



The Immorality of Theft, the Amoral­ity of Infringement

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I. THEFT AND INFRINGEMENT: THE COPYRIGHT DILEMMAS

¶1 In an apocryphal story, the famous Stanford law professor Paul Goldstein engages his students in discussion of copyright law.¹ Goldstein first asks his students, would they take a book from a bookstore even if they were certain that they would not be caught? Overwhelmingly, the students say no. Goldstein then asks them to suppose the book was available electronically on the Internet. Would they make a copy of the electronic book, again certain that they would not be caught? This time a majority say yes, including those who had answered no to the first question.

¶2 These questions are copyright's analog to the "trolley" problems, a family of hypothetical moral dilemmas that have long fascinated moral psychologists.² In one dilemma ("the switch dilemma"), a runaway trolley is headed for five people further down the track who will be killed if the trolley continues down its present course. The only way to save them would be for the subject to hit a remote switch that will turn the trolley onto an alternate set of tracks where it will kill one person instead of five. Is it morally permissible to hit the switch and turn the trolley to save five people at the expense of one? Most people say yes.³ In a second dilemma ("the footbridge dilemma"), a runaway trolley is again headed toward five people. This time, however, the subject is standing next to a large man on a footbridge that spans over the tracks in between the oncoming trolley and the five people. The only way to save the five people is to push this stranger off the footbridge onto the tracks below. He will die if pushed, but his body will stop the trolley from reaching and killing the five others. Is it morally permissible to save the five by pushing this stranger to his death? Most people say no.⁴

¶3 Like the trolley problems, Professor Goldstein's two hypotheticals present his students with similar circumstances. From the students' perspective, both taking a physical copy of the book and making an electronic copy yield the same result: a copy of the book obtained at no cost to them. Of course, the law proscribes both, one as theft and the other as infringement. Yet, like the trolley dilemmas, the students seem to intuitively distinguish theft from infringement.

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¹ The story is retold in I. Trotter Hardy, *Criminal Copyright Infringement*, 11 WM. & MARY BILL RTS. J. 305, 332 (2002).

² See, e.g., Joshua D. Greene, et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105, 2105-06 (2001); Marc Hauser, *Reviving Rawls' Linguistic Analogy* (manuscript at 16-18, on file with author), in MORAL PSYCHOLOGY AND BIOLOGY (W. Sinnott-Armstrong ed.) (forthcoming 2006)

³ In a sample of 5,000 people, 89% of subjects judged this action as permissible. Hauser, *supra* note 2, (manuscript at 18, on file with author).

⁴ In the same sample of 5,000 people, just 11% of subjects judged such an action as permissible. *Id.*

¶4 The trolley dilemmas present an interesting academic puzzle for moral psychologists. But the copyright dilemmas present a very real problem for copyright owners and legal theorists. Each day, millions of Internet file-sharers⁵ share and download millions of songs and movies, each time infringing on the copyright of the owner.⁶ These file-sharers transcend nationalities⁷ and cultures.⁸ Though most are college students, file-sharers exist in nearly all age groups,⁹ across both sexes,¹⁰ and in all socioeconomic classes.¹¹ Yet, despite their apparent disparity, file-sharers do have at least two characteristics in common.

¶5 First, file-sharers have access to computers and the Internet. Computers have reduced the marginal costs of reproducing near-perfect copies of a copyrighted work to nearly zero. The contents of a compact disc (CD) or digital video disc (DVD) can now be easily “ripped,” a process by which the contents are converted into a compressed audio or video file stored on the computer’s hard drive. Moreover, the Internet has dramatically reduced the costs associated with distributing these “ripped” copies of copyrighted works. Before the Internet, sharing pirated copies of copyrighted works required the physical transfer of an actual object. But with the Internet and file sharing software, users can now transfer “ripped” files from home without ever leaving their computer. One “ripped” copy can now be shared an indeterminate number of times, among complete strangers, continents apart. The owner of a copyrighted work enjoys the exclusive right to reproduce and distribute copies of his copyrighted work. And before the digital revolution, copying and distributing songs and movies was comparatively difficult and costly. But the spread of computers and the Internet has made it dramatically easier to copy and distribute near-perfect copies of copyrighted works.

¶6 Second, file-sharers seem to share a subjective belief that copyright infringement is not morally wrong. Copyright owners often liken file sharing to theft. They argue that downloading *Abbey Road* from the Internet is no different than stealing the CD from the local music store. And yet, both statistical¹² and anecdotal evidence¹³ suggests that file sharers see nothing wrong with infringement. To millions, theft is immoral, infringement is not.

⁵ Because consideration of the difference between “sharing” and “swapping” electronic versions of copyrighted works is beyond the scope of this Note, the terms “file-sharers” and “file-swappers” will be used interchangeably herein.

⁶ Of course, some of the works shared and downloaded on the Internet are not copyrighted or their copyright has expired. These works, it is assumed, are a small minority. See *MGM v. Grokster*, 125 S. Ct. 2764, 2772 (2005) (noting a statistical analysis indicating that 90% of the files available for download on the FastTrack network were copyrighted); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 903 n.6 (N.D. Cal. 2001) (noting plaintiffs’ statistical analysis indicating that 87.1% of the files downloaded by Napster users were copyrighted), *aff’d in part and rev’d in part*, 239 F.3d 1004 (9th Cir. 2001).

⁷ See Mark Landler, *Fight Against Illegal File Sharing is Moving Overseas*, N.Y. TIMES, Mar. 31, 2004, at W1; Hiawatha Bray, *Study Finds Downloads Don’t Hurt Music Sales: Majority of File-Swappers Are Non-U.S.*, INT’L HERALD TRIB., Apr. 1, 2004 at 16.

⁸ PEW INTERNET & AMERICAN LIFE PROJECT, MUSIC DOWNLOADING, FILE SHARING, AND COPYRIGHT 5 (2003), http://www.pewinternet.org/pdfs/PIP_Copyright_Memo.pdf (finding that 28% of whites, 37% of blacks, and 35% of Hispanic American adult Internet users download music files online). [hereinafter PEW COPYRIGHT MEMO].

⁹ 52% of American Internet users between the ages of 18 and 29, 27% of those between 30 and 49, and 12% of those over 50 downloaded music files online. *Id.*

¹⁰ 32% of adult male American Internet users and 26% of adult female American Internet users downloaded music files online. *Id.*

¹¹ Generally, as household income increases the less likely adult American Internet users are to download music files online, though all economic classes seem to participate: 38% of those in households earning less than \$30,000 annually download music files whereas only 26% of those in households earning more than \$75,000 did. *Id.* In contrast, there may be less correlation between level of educational attainment and music downloading. Of adult Internet users in America, 31% of high school graduates and 23% of college graduates download music files online. Across races, 28% of whites, 37% of blacks, and 35% of Hispanic adult Internet users in America download music files online. *Id.*

¹² PEW INTERNET & AMERICAN LIFE PROJECT, DOWNLOADING FREE MUSIC: INTERNET MUSIC LOVERS DON’T THINK IT’S STEALING 2 (2000), http://www.pewinternet.org/pdfs/PIP_Online_Music_Report2.pdf (finding that 78% of Internet file-sharers don’t think saving music files on their computers is “stealing?”); PEW COPYRIGHT MEMO, *supra* note 8 (finding that 67% of file-sharers didn’t care about whether the music they downloaded was copyrighted); Stacey M. Lantagne, Note, *The Morality of MP3s: The Failure of the Recording Industry’s Plan of Attack*, 18 HARV. J.L. & TECH. 269, 278 (2004) (citing a Gallup Poll finding that 83% of thirteen to seventeen-year olds think that file sharing is morally acceptable, as well as a *New York Times*/CBS News poll finding that of Americans under thirty years old 29% believed file sharing is always acceptable and 64% believed it is at least sometimes acceptable).

¹³ See, e.g., Jon Healey & Jeff Leeds, *Tone Deaf to a Moral Dilemma?: Millions Download Songs Illegally but don’t Feel Guilty*, L.A. TIMES, Sept. 2, 2003, at A1 (“[College file-sharers] understand what they’re doing may break the rules of copyright law, but they

¶7 Theft and infringement, of course, are both proscribed by law. However, most people refrain from theft not simply because it is illegal, but also—or even predominantly—because of a personal belief that such conduct is immoral.¹⁴ Thus, if so many are willing to infringe but not to steal, they must be doing so based on some moral distinction.¹⁵

¶8 Morality, an individual's subjective sense of right and wrong, is the biggest influence in shaping law-related behavior.¹⁶ And not surprisingly, both psychologists and legal theorists have begun to explore the links between personal morality and large-scale copyright infringement.¹⁷ But to date, this analysis has not rigorously answered some basic questions. Why do people believe that theft is immoral? And why do so many differentiate theft from infringement?

¶9 This Note attempts to answer these questions by exploring and applying recent scholarship into the neuroscience of moral decision-making. In doing so, this Note sets forth a hypothesis about our innate intuitions of property and how these intuitions may affect our moral decisions regarding intellectual property, such as copyright. In developing this analysis, I first present a brief overview of the law and legal response to file sharing, illustrating how copyright owners' response, based on copyright law, has been unable to stop the rampant and widespread infringement of copyrighted works on the Internet. Second, I review the emerging Hybrid Theory of Moral Cognition. Using this theoretical framework, I set forth the Innate Property Intuition Hypothesis, a hypothesis that suggests humans share an innate and intuitive understanding of property and ownership, inherited as a result of evolution. Using this hypothesis, I explain why and how so many Internet users are able to morally distinguish infringement from theft. Finally, I speculate as to what, if anything, the copyright industries can do in light of our innate moral intuitions.

II. FILE SHARING: THE LAW AND THE LEGAL RESPONSE

¶10 The first popular peer-to-peer file sharing software,¹⁸ Napster, began as the pet project of a nineteen-year-old college student modestly seeking to share songs with his friends.¹⁹ But when Napster was first released to the public in 1999, this project quickly became the fastest growing software ever,²⁰ rapidly changing how much of America acquired and listened to music. The numbers are spectacular. At the height of its popularity in early 2001, Napster had 80 million registered users, approximately 1.6 million of whom were logged on to Napster at any given time.²¹ During mid-year 2000, approximately 10,000 music files were shared per second by Napster users,

don't see anything immoral about it."); *see also* Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 765-73 (2003).

¹⁴ Cf. TOM R. TYLER, WHY PEOPLE OBEY THE LAWS 64-68 (1990); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views about Morality and the Legitimacy of Legal Authority into Account when Formulating Substantive Laws*, 28 HOFSTRA L. REV. 707, 718-21 (2000).

¹⁵ Some may argue that peer-to-peer file-sharers are confused about the legality of copying works over file sharing networks. But with the attention given to the *Napster* and *Grokster* decisions, it has become difficult to conclude that most file-sharers are unaware of at least potential liability for infringement. *See* Moohr, *supra* note 13, at 769-70; Christopher Jensen, Note, *The More Things Change, The More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 566 (2003).

¹⁶ TYLER, *supra* note 14, at 64-68; Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 226 (1997).

¹⁷ *See, e.g.*, Geoffrey Neri, Note, *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms*, 93 GEO. L.J. 733, 753 (2005); Tyler, *supra* note 16, at 226-29; 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, 237-40 (2002); Sheldon W. Halpern, *The Digital Threat to the Normative Role of Copyright Law*, 62 OHIO ST. L. J. 569, 570-71 (2001).

¹⁸ For a non-technical explanation of peer-to-peer technology *see* Aric Jacover, Note, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2213-18 (2002); David J. Colletti, Jr., Note, *Technology Under Siege: Peer-to-Peer Technology Is the Victim of the Entertainment Industry's Misguided Attack*, 71 GEO. WASH. L. REV. 255, 264-66 (2003).

¹⁹ Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 511 (2003).

²⁰ *Id.* at 512-13.

²¹ Matthew Green, Note, *Napster Opens Pandora's Box: Examining How File Sharing Services Threaten the Enforcement of Copyright on the Internet*, 63 OHIO ST. L.J. 799, 802 (2002).

with 100 additional users attempting to connect every second.²² In September 2000 alone, roughly 1.4 billion songs had been downloaded using Napster; and four months later, in January 2001, that number increased to 2 billion.²³ The music industry's response to the suffocating flood of infringement online was to sue—first the software providers and later individual file-sharers.

