act imposes duties on universities to warn students of sanctions for copyright infringement and to develop plans to “effectively combat the unauthorized distribution of copyrighted material, including through the use of a variety of technology-based deterrents.” They must also “to the extent practicable” provide alternatives to illegal downloading or peer-to-peer sharing of copyrighted material.

Most recently, the recording industry has sought to use internet access as the pressure point for indirect enforcement. Some U.S. internet service providers (ISPs) have been voluntarily cooperating to send warning notices to filesharers on their network. They have, however, balked at taking the program further to implement a “three strikes” plan to cut off customers who are repeat offenders after being warned. Similarly, the British and French governments have recently proposed to implement three-strike plans. However, these plans have been met with howls of protests, and a French court has struck down the initial version of the French law. The ISPs’ initial interest in cooperation arises in part out of a coincidence of interest between them and the recording industry. Filesharers use a lot of network resources, so reducing their impact relieves pressure on ISP resources. ISPs have also begun to act as content distributors, so they increasingly have a stake in suppressing free, unauthorized competition. However, the coincidence of interests between ISPs and the recording industry only goes so far. While ISPs are happy to reduce network congestion and encourage alternate revenues sources, they are reluctant to alienate and discard paying customers.

---

68 See supra note 58 and accompanying text.
71 Id. §§ 485, 487.
72 Id. § 487(a)(29).
74 See Albanesius, supra note 73.
75 See The Spider and the Web, supra note 73.
76 Id.
These indirect enforcement strategies can be incredibly effective. ISPs and university network administrators can cheaply and effectively verify the identity of filesharers and have the ability to impose effective sanctions.

The downside of such indirect enforcement strategies arises from their indirectness. They impose enforcement costs and responsibilities on third parties rather than the copyright owners, who enjoy most of the benefits. Moreover, as currently envisioned and practiced, these processes do not afford consumers the protections of standards of legal proof or due process. The sanctions are also not necessarily directly proportional to the act of infringement—the punishment does not fit the crime. Dismissal from university or complete cutoff from the internet—increasingly a necessity in industrialized countries—strikes many as unduly harsh.

These indirect strategies, although potentially effective, are thus likely to be curtailed by resistance from those who bear the costs. The intermediaries responsible for enforcement are balking at full voluntary cooperation, and when the strategies are imposed, some will fight full application in the political process and the courts.

In the end, the most productive adaptive strategies have been new business models—the vehicles the music industry has used to turn changing consumer behavior and preferences into win-win outcomes. Like the hypothetical beachfront inn owner discussed earlier, social norms that defied property rights (i.e., filesharing) have served as a signal and sometimes an opportunity. Arguably, filesharing was not needed to tell the music industry that digital distribution presented a transformative opportunity as well as a challenge. The difficulty, however, is that revolutionary change rarely arises from industry incumbents. Path dependence is a powerful force, and even businesspeople prefer to continue in familiar arrangements if they can. Filesharing forced the issue.

The most successful new business model so far has been the sale of digital music files via online stores, most notably iTunes.\textsuperscript{77} This model was in many ways unremarkable—it simply shifted distribution from physical means to digital. However, iTunes was important as it undermined part of the appeal of filesharing. Like filesharing services, it satisfied consumer demand for a user-friendly, comprehensive source of music that provided nearly instant gratification. Unlike filesharing services, it was wholly legitimate. It gave consumers the opportunity to comply with the law, and thus allowed some to break the habit of violating the law, and prevented others from ever engaging in unauthorized behavior. This outcome was part of Steve Jobs’s business case for iTunes—he was optimistic that

iTunes could compete with filesharing because he believed that some people would prefer to comply with the law.\textsuperscript{78} He was right—iTunes and its competitors created a norm that competes with filesharing.

