

FEAR AND NORMS AND ROCK & ROLL: WHAT JAMBANDS CAN TEACH US ABOUT PERSUADING PEOPLE TO OBEY COPYRIGHT LAW

By Mark F. Schultz[†]

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† Assistant Professor, Southern Illinois University School of Law. Earlier versions of this Article were presented at the Fifth Annual Intellectual Property Scholars Conference at DePaul University School of Law, the Second Annual Intellectual Property and Communications Law and Policy Scholars Roundtable at Michigan State University College of Law, the 2005 Law and Society Annual Meeting in Las Vegas, Nevada, and various faculty workshops at the Southern Illinois University School of Law. The Author thanks the participants of these events, in particular Irene Calboli, Gregory Duhl, Brett Frischmann, Eric Goldman, Shubha Ghosh, Jay Kesan, Patricia McCubbin, Adam Mossoff, Katherine Strandburg, and Peter Yu for their valuable comments and suggestions. Work on this Article was supported by a Summer Research Grant from the Southern Illinois University School of Law, and the author wishes to thank Dean Peter Alexander for his generous support. He also expresses his appreciation and gratitude to Jason Green, Todd Chapman, and Mike Fritz for excellent research and editorial assistance.

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How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortunes of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.

—Adam Smith, *A Theory of Moral Sentiments*¹

*Think this through with me
Let me know your mind
Woh-oh, what I want to know
Is, are you kind?*

—Robert Hunter and Jerry Garcia, Uncle John's Band²

1. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* I.I.1 (London, 6th ed. 1790).

2. Annotated Grateful Dead Lyrics, Uncle John's Band, <http://arts.ucsc.edu/gdead/AGDL/uncle.html> (last visited Mar. 13, 2006).

I. INTRODUCTION

Among fans of popular music, there is one group that is far more likely than most to respect copyright law. These fans scrupulously observe restrictions bands impose on the copying and distribution of their music. They keep track of these rules and make sure their fellow fans are aware of them. If they find fellow fans stepping out of line, they quickly scold them. They even cooperate with bands' lawyers to enforce the rules. Who are these responsible, rule-loving fans who embrace authority? None other than the fans of the Grateful Dead and their descendants in the jamband community.³ Notwithstanding their stereotypical image as laidback types with little taste for rules or authority, jamband fans are extremely supportive of the rights of artists to control the copying and distribution of their work. Therein lies a story that is interesting in its own right, but which also tells us a great deal about law, social norms, and persuading people to comply with copyright law.

The jamband community is a vital and growing movement in popular music that includes some of the top-grossing touring bands in the country. The original jamband was the Grateful Dead, but the label now applies to bands from many genres—rock, jazz, country, folk, bluegrass, and even gospel—and includes major acts like Phish, Widespread Panic, and the String Cheese Incident. What defines a jamband more than anything else is its policy regarding intellectual property: jambands allow their fans to record live shows and to copy and distribute the recordings freely. Jambands have enjoyed great commercial success in distributing music via the internet in forms that other bands have not dared to try. They explicitly attribute their success to the bond of trust they have with their fans.

Jambands can trust their fans because the fan community has developed social norms against copying musical works that jambands have designated as “off limits.” These restricted works typically comprise studio recordings or certain live releases sold commercially. The community enforces these norms internally and externally, sometimes even reporting violations to the bands' attorneys. The jamband community has also developed its own file-sharing applications which respect copyright holders' rights.

These social norms certainly make jambands an interesting phenomenon, but one might ask why they are significant. First, they are significant because they defy conventional wisdom, which says that the average indi-

3. See *infra* Part III for description and history of jambands. See generally jamband, WIKIPEDIA: THE FREE ENCYCLOPEDIA, <http://en.wikipedia.org/wiki/Jamband> (last visited Apr. 15, 2006).

vidual is unlikely to be persuaded to comply voluntarily with copyright law.⁴ As is usually the case, conventional wisdom is conventional for a reason. It finds ample justification in the actions and attitudes of tens of millions of users of peer-to-peer networks. It is widely agreed that a vast divide separates copyright law and social norms.⁵ The jamband community, however, provides evidence that this divide is not inevitable.

4. See, e.g., *Why Are Music Sales Falling? DOWNLOADING*, PR NEWSWIRE, June 17, 2003, available at LEXIS, News Library (summarizing results of national record buyers survey conducted by Edison Media Research for the trade publication *Radio & Records*). Edison Media Research's survey conducted in May 2003 found "61% of 12-17-year-olds have burned someone else's copy of a CD instead of buying their own copy, a 13% increase in one year." *Id.* Also, "71% of heavy downloaders say that 'Instead of buying a CD they have burnt someone else's copy of a CD,' and 48% of them say 'They no longer have to buy CDs because they could download music for free over the Internet.'" *Id.* McLeod argues that the massive lawsuits the Recording Industry Association of America (RIAA) filed against file-sharing will not stop file-sharing, that consumers have grown attached to it, and that more and more musicians believe file-sharing can help promote their music, even though the RIAA made a statement that file-sharing is directly responsible for the widely reported slump in CD sales from 2000 to 2003. Kembrew McLeod, *Share the Music*, N.Y. TIMES, June 25, 2004, at A23; Daniel J. Gervais, *The Price of Social Norms: Towards a Licensing Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 52 (2004) (stating that efforts to stop illegal copyrighted file-sharing will likely fail, since the market for prepackaged physical compact discs of ten or twelve songs will eventually be replaced with technology to adapt to demand for file-sharing); Jon Healy, *Legal Victory for File Sharing*, L.A. TIMES, Aug. 20, 2004, at A1 (explaining how even though the "battles between entertainment companies and new technologies [including copyright]" change with the times, there are no central computers that track all the songs available for downloading [like Napster did] and file-sharing networks cannot monitor nor reign in users); John Healy, *States Press File Sharing Issues*, L.A. TIMES, Aug. 5, 2004, at 8 ("[F]ile-sharing networks have fueled rampant piracy by enabling users to copy songs, movies and other digital files from one another's computers for free. The music and movie industries have tried to blunt the copying through the federal courts, but their efforts have yet to pay off."); David McGuire, *'F' is for File Sharing: Area Colleges Strive to Curtail Illegal Downloads*, WASHINGTONPOST.COM, Sept. 9, 2004, available at LEXIS, News Library (noting that "education . . . is not effective in changing [students' attitudes in order to comply with copyright law]," particularly since the university environment is a crucial venue for selling music and "80% of the bandwidth within a university is being taken up by peer to peer").

5. See, e.g., Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 15 (2003) (noting that when thirty million people swap music files over the internet, federal judges cannot make those thirty million people obey copyright laws as a matter of "collective conscience"); Lawrence B. Solum, *The Future of Copyright Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, 83 TEX. L. REV. 1137, 1148 (2005) (reviewing LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004)) ("In one segment of the culture, college dorms and teenage bedrooms, the copynorms went one way: This is just

Second, the social norms of the jamband community are significant because social norms are one of the keys to solving the file-sharing dilemma.⁶ File-sharing software has made compliance with copyright law at least partly voluntary for a vast group of people with access to the internet. The music industry has responded with lawsuits—mostly pursued by the Recording Industry Association of America (RIAA)—calculated to deter file-sharers. The recording industry hopes these lawsuits will change the behavior of file-sharers by instilling fear in potential file-sharers. The problem with a “fear strategy” is that it is very difficult to project threats of detection and legal action credible enough to alter behavior. Some enforcement is useful to demonstrate the moral seriousness of the law and to deter those who are averse to *any* risk of enforcement, but more enforcement will not necessarily yield significantly more compliance. This problem is not unique to copyright law, as researchers have found that deterrence factors are not the most essential influences on people’s decision to obey a law. Rather, most people obey the law most of the time because they think it is the right thing to do. In other words, social norms play a large role in securing compliance with the law. While lawsuits are a useful part of an overall strategy for securing compliance, there may not be a great deal more to gain from them.⁷ The music industry’s most efficient

sharing; it’s like swapping compilation cassette tapes. In the IP industry, not unexpectedly, copynorms went another way: This is just theft; it’s like running a pirate CD pressing plant.”); Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331 (2003); Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 238 (1991) (“[T]he lay public seems to have a startlingly concrete idea of what copyright is . . . This popular idea, however, has little to do with actual copyright law.”); Gervais, *supra* note 4 (stating if policymakers want to outlaw socially acceptable behavior with regards to technology, they will not be able to do so simply by making it illegal); Jeff Howe, *Listen, It Isn’t in the Labels. It’s the Law*, WASH. POST, Oct. 5, 2003, at B01 (explaining that listeners of music “can’t be bothered to respect the perfectly reasonable provisions of copyright law” and “a lack of public awareness and congressional support has doomed various legislative proposals to reform the DMCA”).

6. As Lawrence Solum has said, [c]opynorms are the sea we swim in when we think about copyright law. We don’t see them, except when they begin to break down or change. . . . Which version of copynorms will prevail? The norms embraced by the Napster generation or the norms pushed by the [Motion Picture Association of America (MPAA)] and the [Recording Industry Association of America (RIAA)]? This battle over copynorms is paramount to the shape of copybehavior and copyright law in the future.

Solum, *supra* note 5, at 1148.

7. *But see* Matthew Sag, *Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry’s File Sharing Litigation*, NW. J. TECH. & INTELL. PROP. (forthcoming 2006) [hereinafter *Twelve Year-Olds, Grandmothers, and Other Good Tar-*

and effective strategy for saving itself is to seek ways to change social norms regarding unauthorized copying.