¶11 This Part explores in some detail the copyright owners' legal response to Napster-type online file sharing. First, I will briefly explain the relevant copyright law. Having set forth the statutory law, I will second summarize how the courts have applied it to the distributors of file sharing software. Third, I will summarize the copyright industries' subsequent strategy of filing suits against individual file-sharers. Both strategies, I contend, have been and will continue to be ineffective at curbing the widespread and rampant infringement of copyrights.

A. Copyright's Legal Framework: Exclusive Rights and Infringement

1. Property Rights and Exclusive Rights

¶12 In law, property refers less to an object itself than to the *rights* of an individual to that object.²⁴ These property rights are often referred to as the “bundle of rights” that make up property. Although the specific rights included in the bundle vary, most generally property rights include the rights of possession, use, and enjoyment; the right to transfer; and the right to exclude others.²⁵

¶13 Copyright law grants certain property-like rights in an original work of authorship.²⁶ The Constitution explicitly grants Congress the power to pass laws granting creators for a limited time the exclusive rights to their creative works.²⁷ The justification for this constitutional grant is frequently analyzed in utilitarian terms.²⁸ Under this argument, the grant of exclusive rights in their creative works is justified as an incentive for authors and artists to invest in creative works. But to ensure the public benefits as well from these creative works, the creators' exclusive rights are limited in scope, protecting only the actual expression and not the ideas underlying their creation,²⁹ and duration, limiting the term of these exclusive rights after which the work passes into the public domain.³⁰

¶14 Pursuant to this constitutional grant, Congress has extended copyright protection to all “original works of authorship [that have been] fixed in [some] tangible [medium],”³¹ a book, painting, recording, or computer file for example. Thus, copyright protection is available to a variety of subject matters including literary works, musical works (including any accompanying lyrics), pictorial, graphic, or sculptural works, motion pictures and other audiovisual works, and sound recordings.³² Movies, of course, are copyrightable as motion pictures. Songs, however, consist of two distinct copyrightable works. The underlying music and lyrics are protected as a musical work, while the actual recording of the musical work is protected as a sound recording.³³

²² *Id.*

²³ *Id.*

²⁴ See S. Green, *supra* note 17, at 208-09; Jeffrey Evans Stake, *The Property Instinct*, 359 PHIL. TRANS. R. SOC. LOND. B 1763, 1763 (2004).

²⁵ S. Green, *supra* note 17, at 215.

²⁶ See 17 U.S.C. § 102.

²⁷ CONST. Art. I, Sec. 8, Cl. 8. (“The Congress shall have Power . . . To Promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . .”).

²⁸ CRAIG JOYCE ET AL., COPYRIGHT LAW 59-60 (6th ed. 2003); Moohr, *supra* note 13, at 744-45.

²⁹ See 17 U.S.C. §102(2).

³⁰ See *id.* §§ 302-305.

³¹ *Id.* § 102.

³² *Id.*

³³ *Id.* §§ 102(2), (7).

¶15 Copyright owners enjoy several exclusive rights regarding the work. Most importantly for this Note are the reproduction and distribution rights, and limitations thereto.³⁴ These rights are part of the “bundle of rights” that makes up copyright.

2. Infringement: Direct and Secondary

¶16 Infringement is any violation of the copyright owner’s exclusive rights in a copyrighted work.³⁵ In a civil action, the owner of an infringed copyright may seek an array of remedies against the infringer, including an injunction against further infringement or money damages.³⁶ In some circumstances, an infringer may also face criminal liability.³⁷

¶17 Civil liability for infringement may be either direct or secondary. Direct infringement, as the name implies, occurs when an individual violates one of the copyright owner’s exclusive rights.³⁸ Secondary liability reaches third parties who may not have directly infringed on a copyright, but nonetheless somehow contributed or failed to prevent the direct infringement.³⁹

¶18 Courts have recognized two distinct theories of secondary liability: contributory infringement and vicarious infringement. Contributory infringement has its roots in tort⁴⁰ and has been likened to “aiding and abetting” liability for an infringing act.⁴¹ The traditional elements of contributory infringement are (1) direct infringement by some third party, (2) that the defendant, the alleged contributory infringer, actually knew about the direct infringement, and (3) that the defendant caused or materially contributed to the underlying direct infringement.⁴² Vicarious infringement is a distinct cause of action deriving from the doctrine of *respondeat superior*.⁴³ To establish vicarious infringement, the copyright owner must prove (1) direct infringement by some third party, (2) that the defendant, the alleged vicarious infringer, had the right and ability to control or supervise the underlying direct infringement, and (3) that the defendant derived a direct financial benefit from the underlying infringement.⁴⁴ Both the contributory and vicarious liability theories have been deployed by copyright owners in their efforts to restrain online file sharing.

B. The Legal Strategy against Software Providers

1. The Fall of Napster

¶19 Following Napster’s meteoric growth, it took little time for the recording industry to move against the company in litigation.⁴⁵ And while *Napster* litigation appeared to be a significant success for copyright owners at the outset, within that victory were the seeds of future problems for copyright owners.

³⁴ *Id.* §§ 107-122.

³⁵ *See id.* § 501.

³⁶ *See id.* §§ 503, 504. The copyright owner may seek damages in the amount of actual damages to him as a result of the infringement plus any profit made by the infringer through his infringement. *Id.* § 504(b). Alternatively, the copyright owner may seek statutory damages for each infringement at amount determined by the court within a statutorily prescribed range. *Id.* § 504(c).

³⁷ *See id.* § 506.

³⁸ *See id.* § 501.

³⁹ Indirect forms of infringement are not found in the copyright statute. Rather, they were developed by case law. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984).

⁴⁰ *Fonovisa, Inc v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

⁴¹ FRED VON LOHMANN, ELEC. FRONTIER FOUND., IAAL: WHAT PEER-TO-PEER DEVELOPERS NEED TO KNOW ABOUT COPYRIGHT LAW 3 (2004), http://www.eff.org/IP/P2P/p2p_copyright_wp.php.

⁴² *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1160 (9th Cir. 2004); *see also* LOHMANN, *supra* note 41. As discussed below, *infra* text accompanying notes 78-79, the Supreme Court in reversing the Ninth Circuit modified the elements of contributory infringement by holding that actual knowledge is not required when there is evidence that the defendant induced its users to infringe. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764, 2778-80 (2005).

⁴³ *Grokster*, 380 F.3d at 1164; *see also* LOHMANN, *supra* note 41, at 3.

⁴⁴ *Grokster*, 380 F.3d at 1164; *see also* LOHMANN, *supra* note 41, at 3-4.

⁴⁵ *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2001), *aff’d in part and rev’d in part*, 239 F.3d 1004 (9th Cir. 2001).

¶20 In December 1999, the RIAA, a consortium of record companies, copyright owners in musical works and sound recordings, sued Napster alleging contributory and vicarious infringement.⁴⁶ Though the RIAA could have sued Napster's individual users for direct infringement, they targeted Napster instead for obvious reasons. Rather than having to identify, locate, and pursue lawsuits against millions of individuals around the world, the RIAA could file one lawsuit against one entity: Napster. An injunction against Napster would deny its users access to the service, preventing further infringements. Moreover, lawsuits against the individual users could prove to be a public relations disaster for the recording industries.⁴⁷

¶21 In July 2000, a federal district court granted the RIAA a preliminary injunction against Napster, holding that Napster would likely be found liable for both contributory and vicarious infringement.⁴⁸ The injunction, however, was not enforced⁴⁹ until it was reviewed and modified by the Court of Appeals for the Ninth Circuit in February 2001.⁵⁰ Under the Ninth Circuit's ruling, upon receiving from the record companies a list of copyrighted songs shared on its servers, Napster was required to remove from its servers the names of those copyrighted songs, thereby preventing their transmission.⁵¹

¶22 Legally, *Napster* established two important principles. First, it confirmed that online file sharing could constitute a *direct* infringement of copyright.⁵² In the Ninth Circuit's words, "Napster users infringe on at least two of the copyright holders' exclusive rights: the right[] of reproduction . . . and [the right of] distribution."⁵³ File-sharers who upload a file containing a copyrighted song violate the copyright owner's exclusive right to distribute copies of the copyrighted work.⁵⁴ And file-sharers who download a file containing a copyrighted song, thereby creating a copy of the uploader's music file, violate the copyright owner's exclusive right to reproduce copies of the copyrighted work.⁵⁵

¶23 Second, *Napster* indicated that secondary liability for software providers would depend on the design and architecture of the software itself. In the case of Napster, Napster maintained on its servers lists of song files available on each user's computer. Other users searched these lists to find songs. Once a user clicked on a song to download, Napster simply connected the downloader to the sharer. Because no actual songs were ever uploaded to or downloaded from Napster's servers, Napster itself was not liable for direct infringement. But because Napster had *access* to its servers, which contained the *lists* of songs its users were sharing, Napster was found to have actual knowledge of the direct infringement of its users,⁵⁶ as required for contributory infringement liability.⁵⁷ Likewise, because Napster could prevent its users from listing their copyrighted songs on its servers, it had the right and ability to control that direct infringement,⁵⁸ as required for vicarious infringement liability.⁵⁹

⁴⁶ *Id.*

⁴⁷ Predictably, this has been the case ever since the recording industry began suing individual users. See Lantagne, *supra* note 12, at 285; Kristina Groennings, *Costs and Benefits of the Recording Industry's Litigation against Individuals*, 20 BERKELEY TECH. L.J. 571, 589-91 (2005).

⁴⁸ *Napster*, 114 F. Supp. 2d at 896.

⁴⁹ Two days after the district court ruling, the Ninth Circuit Court of Appeals stayed the injunction until it reviewed the case. *Id.* at 927 n.32.

⁵⁰ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1004 (9th Cir. 2001).

⁵¹ See *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1095-96 (9th Cir. 2002) (affirming the district court's modified injunction).

⁵² *Napster*, 239 F.3d at 1014.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1020.

⁵⁷ See *supra* text accompanying note 42.

⁵⁸ *Napster*, 239 F.3d at 1023-24.

⁵⁹ See *supra* text accompanying note 44.

2. *The Rise of the Second-Generation Peer-to-Peer Software Providers*

¶24 While the *Napster* litigation was successful in bringing on the demise of Napster, it did not end illegal file sharing. Within hours of the initial July 2000 injunction against Napster, the second-generation peer-to-peer file sharing software began seeing a marked increase in use.⁶⁰ While the exact design and architecture of these software—distributed under names such as Morpheus, iMesh, Limewire, and Grokster—vary, they have one key feature in common: decentralization.⁶¹ Unlike Napster, these second-generation services do not use a central server to store the names of the songs shared by their users. Rather, each user’s computer functions as a server. Moreover, unlike Napster, the second-generation software allow their users to share and download all kinds of file types—not just music files.

¶25 These second-generation software applications “quickly filled the void left by Napster.”⁶² By late October of 2001, these software collectively began rivaling the popularity of Napster at its peak.⁶³ And as with Napster, that same month, the RIAA, this time joined by the MPAA, a consortium of movie studios, sued several providers of second-generation peer-to-peer file sharing software.⁶⁴ This litigation, under the name *MGM v. Grokster*, ultimately reached the United States Supreme Court,⁶⁵ resulting in one of the most anticipated decisions in recent history.

3. *MGM v. Grokster*

¶26 After *Napster*, few argued that individual users could face direct liability for their file sharing.⁶⁶ The next round of file sharing litigation focused instead on clarifying the secondary liability of software providers.

¶27 The Ninth Circuit in *Grokster* refused to hold the second-generation software providers liable for contributory or vicarious infringement, despite the direct infringement of their users.⁶⁷ Distinguishing the second-generation software from Napster, the court noted, “[T]he software design is of great import.”⁶⁸ Unlike Napster, which used centralized servers to track the songs shared on the network, the second-generation software providers maintained no such servers.⁶⁹ Thus, the copyright owners could not prove that the software providers had specific knowledge of the underlying infringement of their users,⁷⁰ a required element for contributory infringement liability.⁷¹ And because the software providers operated no central servers and had no ability to prevent users from sharing copyrighted works, the copyright owners could not prove that the software providers had the right and ability to control or supervise the underlying infringement of their users,⁷² a required element for vicarious infringement liability.⁷³

¶28 The Ninth Circuit’s *Grokster* ruling immediately proved controversial, and the Supreme Court granted certiorari.⁷⁴ In June 2005, the Supreme Court vacated the Ninth Circuit’s decision,⁷⁵ holding

⁶⁰ M. Green, *supra* note 21, at 822.

