Would Criminal Sanctions for Patent Violations Encourage Violators to Respect Intellectual Property Rights?

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ABSTRACT

This paper analyzes the historical differences between copyrights and patents. Copyright law allows for criminal sanctions for violations. Patent law does not allow for criminal sanctions. The paper looks at this history and poses the question—Why the difference? The paper analyzes these differences and asserts that an imbalance exists between the two types of intellectual property that needs to be adjusted.

1.1 THE ORIGINS OF INTELLECTUAL PROPERTY LAW

This research traces the history of intellectual property law in the United States. It looks at differences that developed between patent and copyright law. The paper theorizes as to changes in patent law that could be made to buttress enforcement and reduce violations.

There are a number of theoretical articles about the origins of intellectual property law. One author discusses these origins as "Origin Myth" or "Origin Stories." (Silbey, 2008). The author discusses such myths as the creation myth and indicates that our notions of property rights in the Intellectual Property area are deeply rooted in those theories from childhood. Other scholars trace our patent system to the Statute of Monopolies passed in England in 1623. This statute codified what had been the practice for quite some time in England, namely the practice of granting to merchants what are called limited term monopoly rights for either new inventions or importers of new trade, (Walterscheid, 1997). Walterscheid indicates that the custom of granting limited term monopoly privileges actually dates back to the Italian City states of the fourteenth and fifteenth century.

A more recent and direct source of intellectual property rights would be the United States Constitution, article 1, section 8, which indicates that "the Congress shall have power to… Promote the progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (U.S. Const. art. 1, § 8, cl. 6.) These 26 words constitute the entire constitutional foundation for American intellectual property Law. Our founding fathers clearly intended to protect intellectual property and to provide a mechanism for Congress to regulate in this area of law.

Congress wasted no time in passing legislation and the first Intellectual Property law was passed on May 31, 1790 (1790 Copyright Act). The act was a copyright act that dealt with "maps, charts, and books not exceeding one year." Some of the relevant portions of the May 1790 Act indicate:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that from and after the passing of this act, the author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, a resident within the same, his or their executors, administrators or assigns, who hath or have purchased were legally acquired the copyright of any such map, chart, book or books in order to print, reprinted, published work in the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording entitled thereof in the clerk's office, as is herein after directed. (1790 Act.)

1.2 CRIMINAL PENALTIES ADDED TO COPYRIGHT LAW

At the time of the adoption of the constitution, and these early acts, all intellectual property rights and enforcement were civil matters. For the next 100 years, copyright enforcement was a civil matter. Not until Congress passed a new Copyright Act in 1897 did criminal penalties become a part of copyright law (1897 Copyright Act). That act stated that;

> "any person publicly performing or representing any dramatic or musical composition for which copyright has been obtained, without the consent of the proprietor said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefore, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just. If the unlawful performance and representation be willful and for profit, such person or persons shall be guilty of a misdemeanor and upon conviction be imprisoned for a period not exceeding one year." (1897 Act)

It is quite interesting to note that the criminalization involved public performances of copyrighted works. It is also important to note that this law differentiates between "willful and for profit" conduct and other conduct presumably either not willful and/or not for a profit. (1897 Act) The point of who was covered by this first act that criminalized copyright violations is an important point. Performers were the primary target. Later on, in 1909 Congress amended the copyright act to include "aiding and abetting willful and for-profit infringement." (1909 Act.). Many scholars have suggested that the reason the act was expanded in 1909 was because the performers that were covered by the 1897 act, were primarily transient performers who move from town to town. It was next to impossible to sue them because to try to find their permanent home address was quite difficult. The 1909 act was passed to allow those who believed their copyrighted music and material was violated, could go after bar owners, theater managers, and others who were not quite as transient as the performers themselves (Copyright Act of 1909).