It thus appears that the jamband community can teach us some useful lessons about persuading people to obey copyright law by fostering pro-copyright norms. These lessons would be particularly helpful if the norms of the jamband community are founded on something beyond the unique circumstances, history, and customs of this particular community. Fortunately, they are. The norms of the jamband community appear to conform to a fundamental norm of human behavior called reciprocity.⁸

In recent years, scholars of law and norms have focused on reciprocity as an explanation for the emergence and endurance of certain social norms. Dan Kahan describes reciprocity as a product of settings that call on people to cooperate with others. In these cooperative settings,

individuals adopt not a materially calculating posture but rather a richer, more emotionally nuanced reciprocal one. When they perceive that others are behaving cooperatively, individuals are moved by honor, altruism, and like dispositions to contribute to public goods even without the inducement of material incentives. When, in contrast, they perceive that others are shirking or otherwise taking advantage of them, individuals are moved by resentment and pride to withhold their own cooperation and even to engage in personally costly forms of retaliation.⁹

Kahan, Lior Strahilevitz, and others contend that under the right conditions, reciprocity fosters norms that promote pro-social, cooperative behaviors.¹⁰ For example, Kahan and others have used reciprocity to explain

gets] (contending that the RIAA can make additional gains by targeting marginal downloaders in addition to the major uploaders targeted thus far). The incremental effect would depend in part on how well downloaders understand that only major uploaders are targeted at this time.

8. See *infra* Section III.B.

9. Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71 (2003) [hereinafter *Logic of Reciprocity*].

10. See Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 333-35 (2001) [hereinafter *Trust*]; Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 509-10 (2003) [hereinafter *Charismatic Code*]; Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1232-35 (2000) [hereinafter *Commodifying California's Carpool Lanes*]; Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 359-60 (2003) [hereinafter *Social Norms*].

why people pay taxes,¹¹ while Strahilevitz has proposed that reciprocity governs certain norms of loose-knit groups, including mainstream file-sharers.¹²

This Article contributes to the literature on law and reciprocity by adding another detailed case study of how reciprocity makes a community more or less likely to comply with the law. It also reviews in detail the behavioral and experimental economics literature that provides support for, and defines, the phenomenon of reciprocity. This research helps to show how reciprocity explains the social norms of the jamband community. The jamband community has found a way to tap into reciprocity, thus inspiring norms that are unusually supportive of the rights of musicians.

Based on these observations, this Article makes several specific suggestions the mainstream music industry can follow to develop a better relationship with its fans and thus encourage the development of pro-copyright social norms. It concludes that both copyright compliance and the future health of the music industry depend on building loyal, sustained, and mutually beneficial relationships between musicians and their fans. Digital distribution—both legal and illegal—is bringing about the demise of the old business model. No longer can the music industry rely on one-hit-wonders to sell relatively high-priced pieces of plastic or vinyl containing one or two hits bundled with less desirable songs. People have choices now, and among those choices is the choice whether to comply with copyright law. The music industry thus needs to think in terms of building loyal communities that have reciprocal relationships with artists rather than merely moving physical products into the hands of consumers.¹³

Part II of this Article describes the limitations of a strategy that relies only on legal deterrence and explains why norms are essential to solving the file-sharing problem. Part III is a case study of the jamband commu-

11. See Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 U. KAN. L. REV. 1145 (2003); Kahan, *Logic of Reciprocity*, *supra* note 9, at 80-85.

12. Strahilevitz, *Charismatic Code*, *supra* note 10, at 509-10.

13. Not everyone needs to be so conscientious and involved. Rather, conditions must be right for the most cooperative members of a community—the “conditional cooperators”—to set the tone and conditions of participation for more casual or selfish members. If people can communicate, see others cooperating, and sanction non-cooperators, then reciprocity makes people more inclined to cooperate. Cross-cultural field and laboratory experiments indicate that conditional cooperators exist in all human populations, not just ones that are (arguably) exceptionally kind like the jamband community. The presence of conditional cooperators in all populations makes it more likely that other segments of the music industry can follow its example by tapping into reciprocity. See *infra* notes 344-353 and accompanying text.

nity, particularly focusing on its norms that support artists' copyrights. Part IV surveys various theories regarding the formation of social norms and concludes that the behavioral trait of reciprocity best explains the norms of the jamband community. Part V suggests some lessons that the mainstream recording industry can draw from the jamband community.

II. SOCIAL NORMS: WHO NEEDS THEM?

Although it is a now tiresome and perhaps discredited cliché that the internet has changed everything, it really did change music piracy. File-sharing has made unauthorized copying of music a mass consumer phenomenon. This Part discusses how file-sharing has fundamentally changed the nature of the challenge of persuading people to comply with copyright law. Despite aggressive litigation, the music industry has not yet fully adapted its enforcement strategy to this new reality. As it has long done with commercial pirates, the music industry has attempted to instill fear in potential file-sharers. This Part reviews research regarding the effectiveness of such deterrence strategies when they are aimed at the general public. It concludes that the music industry's strategy is far better suited to a relatively small number of commercial pirates than to millions of consumers. Research indicates that fostering social norms against unauthorized copying is a key part of an effective strategy for securing compliance with law.

A. The Changing Nature of Music Piracy

As late as 1994, the music industry expressed optimism that it could beat the problem of piracy.¹⁴ Although it saw piracy as an urgent prob-

14. For example, music industry executives saw the General Agreement on Tariffs and Trade (GATT) as a significant step toward battling piracy. See Judy Holland, *GATT is Good News for Music Industry*, STATES NEWS SERV., Nov. 30, 1994, available at LEXIS, News Library [hereinafter *GATT is Good News*]. As a Broadcast Music, Inc. executive said, "[a] lot of countries will have meat in their enforcement now." *Id.* Local efforts that year raised even greater hopes, with a Russian record executive declaring that international trade association efforts in Russia would end that country's role in worldwide piracy: "This organization has the money and the links to solve any problem in this area." Beth Knobel, *Association Announces War on Music Piracy in Russia*, L.A. TIMES, Dec. 6, 1994, at D5. Similarly, record executives enthused that a crackdown in Mexico would "cause piracy in Mexico to drop dramatically in the coming years." John Lannert, *Will The New Political Mood Motivate Latin America's "Most Enthusiastic Record-Buyers"?*, BILLBOARD, Nov. 26, 1994, at 66. In the People's Republic of China, authorities believed that new inspection requirements for CD factories would "possibly wipe out the piracy activities from the root." *Hong Kong Police Close CD Factories*, UNITED PRESS INT'L, Nov. 12, 1994, available at LEXIS, News Library.

lem,¹⁵ it contended that increased enforcement efforts and stricter penalties could greatly alleviate the problem.¹⁶ This focus and attendant optimism made sense at the time, because music piracy was still a problem of illicit commercial competition rather than a mass consumer problem.¹⁷ These illicit competitors—commercial pirates—were in it for the money. If one could convince them that the risk and consequences of getting caught outweighed the reward from copying, then they were likely dissuaded.¹⁸ With sufficient help from authorities, the music industry might have reasonably hoped to make commercial pirates fear getting caught.¹⁹

By contrast, the problem of file-sharing has not proven amenable to such straightforward strategies. The music industry first tried to cut off the supply of music by imposing copy-protection technology²⁰ and suing file-

15. At the time, the music industry (somewhat incredibly) claimed to be losing \$2 billion a year worldwide from unauthorized copying. Holland, *supra* note 14.

16. It thus championed such requirements in the GATT negotiations which led to the World Trade Organization (WTO). See Bill Holland, *Biz Pleased With Senate Passage of GATT Bill*, BILLBOARD, Dec. 17, 1994, at 6. For the TRIPS Agreement, which linked increased intellectual property protection to trade liberalization, see Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments, Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

17. At the time, relatively few people were internet users, and making a digital music file was a time-consuming and complicated process. Michael Meyer & Anne Underwood, *Crimes of the 'Net'*, NEWSWEEK, Nov. 14, 1994, at 46 (noting then-current difficulty of “pirating a digital version [of a single song because it] can require anywhere from 30 minutes to several hours, depending on your equipment”). It took expensive equipment to create commercial grade copies and significant (albeit illicit) distribution channels to sell enough copies to make the cost and risk of copying worthwhile, as consumer CD-recorders had not yet hit the market. See Kathleen O’Steen, *Little Disc Sparks Big Problems for Studios*, VARIETY, Nov. 7, 1994, at 7.

18. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953 (2003) [hereinafter *Role of Deterrence*] (setting forth criteria for effective deterrence strategies based on enforcement and penalties). Although Robinson and Darley believe that most individuals are motivated to comply with the law by social norms, they believe that deterrence will work under rare circumstances where people understand a law and perceive that they are likely to be caught. *Id.*

19. Since commercial pirates are relatively few in number and must set up physical manufacturing facilities and distribution channels, the music industry could devote enough resources to make the threat of being detected plausible. Such plausibility is a keystone of deterrence. See *id.* at 980.

20. See, e.g., *Macrovision Shows Systems to Foil DVD Copying, P2P Sharing*, CONSUMER ELECS. DAILY, July 12, 2004, available at LEXIS, News Library, Consumer Electronics Daily File (explaining two copy prevention systems called Ripguard and Hawkeye that prevent “ripping programs”—programs used to circumvent a DVD’s Content Scrambling System encryption—from being downloaded to a hard drive and copied

sharing services and software providers.²¹ So far, copy-protection technology has proven ineffective both technologically and commercially and may remain so for the foreseeable future.²² Suits against file-sharing technology providers likely reached their zenith with the recent U.S. Supreme Court decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*²³ In *Grokster*, the Court introduced the doctrine of “inducement,” which imposes liability on product and software providers for “distribut[ing] 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.”²⁴ This is not the result for which the music industry might have hoped, as future developers and distributors of file-sharing technology may be able to avoid liability, provided that they are very careful in their words and actions. In the end, the technology for file-sharing remains available and likely will continue to be available. Indeed, the creators of BitTorrent, the most heavily used file-sharing program for illegal copying, may escape any liability under *Grokster*.²⁵

As these supply-side strategies have faltered, the music industry has taken a page from its strategy against commercial pirates by trying to instill fear in file-sharers. Since 2003, the RIAA has sued over ten thousand individuals for uploading files onto file-sharing networks.²⁶ The purpose of the suits appears to be exemplary rather than compensatory. As an attorney for one defendant put it: “This case had very little to do with [the defendant] and everything to do with the recording industry’s attempt to intimidate internet users around the country and college students in particular, . . . They looked to instill fear”²⁷ At this point, the results

to a blank disc by interrupting the unauthorized copy process by reading phony “bad sectors” as disc errors); Laura M. Holson, *The Year Ahead: Giving an Audience What It Wants, but Not Giving It Away - Movies; Studios Fight Piracy With Education*, N.Y. TIMES, Dec. 29, 2003, § C, at 6.

21. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Copyright.net Music Publ’g LLC v. MP3.com*, 256 F. Supp. 2d 214 (S.D.N.Y. 2003).

22. See Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 721-28 (2005) [hereinafter *P2P*] (surveying ineffective efforts at copy protection).

23. 125 S. Ct. 2764 (2005).

24. *Id.* at 2780.

25. See Posting of Mark F. Schultz to Technology and Marketing Law Blog, http://blog.ericgoldman.org/archives/2005/06/what_happens_to.htm (June 28, 2005, 09:26 EST).

26. See 725 More File-sharers Sued; 10,037 Total(!), RIAA Watch, <http://sharenomore.blogspot.com/> (Apr. 29, 2005, 18:17 EST); see also Yu, *supra* note 22, at 658-67 (detailing early history of RIAA suits).

27. Jon Healey & P.J. Huffstutter, *4 Pay Steep Price for Free Music*, L.A. TIMES, May 2, 2003, at A1.

seem mixed at best. Notwithstanding the RIAA's lawsuits, it is estimated that thirteen million households download files each month.²⁸ Moreover, in a recent Pew internet survey, fifty-eight percent of those who download music said they did not care whether it was copyrighted.²⁹

B. The Problem with Deterrence-Based Strategies

The RIAA's experience with its lawsuits has echoed the general experience with such deterrence-based strategies: they are enthusiastically pursued but not necessarily effective.³⁰ Like the RIAA, lawmakers and other authorities focus almost exclusively on deterrence strategies for securing compliance with law.³¹ To many, increasing penalties seems to be the obvious and only way to change behavior. As one commentator put it, "the only way to fend off the non-profit Internet pirate is by increasing prison sentences for Internet pirates."³² The problem with this strategy is

28. John Borland, *RIAA Lawsuits Yield Mixed Results*, CNET NEWS.COM, Dec. 4, 2003, http://news.com.com/2100-1027_3-5113188.html (explaining that while thirteen million households download files every month, there is also "evidence that file swapping is growing overall").

29. Lee Rainie et al., Pew Internet Project and comScore Media Metrix Data Memo, at 11 (Apr. 2004), http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf (asking, "Do you care whether or not the music you download onto your computer is copyrighted, or isn't that something you care much about?").

30. See, e.g., Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497, 501 (1993) (summarizing and analyzing research regarding the effect of deterrence factors on drug use and concluding that "[c]ertainty and severity effects are quite modest in size, generally accounting for less than 5% of the variance in marijuana use reported in perceptual deterrence surveys").

31. See Robinson & Darley, *Role of Deterrence*, *supra* note 18, at 956-57. Deterrence strategies focus on causing people to fear the consequences of breaking the law "by threatening to deliver or by actually delivering negative sanctions for rule-breaking." COMM. TO REVIEW RESEARCH ON POLICE POLICY AND PRACTICES, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 294 (Wesley G. Skogan & Kathleen Frydl eds., 2004) [hereinafter FAIRNESS AND EFFECTIVENESS IN POLICING]. This is a standard rational choice approach: "In this view, individuals minimize their personal costs and maximize their rewards." *Id.* Therefore, the law and authorities seek to control people's behavior by creating "a credible risk that [they] will be caught and punished for wrongdoing, that is, 'by manipulating an individual's calculus regarding whether crime pays in the particular instance.'" Tom Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. OF POL. & SOC. SCI. 84, 86 (2004) (quoting Tracy L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 396 (2000)).

32. Karen J. Bernstein, *The No Electronic Theft Act: The Music Industry's New Instrument in the Fight Against Internet Piracy*, 7 UCLA ENT. L. REV. 325, 326 (2000); see also Andrea L. Foster, *Lawmakers Demand That Colleges Crack Down on Illegal File Sharing*, CHRON. HIGHER EDUC., Feb. 27, 2003, available at <http://chronicle.com/free/2003/02/2003022701t.htm> (describing similar sentiment among lawmakers regarding file-sharing).

that while having a law and enforcing it has some effect on people's behavior, marginal changes in penalties or enforcement may not change behavior much or at all.³³

A strategy based on scaring people into complying with copyright law by ratcheting up enforcement and penalties will quickly surpass the point of diminishing returns. Some enforcement is helpful and necessary, because laws do derive a deterrent effect merely from existing and from being credibly enforced.³⁴ Since consumers were not significant targets of copyright enforcement until recently,³⁵ the RIAA's suits have the important effect of putting people on notice that infringement is an illicit act that incurs a risk (albeit a vanishingly remote one) of legal sanctions. For some people, this notice alone is enough to change behavior, either because they are unwilling to tolerate any risk of sanctions at all or because illegality represents a symbolic threshold they are unwilling to cross.³⁶ Nevertheless, increasing penalties or enforcement may not appear to have the direct effect of increased compliance that some lawmakers and music industry advocates seem to assume.³⁷ Many studies find very little or no deterrent effect at all from increasing the level of enforcement or penalties.³⁸

33. See MacCoun, *supra* note 30, at 501.

34. See FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 31, at 294. The existence of law and credible law enforcement has an important general effect on people's behavior. See *id.* (citing studies); Robinson & Darley, *Role of Deterrence*, *supra* note 18, at 951 ("There seems little doubt that having a criminal justice system that punishes violators, as every organized society does, has the general effect of influencing the conduct of potential offenders.").

35. As described earlier, commercial piracy was the focus of enforcement. See notes 14-29 and accompanying text. Consumers could not infringe copyrights in ways that were truly commercially significant. For consumers, music was largely a chattel rather than a public good—embedded in vinyl, plastic, or tape.

36. See MacCoun, *supra* note 30, at 501. MacCoun distinguishes between "absolute deterrence" and "relative deterrence." MacCoun posits that a large part of the deterrent effect of a law comes simply from its existence—"absolute deterrence"—the effect that a law has by simply existing, because some people are averse to *any* non-zero risk or because they are unwilling to engage in illicit behavior for reasons of personal morality or social status. *Id.* at 501, 503-04. He distinguishes such effects from "relative deterrence"—the amount of additional deterrence gained from increasing enforcement and/or severity of punishment. *Id.* at 501.

37. See FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 31, at 295. *But see* Sag, *supra* note 7, at 24-25, 28 (contending that there are still additional groups the RIAA might productively target).

38. FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 31, at 295 (citing MacCoun, *supra* note 30) ("[D]eterrence effects, when they are found, are small in magnitude. For example, in a review of studies of deterrence in the area of drug use, MacCoun

The primary shortcoming of relying solely on increasing the fear of punishment to deter wrongdoing is that it is very difficult to convince people that they are likely to be caught and punished.³⁹ “To influence behavior, [people’s] estimates [of the risk of getting caught] need to be high enough to exceed some threshold of being psychologically meaningful.”⁴⁰ Typically, neither the reality nor the perception of enforcement meets this goal. Most laws are not enforced stringently enough to create a strong deterrent effect.⁴¹ Compounding this difficulty is the fact that people often underestimate their chance of getting caught.⁴² The actual risk of getting caught and punished for most crimes is already low, even before filtered through people’s perceptions—for example, the likelihood of getting caught for burglary is as low as thirteen percent.⁴³ Homicide is the rare crime for which society devotes resources sufficient to ensure a deterrent effect—the likelihood of getting caught is about seventy percent.⁴⁴ The picture for file-sharing is far bleaker. The RIAA has sued about ten thousand file-sharers,⁴⁵ while reports estimate that millions use illegal file-sharing services monthly.⁴⁶ The RIAA has a long way to go before it even catches up with the rates for burglary.⁴⁷

. . . finds that around 5 percent of the measured variance in drug use behavior can be explained by variations in indicators of the expected likelihood or severity of punishment.”)

39. See Robinson & Darley, *Role of Deterrence*, *supra* note 18, at 954-55; see also FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 31, at 295. Robinson and Darley state that there are three challenges to making deterrence work: “The potential offender must know of the rule; he must perceive the cost of violation as greater than the perceived benefit; and he must be able and willing to bring such knowledge to bear on his conduct decision at the time of the offense.” Robinson & Darley, *Role of Deterrence*, *supra* note 18, at 953. Unfortunately, it is often the case that one or more of these conditions is not met. In particular, (a) people do not know or understand the law; and (b) the likelihood of getting caught is quite low, and they tend to discount it further. *Id.* at 954-55.

40. FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 31, at 295.

41. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 458-64 (1997) (describing how actual apprehension and punishment of law-breakers falls far short of the level needed to deter people effectively).

42. Robinson & Darley, *Role of Deterrence*, *supra* note 18, at 954-55; Robinson & Darley, *Utility of Desert*, *supra* note 41, at 461-62.

43. See Robinson & Darley, *Utility of Desert*, *supra* note 41, at 459.

44. See *id.*

45. See *supra* note 26 and accompanying text.

46. See *supra* note 28 and accompanying text.

47. There is some question as to whether the research regarding the deterrent effect of enforcement of criminal laws is applicable to the enforcement of civil copyright laws. See Tom Tyler, *Compliance With Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT’L L. & POL. 219, 222 (1997) (“[T]his research has primarily focused upon issues of criminal behavior . . . [w]e do not know whether changing the context from criminal to civil law will change the nature of the social dynamics underlying

Nevertheless, we might consider increasing enforcement and penalties for copyright infringement to the point where people are too scared to not comply. In a free society, however, it is difficult and inefficient to control people's behavior by relying solely on the coercive power of the state.⁴⁸ Tom Tyler described the problem in his seminal study on voluntary compliance with the law, aptly titled *Why People Obey the Law*. Tyler states: "This type of leadership is impractical because government is obliged to produce benefits or exercise coercion every time it seeks to influence citizens' behavior. These strategies consume large amounts of public resources and such societies would be 'in constant peril of disequilibrium and instability.'"⁴⁹ Copyright law already has become controversial enough. Drastically increasing penalties is unlikely to be a politically viable strategy.