⁶¹ Jacover, *supra* note 18, at 2214-18. For a non-technical explanation of the different architectural designs of second-generation peer-to-peer software see *id.* at 2213-19; Colletti, *supra* note 18, at 265-67.

⁶² Jensen, *supra* note 15, 538-39.

⁶³ M. Green, *supra* note 21, at 822.

⁶⁴ Matt Richtel, *A New Suit Against Online Music Sites*, N.Y. TIMES, Oct. 4, 2001, at C4.

⁶⁵ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff’d*, 380 F.3d 1154 (9th Cir. 2004), *vacated*, 125 S. Ct. 2764 (2005), *remanded to* 419 F.3d 1005 (9th Cir. 2005).

⁶⁶ See, e.g., *Grokster*, 259 F. Supp. 2d at 1034-35. On appeal to the Ninth Circuit, the software distributors in *Grokster* did not even bother to dispute this point. See 380 F.3d at 1160.

⁶⁷ See *Grokster*, 380 F.3d at 1160.

⁶⁸ *Id.* at 1163.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *supra* text accompanying note 42.

⁷² *Grokster*, 380 F.3d at 1165-66.

⁷³ See *supra* text accompanying note 44.

⁷⁴ 125 S. Ct. 686 (2005) (granting certiorari).

that the Ninth Circuit analysis of contributory infringement was fundamentally flawed.⁷⁶ The Ninth Circuit had held that the software distributors could not be liable for contributory infringement because they had no specific knowledge of the infringing activities of their users.⁷⁷ The Supreme Court, however, ruled that specific knowledge was *not required* when there was evidence showing that the software providers purposefully intended to induce or encourage direct infringement by their users.⁷⁸ As the Court explained, “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”⁷⁹

¶29 Applying this analysis, the Supreme Court found ample evidence suggesting software providers’ intention that users engage in direct copyright infringement.⁸⁰ Rather than ruling on ultimate liability, however, the Court instead remanded the case for the district court to consider the evidence of intent in assessing liability.⁸¹

4. *The Persistence of File Sharing After Grokster*

¶30 The Supreme Court’s *Grokster* decision strongly indicated that providers like Grokster would face serious legal consequences for file sharing. In light of the unfavorable Supreme Court ruling, Grokster agreed to stop distributing its software as part of a settlement with the RIAA.⁸² Likewise, many of the other providers of second-generation peer-to-peer software are reportedly in similar settlement negotiations.⁸³

¶31 Yet, like the *Napster* decision before it, *Grokster* does not seem to have depressed the actual level of file sharing online. In fact, as one researcher quipped three months after the *Grokster* decision, “File sharing has never been more popular than it is now.”⁸⁴ As a practical matter, even though the Grokster software is no longer available, the company’s users are able to continue using pre-settlement versions of the software to share and download files.⁸⁵ It is likely that future settlements or judgments against other software providers will also have small effect on end users.⁸⁶ As the Ninth Circuit realized, “Even if the [s]oftware [d]istributors closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption.”⁸⁷

C. *The Legal Strategy against Individual File-Sharers*

¶32 Soon after the district court’s ruling in *Grokster*, copyright owners introduced a new prong in their legal strategy. In September 2003, the RIAA announced it would begin suing individual file-sharers for infringement.⁸⁸ Since then, the RIAA has periodically filed new waves of lawsuits against

⁷⁵ 125 S. Ct. at 2783.

⁷⁶ *Id.* at 2778. Because the Supreme Court held that Ninth Circuit’s analysis contributory infringement was mistaken, it did not address the Ninth Circuit’s analysis of vicarious infringement. *Id.* at 2776 n.9.

⁷⁷ See *Grokster*, 380 F.3d at 1162-63.

⁷⁸ See *Grokster*, 125 S. Ct. at 2780.

⁷⁹ *Id.*

⁸⁰ *Id.* at 2780.

⁸¹ *Id.* at 2783.

⁸² Jonathan Krim & Frank Ahrens, *Legal Pressure Shatters Grokster*, WASH. POST, Nov. 8, 2005, at D1.

⁸³ See Saul Hansell, *File sharing Services seek Pact with Record Studios*, N.Y. TIMES, Sept. 20, 2005, at C1.

⁸⁴ Jefferson Graham, *Court Cases Don’t Scare Music File Swappers Away*, USA TODAY, Sept. 6, 2005, at B5 (quoting the president of Big Champagne, a company that measures online file sharing activity).

⁸⁵ See Saul Hansell, *Putting the Napster Genie Back in the Bottle*, N.Y. TIMES, Nov. 20, 2005 (“Grokster users who don’t update to the new version of the service will still be able to trade songs with one another free.”).

⁸⁶ See Andrew Kantor, *For File Sharing, It’s the Same Old Song*, USA TODAY, Dec. 2, 2005 (“[I]t doesn’t matter what happens to companies making this software. It’s already out there. The creators could disappear . . . , and the software would still be there, being used by millions of people.”).

⁸⁷ *Grokster*, 380 F.3d at 1163.

⁸⁸ See RIAA, *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, Sept. 8, 2003, <http://www.riaa.com/news/newsletter/090803.asp>.

file-sharers, each targeting several hundred at a time.⁸⁹ One year later, the MPAA joined the RIAA, filing similar suits against individual file-sharers for infringement.⁹⁰

¶33 Initially the lawsuits against individual users proved successful at curbing online file sharing. In the months following the first wave of lawsuits targeting individual users, the percent of adults that used file sharing software dropped nearly in half.⁹¹

¶34 This drop, however, proved only temporary. By February 2004, only six months after the initial wave of lawsuits, an estimated 23 million Americans openly admitted to illegally downloading music files online, an increase of 5 million from two months before.⁹² And over the longer-term, file sharing has steadily increased. By August 2005, an average of 9.6 million people were logged onto a file sharing network at any one time, up from 6.8 million the year before.⁹³ In the two years since the RIAA began suing individual file-sharers, the average number of people logged onto a peer-to-peer network at any one time has doubled.⁹⁴

D. The Failings of the Legal Response

¶35 The copyright industries' legal response to Internet file sharing was to first sue the software providers and then individual peer-to-peer users. This two-pronged strategy, however, has failed at curbing widespread infringement. I argue that this failure is attributable to two shortcomings in the copyright industries' response: first, a misguided assessment of the relationship between law and technology, and second, a widespread sense among the file sharing public that online infringement is morally distinguishable from theft.

1. The Failings of the Legal Response to the Software Providers

¶36 The suits against the *software providers* have failed at curbing online infringement because of the inherent relationship between law and technology. The law can neither anticipate nor keep pace with advancing technology. Technology will always be one step ahead of the law.

¶37 Consider the specific case of second-generation peer-to-peer file sharing technology. This technology is only the latest infringement-enabling advance that has threatened copyright owners.⁹⁵ Before it, there was the Xerox copy machine and the home video recorder.⁹⁶ More immediately, second-generation software is itself a direct response to the law's attempt to curb another infringement-enabling technology, Napster. Now that the Supreme Court has cast legal doubt over the continued viability of the second-generation software, programmers are now developing new, "third-generation" software, designed to be impervious to the legal rulings that brought down its predecessors.⁹⁷ Just as file-sharers migrated from Napster to second-generation peer-to-peer software after *Napster*, so may they migrate from second-generation technology to these newer services in the

⁸⁹ See, e.g., John Schwartz, *Music Industry Returns to Court, Altering Tactics on File Sharing*, N.Y. TIMES, Jan. 22, 2004, at C1; John Schwartz, *More Lawsuits in Effort to Thwart File Sharing*, N.Y. TIMES, Mar. 24, 2004 at C4.

⁹⁰ Laura M. Holson, *Film Group Said to Plan Suits aimed at Illegal File Sharing*, N.Y. TIMES, Nov. 4, 2004, at C6.

⁹¹ PEW INTERNET & AMERICAN LIFE PROJECT, SHARP DECLINE IN MUSIC FILE SWAPPERS (2004), http://www.pewinternet.org/pdfs/PIP_File_Swapping_Memo_0104.pdf (reporting the findings of a poll indicating that the number of online adult Americans downloading music fell from 29% to 14%). The accuracy of this study's findings, however, has been questioned because the study's methodology relied on adults self-reporting their illegal activity. See Brian Hinds, *Did Big Music Really Sink the Pirates?* BUS. WEEK (Jan. 16, 2004) at http://www.businessweek.com/technology/content/jan2004/tc20040116_9177_tc024.htm.

⁹² PEW INTERNET & AMERICAN LIFE PROJECT, 14% OF INTERNET USERS SAY THEY NO LONGER DOWNLOAD MUSIC FILES (2004), http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf (reporting the findings of a poll indicating that the number of online adult Americans downloading music increased from 14% to 18% since the earlier January poll).

⁹³ Graham, *supra* note 84, (quoting the president of Big Champagne, a company that measures online file sharing activity).

⁹⁴ Simon Aughton, *P2P Activity Doubles in Two Years*, PC PRO, Oct. 11, 2005, <http://www.pcpro.co.uk/news/78525/p2p-activity-doubles-in-two-years.html>.

⁹⁵ Hal R. Varian, *In the Clash of Technology and Copyright, File Sharing is Only the Latest Battleground*, N.Y. TIMES, Apr. 7, 2005 at C2.

⁹⁶ Indeed, it was the copyright owners' legal response to the first home video recorders that ultimately gave rise to the "Betamax" case, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the fundamental precedent at issue in *Grokster*.

⁹⁷ See, e.g., John Markoff, *File-Sharers Anonymous: Building a Net that's Private*, N.Y. TIMES, Aug. 1, 2005 at C1.

future.⁹⁸ As the copyright industries are beginning to concede,⁹⁹ the law cannot ultimately deny users access to infringement-enabling technologies.¹⁰⁰

2. *The Failings of the Legal Response to Individual File-Sharers*

¶38 The suits against *individual users* have failed to deter large-scale file sharing because, legal consequences notwithstanding, many simply don't believe that file sharing, and more generally copyright infringement, is immoral. Users know that file sharing is infringement and therefore illegal.¹⁰¹ Moreover, the recent suits against individual users make clear that file-sharers risk facing possible legal sanctions for their conduct. But the threat of legal sanctions has only a minor influence in shaping people's behavior.¹⁰² We obey laws primarily because they are consistent with our morals, not because we fear possible legal sanctions.¹⁰³ Only when the law diverges from our morals does the risk of legal sanctions influence our behavior.¹⁰⁴ This, no doubt, explains why the initial lawsuits against individual users had the immediate effect of reducing file sharing. But as file-sharers soon realized, the copyright owners could only sue a small, small fraction of file-sharers. As a result, today the numbers of file-sharers has again been steadily climbing.

¶39 The copyright industry's legal response to Internet file sharing has made two facts clear. First, online file sharing is infringement and a violation of copyright law. Second, file sharers face legal sanctions if they continue to share and download files. Yet, today, millions of Americans continue to knowingly defy the law and risk legal sanctions. Millions, who would never steal a CD or DVD from a music store, unhesitatingly share and download songs and movies on the Internet. These people believe stealing is morally unacceptable. Yet, they don't feel infringement is immoral. Unless it can be resolved, this dissonance may mean that the copyright industries' legal strategy against online infringement will not reach its goal of effective deterrence for the masses. I suggest that copyright industries must look more closely to morality to understand how to address the problem of widespread online infringement.

III. THE INTUITIVE AMORALITY OF INFRINGEMENT

¶40 Why do millions morally distinguish theft from infringement? Recent research into the neuroscience of moral cognition suggests the distinction is intuitive.¹⁰⁵ More specifically, the act of theft triggers an intuitive moral response, leading most people to agree that theft is immoral. The act of infringement, however, triggers no such response. Thus, theft is intuitively wrong, but infringement is not.

¶41 This Part proceeds in three sections. First, I present the emerging theory of moral cognition, the Hybrid Theory. This theory suggests that many moral decisions are made intuitively, based on an innate moral knowledge inherited by all humans as a result of evolution. Second, I use this theory to

⁹⁸ Cf. Tom Zeller, Jr. et al., *The File Sharers: Trying to Tame an Unruly Technology*, N.Y. TIMES, June 28, 2005, at C1 (quoting the chief executive of an Internet research company as saying: "File sharing technology is endlessly mutable, and its users are a migratory species. From Napster, . . . file sharing enthusiasts turned to [second-generation] upstarts like Kazaa, Grokster, and Streamcast . . . And in a world where innovations and programming wisdom can be shared across oceans and borders, there were always new options emerging.").