The 1909 Act was far more comprehensive than the 1897 act and included coverage for; author's writings, periodicals, newspapers, lectures, sermons, dramatic and musical compositions, maps, art, photographs and other categories. (1909 Act)

The 1909 Act provided that the above subsections were not intended to limit the applicability of copyright law only to categorize the areas. It extended coverage to foreigners that were domiciled in the United States at the time first publication of their work. That 1909 act spelled out copyright registration requirements, and generally provided for 28 years of protection for the copyrighted work, with the possibility of a 28 year

renewal. For purposes of this discussion, the most important provisions of the 1909 act included: Section 25 (e) which provided, in part that;

> Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture…no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one subjection (e) of this act. (1909 Act)
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> The 1909 act goes on to indicate in section 28, "That any person who willfully and for-profit shall infringe any copyright secured by this act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the court" (1909 Copyright Act).

These provisions are quite important to review because the beginnings of a division in applicability of the act becomes apparent. Once again performers themselves are subject to criminal penalties. Others who willfully and knowingly aid or abet performers violating these provisions are also subject to criminal penalties. Excluded from criminal penalties are individuals who violate someone's copyright by mechanical method. This is an ironic distinction. In 1909 the cost of reproduction equipment was quite expensive.

Common ordinary performers and common ordinary citizens would not have access to reproduction equipment. The act essentially allows for violations of someone's copyright by mechanical means provided that royalties are paid as provided for in the act. The gist of this provision is to allow smalltime performers and artists to be charged criminally for violating the copyright act, but allowing large corporations, businesses and wealthy individuals that have mechanical recording devices to avoid criminal liability provided they pay royalties. It is important to note that even if the violation by mechanical means is willful and knowing, it is specifically precluded from criminal liability. Thus begins the very first clear demarcation between social economic classes in copyright law, and by extension intellectual property law. The same differentiation between social economic classes and how they're treated weaves its way throughout intellectual property law for the next three to four generations.

1.3 MODERN ERA CRIMINAL COPYRIGHT PENALTIES

Fast forward almost another 100 years to see other major changes affecting the criminal nature of copyright violations. Acts in 1971, 1974, and 1976 all expanded the criminal penalties for copyright violations (1909 Act). These acts continued to raise the penalties for copyright violations and the 1976 act finally included sound recordings, specifically. First offenses have penalties as much as $10,000 and second and repeat offenses have penalties as high as $25,000 (1971 Act).

The 1971 Act also recognized that willful infringement for-profit of mechanically reproduced recording parts should also be subject to criminal liability (1971 Act). The 1971 act provided a number of provisions including the requirement that copyrighted music and/or publications should indicate they are copyrighted

on the first page. The act further gives a better definition of what it means to be a sound recording (1971 Act). Nevertheless, sound recordings that are mechanically produced had not had full copyright protection. The 1971 Act spells out the purpose of the act to expand the protection afforded musical and print duplication to sound recordings. The act states that, "As a result, so-called 'record pirates' if they satisfy the claim of the owner of the musical copyright can and do engage in widespread unauthorized reproduction of phonograph records and tapes without violating federal copyright law… The purpose of section 646 as amended is twofold. First, section one of the bill creates a limited copyright in sound recordings, as such making unlawful the unauthorized reproduction and sell of copyrighted sound recordings (1971 Act). The 1971 Act states that "The attention of the Committee has been directed to the widespread unauthorized reproduction of phonograph records and tapes…The pirating of records and tapes is not only depriving legitimate manufacturers of substantial income, but of equal importance is denying performing artists and musicians of royalties and contributions to pension and welfare funds and Federal and State governments are losing tax revenues. If the unauthorized producers pay the statutory mechanical royalty required by the Copyright Act for the use of copyrighted music there is no Federal remedy currently available to combat the unauthorized reproduction of the recording…it is clear that the extension of copyright protection to sound recordings would resolve many of the problems which have arisen in connection with the efforts to combat piracy in State courts" (1971 Act).