The other major business response to filesharing has been the subscription services. So far these flat-fee streaming and downloading services have had limited traction. There is speculation that they may dominate the future, as devices like the iPhone allow consumers to stay connected to the internet ubiquitously and constantly. As of this writing, the Spotify streaming service has proven to be very popular in Europe and will eventually reach the United States. Such services also undermine the filesharing norm by providing an alternative that provides many of the same benefits as filesharing (and perhaps more, given the convenient and constant access they offer).

Many have also suggested that filesharing can actually benefit the music industry by providing free advertising for recorded music, and perhaps more importantly, for related businesses such as live performance. There are indeed many cases where individual artists have benefited from giving away their music on filesharing networks. For example, filesharing networks allowed Wilco to build support for its acclaimed album “Yankee Hotel Foxtrot” after it was rejected by their label. The U.K.-based Arctic Monkeys broke out by giving away their music on filesharing networks, garnering a record deal and enjoying a record-setting debut on U.K. charts. Other bands, like Def Leppard, are finding new fans for their live performances as younger people discover their old hits on filesharing networks.

While these are examples of great successes for individual artists, the results are less promising for the industry as a whole. Wilco and the Arctic Monkeys were able to improve their position in the existing recording industry vis-à-vis competing artists. Def Leppard was able to re-purpose a well-exploited asset (its old hits) to improve its position in another business, the nostalgia performance circuit. None of these examples show a large alternative revenue source that will replace the recording business undermined by filesharing. I discussed these challenges at length in an earlier paper entitled “Copyright, Live Performance, and the Future of the Music Business.”\textsuperscript{79} In sum, while touring can be a lucrative business for some, there are many inherent limits to its ability to support, on its own, a large, diverse recording business. Giving away recordings on filesharing


networks in hopes of deriving ancillary benefits is likely to prove to be a limited way to turn filesharing norms to the benefit of the music business.

Of course, there are some far more radical strategies that involve going directly to fans, such as Radiohead's celebrated experiment in allowing fans to name their own price (including zero) for its "In Rainbows" album. Such strategies strike me more as forms of persuasion, ways of convincing fans to buy music based on building a relationship with an artist. These strategies are probably the most underexploited and fastest growing alternatives for combating filesharing.

C. PERSUASION: CHANGING NORMS

Sometimes, when law and social norms clash, it is norms that eventually give way to the law. Social norms clearly evolve and change, although the mechanisms that catalyze change are varied, hard to predict, and imperfectly understood. Nevertheless, there are some instances where concerted action by officials and civil society can affect norms.

1. The Persuasion Strategy in General. There are many factors that shape social norms. The research on the topic is vast and the possibilities many, but the following suggests a few possibilities that are particularly relevant to private actors such as the music industry that are trying to persuade people to change their behavior.

   Education. Public service announcements, public demonstrations, and other forms of education are the persuasive strategies that likely come to mind first and most commonly. As the most familiar, they need the least explanation. Still, it is worth noting that education can help in shaping what the literature calls "injunctive norms." Injunctive norms embody people's understanding of what is viewed as "right" behavior by authority figures such as family, moral, and religious authorities, professional and social peers, and the mass media. People often look to injunctive norms to decide whether to behave out of an internalized sense of morality (i.e., a conscience) or because they fear condemnation and loss of social status. Education is useful and necessary to shaping injunctive norms, as it helps to communicate to people what is expected of them.

   Of course, education may fail, as people may not be convinced that the injunctive norm asserted should govern their behavior. The message can be seen as self-serving and thus dubious. Or it may be overcome by contradictory messages arising from the behavior of peers (the "descriptive norms" discussed

81 See Cialdini et al., supra note 14, at 201.
82 Id.; TYLER, supra note 17, at 24–25.
next). Peer groups may send a contradictory message regarding injunctive norms, or a person may have a different, contradictory moral compass.

*Perceptions Regarding Peer Behavior.* People also take their cues from what they perceive others to be doing—these are sometimes referred to as “descriptive norms.” People likely follow descriptive norms because they look to peer group behavior for cues on how to behave or because they have an innate instinct to imitate one another.