⁹⁹ See Tom Zeller, Jr., *The Imps of File Sharing may Lose in Court, But They are Winning in the Marketplace*, N.Y. TIMES, July 4, 2005, at C3 ("Even the most ardent supporters of Big Entertainment [including the former president of the RIAA] concede that, in the long run, copyright holders are no match for the ability of file sharing technology to adapt, mutate, evolve, and expand.").

¹⁰⁰ See, e.g., Jon Pareles, *The Court Ruled, So Enter Just Go There*, N.Y. TIMES, June 29, 2005 at E1.

¹⁰¹ See *supra* note 15.

¹⁰² Tyler, *supra* note 16, at 220-21; Tyler & Darley, *supra* note 14, at 711-13.

¹⁰³ TYLER, *supra* note 14, at 64-68, 174; Tyler, *supra* note 16, at 226; S. Green, *supra* note 17, at 237-40;

¹⁰⁴ Tyler & Darley, *supra* note 14, at 719-20.

¹⁰⁵ By intuitive, I specifically mean a nonrational mental process that is inaccessible to conscious introspection or participation. Oliver R. Goodenough & Kristin Prehn, *A Neuroscientific Approach to Normative Judgment in Law and Justice*, 359 PHIL. TRANS. R. SOC. LOND. B. 1709, 1717 (2004). Other legal commentators have hinted that we somehow intuitively distinguish between tangible and intangible property, but they do not explain why and how we would make this distinction and what exactly is meant by intuition. See S. Green, *supra* note 17, at 212-14; Hardy, *supra* note 1, at 327, 332-35.

suggest that while theft triggers an intuitive moral response, infringement triggers no such intuition. This is so because intellectual property is beyond our intuitive understanding of property ownership. Finally, I consider (and hopefully assuage) three likely objections to this theory of morality.

A. The Hybrid Theory of Moral Cognition

¶42 Before the advent of neuro-imaging technologies, philosophers and psychologists could only speculate about the nature of moral thinking. Able only to observe the external stimulus and response, researchers were left to simply hypothesize about the nature of the mental process that led from perception (or input) to moral judgment (or output).¹⁰⁶ Before the recent advances in cognitive neuroscience, two leading schools of thought had emerged.¹⁰⁷ The theory of moral *intuitionism*, commonly associated with the Scottish philosopher David Hume, held that moral judgments are intuitive, triggered automatically and inaccessible to conscious thought.¹⁰⁸ On this theory, any conscious reasoning offered for our moral judgments is merely post hoc rationalization of our immediate moral intuitions. In direct contrast, the theory of moral *rationalism*, often associated with influential psychologist Lawrence Kohlberg, held that moral judgments derive from conscious reasoning regarding the permissibility of those actions.¹⁰⁹

¶43 Today, neuro-imaging technologies, such as fMRI and PET, have allowed researchers to pry open the black box of the mind, to observe the cognitive processes that map our perceptions to our moral judgments and connect those processes to specific anatomical structures in the brain.¹¹⁰ Using these technologies, researchers have determined that moral judgments are neither entirely intuitive nor reasoned. Rather, they are both.

¶44 Cognitive neuroscientists have converged on what I call the Hybrid Theory of Moral Cognition.¹¹¹ The Hybrid Theory suggests that both intuition and conscious reasoning play a role in shaping our moral judgments. Anatomically, researchers have identified two functionally distinct and relatively independent structures of the brain that are employed when making moral judgments: the affective system, associated with emotion and intuition, and the cognitive system, associated with abstract reasoning and higher cognition.¹¹²

¶45 The *affective* system is the source of our moral intuitions—gut feelings about right and wrong. Anatomically, the affective system is associated with more primitive parts of our brain, responsible for our intuitive and emotional reactions.¹¹³ These intuitive responses are rapid, automatic, and unconscious.¹¹⁴ The source and content of these intuitions are innate, the result of evolution.¹¹⁵

¹⁰⁶ See Goodenough & Prehn, *supra* note 105, at 1713.

¹⁰⁷ See, e.g., *id.* at 1710.

¹⁰⁸ See, e.g., *id.*; Hauser, *supra* note 2, (manuscript at 8, on file with author).

¹⁰⁹ See, e.g., John Mikhail, *Aspects of the Theory of Moral Cognition: Investigating Intuitive Knowledge of the Prohibition of Intentional Battery and the Principle of Double Effect*, 85-86 (2002), available at <http://papers.ssrn.com/abstract=762385>; Goodenough & Prehn, *supra* note 105, at 1711. Although some associate this view of moral judgment with the German philosopher Immanuel Kant, see, e.g., Goodenough & Prehn, *supra* note 105, at 1710; Hauser, *supra* note 2 (manuscript at 8-9, on file with author), Kant recognized that intuitions can help shape moral judgments, Hauser, *supra* note 2 (manuscript at 9, on file with author).

¹¹⁰ Goodenough & Prehn, *supra* note 105, at 1713. Functional magnetic resonance imaging (fMRI) and positron emission tomography (PET) are two brain-imaging techniques that indirectly measure brain metabolism, allowing researchers to identify the areas of the brain active or inhibited during a mental task. See *id.* at 1715-16.

¹¹¹ See, e.g., Goodenough & Prehn, *supra* note 105, at 1716-17 (2004); Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6(12) TRENDS IN COGNITIVE SCI. 517, 517 (2002); Joshua D. Greene, *Cognitive Neuroscience and the Structure of the Moral Mind*, in THE INNATE MIND: STRUCTURE AND CONTENTS 348, 349-50 (P. Carruthers, S. Laurence & S. Stich, eds., 2005); Jonathan Haidt & Craig Joseph, *Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues*, 133(4) DAEDALUS 55, 55-56 (2004). The Hybrid Theory is not a name used by any of its proponents. Rather, I borrow the name “Hybrid” from Marc Hauser, who uses it to describe the theory. See Hauser, *supra* note 2 (manuscript at 9, on file with author).

¹¹² See Greene, *supra* note 111, at 350-51.

¹¹³ See *id.*; see also Greene & Haidt, *supra* note 111, at 519-22 (identifying the parts of the brain associated with the affective system).

¹¹⁴ See Haidt & Joseph, *supra* note 111, at 55-56, 59.

¹¹⁵ See Greene, *supra* note 111, at 350-52; Joshua Greene, *From Neural “Is” to Moral “Ought”: What Are the Moral Implications of Neuroscientific Moral Psychology*, 4 NATURE REVIEWS NEUROSCIENCE 847, 848-49 (2003); Haidt & Joseph, *supra* note 111, at 57-60; Jon Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 825-26

Certain pro-social norms proved useful for our ancestors' survival.¹¹⁶ Through natural selection, these norms became hard-wired in the human brain as innate moral intuitions, intuitive moral rules guiding our social interactions. Thus, rather than a product of culture or society, these innate moral intuitions are universal, shared by all human beings.¹¹⁷

¶46 The *cognitive* system is the source of our conscious moral reasoning. Anatomically, the cognitive system operates in the most evolved parts of our brain, in the areas associated with abstract reason and other higher cognition.¹¹⁸ Unlike the affective system, the responses of the cognitive system are slow, more deliberative, and consciously accessible.¹¹⁹ Also in contrast to the innate moral intuitions of the affective system, the cognitive system contains knowledge learned through experience and socialization.¹²⁰ Thus, unlike our innate moral intuitions, moral reasoning can vary as a function of the cultural influences and personal experiences of the individual. Using this consciously accessible knowledge, the cognitive system can reason and arrive at moral decisions.

¶47 Under the Hybrid Theory, our moral judgments are shaped by reactions from either the affective system, cognitive system, or both. When these systems are triggered and how they interact depends on the type of behavior the mind is evaluating. Consider the following two scenarios.

1. *Intuitively Immoral Behaviors*

¶48 Certain social behaviors trigger a quick, unconscious, and negative intuitive reaction from our affective system. Consider, for example, bludgeoning an infant. Such a behavior would violate some pro-social norm hard-wired in our brain as an innate and intuitive moral rule.¹²¹ Such behaviors trigger a negative intuitive response that tends to drive the moral judgment.¹²² I call these behaviors *intuitively immoral behaviors*.

¶49 When the mind perceives an intuitively immoral behavior, the affective system responds automatically and unconsciously, creating a negative intuition regarding the permissibility of the behavior. The cognitive system also reacts, though its response time is slower. Conscious moral reasoning may consider the specific circumstances, weighing the costs and benefits of the conduct, before ultimately arriving at a moral decision. When both the intuitive response and conscious reasoning converge on the same moral outcome, the mind forms a moral decision. When the affective and cognitive systems diverge, however, the two must be mediated before arriving at a moral decision. Thus, while the moral judgment of an intuitively immoral behavior is often driven by a negative intuitive reaction, conscious reasoning may override this intuition when the reasons are compelling.

¶50 Recall the hypothetical “footbridge dilemma.” Most people find it impermissible to push one man off the footbridge in front of a trolley to save the five others. Why do so many people agree that pushing the stranger is morally impermissible? Rather than basing their judgments on conscious moral reasoning, research under the Hybrid Theory suggests people are responding to a negative intuitive reaction.

¶51 Consider the act of pushing the man off the footbridge. It requires direct, personal contact. Our ancestral environment included many opportunities to harm others through direct, personal contact.¹²³ Evolutionary theory suggests we evolved an innate and intuitive moral rule against such

(2001).

¹¹⁶ Greene, *supra* note 111, at 345.

¹¹⁷ See Haidt & Joseph, *supra* note 111, at 57-61; Haidt, *supra* note 115, at 825-26.

¹¹⁸ See Greene, *supra* note 111, at 350-51; see also Greene & Haidt, *supra* note 111, at 519-22 (identifying the parts of the brain associated with the cognitive system).

¹¹⁹ Haidt & Joseph, *supra* note 111, at 56.

¹²⁰ See Goodenough & Prehn, *supra* note 105, at 1716.

¹²¹ See Greene, *supra* note 111, at 345.

¹²² See *id.* 345-48.

¹²³ See *id.* at 345.

conduct—to avoid harming each other in this way.¹²⁴ This rule is violated *not by the harm alone*, but by harm *caused through direct, personal contact*. Thus, in the footbridge scenario, the Hybrid Theory suggests that the mental perception of pushing the man, a violation of this rule, triggers a negative intuitive response because it closely reflects similar behaviors and circumstances faced by our evolutionary ancestors.¹²⁵ Put differently, pushing the stranger is an intuitively immoral act.

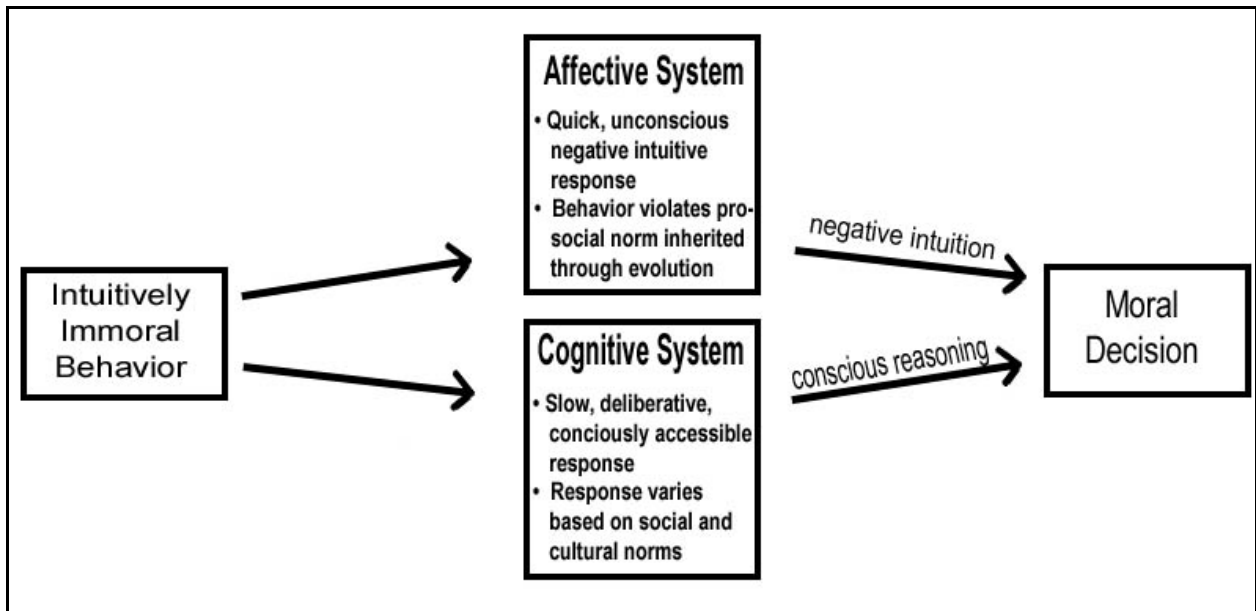


Figure 1: Moral Judgment of an Intuitively Immoral Behavior

¶52 Empirical evidence has verified this hypothesis: most respondents to the footbridge scenario are influenced by a negative intuitive reaction.¹²⁶ When considering the footbridge scenario, brain-imaging studies revealed that these subjects showed greater neural activity in the areas of the brain associated with the affective system.¹²⁷ For most, the decision to not push the man off the footbridge is dominated by unconscious emotion and intuition.