It is quite clear from the passage above that Congress recognized a serious problem with the failure to protect sound recordings. The automatic royalty provisions of the 1909 act allowed unscrupulous businessmen to sell some recordings from musicians even though these musicians were not under contract to them for their particular recordings. The remedies of only being able to collect the actual royalty fees put the recording industry at a serious disadvantage. Congress saw this problem and corrected it. While this correction may have had a benefit to artists, it was primarily passed at the behest of recording studios. After signing artists and producing records they had no way to protect themselves from third-party manufacturers that reproduced the sound recordings paid the royalty fee, which allow them to sell these records to the public. Powerful recording industry tycoons and executives lobbied Congress for these changes.

Both the 1974 act and the 1976 act cleared up other issues and the 1976 act raised fines to $25, 000 for a first offense and up to $50, 000 for repeat offenders (1976 Act).

In 1982 Congress passed the Piracy and Counterfeiting Amendments act \of 1982. This act was intended to stem a growing amount of piracy for songs and software. This act called the "Piracy and Counterfeiting Amendments Act of 1982," indicates:

> "Section 2318. Trafficking in counterfeit labels for phonorecords, and copies of motion pictures or other audiovisual works;
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> > "(a) Whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in a counterfeit label affixed or designed to be affixed to a phonorecord, or a copy of a motion picture or other audiovisual work, shall be fined not more than $250,000 or imprisoned for not more than five years, or both."

This act once again raised the possible fines for violation to up to $ 250.000.00, and up to five years in prison for multiple violations. The 1982 Piracy and Counterfeiting Amendments act of 1982 was by far the

most aggressive and repressive copyright act passed by Congress. Amazingly, someone who was guilty of copying as few as seven videotapes could be fined as much as $25,000 and can spend up to one year in jail. This provision was enforced against a number of college students that simply copied movies for personal use. Clearly a violation of copyright law, but fines of $25,000? One year in jail? These penalties are an amazing degree of criminalization for relatively minor violations. In this instance, the 1982 act was passed at the behest of the recording industry in America. They were determined to protect their financial interests. Interestingly enough, the same recording industry in America battled and lost one of the major cases that would define the era. In the case of Sony Corporation of America versus Universal City Studios Incorporated, 464 US 417 (1984), Universal Studios attempted to force Sony to remove Betamax players from the market. Universal City Studios along with other recording industry executives and companies claimed that Sony's Betamax recorder was designed specifically to violate their copyrights and copyright protected music and videos. Sony countered that the Betamax player had other non-infringing uses and that simply because it had the capacity to copy videos did not make it illegal. In a landmark ruling in 1984 the United States Supreme Court agreed with Sony. They reversed the Court of Appeals that had held that Sony was liable for contributory infringement of copyrights. The court indicated that there was a significant likelihood that free television programs and other recordable events could be recorded that would allow consumers to time shift their watching habits and that this was not a violation of copyright law. New acts in 1992 and 1997 addressed the problem related to the new digital environment. The 1997 act became known as the NET act, and increased potential fines to as much as $100,000 with penalties as much as one year in prison.

1.4 COMPUTERS ADDED TO COPYRIGHT LAWS

The last act passed by Congress is known as the Digital Millennium Copyright Act (DMCA). This 1998 act raises the stakes significantly. First-time offenders can be fined as much as $500,000 and imprisoned for five years or both. For repeat offenders the maximum penalty is $1 million and maximum time in prison up to 10 years, or both (DMCA)..The Digital Millennium Copyright Act was Congress' attempt to catch up with the new digital environment. The act also incorporates and implements the World Intellectual Property Organization (WIPO) Copyright Treaty and Performances and Phonograms Treaty. This all pervasive act, dealt with not only recording industry concerns, but also the burgeoning computer industry. By the passage of this act, many were aware that we were living in an entirely new age of computers and computer technology. Notwithstanding this awareness, Congress never did fully grasp, as probably most people did not, how ubiquitous computer technology would become in our everyday lives. The Digital Millennium Copyright Act (DMCA) was quite broad at the time of its passage. It did not take long for the problems associated with digital media, and the brave new digital world to outpace the confines of the act. Notwithstanding the warp speed that new inventions were permeating society, The DMCA did accomplish some noteworthy goals. One of the most important provisions of the DMCA are the safe harbor provisions for online service providers. The safe harbor provisions allow online service providers to not be held liable for allegedly infringing material provided that they follow certain guidelines. If they operate within these guidelines, and either promptly remove or block access to allegedly infringing material in a timely fashion