Eric Goldman's study of the effect of the No Electronic Theft Act on "warez" trading is particularly instructive of the long odds that the RIAA faces in attempting to change behavior largely by means of litigation.⁵⁰ Long before music file-sharing emerged as a problem, small, informal groups used the internet to engage in warez trading—illegally copying and trading software for fun and boasting rights.⁵¹ In 1997, Congress passed the No Electronic Theft Act⁵² (NET Act) specifically to address the problem of warez trading.⁵³ The NET Act imposed criminal penalties for warez trading, including jail time of one to six years depending on the se-

compliance. Therefore, research on the factors shaping public willingness to comply with intellectual property laws is crucial."). Nevertheless, there are reasons to believe that the deterrent effect of copyright law is similar to, but perhaps weaker than, that of criminal law. Copyright law is an unusual civil law in that it regulates the everyday, common behavior of the average citizen and can result in large, rather painful, liability in the form of statutory damages, unrelated to any amount of damages actually caused. In these ways—broad applicability and punitive consequences—it resembles criminal law more than most torts. Copyright law may not, however, deter people as strongly as criminal law, as infringement may not carry the same stigma as breaking the criminal law. See MacCoun, *supra* note 30, at 504 (discussing how the stigma of illicit labels deter some individuals).

48. See Tom Tyler, *Why People Obey the Law* 22 (1990).

49. *Id.* at 22-23.

50. See Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369 (2003) [hereinafter *Road to No Warez*].

51. *Id.* at 370-71.

52. Pub. L. No. 105-147, 111 Stat. 2678 (1997), available at <http://www.usdoj.gov/criminal/cybercrime/17-18red.htm> [hereinafter NET Act]; see Goldman, *Road to No Warez*, *supra* note 50, at 371-77 (discussing motivations for and development of the NET Act).

53. Goldman, *supra* note 50, at 370-71.

riousness of the offense.⁵⁴ Since passage of the NET Act, the U.S Department of Justice has successfully prosecuted dozens of warez traders, with a number of cases receiving significant publicity.⁵⁵

Goldman concluded that despite these prosecutions, the NET Act “has not conformed the behavior of warez traders or had any real effect on piracy generally.”⁵⁶ According to Goldman, warez traders were likely ignorant of the law or, despite the numerous prosecutions, did not believe they would get caught.⁵⁷ In addition, however, warez traders were not likely to comply with the law because they did not believe in it. As Goldman concluded: “Warez traders do have standards and codes of ethics, but they are indifferent to rules they do not believe in.”⁵⁸ This conclusion is supported by a large body of social psychology research that says people are most likely to comply with laws that accord with social norms.⁵⁹ Neither warez traders nor file-sharers are likely to respond to a remote possibility of penalties in the absence of social norms that support copyright. The next Section discusses the benefits of pursuing a normative strategy.

C. Normative Strategies

The most efficient and effective way to persuade people to comply with copyright law is to convince them that it is the right thing to do.⁶⁰ This strategy is not as idealistic as it might at first sound. Authorities rely on the voluntary compliance of most people with most laws, most of the time.⁶¹ In fact, many scholars contend that the legal system in a democracy cannot function without widespread voluntary compliance with the law.⁶² If you ask people why they obey the law, they most often cite moral

54. NET Act, *supra* note 52, § 2319(c).

55. *See* Goldman, *supra* note 50, at 381-96 (discussing prosecutions under the NET Act).

56. *Id.* at 396.

57. *Id.* at 399-401.

58. *Id.* at 409.

59. *See infra* notes 60-67 and accompanying text.

60. *See* Robinson & Darley, *Utility of Desert*, *supra* note 41, at 468-71 (surveying research indicating that social norms are the key factor in convincing people to comply with the law).

61. *See* LON L. FULLER, *Human Interaction and the Law*, in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 211, 234 (Kenneth I. Winston ed., 1981) (“The lawgiver must be able to anticipate that the citizenry as a whole will . . . generally observe a body of rules he has promulgated.”).

62. *See* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE (1974); David Easton, *A Re-assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435 (1975); Richard L. Engstrom & Michael W. Giles, *Expectations and Images: A Note on Diffuse Support for Legal Institutions*, 6 LAW

reasons.⁶³ More important, studies show that people's actions confirm what they say: the most important factor in securing compliance with law is social norms.⁶⁴

People are most likely to comply with law out of a sense of internal obligation or fear of informal sanction from peers for violating community norms.⁶⁵ In Tyler's review of a number of studies regarding what influences people to obey the law, he concluded that "personal assessments of the morality of the law typically have a strong influence on whether citizens say that they break the law."⁶⁶ In his review, about twenty percent of the variance in obedience to law could "be explained by differences in judgments about the morality of law."⁶⁷

Normative support for law can come from many places, including enforcement of the law itself.⁶⁸ As described above, the very fact that a law makes something illicit is enough to change the behavior of some people.⁶⁹ The law can serve as a signal for what is right, and enforcement of the law can serve to educate people about what behavior is acceptable and unacceptable.⁷⁰ Nevertheless, enforcement and penalties that get too far

& SOC'Y REV. 631 (1972); *see, e.g.*, Talcott Parsons, *Some Reflections on the Place of Force in Social Process*, in *SOCIOLOGICAL THEORY AND MODERN SOCIETY* 264 (Talcott Parsons ed., 1967); Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 *LAW & SOC'Y REV.* 427 (1977).

63. Catherine A. Sanderson & John M. Darley, "I Am Moral But You Are Deterred": *Differential Attribution About Why People Obey the Law*, 32 *J. APPLIED SOC. PSYCHOL.* 375, 375-88 (2002). Interestingly, they attribute moral reasons to their own behavior, but believe that only the threat of punishment deters many others in society. *Id.*

64. *See* Robinson & Darley, *Utility of Desert*, *supra* note 41, at 468-71.

65. *Id.*

66. TYLER, *supra* note 48, at 36-37.

67. *Id.*

68. A number of scholars contend that the law serves an "expressive function," indicating to people what is right and wrong. Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 *VA. L. REV.* 1649, 1650-51 (2000) [hereinafter *Focal Point Theory*]; *see also* Robert D. Cooter, *Expressive Law and Economics*, 27 *J. LEG. STUD.* 585 (1998); Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 *AM. LAW & ECON. REV.* 1 (2003); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. CHI. L. REV.* 591 (1996); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 *OR. L. REV.* 339 (2000) [hereinafter *Expressive Law*]; Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 *MICH. L. REV.* 338, 400-07 (1997) [hereinafter *Norms*]; Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021 (1996).

69. *See supra* note 36 and accompanying text.

70. *See* Robinson & Darley, *Utility of Desert*, *supra* note 41, at 471-76. *See generally supra* note 68.

out ahead of social norms can have the opposite of their intended effect.⁷¹ If penalties are out of line with expectations about what is just, they can have “crimogenic effects.”⁷² That is, people may lose respect for the law, and some who would have been inclined to follow it become willing to disobey it or support those who do.⁷³ Laws can contribute to a social norm—but they cannot compel support for it.⁷⁴ If copyright law is to be rescued from non-compliance, it will be because most people choose to obey it voluntarily, like they do most other laws. More thought should be put into increasing normative support for copyright law.

Although the normative strategy sounds like a wonderfully efficient solution, there is a catch. The deterrence strategy may not work as intended, but it has visceral appeal because it offers a very clear prescription: increase consequences, increase compliance. The prescription of the normative strategy, on the other hand, is clear only in the abstract: change social norms to favor compliance. The difficulty, of course, is that changing social norms is, in reality, a very complex challenge. Building norms is not like building a house. Hard work, strong desire, and resources are not enough. Norms likely arise from a variety of sources, including relig-

71. How much enforcement and punishment can contradict social norms but remain effective is a difficult question. In his seminal article *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, Dan Kahan concluded that law enforcement that noticeably and strongly contradicts social norms—a “hard shove”—may get people’s attention, but may ultimately prove ineffective and counterproductive as authorities charged with enforcing the law hold back because of their own beliefs and because of political pressure. See Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 619 (2000). Hesitance in enforcement thus reinforces the undesirable social norm rather than deterring behavior. *Id.* Kahan contends that a “gentle nudges” approach is more effective where law moves out of line with social norms only a bit at a time, thus gradually “nudging” society toward a goal. See *id.* at 644-45. Kahan’s example of a successful “gentle nudges” campaign is the evolution of drunken driving laws in recent decades. See *id.* at 634. While the RIAA’s rhetoric often evinces affection for a “hard shoves” approach, it almost certainly does not have the resources to match. Despite highly publicized cases, the chances of getting caught file-sharing are vanishingly small. So much light with so little heat is likely to send exactly the same wrong message as harsh, but unenforced laws: everybody is doing this and nobody is really serious about stopping it.

72. Robinson & Darley, *Role of Deterrence*, *supra* note 18, at 985-87.

73. *Id.*

74. Robinson & Darley, *Utility of Desert*, *supra* note 41, at 473 (“Notice that we said that laws can contribute to the formation and change of community norms and individuals’ moral reasoning; laws cannot themselves compel community acceptance.”).

ion, philosophy, culture, education, and biology.⁷⁵ There likely is no universal or easy way to establish a social norm.

There are, however, certain behavioral regularities that strongly influence the formation of social norms. This Article's goal, in part, is to contribute to the understanding of how one such human behavioral trait called reciprocity encourages the formation of social norms that support compliance with law. The next Part sets forth a case study of the unlikely pro-copyright social norms of the jamband community. The Part following the case study of jambands applies research regarding reciprocity to illustrate how reciprocity helps to explain the norms of the jamband community.