¶53 Of course, some do find it morally permissible to push the man in front of the trolley. These subjects presumably reason that sacrificing one is worth it to save five. But to conclude so requires these subjects' slower cognitive reaction to override their negative intuitive reaction to harming others through direct, personal contact. Indeed, the brain-imaging data shows that these individuals experienced greater activity in areas of the brain associated with the cognitive system when compared to those who decided against pushing the man.¹²⁸ Moreover, the experiments showed that where a subject's cognitive system overrides her negative intuitive response to arrive at the counterintuitive moral decision, the response time increased significantly.¹²⁹ Inversely, when presented with a circumstance that triggers strong moral intuitions with no countervailing contextual considerations—for example, infant battery—people's reactions are uniformly quick and negative.¹³⁰

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ Greene et al., *supra* note 2, at 2106-07.

¹²⁷ *Id.*

¹²⁸ See Joshua D. Greene, et al., *The Neural Bases of Cognitive Conflict and Control in Moral Judgment*, 44 NEURON 389, 395-96 (2004).

¹²⁹ See Greene et al., *supra* note 2, at 2106-07.

¹³⁰ See Greene et al., *supra* note 128, at 393-95.

2. Intuitively Amoral Behaviors

¶54

Other behaviors involve circumstances far, far removed from our ancestral environment. Modern abortion procedures and stem cell research are two examples.¹³¹ Because these behaviors are so unlike anything in our ancestral environment, they lie outside the scope of our innate moral intuitions. As a result, they trigger no reaction in the affective system, no intuitive moral response.¹³² In the absence of a driving moral intuition, the cognitive system is left to reason about the appropriate moral response, weighing the specific context and consequences.¹³³ I call these behaviors *intuitively amoral behaviors*.

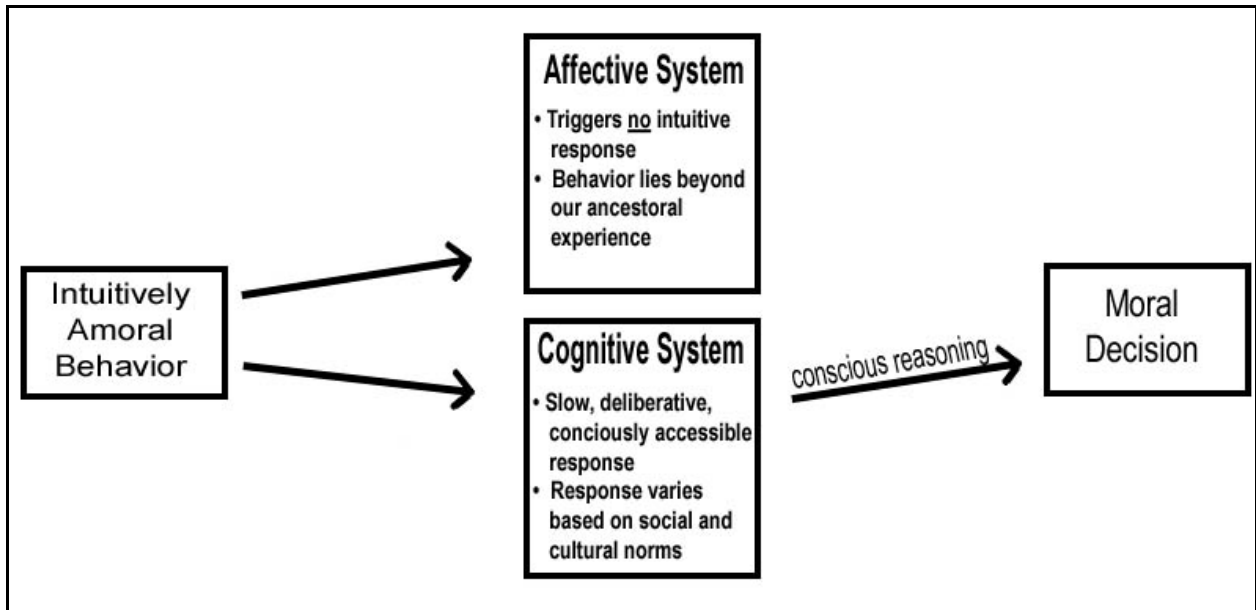


Figure 2: Moral Judgment of an Intuitively Amoral Behavior

¶55

Recall the hypothetical “switch dilemma.” Most people believe it is morally permissible to throw the switch to change the trolley’s tracks thereby killing one man and saving five. Why do so many people agree that pushing the stranger in front of the train is morally impermissible? Why is the same innate moral intuition not triggered?

¶56

Recall that the Hybrid Theory suggests our innate moral intuitions reflect behaviors and circumstances present in our ancestral environment.¹³⁴ Now consider the act of hitting the switch. Although the resulting harm is the same, our ancestral environment did not include opportunities to harm others using complicated, remote-activating devices, like the train track switch.¹³⁵ Unlike the footbridge scenario, the circumstances in the switch scenario are unlike any encountered by our evolutionary ancestors.¹³⁶ As a result, though our innate moral intuitions include a rule against harming others through direct, personal contact, that rule does not extend to indirect or impersonal contact.¹³⁷ We intuitively distinguish hitting the switch from pushing the stranger with this innate and intuitive personal-impersonal distinction.¹³⁸ Because hitting the switch does not violate the innate

¹³¹ See Hauser, *supra* note 2 (manuscript at 9-10, on file with author).

¹³² See Greene, *supra* note 111, at 346.

¹³³ See *id.*

¹³⁴ See *supra* notes 116-117 and accompanying text.

¹³⁵ See Greene, *supra* note 111, at 345.

¹³⁶ See *id.* at 345-46.

¹³⁷ See *id.* at 345.

¹³⁸ See *id.* at 345-46.

and intuitive moral rule against harming others through direct, personal contact, there is no negative intuitive response to this behavior, and the cognitive system is free to consider the net utility of the act—that five is better than one.¹³⁹ Put differently, pushing the switch is an intuitively amoral behavior.

¶57 Empirical evidence has verified this hypothesis as well. Most respondents to the switch scenario are not responding to an intuitive reaction. When considering the switch scenario, brain-imaging studies reveal that subjects showed greater neural activity in the areas of the brain associated with higher cognition and abstract reasoning and no relative increase in neural activity in those areas associated with the affective system.¹⁴⁰ For most, the decision to throw the switch is dominated by the cognitive system, not the affective system.¹⁴¹ Thus, from the perspective of brain-imaging, the cognitive response to an intuitively amoral behavior (like pushing the switch) looks like the response to any other amoral decision.¹⁴² What shall I wear today? White or wheat bread? Without affective influence—that is, absent an innate moral intuition—these decisions are made with the cost-benefit analysis typical of decisions with no moral implications.

3. Summary

¶58 The distinction between intuitively immoral and amoral behaviors serves to illustrate the thrust of the Hybrid Theory. Certain behaviors trigger an intuitive response because they violate some innate moral intuition; others behaviors do not. When triggered, these intuitions tend to drive our moral judgment, though conscious reasoning can override when the reasons are compelling. But when no intuition is triggered, the mind consciously reasons to arrive at the moral judgment, as it would any other amoral decision.

¶59 Thus, the emerging picture of morality, under the Hybrid Theory, is one that is both partially innate and partially socially constructed, both partially pan-cultural and partially culture-specific,¹⁴³ reflecting both deontological and utilitarian principles.¹⁴⁴ Though our conscious reasoning allows us to consider all the implications of our moral decisions, our innate and universally shared moral intuitions unconsciously drive a subset of those decisions.

B. The Innate Property Intuition Hypothesis

¶60 The Hybrid Theory suggests that we distinguish between the switch scenario and the footbridge scenario intuitively, based on an innate distinction between harm caused through direct, personal contact and harm caused through indirect or impersonal contact. Put differently, we possess an innate and intuitive moral rule against causing harm through direct, personal contact, but this rule does not extend to indirect or impersonal contact. Actions that violate this rule trigger a reaction from the affective system, creating a negative intuitive response that causes most to deem the conduct impermissible. But when the action does not entail direct, personal contact, that conduct is beyond the experience of our evolutionary ancestors. The same intuitive response is not triggered, and absent this intuitive response the mind is free to consciously reason through the moral judgment. Pushing the man is intuitively immoral, but pressing the switch is intuitively amoral.

¶61 But how do these trolley problems relate to file sharing? Most file-sharers would not walk into a music store and steal a compact disc. But they will readily download the same music for free on the

¹³⁹ See *id.* at 346.

¹⁴⁰ Greene et al., *supra* note 2, at 2106-07.

¹⁴¹ *Id.*

¹⁴² More specifically, the areas of the brain triggered by a cognitively amoral decisions and the response time of such a decision are indistinguishable from that of a decision with no moral implications. See Greene et al., *supra* note 2, at 2106-07.

¹⁴³ Robert A. Hinde, *Law and the Sources of Morality*, 359 PHIL. TRANSACTIONS R. SOC'Y B 1685, 1691 (2004); Haidt & Joseph, *supra* note 111, at 55, 65.

¹⁴⁴ More specifically, the intuitive responses of the affective system reflect deontological rules and the consciously reasoned responses of the cognitive system reflect consequentialist considerations. Greene et al., *supra* note 128, at 398.

Internet. How do they distinguish theft from infringement? As with the trolley problems, I believe the answer lies in our innate moral intuitions.

¶62 More specifically, I hypothesize the existence of an innate property intuition— an innate set of moral rules regarding property— that causes us to intuitively distinguish between theft and infringement. This Innate Property Intuition Hypothesis (IPIH) suggests that the act of theft, like harm through direct, personal contact, triggers an intuitive response from the affective system, whereas the act of infringement does not.¹⁴⁵ Thus, theft is intuitively immoral, infringement is intuitively amoral.

¶63 This Part sets out the IPIH in three sections. First, I explain why humans would share an innate property intuition and suggest three possible contours to this intuition. Next, I explain why this intuition would be triggered by theft but not infringement. Finally, I present an experimental design to encourage others to empirically verify the claims made by the IPIH.

1. Innate Property Intuition of Ownership

¶64 The Hybrid Theory suggests that all humans inherited a set of pro-social norms that are now hard-wired in our brains as a result of evolution as innate and intuitive moral rules. An innate and intuitive rule against harming others through direct, personal contact is one example. The IPIH suggests that an innate and intuitive rule against theft is another.

¶65 Like other pro-social norms, an innate and intuitive understanding of property rights carries with it an evolutionary advantage. At its core, the law of property is merely a set of agreed upon rules that peacefully resolve disputes over scarce resources by allocating rights among competing claims. Understood in this way, it is easy to see how a shared, intuitive understanding of property rights could be a product of evolution.¹⁴⁶ A shared, intuitive understanding of how competing claims should be resolved allows competitors to settle disputes without violence, increasing the chances of survival and reproduction.¹⁴⁷

¶66 Thus, evolution suggests we inherited an innate and intuitive ability to recognize ownership of objects. Once ownership is recognized in an object, others know to defer to the owner, thereby avoiding costly competition. Put differently, we possess an innate and intuitive moral rule against theft—that once something is owned, it should not be taken from its owner. Yet this evolutionary analysis also suggests three limiting contours to our innate and intuitive understanding of ownership, important to our innate rule against theft.

¶67 First, ownership is limited to only *scarce* or exhaustible resources. The evolutionary purpose of our innate property intuition was to help our ancestors deal with the problem of scarcity and avoid the costs of competition.¹⁴⁸ Scarcity triggers competition, and our property intuitions serve to ameliorate the costs of competition.¹⁴⁹ A shared understanding of ownership prevents competing

¹⁴⁵ This hypothesis builds on a theory previously set forth by Goodenough and Prehn. See Goodenough & Prehn, *supra* note 105, at 1720-21.