Descriptive norms may seem to represent a self-reinforcing trap for those who seek to alter norms, but the key point of leverage is that people take their cues from their perceptions of others’ behavior. The goal is thus to shape that perception. Those who seek to change norms actually need to be careful about the message they send regarding general compliance. Researchers have pointed out that dramatic messages regarding the deplorable behavior of others may have a counterproductive effect. For example, an anti-littering commercial that shows a landscape covered with litter may cause people to believe littering is acceptable, common behavior.

Instead, those seeking to persuade need to show that most people are complying. A famous successful experiment in shaping perceptions of compliance was conducted by the Minnesota Department of Revenue. Researchers sent taxpayers a letter that asserted that the overwhelming majority of people comply with the tax laws. Those who received the letter paid taxes at a higher rate than the control group.

*The Relevant Peer Group.* People look to their peers to determine both injunctive norms (what their peers say is right) and descriptive norms (what their peers actually do), but the important question is which peer group will influence people’s norms. Experience tells us that peer groups are not monolithic in their norms. Thus, the peer group with whom somebody identifies matters greatly to norm compliance. Social networks and their norms can either complement or subvert laws or the norms of society in general.

---

83 Cialdini et al., *supra* note 14.
84 *Id.*
86 Cialdini et al., *supra* note 14.
Those seeking to shape norms most likely can benefit from fostering community ties among a group that supports the norm. Research shows that geographic and social proximity are important factors in determining the influence of peers.\textsuperscript{90} The internet has greatly enhanced the opportunity to build communities, and it thus may provide a concomitant opportunity to shape norms.

\textit{Reciprocity.} People’s normative choices are also shaped by their perceptions of how fairly and cooperatively others are behaving. This set of behavioral characteristics is often referred to as “reciprocity.”\textsuperscript{91} An equilibrium of opportunism or cooperation can prevail depending on whether conditions are right for reciprocity.

According to research, people tend to enter a new situation inclined to cooperate. Reciprocity will tend to sustain that cooperation unless people are seen to be getting away with acting opportunistically. One way to reinforce cooperation is to encourage a community to help enforce cooperation. People are willing to enforce cooperation, even if it costs them something to do so. Conversely, people will walk away from a situation from which they receive benefits if they perceive that others are getting away with behaving unfairly.\textsuperscript{92}

2. Persuasive Strategies and the Music Industry. Members of the music industry have begun to employ a number of interesting persuasive strategies. The industry has long employed standard educational strategies to combat filesharing and unauthorized copying. Little needs to be said about such familiar and ubiquitous strategies. However, persuasion has begun to work more subtly on norms as some music industry players have re-shaped their business models and practices to forge closer relationships with fans.

In an earlier case study, I found that “jambands” and their fans had built a community with norms that encouraged respect for the artists’ rights.\textsuperscript{93} Jambands (e.g., the Grateful Dead, Phish) allow their fans to tape live performances and to trade the live recordings. The fan community in turn encouraged respect for the copyright of the bands’ commercial recordings and compliance with the bands’

\begin{flushleft}


\textsuperscript{93} See Schultz, supra note 91, at 653 (discussing case study).
\end{flushleft}
rules regarding use of their live recordings (e.g., non-commercial copying only). The remarkable level of respect was demonstrated by business decisions that few other artists dared try at the time like releasing digital tracks online without copy protection.

A few lessons could be generalized from the jamband experience, which I theorized built upon reciprocity to encourage cooperative norms:

- **Build communities and close relationships with fans.** Jambands tended to give their fans unusually high amounts of access to the bands. Direct communication and long-term relationships were hallmarks of this community.
- **Improve perceptions of fairness.** Besides giving away live recordings, the bands tended to keep ticket prices low, offer fans opportunities at choice seating, and provide other benefits. Fans perceived the treatment as fair and tended to advocate fair treatment in return.
- **Get the fans involved in enforcement.** Fans helped to run the fan community. They informed each other of the rules and enforced them through social sanctions. Some even contacted legal counsel for the bands to assist with enforcement against bootlegging.