III. THE JAMBAND COMMUNITY: A CASE STUDY IN VOLUNTARY COMPLIANCE

Although widespread illegal file-sharing appears to be the rule, this Part presents a case study of the social norms of an important exception to this rule. Fans of bands known as "jambands" have developed social norms that encourage voluntary compliance with the restrictions that bands place on the copying of their music. Paradoxically, this community is also remarkably permissive with its intellectual property. Jambands allow their fans to record live concerts and distribute the recordings freely. The recording and distribution of concerts forms the basis of a unique community whose norms are far more respectful of intellectual property than those of mainstream music fans. This Part provides a brief history of the jamband community, and then describes the social norms that support the reciprocal relationship between the bands and fans in this community.

A. A Brief History of Jambands

As the name indicates, most jambands do indeed "jam"—that is, they improvise heavily while playing live music. Many genres, however, share this characteristic. A bit more revealing is the fact that the original and prototypical jamband was the Grateful Dead. Nevertheless, using the Grateful Dead as a reference point for jambands may serve to obscure as much as it does to enlighten. The status of the band as a 1960s counterculture icon carries a certain amount of baggage. When one brings up the

75. While there is a vast amount of research on social norms across the social sciences offering many explanations regarding how norms emerge, there is no consensus theory. See generally Richard McAdams & Eric B. Rasmussen, *Norms in Law and Economics*, in THE HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell, eds., forthcoming 2006), available at <http://www.rasmusen.org/papers/norms.wpd> (last visited Mar. 13, 2006) (describing biological, religious, philosophical, and cultural explanations for the origin of norms).

Grateful Dead and its fans, known as “Deadheads,” some see a uniquely kind and generous community,⁷⁶ others see strung-out counterculture dropouts,⁷⁷ and still others see a lot of tiresome tie dye kitsch.⁷⁸ One must put aside such preconceptions and look past the band’s admittedly colorful legacy to understand its true impact. The Grateful Dead’s most enduring influence on later musicians may be a different way of doing business, which includes letting people record and trade music freely and a community of music fans dedicated to sharing that intellectual property.

For thirty years, the Grateful Dead and its zealous fans, known as Deadheads, constituted a unique community.⁷⁹ The band toured endlessly, and its fans followed them from show to show, with a core group fashioning their lives and livelihoods around the band.⁸⁰ The Grateful Dead’s reputation and fortune were largely based on concert performances. The Grateful Dead made each show a unique experience, presenting a unique set list and improvising heavily, often with extended jamming. The band allowed fans to tape these shows openly, and the fans avidly traded the tapes.⁸¹

Before the Grateful Dead, taping and trading of live concerts was a common but largely underground practice among fans of different bands and musical genres, sometimes tolerated and sometimes not.⁸² The Grate-

76. See generally Dennis McNally, *Long Strange Trip* (2002).

77. BLAIR JACKSON, *GARCIA: AN AMERICAN LIFE* xii (1999) (“Garcia and the Dead were badly misunderstood . . . they were routinely dismissed as lazy, aimless hippies playing for an army of burnouts and would-be flower children bent on recapturing the lost spirit of the ’60s.”).

78. See, e.g., Jerry Carroll, *A Plateful of History*, S.F. CHRON., Mar. 13, 1998, at C2 (“Its inexorable descent into kitsch continues: A Grateful Dead plate is being advertised by the Hamilton Collection in the National Enquirer. Yours for \$29.95, plus shipping. Comes with a ‘certificate of authenticity’ so no one can say you don’t have the genuine article.”); *‘Dead’ Merchandise Big in Fashion Circles: Counter-Culture Band Reviving Hippie ’60s*, CLEV. PLAIN DEALER, Nov. 17, 1993, at 2F (discussing “neo-hippie” fashion trend of the early ’90s, which, among other things, spawned a Grateful Dead chia pet).

79. See generally MCNALLY, *supra* note 76 (history of the Grateful Dead by its official historian and publicist); DEADHEAD SOCIAL SCIENCE: YOU AIN’T GONNA LEARN WHAT YOU DON’T WANT TO KNOW (Rebecca G. Adams & Robert Sardiolo eds., 2000) (sociological studies of Deadheads); JACKSON, *supra* note 77 (biography of Jerry Garcia, guitarist and acknowledged leader of the Grateful Dead).

80. See MCNALLY, *supra* note 76, at 385-90 (discussing unique bond with fans).

81. JACKSON, *supra* note 77, at 277.

82. See Jackie Loohaus, *Getting an Earful*, MILWAUKEE J. SENTINEL, Apr. 30, 2000, at O1E (describing long history of taping and trading concerts in rock music and other genres). For decades, fans have taped live performances of jazz, see, e.g., *id.* (noting legendary Charlie Parker bootlegs); Hollie I. West, *The Belated Grammy*, WASH. POST, Feb. 29, 1980, at D1 (discussing Grammy Award winning 1980 release of forty-

ful Dead community turned taping and trading into an institution. Grateful Dead taping started out surreptitiously in the late '60s, but grew every year.⁸³ By the mid-'70s, fans began to tape and trade more openly, and the band and its organization condoned the practice.⁸⁴ In the mid-'80s, tapers became so numerous and well-accepted that the band created a tapers' section at concerts, allowing tapers to mail order tickets for this large special section, typically located behind the soundboard.⁸⁵

Over the years, a community grew up around Grateful Dead tape trading and flourished.⁸⁶ Grateful Dead lyricist John Perry Barlow described the importance of tape trading to the existence of the Deadhead community:

I think it is probably the single most important reason that we have the popularity that we have . . . [T]he proliferation of tapes . . . formed the basis of a culture and something weirdly like a religion. . . . A lot of what we are selling is community. That is our main product, it's not music.⁸⁷

The Deadhead community was an avid consumer of new recording and communications technology. The recording medium of choice moved from reel-to-reel tapes, to cassettes, to digital audio ("DAT") tapes. They

year-old audience recording made with Duke Ellington's permission); opera, *see, e.g.*, Bill Gowen, *It's All About The Money: Opera Broadcasts Becoming An Endangered Species*, CHI. DAILY HERALD, July 11, 2003, at 9 (noting long tradition of bootlegging Metropolitan Opera broadcasts); Stephen Humphries, *Get Your Official 'Bootleg' Here!*, CHRISTIAN SCI. MONITOR, Nov. 21, 2003, at 16 (noting that bootlegging of Metropolitan Opera performances goes back to 1901); bluegrass, *see* JACKSON, *supra* note 77, at 277 (noting that Grateful Dead guitarist Jerry Garcia taped bluegrass music in the mid-'60s); and rock and roll, *see* Loohaus, *supra*.

83. JACKSON, *supra* note 77, at 277.

84. *Id.* Having been a taper himself, Garcia was particularly sympathetic. In 1975, he said of taping:

I think it's okay. . . . If people like it they can keep doing it. I don't have any desire to control people as to what they're doing and what they have. There's something to be said for being able to record an experience you've liked, or being able to obtain a recording of it. . . . My responsibility to the notes is over after I've played them. At that point I don't care where they go.

Id. By the tours of the late '70s, soundman Dan Healy embraced audience tapes as a way to check the quality of his work. *Id.* at 277-78.

85. Jeremy Ritzer, *Deadheads and Dichotomies: Mediated and Negotiated Readings*, in DEADHEAD SOCIAL SCIENCE 241, 246-47 (Rebecca G. Adams & Robert Sardiolo eds., 2000).

86. *See id.*

87. MCNALLY, *supra* note 76, at 386.

communicated at first through classified ads in magazines such as *Relix*.⁸⁸ Soon after, they were among the early adopters of internet technology,⁸⁹ using Usenet newsgroups⁹⁰ and then forming the core of one of the world's very first online communities, the WELL, in 1985.⁹¹ By the time

88. *Relix* Magazine still exists to this day.

[*Relix*] was launched in 1974 under the name Dead Relix. In its earliest incarnation, this hand-stapled, homegrown newsletter was an outlet for Grateful Dead tape traders . . . avid concertgoers who taped and traded Grateful Dead concerts. The first issues were small (less than 20 pages), had hand-drawn black and white covers and focused on taping tips and Grateful Dead news. It also provided a forum for tape traders and music fanatics to communicate with each other.

About Relix, Relix Magazine Website, <http://www.relix.com/aboutrel.phtml> (last visited Mar. 13 2006).

89. "Deadheads were electronic pioneers long before it became fashionable to use the internet or to populate the World Wide Web. Even prior to the establishment of the Usenet in 1979, Deadheads were communicating electronically." Rebecca G. Adams, "What Goes Around, Comes Around": Collaborative Research and Learning, in *DEAD-HEAD SOCIAL SCIENCE 35* (Rebecca G. Adams & Robert Sardiolo eds., 2000).

90. *Id.* Usenet was one of the early institutions through which internet users communicated—akin to modern message boards or e-mail discussion lists. Google has been able to preserve some, but not all of the earliest Usenet posts. For one of the earliest extant Usenet posts regarding the Grateful Dead, see Deadheads, Usenet Discussion Thread Archived at Google, Apr. 13, 1982, http://groups-beta.google.com/group/net.music/browse_thread/thread/81bee47dd976bc30/e606e6b77f031c06?lnk=st&q=%22grateful+dead%22&rnum=3&hl=en#e606e6b77f031c06. In the early days of Usenet newsgroups, administrators tried to keep them limited to a handful of general topics. The general discussion group for music, net.music, however, became so dominated by Deadheads that the community spent much of its time discussing (a) the Grateful Dead and (b) whether Deadheads should have their own discussion group. See, e.g., Beware the coming of NET WARS, Usenet Discussion Thread Archived at Google, Feb. 8, 1983, http://groups-beta.google.com/group/net.news/browse_frm/thread/ec6641941f97f888/ef0aa58ef880d9dd?lnk=st&q=gdead&rnum=8&hl=en#ef0aa58ef880d9dd. Administrators finally acquiesced, creating rec.music.gdead in 1986.