when they've received notification of infringement claim from a copyright holder, they will avoid liability as a company (DMCA). Ironically, this provision of the DMCA codifies what ultimately case law started to conclude. The Internet turned copyright law on its head. Prior to Internet law, copyright law places the onus of compliance with copyright provisions on the infringer. The law had positive proscriptions indicating that certain behavior was illegal or improper under copyright law. It was left up to the potential infringer to avoid such conduct. A number of cases, primarily led by Google, Incorporated led the fight to allow Internet service providers to provide Internet content irrespective of potential copyright violations. The notion that someone holding a copyright or their agent has the responsibility to notify ISPs of infringing conduct is a new development in copyright law. The DMCA sets the new paradigm into statutory law. We now have to compare how copyright law evolved with the much briefer history of how patent law evolved.

2.1 PATENT LAW HISTORY

The first patent act was passed in 1790. This act allowed patents for "any art, manufacture, engine, machine or device," (1790 Patent Act). According to one scholar, the American Patent Act of 1790 was "the first statutory enactment by any country obligating any form of examination to determine whether a patent should be granted," (Walterscheld, American Patent Law and Admin., 1997). Walterscheld goes on to indicate that the idea of absolute novelty was a uniquely American idea. England as well as the Italian City States did not insist on absolute novelty, only newness to the particular area where the practice was being introduced. The 1790 act required actual novelty, (Walterscheld, American Patent Law and Admin., 1997) Just a few years later in 1793 the act was amended to include "composition of matter, " as well as to impose a registration system akin to the British system in lieu of examination, (Walterscheld, and 1793 Act). Patent law statutory history is quite short as compared to copyright law statutory history. The 1952 statute amended the 1793 act and laid out what would become the scheme for patent protection since that time. Under the 1952 act, eligibility for a patent requires four things. Utility, novelty, non-obviousness, and sufficiency of disclosure (1952 Act). The vast majority of activity regarding patent law has been within the court system. One of the major topics of historical disagreement has been what has been called "the Jeffersonian story of patent law." According to advocates of this school of thought, patent law grants a special monopoly privilege to a few not justifiable under concepts of natural philosophy. The idea behind this notion is that Congress passed the Sherman act making monopolies illegal, yet somehow or another people with a patent are able to have a monopoly. This concept had been buttressed by statements from Supreme Court justices in their opinions which seemed to support this notion. Other scholars tend to disagree with the theoretical paradigm and postulate that patents are nothing more than property rights, (Mossoff, 2007)

2.2 THE AMERICA INVENTS ACT

The America Invents Act presented wholesale changes to the US Patent system by changing from a first to invent to a first to file system in harmony with the rest of the world, (Leahy-Smith Act, 2011). This major change to the patent system was the most extensive change in over 100 years. By changing to a "first to

file" system, the act places the responsibility of protecting patent rights squarely within the inventor's control.