In sum, these bands had built a community that sustained and supported their careers and respected their rights. These bands likely were not following a calculated strategy with respect to copyright compliance, but have certainly benefitted from the relationship of trust they have built with their fans.

Other artists have now followed similar strategies. The most dramatic example was Radiohead’s “name your own price” release of its album “In Rainbows.” One might have predicted that everybody would have chosen a zero price. Instead, the band made large amounts of money.\(^4\)

Reciprocity appears to be the likely explanation for the behavior of Radiohead fans. They perceived the band as acting fairly and chose to act fairly in return, rather than opportunistically. Of course, there may be questions as to how a lesser-known artist might do what Radiohead did. After all, Radiohead had already built a large community of fans through years of touring and major label promotion before it decided to go it alone.

However, some lesser-known artists have also had success with building closer ties to their fans. Two recently turned to their fans to fund their recordings. Jill Sobule financed her own recording in 2008 through a fundraising drive with her

\(^4\) See *supra* note 80.
fans. Different levels of contributions netted increasing benefits from Sobule: The perks included t-shirts, live performances, and the opportunity to sing background vocals on the album. She raised $75,000. Nine Inch Nails drummer Josh Freese recorded a solo album using the same strategy. His benefits were more whimsical—including meals at the Cheesecake Factory with him, a trip to Disneyland, and the opportunity to hang out and drink with him and his more famous musician friends.

Imogen Heap is another lesser-known artist who appears to be benefitting from an array of community building strategies. Heap has worked hard to use modern social networking tools to build a network of close—and paying—fans. For her latest album, Heap chronicled every step of her recording process via Twitter. She spoke candidly of her challenges, asked fans for advice, and responded with thanks. She also maintained a regular video blog on Twitter, which chronicled not only her album but also her daily life. “As fans became more and more engaged in the making of Heap’s album and the virtually, real friendship they shared with her, Heap allowed them to participate even further in the making of” her latest album. She then had fans submit photos to Flickr in a contest to design her album artwork. Winners received cash prizes and were acknowledged in the album credits.

Heap now has a loyal community of fans, and this community was willing to help her defend her rights, much like the jamband fans described earlier. When one of the promotional copies of her album showed up in an eBay auction before the release date, her fans notified her via Twitter. Her fans engaged in guerilla bidding on her behalf, with a large group bidding the auction price up to $10,000,000 before eBay pulled the listing.

Heap continued to promote her album with more connections to her fans. She organized live group meetings among her Twitter followers where she signed autographs. She started a weekly live video chat and performance for fans.

Heap’s promotion appears to have been successful. Her album debuted in late August 2009 on the U.S. Billboard Chart at number five. While the record charts are not what they used to be, this was still a remarkable achievement for a relative

98 Id.
99 Id.
100 Id.
unknown whose promotion was largely self conducted. More important, she established a connection with her fans and was rewarded with reciprocally fair treatment.

Most artists probably would not try anything quite as exotic as Radiohead’s pricing strategy or engage fans quite as intensely as Imogen Heap. But the future is likely to include a lot more direct artist-fan connection. Distant, record label intermediated marketing is less likely to build the sort of connection necessary to convince people to pay for music. However, if people are made to feel part of a community and in a relationship with an artist, a more positive, copyright-and-artist respecting social norm is more likely to arise.

While customer loyalty is always desired by a business, this kind of deep loyalty is particularly important when paying for the product seems to be voluntary (or is voluntary, as Radiohead briefly made it). A core of loyal, paying fans can sustain an artist, even if casual outsiders try out the music without paying. Community-building may thus become an essential part of career building for at least some artists.

III. RECOMMENDATIONS FOR RECONCILING COPYRIGHT LAW AND COPYNORMS FOR RECORDED MUSIC

So far, this Article has addressed separately each of four options for responding to a law-norms split. Bridging the gap between copyright law and social norms regarding copying recordings is likely to require a combination of several elements. It is impossible to know what form a successful business model might take (and prudent people would not turn to most law professors for business advice), but the broad outlines of the combined legal and business approaches are discernible.