91. The WELL was

created by Stewart Brand in 1985 using a personal computer on his houseboat in Sasalito [sic], California. . . . On the WELL, members could create and host their own topical discussion boards, and the most popular one was devoted to the Grateful Dead, the Deadhead conference. One of the Sysops for the WELL was John Perry Barlow, who was also a lyricist for the Dead . . . People from all across the country called in to the bulletin board to join the online community. It was a successful experiment and was copied by other bulletin board systems. Using the WELL and the internet, Brand and Barlow are now cyberspace activists and are founding members of the Electronic Frontier Foundation.

Nerds 2.0.1, PBS Website, http://www.pbs.org/opb/nerds2.0.1/wiring_world/thewell.html (last visited Mar. 13, 2006).

the world wide web became widely available in the mid '90s, and CD burners affordable a few years later, Deadheads were well prepared for the new world of easy digital trading and downloading.⁹² Perhaps it is no coincidence that lyricist John Perry Barlow went on to become a prominent cyberspace visionary and activist and co-founder of the Electronic Frontier Foundation after beginning his online activities in connection with the Grateful Dead.⁹³

Meanwhile, the phenomenon of tape trading and Deadhead type communities had expanded far beyond the Grateful Dead. By the late '80s, a new generation of musicians began to consciously imitate what the Grateful Dead had made up as it went along.⁹⁴ The most prominent among these musicians was the band Phish.⁹⁵ Phish began as a college band in 1984⁹⁶ and hit the road to tour heavily in the late '80s.⁹⁷ By the early '90s, they had their own large following of fans ("Phans"), who often traveled with the band.⁹⁸ Like the Grateful Dead, they changed their set lists nightly, improvised heavily, and allowed their fans to tape shows.⁹⁹ By 1992, several other bands, including Widespread Panic and Blues Trav-

92. The first proposal on the Grateful Dead Usenet group for a trade of concert recordings on CDRs occurred in early 1997, *see* CDR, DAT trades, Usenet Discussion Thread Archived at Google, Jan. 22, 1997, <http://groups.google.com/groups?selm=5c5js7%2485r%40agate.berkeley.edu&output=gplain>, when CDR recorders and media were still expensive (but soon to drop in price drastically).

93. *See* Brian Doherty, *John Perry Barlow 2.0: The Thomas Jefferson of Cyberspace*, REASON, Aug./Sept. 2004, <http://www.reason.com/0408/fe.bd.john.shtml>; Elec. Frontier Found., John Perry Barlow Profile, <http://homes.eff.org/~barlow/> (last visited Mar. 13, 2006).

94. *See* RICHARD GEHR & PHISH, *THE PHISH BOOK* 41, 45 (1998) (noting that Phish, Blues Traveler, Widespread Panic, and the Aquarium Rescue Unit, all influenced by the Grateful Dead and Allman Brothers and sharing the "improve/groove aesthetic," broke out at the same time in the early '90s). Many of these bands consciously avoided mimicking the Grateful Dead musically, but rather adopted a similar improvisational approach and attitude toward their fans. *See id.* at 116-19 (discussing Phish's relationship with the Grateful Dead).

95. *See generally* DEAN BUDNICK, *JAMBANDS: THE COMPLETE GUIDE TO THE PLAYERS, MUSIC & SCENE* 161-68 (Backbeat Books 2003) [hereinafter *JAMBANDS*] (entry on Phish in encyclopedic work on jambands).

96. *See* Phish.com, Band History, <http://www.phish.com/bandhistory/index.php?year=1983> (last visited Mar. 13, 2006).

97. GEHR & PHISH, *supra* note 94, at 40-41.

98. *See id.* at 109-12 (discussing fans).

99. When Phish signed its first major label contract with Elektra in 1992, the band successfully argued for allowing their fans to continue taping concerts, a very unusual concession from a major label. Patt Lall, *Phish Tour Diary*, MUSIC MONITOR, <http://www.penduluminc.com/MM/articles/phishtour.html> (last visited Mar. 13, 2006).

eler, had also achieved some success with this model.¹⁰⁰ They pulled together with Phish that year for a joint tour, named H.O.R.D.E., in order to combine their audiences to play at larger venues.¹⁰¹ The first H.O.R.D.E. tour was only moderately successful, but it helped form the core of a community and define the jamband scene.¹⁰² It was around this time that the press began to refer to these bands as “jambands” or “jam bands,” often in connection with the H.O.R.D.E. tour.¹⁰³ In succeeding years (until it was last held in 1998), the H.O.R.D.E. tour grew to be extremely successful and helped launch the careers of popular musicians including the Dave Matthews Band and some non-jamband acts like Sheryl Crow and Joan Osborne.¹⁰⁴ Most important, H.O.R.D.E. helped define the jamband scene.

In August 1995, Jerry Garcia, the guitarist and heart of the Grateful Dead, passed away.¹⁰⁵ The Grateful Dead stopped touring and disbanded,¹⁰⁶ and its many fans sought a new musical home. At this point, the jamband scene truly coalesced.¹⁰⁷ Phish’s already large following be-

100. See GEHR & PHISH, *supra* note 94, at 41.

101. See Blues Traveler Official Website, H.O.R.D.E. Festival, <http://www.blustraveler.net/projects/horde/> (last visited Mar. 13, 2006). The 1992 H.O.R.D.E. tour included Aquarium Rescue Unit, Blues Traveler, Bela Fleck and the Flecktones, Phish, Spin Doctors, and Widespread Panic. See BUDNICK, *supra* note 95, at 25.

102. See Blues Traveler Official Website—HORDE Page, <http://www.blustraveler.net/projects/horde/> (last visited Mar. 13, 2006); BUDNICK, *supra* note 95, at 25.

103. See Scott Aiges, *Following the Hordes*, NEW ORLEANS TIMES-PICAYUNE, July 16, 1993, at L8 (“Often referred to as neo-hippie jam bands, the groups share a laid-back attitude and a penchant for extended improvisations.”). Sometimes they were not viewed as a new genre so much as a retro throwback. See *id.*; Steve Morse, *Get Set for Splashy Phish at Music Awards*, BOSTON GLOBE, Apr. 2, 1993, at 97 (describing Phish as a “neo-hippie jam band”).

104. See Blues Traveler Official Website, H.O.R.D.E. Festival, <http://www.blustraveler.net/projects/horde/> (last visited Mar. 13, 2006); Blues Traveler Official Website, H.O.R.D.E. 1994, <http://www.blustraveler.net/projects/horde/94/index.html> (last visited Mar. 13, 2006).

105. JACKSON, *supra* note 77, at 452-56.

106. See MCNALLY, *supra* note 76, at 614-15. The hiatus lasted several years. Starting in 2003, and as of this writing, the surviving members are touring from time to time as “The Dead.” See Official Homepage of the Grateful Dead, <http://www.dead.net/> (last visited Mar. 13, 2006).

107. Ann Powers notes that:

[O]bservers agree that not until the Grateful Dead disbanded after the 1995 death of its leader, Jerry Garcia, did the jam-band scene solidify. ‘People started to look to the clubs, where you could have that immediacy with the bands and with one another,’ said Dean Budnick, author of the book “Jambands” . . . and editor of the website <http://www.jambands.com>.

came larger, and many other bands gained new fans.¹⁰⁸ By 2004, the jamband scene was big enough to support several simultaneous major tours,¹⁰⁹ as well as numerous festivals¹¹⁰ and smaller bands.¹¹¹

In keeping with the traditions of Deadheads as tech-savvy pioneers, jamband fans embraced the internet and other new technology.¹¹² From the early '90s and onward, jamband fans created a vast network of online communities, including countless e-mail discussion lists,¹¹³ websites,¹¹⁴ databases,¹¹⁵ and a vast network for digital music trading called e-tree.¹¹⁶ The jamband community also developed several open-source software ap-

Ann Powers, *A New Variety Of Flower Child In Full Bloom: Music and the Internet Nourish a Counterculture*, N.Y. TIMES, July 21, 1999, at E1.

108. *Id.*

109. The summer of 2004 saw tours by Phish (its farewell tour), String Cheese Incident, the Dead, and the Dave Matthews Band. These tours all filled mid to large sized venues. See Edna Gunderson, *Mayer, Madonna, Idols Among The Tours of Summer*, USA TODAY, May 28, 2004, at 2E; Michael Endelman & Raymond Fiore, *Tours Calendar; You can't spend all summer playing Playstation. Here's a look at the hottest acts now hitting the road*, ENTMT WKLY., May 28, 2004, at 64.

110. See BUDNICK, *supra* note 95, at 253-57 (describing jamband festival scene, including Bonnaroo which has drawn over 70,000 fans each of the past few years).

111. See generally *id.* at 1-240 (encyclopedic listing of over 150 jambands).

112. As a 1999 article on the online jamband magazine site, PauseRecord, described: It is undeniable the effect the internet has had promulgating the wonderful music and community that we all are an integral part of. Going back to the early 1990's (and even mid-80's), fans of the Grateful Dead and Phish could be found on local BBS's and The Well. Since then, a huge consortium of websites have been erected to honor bands, facilitate tape trading, grow community, and provide breaking news.

John Procopio, *Ten Websites A Jam Fan Can't Live Without*, Pause Record Website (Dec. 27, 1999) (defunct website archived at the Internet Archive), http://web.archive.org/web/20000303014913/http://www.pauserecord.com/eyesoftheweb/Best_Sites.html.

113. Aaron Hawley, *Life on the Lists*, Jambands.com (Mar. 30, 2004), http://www.jambands.com/Features/content_2004_03_30.02.phtml (discussing proliferation and history of jamband e-mail discussion lists stretching back to the pre-world wide web days of the internet).

114. See, e.g., *Jambase.com Website Links*, <http://www.jambands.com/FanSiteLinks/> (last visited Mar. 13, 2006) (listing numerous band sites and general interest sites related to jambands). A 1999 article noted over 3,000 jamband sites. Procopio, *supra* note 112.