¹⁴⁶ See Stake, *supra* note 24, at 1763. As Professor Stake has argued:

“There are obvious reasons to believe that a system for allocating rights in things could, at least in part, be hard-wired into animal brains. A scarcity of resources creates competition for them, and some forms of competition result in harm to the competitors. [Competitors] can reduce the costs of competition by adopting strategies for determining the outcome of fights without physical damage.

Id.; accord Morris B. Hoffman, *The Neuroeconomic Path of the Law*, 359 PHIL. TRANSACTIONS R. SOC'Y B 1667, 1675 n.3 (2004); cf. Owen D. Jones, *Law, Evolution and the Brain: Applications and Open Questions*, 359 PHIL. TRANS. R. SOC. LOND. B. 1697, 1706 (2004) (speculating as to the existence of an innate understanding of property inherited as a result of evolution).

¹⁴⁷ See Stake, *supra* note 24, at 1763.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

claims to a scarce resource from erupting into fights.¹⁵⁰ But if the resources are non-scarce or inexhaustible, there is no competition.

¶68 Second, ownership is defined by *possession*, based on notions of first-in-time, first-in-right and physical control (either actual touching or physical proximity near the object). Our evolutionary ancestors had to be able to determine what objects were theirs and what belonged to another. As Professor Jeffrey Stake has argued:

[All competitors] need to know when to be assertive [and] when to be deferential. Humans with a miscalibrated cognitive module for recognizing possession by others would have found themselves trying to obtain what was fiercely defended, whereas those who did not recognize their own possession would have failed to keep track of things that could have been easily secured. The result is that most of us descended from beings who could correctly determine [ownership].¹⁵¹

But to be effective, an intuitive understanding of ownership must reflect criteria that are both observable and unambiguous.¹⁵² From an evolutionary perspective, the requirement of first-in-time and physical control both make good sense. Competitors need be able to accurately determine whether others have satisfied the criterion to avoid competing claims of ownership. First-in-time and physical control, particularly through touching, leaves little doubt regarding ownership.¹⁵³

¶69 Third, the requirements of scarcity and possession logically entail the requirement that ownership of property is limited to *physical, tangible* objects. Intangible objects are of course inexhaustible. Air and ideas cannot be “used up” as is the common understanding of the expression. Moreover, intangible objects are incapable of physical control. Thus, the notion of ownership of intangible objects makes no intuitive sense.

2. *Theft as Intuitively Immoral; Infringement as Intuitively Amoral*

¶70 The IPIH suggests all humans have inherited an innate and intuitive understanding of property through evolution which enabled our ancestors to reliably and peacefully resolve competing claims to an object without violence. Thus, we intuitively recognize and respect ownership. Yet, this evolutionary analysis suggests that our intuitive understanding of ownership is also limited by the requirements of scarcity, possession, and physicality. How do these limitations affect the apparent moral distinction between theft and infringement?

¶71 Consider theft. A file-sharer, young Lester, walks into the music store. He sees a CD he likes. The disc is a physical object (*physicality*). Its location, in the store, and its proximity to the storekeeper, make its ownership unambiguous (*possession*). To steal the disc, Lester must touch the physical object and take it into his possession (*physicality; possession*). And when he removes it, he can see that its place on the shelf is empty; the storekeeper has one less disc (*scarcity*). Lester considers stealing the disc, but quickly decides that stealing is immoral.

¶72 Now consider infringement. Back home, incorrigible Lester is now downloading the same songs from the Internet. The song files, of course, are intangible; no one can see or touch them (*no physicality*). And downloading requires neither touching nor a change in physical proximity (*no physicality; no possession*). Moreover, when Lester’s finished downloading the song file, he has not deprived anyone of its use (*no scarcity*). Instead, there is now one more copy to share with others.

¶73 The disc is no different from the objects encountered by our evolutionary ancestors. It is scarce, tangible, and capable of physical possession. Thus, the disc accords with our intuitive understanding of property and ownership. The act of theft deprives the “intuitive owner” of his ownership and, like the “footbridge dilemma,” this behavior triggers a negative intuitive response which leads most to conclude that the act of theft is morally wrong. Stealing the disc is an intuitively immoral behavior.

¹⁵⁰ *Id.* at 1765.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

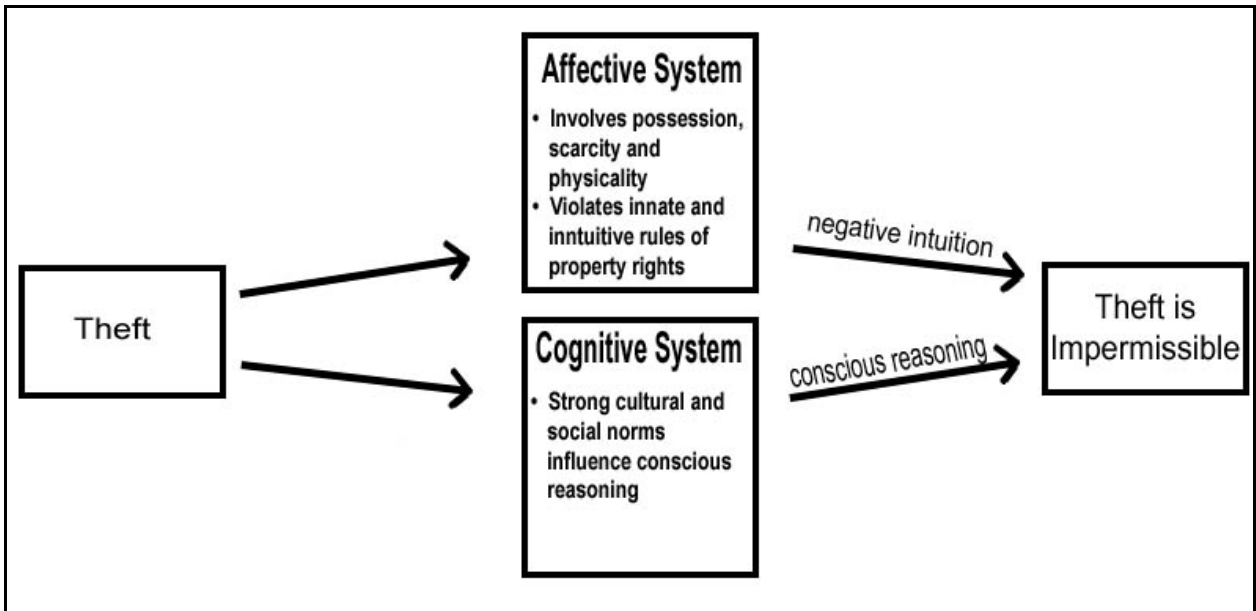


Figure 3: Theft as an Intuitively Immoral Behavior

¶74

In contrast, the song files and songs are intangible, inexhaustible, and incapable of physical possession. According to our innate property intuition, no one can “own” something that is intangible, inexhaustible, and incapable of physical possession. To download the song does not intuitively violate another’s ownership rights because intangible, inexhaustible objects incapable of physical possession cannot be owned. Infringement does not violate our intuitive understanding of ownership. As a result, the act of infringement does not trigger the same negative intuitive response as theft of tangible property. Infringement is an intuitively amoral behavior.

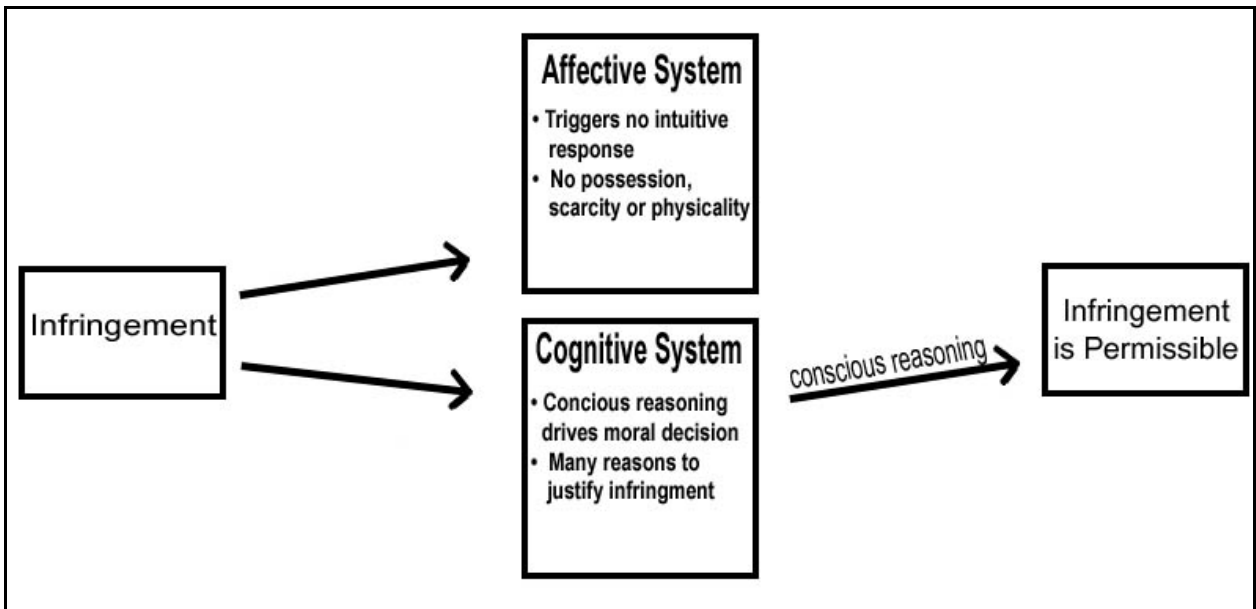


Figure 4: Infringement as an Intuitively Amoral Behavior

¶75

Like the “footbridge scenario,” theft triggers a negative intuitive response. And like the “switch scenario,” infringement fails to trigger the same intuitive response. Absent this intuition, the

cognitive system uses conscious knowledge to reason about the morality of infringement. For some people, their reasoning suggests that infringement is immoral. But for millions, there are plenty of reasons to conclude otherwise.¹⁵⁴ Thus, for millions of file-sharers like Lester, infringement is not immoral.

¶76 Empirical evidence already suggests the mind makes an intuitive distinction between harm through direct, personal contact and indirect and impersonal contact.¹⁵⁵ The IPIH claims the mind makes a similar distinction between theft of scarce, tangible objects capable of physical possession and inexhaustible, intangible objects incapable of physical possession. Intellectual property is nonrivalrous, intangible, and incapable of physical possession. The act of infringement via electronic copying is too far removed from our ancestral experiences to trigger any negative intuitive response. Per the innate knowledge of the mind, theft is intuitively immoral, infringement is intuitively amoral. The result is that though most reject theft in its traditional incarnation, the same moral bar does not apply to online infringement.

3. Empirical Claims and an Experimental Design under the Hybrid Theory

¶77 The practical advantage of a hypothesis based on science, rather than speculative psychology, is that it makes testable empirical claims. Like the recent research tracking the cognitive processes of the brain as the mind evaluates the trolley problems, similar experiments using brain-imaging can verify whether the brain reacts to an innate property intuition when distinguishing theft from infringement.

¶78 The IPIH claims that the act of theft triggers a negative intuitive response and the act of infringement does not. Under the Hybrid Theory, this claim suggests we should expect to see increased neural activity in the areas of the brain associated with the affective system in the case of theft and increased neural activity in the areas of the brain associated with the cognitive system in the case of infringement.

¶79 Consider the following experimental design. Subjects are given two hypothetical situations, one involving theft and the other infringement. The subjects are asked whether that conduct is morally permissible or impermissible. Four responses are possible. (1a) The act of theft is *morally permissible*. (1b) The act of theft is *morally impermissible*. (2a) The act of infringement is *morally permissible*. (2b) The act of infringement is *morally impermissible*.

	<i>Permissible</i>	<i>Impermissible</i>
<i>Theft</i>	(1a)	(1b)
<i>Infringement</i>	(2a)	(2b)

¶80 Under the Hybrid Theory of Moral Cognition, intuitive responses are associated with the affective system and conscious reasoning with the cognitive system of the brain. The IPIH suggests that most people believe theft is impermissible because it triggers a negative intuitive response. If so, in case (1b), we should expect to see increased activity in the areas of the brain associated with the affective system. Moreover, because the affective system responds automatically and rapidly, we would expect the response time to be faster, when compared to the responses in cases (1a), (2a), and (2b). Of course, a few may find a compelling countervailing reason to say theft is permissible.