3.1 CRIMINAL COPYRIGHT AND PATENT LAW DIVERGENCE

Of importance to this discussion is how patent law and copyright law diverged into two completely separate paths. This is quite interesting considering their common origins in the constitution. It is amazing that this area has not been fully developed. There are very few theories in the body of research that attempts to explain why the major differences between copyright law and Patent law evolved. What can fully explain the different treatment between the two intellectual property areas? While the history of criminal sanctions can be traced from its misdemeanor origins for copyright law to ever increasing fines and longer sentences for copyright violators, the absence of any corresponding criminal penalty or sanction for patent law violations is stark. When we consider the fact that the first misdemeanor criminal sanction for copyright violations was passed in 1897. Why is it that well over 100 years later, no criminal sanctions have been passed regarding patent violations? Ideas of criminal sanctions for patent violations are not completely novel. The European Union considered such sanctions when they recently updated their intellectual property laws. Ultimately, they decided not to impose criminal sanctions for patent violations. When looking at the impact to society for patent violations versus copyright violations, many argue that patent violations have a larger impact. It may be true that more people are involved in copyright violations. That is not the same as saying that the impact is larger for copyright violations. Most recently in the news, most people should be aware of what have been termed as the "smart phone patent wars." The major lawsuits in these wars have been between Apple Computer Incorporated and Samsung Electronics Company, Limited. These multimillion dollar battles involve billions of dollars in profits. Apple has claimed that Samsung has violated their patents that make their smart phones unique. On the other hand Samsung has made the same claim. Recently, in May 2018, Samsung was ordered to pay Apple 539 million dollars in damages (Bloomberg News). One thing is certain; there are billions of dollars at stake in a lot of patent litigation. It seems obvious on its face that someone or some individuals at one or both of these companies must assume some responsibility for the intentional violation of patent protections. It is inconceivable that corporate executives at Apple or corporate executives at Samsung are totally unaware of any infringing activities by their companies. After the millions of dollars spent in litigation, numerous depositions, interrogatories and discovery requests, we can presume that everyone at either or both companies innocently and unknowingly infringed on the others' patent rights? This is next to impossible to fathom. Engineers, technologists, and other employees have to have some awareness where they got the ideas or technology that forms the basis for these lawsuits. With this much evidence in existence, how hard would it be to mount some sort of criminal investigation that held some of the parties liable for their behavior? Theories that purport to write off the possibility of patent criminal liability based on the difficulty of prosecution are misguided. If given the statutory authority to proceed with criminal prosecutions, there are some industrious prosecutors that would quickly build solid criminal cases going after some of the worst and most flagrant offenders.

3.2 CORPORATIONS TREATED AS PERSONS

In the last 10 years or so the United States has embarked upon a relative paradigm shift in how corporations are treated. The Supreme Court has on a number of occasions indicated that corporations are in fact people. They've indicated that corporations have rights, duties and obligations stemming from their citizenship as people. In one such case Citizens United v. Federal Election Commission, 558 US 310 (2010), the Supreme Court held that companies and unions could spend as much as they like to defeat political candidates. The decision essentially recognized First Amendment free speech rights for corporations. The Supreme Court as well as lower courts have begun to impose corporate criminal liability on not only corporations but also individually on corporate officers. This new theoretical paradigm posits that those who run corporations must personally be liable for the behavior of those corporations to assure that these businesses fulfill all of its obligations to the society. Although the idea of corporate criminal liability is not entirely new, its imposition to officers and directors has evolved in recent times, (see for example, Dodd-Frank). After a number of corporate scandals, as well as corporate failures, the United States passed what became known as the Dodd-Frank act. This act specifically provides that officers and directors of a corporation are charged with the responsibility of knowing what is happening in those businesses. Failure to understand what's going on, when you are in a position of leadership, is not an excuse for avoiding criminal liability. The Dodd-Frank act specifically imposes liability on these officers and directors who are in a position to know what the business is doing, (Dubber, 2013)

3.3 EXPLORING THE DIFFERENCES IN CRIMINAL LIABILITY

Why is their duplicity in liability for corporate officers and directors when it comes to patent infringement but clear liability when it comes to other kinds of corporate misconduct? On the one hand, Dodd-Frank imposes civil and criminal liability to these officers and directors that violate financial, disclosure, and/or ethical rules and regulations. Patent infringement is like the 800 pound gorilla in the room. The fact that Apple and Samsung are involved in over 50 lawsuits with each other regarding patent infringement gives us some sense as to how important these issues are and the real scope of potential violations (CNET, 2012). Most analysts would indicate that the potential loss to business for patent infringement approaches billions of dollars. Although the estimates are all over the board, they are all in the billions.