First, the strategy will likely include some forms of enforcement, both direct and indirect, to keep everybody honest and to give some breathing room for alternative business models to grow and thrive. Thus, the industry must continue to fight any future Napsters or Groksters to avoid having its efforts to change norms undermined by their competition. (Unless, that is, such competitors can be co-opted via the adaptive strategy into authorized, revenue-producing partners.) In addition, consumers may need some “stick” to accompany the carrots given as part of the other strategy. While the resumption of the RIAA’s lawsuits against filesharers seems neither likely nor necessary at the moment, law-abiding consumers cannot be allowed to feel they are “suckers” for paying for music. If there is not some level of visible enforcement, the equilibrium is likely to deteriorate toward non-compliance.

Second, the cooperation of ISPs and other intermediaries in enforcement would greatly aid copyright owners, but they should not depend on it as a “silver
Although voluntary cooperation could be extremely effective, copyright owners probably should have modest expectations. Intermediaries will only cooperate to the extent that doing so is in their interests. For example, ISPs are happy to lighten the load on their networks, but do not want to lose customers. If copyright owners attempt to impose further responsibilities on intermediaries via legislation, they can expect a bitter fight they may not win. In most instances, it is hard to make a legal or policy case for imposing most of the burden of enforcement on largely innocent intermediaries.

Third, copyright owners must offer consumers a compelling alternative to filesharing to reduce the necessity of enforcement and increase voluntary compliance. Of course, that statement is absurdly easy to make and difficult to implement. Still, the law and social norms literature can contribute a bit to the task. Many artists in the future likely will need to build and sustain a close, strong relationship with a fan community. Some of the hallmarks of this relationship will include perceptions of fair treatment and involvement of the fans in enforcing norms of respect for the artists’ rights.

Taken together, these strategies may allow the music industry (whatever and whoever that may be in the future) to find its way to a reconciliation of social norms to copyright law. Much experimentation is likely to be necessary, and it is hard to envision a complete and perfect solution. However, there is a possibility to turn social norms more firmly toward compliance with copyright law in spite of a system that is likely to remain quite “leaky.”

IV. CONCLUSION

This Article suggests that many scholars and commentators have been too quick to claim that copyright must be reformed because of an irreconcilable clash with social norms, as evidenced by the persistence and size of the filesharing problem. There are indeed good reasons to consider changing a law when it clashes with social norms. Such clashes can be disruptive and costly. However, there are other options that ought to be considered first.

This Article surveys the four options available when norms clash with the law: “surrender,” which consists of changing the law; “deterrence,” which consists of ratcheting up penalties and enforcement; “adaptation,” which consists of finding indirect ways to combat or accommodate social norms; and “persuasion,” which consists of strategies for persuading people to adopt or comply with more cooperative norms. None of these strategies is necessarily superior to the others. Their appropriateness depends on context.

In the context of the recording industry’s problems with copyright compliance, the latter three strategies—deterrence, adaptation, and persuasion are likely most appropriate. Abandoning or transforming copyright law to accommodate
filesharing is unlikely to be a viable option any time soon, given political resistance and the lack of a moral case for it. Instead, a strategy that combines deterrence, adaptation, and persuasion may be more effective for now.

Of the three strategies, persuasion holds the most promise, as it is the least explored so far. Deterrence has been thoroughly attempted, via suits against individual filesharers and intermediaries such as Grokster. Although some credible deterrent was and remains necessary, such enforcement efforts can only do so much (and may be counter-productive) without adaptation and persuasion to bring norms more into line. Adaptation to changing circumstances is necessary for all businesses, and none more than a business that faces the enormous challenges that the music industry does. Ultimately, however, at least some fans need to be persuaded to pay for music. Thus, efforts to build fan support through more direct artist contact, community building, and other efforts that increase loyalty will likely prove to be essential parts of a strategy for many parts of the recording industry.