115. See, e.g., *The Traders' Database*, <http://db.etree.org/> (last visited Mar. 13, 2006) (listing jamband show recordings in circulation); *Phishtistics*, <http://www.ihoz.com/PhishStats.html> (last visited Mar. 13, 2006) (compiling statistics about performances by the band Phish).

116. See *EtreeWiki*, <http://wiki.etree.org> (last visited Feb. 22, 2006); see also Paul Jones, *Strategies and Technologies of Sharing in Contributor-Run Archive*, LIBRARY TRENDS, Spring 2005, http://www.findarticles.com/p/articles/mi_m1387/is_4_53/ai_n14732771 (describing origin and organization of etree community).

plications for use in sharing jamband music, some of which are beginning to have a major impact on the mainstream music community.¹¹⁷

These days, the jamband community has expanded far beyond its neo-hippie roots. In fact, jambands now encompass many genres of music including rock, blues, jazz, funk, folk, reggae, bluegrass, and even gospel.¹¹⁸ Although most jambands still do indeed “jam” and jamband fans still attend multiple shows, the community is defined more by how bands and fans treat one another. At this point, the jamband label indicates that the band belongs to a community with shared norms and follows business practices that depart from the mainstream. Curiously, many of these unique norms and business practices center on the treatment of intellectual property. The next Section sets forth a case study of the jamband community, focusing on the reciprocal relationship between bands and their fans and the unusual treatment of intellectual property.

B. A Case Study of a Reciprocating Community¹¹⁹

Jambands and their fans have forged a unique community based on a mutual passion for music and reciprocal generosity, trust, and respect. As the history recounted above describes, this community grew up organically, as the Grateful Dead and its fans made it up as they went along. In recent years, however, latter day jambands have more consciously copied the business model and culture of the Grateful Dead and its fans. This unique way of doing business begins with an assertion of control—most jambands are far more entrepreneurial than mainstream bands and thus have far more control over their art and business affairs. This control then allows them, paradoxically, to give up some of that control to their most passionate fans, whom they allow to record and distribute live shows. The surrender of control is not complete, however, as the bands set very particular rules regarding the use and distribution of their music, particularly

117. These applications include the file-sharing programs Furthurnet and BitTorrent as well as the lossless audio compression program FLAC. *See infra* notes 139-154 and accompanying text.

118. *See generally* BUDNICK, *supra* note 95.

119. The case study set forth in this Section III.B is drawn from a number of sources. Primary sources of this information included monitoring various jamband community websites, including etree.org and the Internet Archive, from January 2002 to June 2005; monitoring selected jamband community e-mail lists including the “etree announce” e-mail list, the “bt.etree.org e-mail list” and the Yahoo Groups (e-mail lists administered by Yahoo) for the Grateful Dead, New Monsoon, String Cheese Incident, and Yonder Mountain String Band from 2002 to June 2005; and interviews with several members of the jamband community. Secondary sources include the online magazine Jambands.com, Jambase.com, the print magazine *Relix*, and various news accounts.

their commercial releases. Perhaps the most extraordinary part of the story is that social norms of the jamband community encourage fans not only to respect these rules, but also to help enforce them. The next subparts recount these facts in detail.

1. *Asserting and Giving Up Control*

In many ways that would surprise the casual observer, the Grateful Dead was a paradigm of capitalism. The band ran its own business very effectively, gaining a tremendous amount of freedom and independence from the large amounts of income generated by its endless touring.¹²⁰ It supported its own large business organization, Grateful Dead Productions, quite generously.¹²¹ It was able to do things its own way, rarely releasing radio-friendly albums and allowing its fans to tape shows, behaviors that most record companies find alarming. The bands that followed in its wake, like Phish, embraced this spirit of independence.¹²² A number of bands have even surpassed the Grateful Dead's model of taking control of their own business affairs. Many have their own labels and promotion companies. The band String Cheese Incident may be the ultimate example of this model: their organization includes a record label, a promotion company, a travel agency, and a ticketing agency.¹²³ They have never had a deal with a record label, but have secured national distribution for their CDs and DVDs and tour extensively, selling out numerous mid- to large-size venues.¹²⁴ In the world of jambands, the band is often its own business rather than an employee of the music industry.

Jambands use their independence to do things that many other musicians cannot. Among other things, jambands are unique among popular musicians in their generosity toward their fans. The norms of the jamband community encourage bands to let their fans record live concerts and then

120. See generally MCNALLY, *supra* note 76.

121. Trey Anastasio, Phish guitarist, once spoke of his aspiration to follow the Grateful Dead's business practices:

"For a rock act, the Dead have a couple of incredible things about them that other bands don't have," says Anastasio. "One is their level of improvisation . . . But the other is organizational. The Dead are very family-oriented and have health insurance for all their crew, and profit-sharing. That's a definite influence on us from the Dead's scene. They also put their crew's children through school, so you end up with people who are a lot happier working for you."

Morse, *supra* note 103, at 97.

122. As noted above, upon signing with a major label, Phish fought for the right of fans to record concerts. See *supra* note 99 and accompanying text.

123. See BUDNICK, *supra* note 95, at 209.

124. See *id.*

widely and freely copy and distribute those recordings.¹²⁵ The most obvious consequence of this practice is that jambands let people copy a great deal of creative product without paying. Slightly less obvious, but perhaps just as important, jambands surrender a tremendous amount of control over their works. The jamband community's embrace of taping and trading goes far beyond looking the other way at non-commercial bootlegging, and instead forms the basis for the community.¹²⁶

Unlike mainstream concerts, where tapers are considered bootleggers and any taping is surreptitious and secretive, jambands welcome and accommodate tapers.¹²⁷ At a large show, for example a Dave Matthews Band or Phish show, one will see a forest of microphone stands in a special designated "tapers" section.¹²⁸ Some bands even let tapers plug directly into the soundboard, allowing them to create a commercial quality recording untainted by ambient noise. Tapers are a ubiquitous and highly visible presence on the jamband scene. A jamband show rarely goes unrecorded, and many bands even rely on their fans to keep historical archives of their performances.¹²⁹

2. *A Community Founded on Sharing Music*

Taping is not a solitary pursuit, but rather provides the foundation for a vast community that shares concert recordings. The norms of the jamband community encourage more than just generosity from the bands to tapers. The generosity extends from tapers to other fans and then among fans in general. While tapers certainly collect, enjoy, and trade their own tapes,

125. The Internet Archive, located at <http://www.archive.org/audio/etree.php>, is one of the best examples of this norm. It currently contains over 30,000 concert recordings. It is enabled by the generosity of the many bands who allow their concerts to be recorded and posted and the many fans who maintain the archive on a volunteer basis. A recent controversy occurred when the Grateful Dead required the Internet Archive to block access to its recordings hosted on the Archive. The Dead quickly (but not completely) backpedaled from the policy change due to fan reaction, thus illustrating the strength and resilience of these norms as well as the passion with which fans regard them. See Richard B. Simon, *The Grateful Dead Enter the Digital Copyright Wars . . . On the Other Side?*, RELIX, Feb./Mar. 2006, at 72.

126. Jones, *supra* note 116.

127. *Id.*

128. *Id.*

129. See John Patrick Gada, Interview with Grateful Dead Archivist David Lemieux, Jambands.com (Aug. 9, 2005) http://www.jambands.com/Features/content_2005_08_09.07.phtml [hereinafter Interview with David Lemieux] (discussing extensive archive of Grateful Dead tapes and role of fans in supplementing archive).

they also create recordings they can distribute free of charge to others.¹³⁰ The taper, or another who receives a copy of the initial recording, first formats the recording for distribution by breaking it into individual tracks, compressing the files using lossless music compression software, and creating an information sheet with a set list, source information, and other information.¹³¹ The recording is then “seeded,” i.e., released to the community. From there it quickly spreads from one fan to another.

Jamband fans devote large amounts of time and effort to distributing recordings to one another.¹³² While some of this activity is in the form of recording-for-recording trades, in no event does money ever change hands.¹³³ Fans distribute music to other fans at the expense of their own time, efforts, resources, and even money, using technology as simple as the postal service or as complex as cutting edge file-sharing programs created by the jamband community. All of these methods of distribution have an altruistic aspect. A fan who starts with no shows to trade could accumulate a large collection quite quickly just by responding to the frequent free offers on jamband e-mail lists and bulletin boards.¹³⁴ The most basic forms of distribution occur via e-mail lists and message boards, typically devoted to specific bands, where fans offer to make copies of a particular recording for a limited number of other fans.¹³⁵ Fans also organize “trees,” where each recipient of a recording sends copies to a pre-determined group of other recipients, who then make recordings for others. Broadband technology has enabled other ways to distribute jamband recordings,¹³⁶ allowing fans to set up computer servers on high speed connections.¹³⁷ They fill these computer servers up with copies of shows so that other,

130. Interview with Mike Wren, one of the founders of etree.org and Furthurnet and long-time member of the jamband community (July 17, 2000) (on file with author) [hereinafter Wren Interview].

131. See Seeding Guidelines, ETREEWIKI, <http://wiki.etree.org/index.php?page=SeedingGuidelines> (last visited Feb. 12, 2006) (providing guidelines and setting forth community standards for preparing a concert recording for distribution or “seeding”).

132. See Loohauis, *supra* note 82, at 01E.

133. *Id.*

134. “‘Some people are charitable. If you don’t have any shows someone wants, they might say ‘Send me two blank cassettes’ and then he keeps one. And sometimes they just do it because you want to,’ said Wythes. Traders report they have rarely been ripped off in a tape swap.” *Id.*

135. *Id.*

136. Etree.org is the center of most of this activity. See etree.org, Getting Started, <http://wiki.etree.org/index.php?page=GettingStarted> (last visited Mar. 13, 2006) for a description of how this process works.