¹⁵⁴ See *infra* text accompanying notes 180-184.

¹⁵⁵ See footnotes 126-127, 140-142 and accompanying text; see generally Part III.A.1.

Assuming the subject identifies such a reason, in the case of (1a), we would expect to see increased activity in the areas of the brain associated with the cognitive system, in addition to the activity in affective system. For these few, the cognitive system has been able to override the negative intuitive reaction to theft. And unlike before, we would expect to see a slower response time than in those based solely on the rapid response of the affective system.

¶81 The IPIH also suggests that infringement triggers no negative intuitive reaction. If so, in cases (2a) and (2b) we should expect to see relatively little activity in the areas of the brain associated with the affective system. Instead, the IPIH suggests the moral judgment is based on conscious moral reasoning. Thus, we should expect to see relatively increased activity in the areas of the brain associated with the cognitive system. Finally, because the moral judgment regarding infringement occurs in the cognitive system, we should expect slower response times than those moral judgments that are driven by the rapid response of the affective system, namely case (1b).

C. Some Objections to the Hybrid Theory Considered

¶82 Moral theories are notoriously controversial. Many of the moral problems that society faces are as intractable today as they were thousands of years ago. The Hybrid Theory of Moral Cognition does not suggest any answers to our moral problems but rather describes how we think about them. Nonetheless, it may be worthwhile to consider three possible objections.

1. Naturalistic Fallacy: Should Infringement be Permitted?

¶83 Lest copyright owners dismiss the IPIH for misusing scientific mumbo-jumbo to contrive some moral justification for infringement, it is important to make a point about the naturalistic fallacy. The Hybrid Theory suggests we share a set of innate moral rules, inherited as a result of evolution, reflecting pro-social behaviors that proved useful to our ancestors' survival. Intuitive rules against harming others through direct, personal contact and, as the IPIH suggests, violating ownership rights are two such examples of this innate knowledge. A negative intuitive response to a violation of these rules leads most to agree these violations are morally wrong. Under the IPIH, however, this innate moral knowledge does not extend to intellectual property and infringement. Therefore, infringement is not intuitively immoral.

¶84 It is important not to misconceive the meaning of the IPIH; it does not suggest that infringement, in any form, is not an immoral activity. Instead, the IPIH attempts to explain why many do not view copyright infringement with the same moral condemnation as more traditional theft. It does so by arguing that infringement does not trigger the same negative intuitive response that is associated with theft. It does not suggest that therefore theft is immoral and infringement is not.

¶85 Such misconceptions about the IPIH may be categorized as naturalistic fallacy.¹⁵⁶ Science generally and the Hybrid Theory specifically are objective—they describe “what is.” “What is,” however, does not entail “what ought to be.” The IPIH aims only to explain (not justify) the phenomenon of widespread and rampant copyright infringement. That our innate and intuitive moral rules recognize theft as immoral and infringement as amoral does not mean that theft is wrong and infringement is not. If true, the IPIH only helps explain why so many people who would never steal are willing to infringe.

2. Moral Relativists: What Universal Moral Knowledge?

¶86 The Hybrid Theory suggests that some moral rules are innate, universal to all humans, and inherited as a result of evolution. Thus, all humans intuitively recognize rules against harming others through direct, personal contact and, as I have argued, theft of tangible property.

¹⁵⁶ See Owen D. Jones, *Law and Evolutionary Biology: Obstacles and Opportunities*, 10 J. CONTEMP. HEALTH L. & POL'Y 265, 272-73 (1993); Greene, *supra* note 115, at 847.

¶87 The suggestion that some moral principles are universal, however, is anathema to moral relativists. Moral relativists, like prominent American jurist Richard Posner, believe that all moral rules are the product of culture, a reflection of the history and environment from which that society developed.¹⁵⁷ Thus, moral relativists reject the notion that there could be some source of transcultural or universal moral values.¹⁵⁸ To prove this, relativists note that there are no moral principles that all competent adults always and everywhere recognize.¹⁵⁹ Whatever moral principles that are universally recognized are uninteresting because they are tautological—for example “murder is wrong,” where “murder” means wrongful killing.¹⁶⁰ While everyone may agree that wrongful killings are wrong, what actually counts as *wrongful* killing varies from society to society.¹⁶¹

¶88 The Hybrid Theory, however, does not predict that all competent adults will agree on certain moral principles all the time. What the Hybrid Theory posits is that all humans share a set of innate moral rules, and violations of these rules trigger a negative intuitive response. But these intuitions are only *one* factor in our moral judgments. Even when judging intuitively immoral behaviors, conscious reasoning, shaped by social and cultural influences, also plays a role.¹⁶² Moreover, some modern issues so far removed from anything experienced in our ancestral environment simply do not trigger an intuitive response. Moral decisions regarding these intuitively amoral behaviors are made primarily by conscious reasoning. Thus, the widespread disagreement over contemporary moral issues such as abortion and stem cell research is not surprising, but expected. While we may share a universal set of innate moral rules, that does not mean that we will agree on certain moral principles all the time.¹⁶³

¶89 Moreover, the universal, innate moral rules posited by the Hybrid Theory are not tautological. For example, Posner suggests that “murder is wrong” is the equivalent of “wrongful killing is wrong.” Yet, the very concept of wrongfulness is defined by predicates, such as intent and causation, which themselves are not defined by wrongfulness.¹⁶⁴ Put differently, murder entails more than just wrongfulness. In the trolley dilemmas, for example, wrongfulness stemmed from direct, personal contact, an action that itself is not defined by wrongfulness. Thus, it appears the negative intuitive response to harm by direct, personal contact is not tautological. Likewise, though it is unclear what Posner means by “uninteresting,”¹⁶⁵ from the perspective of legal and behavioral theory, the nature of our innate moral knowledge would seem quite a bit interesting. For example, the copyright industries may be interested to know that the infringement-as-theft analogy has failed because it has no intuitive salience.

3. Moral Realists (or Computational Theorists): What About Us?

¶90 Like moral relativists, many moral realists criticize the Hybrid Theory, but from the opposite direction. Moral realists posit that all humans have an innate “universal moral grammar,” a system of unconscious moral principles that generate our moral intuitions.¹⁶⁶ Building off the work of Noam Chomsky in the field of linguistics, moral realists argue the mind has a domain-specific cognitive

¹⁵⁷ RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 8 (1999).

¹⁵⁸ *Id.* at 8, 19.

¹⁵⁹ *See, e.g., id.* at 18-19 (“There could be a universal moral law in the sense of a set of principles that all competent adults always and everywhere recognize Could be; but there doesn’t appear to be a universal moral law that is neither a tautology (such as ‘don’t murder’) nor an abstraction (such as ‘don’t lie all the time’) to touch ground and resolve a moral *issue*, that is a moral question on which there is disagreement.”).

¹⁶⁰ *Id.* at 6.

¹⁶¹ *Id.*

¹⁶² Under the hypothesis I’ve set forth, the influence of experience and learned knowledge on conscious reasoning is precisely why some people *do* believe file sharing to be immoral.

¹⁶³ John Mikhail, *Law, Science, and Morality: A Review of Richard Posner’s The Problematics of Moral and Legal Theory*, 54 *STAN. L. REV.* 1057, 1092-93 (2002).

¹⁶⁴ *See id.* at 1099-1106.

¹⁶⁵ *See id.* at 1107-1110.

¹⁶⁶ *See, e.g., id.* at 1088-1089; Hauser, *supra* note 2 (manuscript at 1, on file with author); Susan Dwyer, *Moral Competence*, in *PHILOSOPHY AND LINGUISTICS* 169-70 (K. Murasugi & R. Stainton, eds., 1999); *see also* JOHN RAWLS, *A THEORY OF JUSTICE* 46-47 (1971).

moral faculty. Upon the mental perception of a moral decision, this faculty generates moral judgments through an unconscious computational algorithm that analyzes the mental perception based on the innate moral principles or a “universal moral grammar.”

¶91 The moral realists differ from the hybrid theorists insofar as they believe that our moral intuitions and reasoning are not the source of moral judgments; instead, these cognitive processes are triggered only after a moral judgment is made.¹⁶⁷ Under the moral realist theory, moral judgments are made through an unconscious computational cognitive process. They criticize the Hybrid Theory for ignoring this process and focusing, instead, on the results of this process, the responses of the affective and cognitive systems. These responses reflect our moral performance, they argue, not our moral competence.¹⁶⁸ Only when we understand our moral competence can we understand our moral performance.¹⁶⁹

¶92 The rift between the moral realists and hybrid theorists is not, however, insoluble. Moral realism is a theory of perception; the Hybrid Theory is a theory of behavior. The theories, thus, are not necessarily inconsistent, and both the moral realists¹⁷⁰ and hybrid theorists¹⁷¹ grudgingly admit so. Rather, what bothers the moral realists is that the Hybrid Theory does not explain how the mind maps the mental perceptions to its innate moral principles in arriving at moral judgments.¹⁷² The hybrid theorists presuppose this process.¹⁷³ But this does not mean that the Hybrid Theory is wrong, inaccurate, or somehow useless. Indeed, despite the Theory of Relativity, Newtonian mechanics is still useful even though it presupposes that objects are not traveling near the speed of light.

IV. RECOMMENDATIONS

¶93 Online file sharing has created real challenges for copyright owners. To date, their legal strategy against software providers has been unable to deny file-sharers access to infringement-enabling technology. Likewise, the threat of legal sanctions against individual users has failed to adequately deter widespread infringement. The Hybrid Theory suggests that the reason file sharing has been so resilient is that millions of Internet users do not believe infringement is morally wrong. And, the IPIH suggests that this shared belief is not a social or cultural result, but a product of our innate moral nature. Infringement does not trigger an intuitive moral reaction because intellectual property is incompatible with our innate understanding of property ownership. Beyond identifying the source of the problem, however, the Hybrid Theory may also suggest a possible solution.

A. The Futility of the Infringement-as-Theft Analogy

¶94 The copyright industries no doubt recognized the importance of morality when they began augmenting their lawsuits with a publicity campaign arguing that infringement is immoral as well as illegal.¹⁷⁴ Interestingly, they have done so by analogizing infringement to theft of real, tangible property,¹⁷⁵ an analogy that has been co-opted by their allies in the media¹⁷⁶ and government.¹⁷⁷

¹⁶⁷ Hauser, *supra* note 2 (manuscript at 9-10, on file with author).

¹⁶⁸ Hauser, *supra* note 2 (manuscript at 9, on file with author).

¹⁶⁹ Mikhail, *supra* note 109, at 4, 63.

¹⁷⁰ See Hauser, *supra* note 2, at 10; Mikhail, *supra* note 109, at 64.

¹⁷¹ See Greene, *supra* note 111, at 351.

¹⁷² See, e.g., Mikhail, *supra* note 109, at 64-65.

¹⁷³ See, e.g., *id.* at 64.

¹⁷⁴ See, e.g., Tom Zeller, Jr., *As Piracy Battle Nears Supreme Court, the Messages Grow Manic*, N.Y. TIMES, Feb. 7, 2005 at C1 (reporting on the cartoon character “Garret the Ferret” who “urges young cybercitizens toward ethical downloading”); RIAA, Issues: Anti-Piracy, <http://www.riaa.com/issues/piracy> (last visited Apr. 12, 2006) (equating online piracy to “stealing”); see also Neri, *supra* note 17, at 738, 746, 749; Hardy, *supra* note 1, at 329-33; Lantagne, *supra* note 12, at 277; Jensen, *supra* note 15, at 558.

¹⁷⁵ See, e.g., Zeller, *supra* note 174 (quoting the MPAA president as comparing file sharing to “steal[ing] a videotape out of Blockbuster”); RIAA, Issues: Anti-Piracy, at <http://www.riaa.com/issues/piracy> (last visited Apr. 12, 2006) (arguing that online piracy is “stealing”—“illegal” and “unethical”); see also Neri, *supra* note 17, at 738, 746, 749; Lantagne, *supra* note 12, at 277-78; Hardy, *supra* note 1, at 329-33; Jensen, *supra* note 15, at 558-59.