That being said, it is difficult to justify why a college student that downloads ten songs without permission is subject to criminal prosecution, but an executive of a major corporation can supervise the theft of billions of dollars in protected patent property, and face no criminal sanctions whatsoever. How could this possibly be fair? Many have tried to argue that the reason why there are no criminal sanctions in patent law is because it will be difficult to prove criminal liability. There certainly may be some truth as to the complexity of patent law, but as demonstrated earlier, that is not an excuse for not having protections and sanctions in place for obvious violators.

Let's take a look at the patent process to make some reasoned judgments as to whether or not criminal liability can be imposed for infringers. In a successful patent prosecution (the term prosecution is used to refer to obtaining a patent) certain things must occur. First, the inventor must describe the invention in writing. Second, the application must "enable any person skilled in the art to which it pertains… To make and use" an invention. Third, a claim has to be clear and concise. Fourth, the inventor must "set forth the

best mode contemplated by the inventor of carrying out his invention." (Mendez, 2008).If the Patent Office can engage in this deep level of analysis, and patent litigators engage in this deep level of analysis when prosecuting and defending their patent infringement cases, why should we be concerned that other specially trained lawyers and paralegals cannot navigate successfully any potential pitfalls with successful criminal prosecution?

The United States patent act as currently configured prohibits "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefore, infringes the patent" (35 USC). Some argue that prosecuting patent infringers would be too difficult. The reasons given are that the criminal courts are not qualified to deal with these patent issues. This argument suggests that patent issues are so complex that judges would not be able to understand what's going on. If that is true then there should not be any civil violations for patent infringement. Just like civil judges have to learn the particulars of patent law, so criminal law judges and prosecutors would have to learn about patent law. It is also quite clear that prosecutors would have to use reasonable judgment in which patent infringers they go after. This level of discretion is not new to prosecutors. Exercising discretion as to whom they should prosecute is part and parcel of what prosecutors do every day. Why would making that assessment in a patent case be any different than the assessment that prosecutors make in any case? In a case that is a close call, prosecutors would certainly have the discretion not to bring criminal charges. In other scenarios, criminal Sanctions may be imposed if a foreign nation is involved in stealing official American secrets (Economic Espionage Act, 1996)

3.4 WHITE COLLAR CRIMES TREATED DIFFERENTLY

Edward Sutherland postulated way back in the 1960s a new concept of criminal liability. He coined the term “white-collar crime". Edward Sutherland used this phrase to refer to criminals that may be educated, and are almost always financially well-off, and can wreck-havoc in society by stealing from and misusing corporate assets with impunity, (Friedrichs, 2004). It is still a common occurrence in the United States for someone that might be guilty of stealing a few hundred dollars’ worth of goods from the local grocery store to be sentenced to more time in prison then a corporate executive that may have stolen millions of dollars including retirees’ life savings. There is no question that this imbalance has improved over the last twenty years. Notwithstanding the improvement, it is still common that white-collar criminals are treated with kid gloves as compared to the street criminal that may have likewise did no physical harm to the victim. Once again, we go to the analogy of a college student that downloads ten copies of protected music illegally. The student is prosecuted for and convicted of criminal copyright infringement. Hypothetically, on the same campus a professor intentionally steals protected patented information and ideas from another company. The professor understands fully that these inventions are patented. With full intention of wrongdoing the professor infringes on the patent and improperly incorporates the patented invention into a product for his own startup company. The way the law stands right now, the student goes to prison, while the professor goes home to dinner. How could that possibly be fair? The idea that Patent Violations are immune from criminal prosecution is inconsistent with the entire notion of protection of individual and corporate privacy,

property and intellectual property rights. The distinction that exists today, that allows a college student to go to jail for downloading a few songs illegally, but allows executives of major companies to escape any criminal liability whatsoever for multi-million dollar theft of patented inventions flies in the face of fairness. The scales of justice need to be balanced.

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