¹⁷⁶ Interestingly, in the days after the Grokster decision, both the *Washington Post* and *New York Times* ran editorials applauding

There is an appealing simplicity to this logic. Property law grants the owner of a physical object several rights, including the right to possess and use that object and to exclude others from it.¹⁷⁸ Likewise, copyright law grants the owner of the copyright several exclusive property-like rights in a creative work, including the right to reproduce and distribute copies of the work. Just as theft deprives an owner's rights in a physical object, file sharing deprives an owner's rights in a creative work.

¶95 Unlike the legal strategy, which attempts to alter behavior coercively through the threat of legal sanctions, this campaign attempts to appeal to morality, encouraging voluntary compliance with copyright law because it is morally right. Yet, despite its appealing simplicity, the infringement-as-theft analogy has thus far failed to persuade millions that file sharing is morally wrong.¹⁷⁹ The Hybrid Theory and IPIH can help explain why.

¶96 Though the infringement-as-theft analogy may be true in the abstract, the IPIH suggests it has no intuitive salience. The notion that downloading a song from the Internet is no different than stealing a CD from the music store is counterintuitive. Songs and song files are intangible, inexhaustible and incapable of physical possession. CDs are tangible, exhaustible and capable of physical possession. Put differently, CDs accord with our intuitive understanding of ownership, songs and song files do not. Thus, downloading a song file does not trigger the same negative intuitive response as stealing a CD. In short, under the infringement-as-theft analogy, the act of infringement remains intuitively amoral.

¶97 Even so, though the copyright industries cannot change our innate moral *intuitions*, they can change our *conscious reasoning* about infringement. The absence of an innate moral intuition does not mean that all humans will agree that infringement is morally permissible. Rather, moral judgments of intuitively amoral behaviors are primarily made through conscious reasoning. Thus, there is still the opportunity for the copyright industries to convince people that copyright infringement, and more specifically, file sharing is morally wrong.

¶98 The infringement-as-theft analogy does not appeal to our innate moral intuitions, but it does appeal to reason. Unfortunately, however, the analogy is unlikely to overcome the litany of countervailing reasons file-sharers cite to conclude that infringement is not immoral. File-sharers may reason that the CD prices are unjustifiably high, considering how little they cost to manufacture.¹⁸⁰ Or they may reason file sharing is okay because it only harms giant corporations, and not the artists themselves.¹⁸¹ Or they may reason that the soulless copyright owners are hypocritical, greedily claiming the moral high ground only when it benefits themselves.¹⁸² Or they may reason that copyright law as a whole is illegitimate, specially crafted only to line the pockets of special interests;¹⁸³ instead of promoting artists and creativity, copyright serves corporate interests.¹⁸⁴ Whatever the justification, millions have reasoned to the conclusion that infringement is not immoral. Despite its appealing logical simplicity, the infringement-as-theft analogy is unlikely to alter many file-sharers conscious moral reasoning.

¶99 In short, the infringement-as-theft analogy has failed because it does not work in either system of moral cognition; it does not appeal to our innate moral intuitions and does alter the conscious moral

the decision and comparing illegal file sharing to theft. Editorial, *No License to Steal*, WASH. POST, June 29, 2005 at A20 (“[F]ile-sharing software . . . enable[s] millions of people to steal.”); Editorial, *At the End of a Session; Stands strongly against Theft on the Internet*, N.Y. TIMES, June 28, 2005 at A22 (“[Second-generation peer-to-peer software] makes the sharing more like theft, and on a sweeping scale.”).

¹⁷⁷ See Neri, *supra* note 17, at 738, 746, 748-49.

¹⁷⁸ S. Green, *supra* note 17, at 215.

¹⁷⁹ Lantagne, *supra* note 12, at 277.

¹⁸⁰ Lantagne, *supra* note 12, at 279.

¹⁸¹ See Jacover, *supra* note 18, at 2212; Healey & Leeds, *supra* note 13 (one college student noting “They’re big. They’re rich. They can deal with it.”).

¹⁸² Lantagne, *supra* note 12, at 277.

¹⁸³ *Id.*; Jensen, *supra* note 15, at 566-67; S. Green, *supra* note 17, at 239.

¹⁸⁴ See Lantagne, *supra* note 12, at 277; Jensen, *supra* note 15, at 540-41.

reasoning. The result is that though the infringement-as-theft analogy may alter some file-sharers' moral judgment, it will not alter most.

B. Appealing to Other Innate Moral Intuitions

¶100 Copyright owners are unlikely to succeed in changing the public's innate moral intuitions. But by appealing to other innate moral intuitions, they may be able to trigger an intuitive moral response to overcome these conscious rationalizations—to transform an intuitively *amoral* behavior into an intuitively *immoral* behavior.

¶101 Natural law recognizes two distinct justifications for property rights. The first is ownership rights through possession of a tangible, exhaustible object.¹⁸⁵ This conception, of course, is a straightforward reflection of our innate property intuition, an intuitive understanding that ownership can only inhere in tangible, exhaustible objects that can be physically possessed. The second justification was based on the theory that one is entitled to reap the fruits of one's labor.¹⁸⁶ Most famously espoused by English natural law philosopher John Locke, the Locke-labor theory of property extends to intangible creations of mental labor as well as the tangible fruits of labor.¹⁸⁷ Of course, this cannot be a restatement of our innate property intuition because the theory extends property rights to intangible objects. Instead, what Locke recognized and formulated is a variation of our innate moral intuition for reciprocity.

¶102 The Locke-labor theory recognizes that when one takes advantage of another's labor, one benefits from another's behavior without reciprocating. The intuition for reciprocity, like other pro-social behaviors, is innate in all humans, inherited as a result of evolution.¹⁸⁸ And an important corollary to our innate reciprocity intuition is that reciprocal exchanges must be relatively equal.¹⁸⁹ We intuitively recognize an individual's right to the fruits of his labor because our reciprocity intuition suggests that one should not benefit from another's behavior without somehow repaying it. This failure to reciprocate, like causing harm through direct, personal contact or interfering with ownership, creates an intuitive moral response,¹⁹⁰ because the exchange is unequal.

¶103 Thus, the Locke-labor theory suggests a plausible avenue to using our innate moral intuitions as grounding for property rights, namely because the theory extends to intangible creations, in addition to the tangible objects recognized by our innate property intuition. Rather than basing property rights solely on the possession of a tangible, exhaustible object, property rights can also inhere in intangible, nonrivalrous objects because of the labor required to create it.

¶104 A theory of copyright protection based on the innate intuition for reciprocity would be based on labor, not ownership. Infringement is wrong not because it takes something from an owner, but because it unfairly exploits the hard work and resources expended to create that property. It may be that file sharing, in its current incarnation, fails to trigger our reciprocity intuition because it is remote and impersonal, far removed from the exchanges of our ancestors. To trigger this intuition, the copyright industries must personalize file sharing—bring the creators and laborers to the exploiters.

¶105 One approach would be a public campaign highlighting the labor required—the exhausting creative energy, technical precision, and time-consuming personal and emotional investment—in creating a professional copyrighted works. This would be juxtaposed with the free riding of file-

¹⁸⁵ See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 522-23 (1990).

¹⁸⁶ See *id.* at 523-24; JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 15-16 (5th ed. 2002); JOYCE ET AL., *supra* note 28, at 59-60.

¹⁸⁷ JOYCE ET AL., *supra* note 28, at 59-60.

¹⁸⁸ See Hoffman, *supra* note 146, at 1669-70; cf. Oliver R. Goodenough, *The Future of Intellectual Property: Broadening the Sense of "Ought"*, 2002(6) EURO. INTELL. PROP. R. 291, 292 ("Expectations of reciprocity appear to be fundamental building blocks in human psychology . . . and may well be part of the justice puzzle.")

¹⁸⁹ From an evolutionary perspective, if one party did not find the reciprocal exchange beneficial in light of its costs, that party would have no reason to engage in that exchange. See Hinde, *supra* note 143, at 1687. Indeed, this intuitive understanding that reciprocal exchanges must be roughly equal is the source of our tort law. See Hoffman, *supra* note 146, at 1671.

¹⁹⁰ Research has shown that a failure to reciprocate creates an intuitive moral aversion, a feeling of guilt. See Strahilevitz, *supra* note 19, at 562-64.

sharers, who selfishly exploit this productive labor without ever repaying it. Unlike a campaign built on the infringement-as-theft analogy, a campaign based on the exploitation of artists' labor is more likely to trigger an innate moral intuition, specifically our innate intuition for reciprocal behavior.¹⁹¹ The infringement-as-theft campaign can only be effective if it can overcome the litany of reasons infringers give to justify infringement.¹⁹² An infringement-as-unfair-exploitation-of-labor campaign, however, may trigger a potent intuitive response that may overcome such conscience considerations. Such a campaign is more likely to affect moral judgments because it invokes a moral intuition, transforming an intuitively amoral behavior into an intuitively immoral behavior.

C. *A Move Toward Natural Law Copyright Protection?*

¶106 An infringement-as-unfair-exploitation-of-labor campaign may nonetheless fail because in the United States, the natural law theory of copyright protection has been profoundly undermined. Though the natural law theory of copyright has enjoyed significant currency in Europe,¹⁹³ since its inception, the American theory of copyright protection has long been based on a utilitarian justification.¹⁹⁴ Most vividly, the Supreme Court in *Feist Publications* expressly rejected the notion that labor alone justified copyright protection.¹⁹⁵ Moreover, the United States has been reluctant to adopt the moral rights regime, like those in Europe, reflecting their natural law understanding of copyright.

¶107 Does all of this mean then that the United States should embrace a regime of copyright protection based on natural law? Probably not. First, it's not clear that a natural law conception of copyright protection would look all that different from our present copyright statute.¹⁹⁶ Core principles of copyright law already embodied in the present copyright statute, such as the notion of property rights in the creations of mental labor¹⁹⁷ and the idea-expression dichotomy,¹⁹⁸ are consistent with a natural law conception of copyright.¹⁹⁹ Second, there is no evidence to suggest that a move to a natural law theory of copyright would result in any less infringement. Even in Europe, where the natural law theory of copyright protection enjoys significant purchase, infringement is a problem.²⁰⁰ While a natural law theory of copyright is more in tune with our innate moral intuitions, altering the theoretical underpinning of copyright will not change people's moral judgments. The more prudent course of action is to promote voluntary compliance with our present laws by appealing to our other innate moral intuitions, specifically our intuition for reciprocity.

D. *Conclusion*

¶108 The "immorality of theft, the amorality infringement" is *not* normative claim about right or wrong. Rather it is *descriptive* claim about how our minds make moral decisions. In suggesting that humans do not intuitively recognize ownership rights in intellectual property as a result of their innate moral knowledge, I have not set forth a moral justification for infringement, but a mere explanation of why and how so many millions morally distinguish theft from infringement.

¹⁹¹ Ironically, many in the public believe the entertainment industry is itself guilty of exploiting artists' labor. This perception is one factor that leads many file-sharers to the consciously rationalize their online infringement. *See supra* notes 181-182 and accompanying text. Thus, appealing to file-sharers' moral sense of reciprocity may be perceived by those file-shares as hypocritical. *Id.*

¹⁹² *See supra* notes 180-184 and accompanying text.

¹⁹³ JOYCE ET AL., *supra* note 28, at 60.

¹⁹⁴ JOYCE ET AL., *supra* note 28, at 27-28, 56.

¹⁹⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359-60 (1991).

¹⁹⁶ *See generally* Yen, *supra* note 185, at 536-39 (arguing the present statute is consistent with the natural law understanding of copyright).

¹⁹⁷ 17 U.S.C. § 102(a).

¹⁹⁸ *Id.* § 102(b).

¹⁹⁹ *See generally* Yen, *supra* note 185, at 535-39.

²⁰⁰ *See supra* note 7.

Moreover, I have suggested a possible strategy in resolving the future battles between copyright protection and technology.

¶109 Internet file sharing is the latest legal battle in the history of copyright. And like those battles before it, it pits two familiar camps against each other: the copyright owners and the technology advocates. The problem of technology in copyright law is often framed as either-or. Either we suppress new infringement-enabling technologies, or we tolerate widespread infringement.

¶110 Morality alters this paradigm, suggesting we need not choose between technology and copyright protection. Rather, we can rely on people's innate intuitions to use technology morally. Scholars will always argue about what degree of protection is appropriate, but almost all will agree that some protection is necessary. I believe we can carve a new path between those who advocate access to technology and those who desire to suppress illegal infringement. We can do both. By appealing to our innate moral intuitions—our innate sense of justice—copyright industries can curb infringement without suppressing technological advancement.