137. See *id.*

anonymous fans may download the shows.¹³⁸ In recent years, jamband fans have also collaborated to create open source¹³⁹ file-sharing programs for the jamband community.¹⁴⁰

A large community has formed around this sharing of concert recordings and the bands who allow it. There really is no way to tell how large this community is, since membership is fluid, often anonymous, and requires no membership card. All indications, including the size of various online communities and the scope of various community projects, suggest that the community is substantial. Hundreds of e-mail lists and discussion boards are devoted to jambands and the distribution of their recordings.¹⁴¹ In the summer of 1998, a community of jamband fans formed an entity called “etree.org,” dedicated to the distribution of live recordings.¹⁴² Etree.org has been the springboard for a number of substantial projects, including Furthurnet (an open source software program that facilitates legal file-sharing only), db.etree.org (a huge database that tracks tapes in circulation), the Free Lossless Audio Codec (“FLAC”) (an open source lossless compression program), and the Live Music Archive (a huge archive of music available for high speed download on demand).¹⁴³ As of

138. They publish the internet addresses of these servers to an e-mail list (or sometimes publicly) and allow all comers to download the show. *See id.*

139. Open source software is developed by programmers (often working as unpaid volunteers) who distribute the uncompiled, original source code with the intention that other programmers and end-users will adjust and improve the source code and share it with the community. Gradually, “a simple open-source program distributed for free will grow as more members manipulate the source code and re-distribute their changes to the community . . .” Josh McDonald, *Open-Source Programs Will Open Up Knowledge*, DAILY BRUIN, Jan. 12, 2006, available at LEXIS, News Library. Some prominent examples of open source software are the Mozilla Firefox web browser and OpenOffice, both of which are competing with Microsoft products. Barry Collins, *Why Not Break Free?*, SUNDAY TIMES (London), Feb. 5, 2006, at 30, available at LEXIS, News Library. *See also* Open Source Initiative, <http://www.opensource.org/> (last visited Feb. 12, 2006).

140. *See infra* notes 141-154 and accompanying text.

141. *See supra* notes 112-114 and accompanying text.

142. *See* Jones, *supra* note 116.

143. Interview with Diana Hamilton, Live Music Archive contributor (July 2005) (on file with author) [hereinafter Hamilton Interview]. Dr. Diana Hamilton is a long-time participant in the jamband community and helped establish both the etree.org community and the Live Music Archive at the Internet Archive. *See also* <http://wiki.etree.org> (last visited Mar. 28, 2006) (providing extensive links to and information about jamband-related resources, including Furthurnet, db.etree.org, FLAC, and the Live Music Archive).

spring 2006, the Live Music Archive hosted over 30,000 concert recordings, often in multiple formats.¹⁴⁴

By now, the volume of concert recordings readily available is staggering. Thirty years of Grateful Dead recordings, amounting to thousands of shows, are freely available for download at any given moment.¹⁴⁵ Major artists like Dave Matthews and Phish seem to have every live performance in their history recorded, including early college bar and fraternity house gigs.¹⁴⁶ Jambands' every moments are recorded for posterity, all the stage patter both profound and inane, including the shows where the band caught lightning in a bottle, the flat nights, the inadequately rehearsed new songs, broken guitar strings, and blown amps. If a fan wants to hear a jamband song, he or she need not run out to the music store, as a dozen live versions are available free for the taking.

This all represents, of course, a tremendous surrender of artistic and commercial control. How do the bands make it work? The answer seems to lie in trust: the fans obey the limits set by the bands, they keep paying for commercial recordings, and they remain fiercely loyal.

3. *Setting Rules*

Jambands may surrender a great deal of control over their intellectual property to their fans, but they set some very definite rules. Like any other artist, they do not allow their commercial releases to be copied. They also do not allow people to make any commercial gain off their live recordings.

The Grateful Dead's statement on taping and distribution of concerts is an example of a fairly typical taping policy:

The Grateful Dead and our managing organizations have long encouraged the purely non-commercial exchange of music taped at our concerts and those of our individual members. That a new medium of distribution has arisen - digital audio files being traded over the Internet - does not change our policy in this regard. Our stipulations regarding digital distribution are merely extensions of those long-standing principles and they are as follows:

No commercial gain may be sought by websites offering digital files of our music, whether through advertising, exploiting databases compiled from their traffic, or any other means.

144. See Live Music Archive, <http://www.archive.org/audio/etree.php> (last visited Mar. 13, 2006).

145. See *id.*

146. See Gada, *supra* note 129.

All participants in such digital exchange acknowledge and respect the copyrights of the performers, writers and publishers of the music.

This notice should be clearly posted on all sites engaged in this activity.

We reserve the ability to withdraw our sanction of non-commercial digital music should circumstances arise that compromise our ability to protect and steward the integrity of our work.¹⁴⁷

Phish has similar, but even more extensive rules. Their rules detail recording policies,¹⁴⁸ fan site policies,¹⁴⁹ and duplication policies.¹⁵⁰

Besides these basic rules, many bands add specific wrinkles. For example, some bands insist that fans stop trading all recordings of a show if it is included in a commercially released live album.¹⁵¹ Other bands require soundboard recordings to be withdrawn if a show is released commercially, but they allow fans to continue to trade audience tapes. "Audience tapes" are made using microphones in the audience, while soundboard tapes are made by patching into the soundboard. Some bands allow distribution through on-demand archives like the Live Audio Archive, while others do not. Some allow only a limited number of releases to be traded, while others restrict only a handful of shows from circulation.

4. *Playing by the Rules*

Fans pay attention to the rules set by jambands and work diligently to comply.¹⁵² As a result, a culture of voluntary compliance with intellectual property rules pervades the jamband community. Fans carefully track information about bands' rules, communicate with the bands to clarify them, and publicize them to one another.¹⁵³ In addition, jamband fans enforce bands' rules through: (1) informal sanctions such as shaming and banishing; (2) specific rules and policies of fan organizations such as etree; (3) monitoring and reporting illegal activities to band management and attorneys; and (4) software code in file-sharing programs that allow only per-

147. Grateful Dead MP3 Statement, http://www.archive.org/audio/etree-band-details.php?band_id=3 (last visited Mar. 28, 2006); <http://www.etree.org/legal.html>.

148. Among other things, Phish's policy sets firm guidelines regarding the behavior of tapers. See Phish Taping Statement, <http://www.phish.com/guidelines/index.php?category=6> (last visited Mar. 13, 2006).

149. *See id.*

150. *See id.*

151. *See id.*

152. Hamilton Interview, *supra* note 143.

153. *Id.*

mitted trading. Fans also appear to base their compliance on a perception that bands' rules are generally legitimate. To the extent that they do not always agree with a band's rules about particular shows, they note that compliance is warranted by the band's continuing generosity.¹⁵⁴

As noted above, a loose organization called etree.org lies at the heart of the online jamband community, and it exemplifies the community's culture of compliance. Etree is a volunteer effort organized around a set of websites and e-mail lists. Etree describes its mission as follows:

etree.org is the award-winning leader in lossless digital audio distribution on the Internet! We are a community committed to providing the highest quality live concert recordings in a losslessly-compressed,¹⁵⁵ downloadable format. All of the music on etree.org is free, and 100% legal to download, trade, and burn. We also assist new traders in learning to trade online through our extensive guides[.]¹⁵⁶

Etree scrupulously plays by the rules. As one etree webpage notes, "The etree.org server team strives to be in strict compliance with the taping policies of every etreed band."¹⁵⁷ It maintains a "zero tolerance" policy against those who violate the rules, stating: "there are performers who are notoriously against taping and trading (Bob Dylan and Live, to name only two). You may *not* use the etree.org mailing lists to discuss such artists. Solicitations to exchange music by these artists are prohibited and will not be tolerated."¹⁵⁸ In case of doubt as to a band's policies, etree puts the burden on the fan to demonstrate that the band has given permission.¹⁵⁹

Etree and other jamband community sites maintain detailed information on bands' taping and trading policies. There are sites dedicated exclu-

154. See *infra* note 193 and accompanying text.

155. The most popular music compression format, MP3, deletes and alters data when it compresses a music file. Although the changes are difficult to detect in high quality (i.e., larger) MP3 files, they are still present. Audiophiles thus tend to spurn the MP3 format and use "lossless" formats that do not delete or alter information. The jamband community includes many audiophiles and also values archival preservation of music. It thus tends to reject the use of the MP3 format. Lossless formats include Shorten and FLAC, formats popularized or created by the jamband community and now widely embraced by audiophiles and high-end consumer electronics manufacturers.

156. EtreeWiki, <http://wiki.etree.org/> (last visited Mar. 13, 2006).

157. SHNs and FLACs in Circulation, <http://db.etree.org/messageboards/read.php?f=1&i=949&t=949> (last visited Mar. 13, 2006). An "etreed" band is one that permits taping and trading of live shows and whose shows are hosted on etree servers. See EtreeWiki, <http://wiki.etree.org/> (last visited Mar. 13, 2006).

158. Etree.org Legal, <http://etree.org/legal.html> (last visited Mar. 13, 2006).

159. See *id.*

sively to listing “taper friendly bands,”¹⁶⁰ webpages dedicated to publicizing bands’ taping and trading policies,¹⁶¹ and sites that contain lengthy discussions of taping etiquette.¹⁶² There are discussion forums dedicated to listing particular shows designated as off limits by otherwise taper friendly bands.¹⁶³ The Live Music Archive has contacted hundreds of bands to receive express permission to add the band to its on-demand archive¹⁶⁴ and has carefully documented those bands (many otherwise friendly to taping and trading) that refused.¹⁶⁵

The jamband community has several ways of helping to enforce the rules of the community. People who deviate from the norms of the community are chastened on e-mail lists and discussion boards.¹⁶⁶ If their of-

160. *See, e.g.*, Bands That Allow Taping, <http://btat.wagnerone.com/> (last visited Mar. 13, 2006); Trade Friendly Bands, <http://www.archive.org/audio/etree-band-showall.php> (last visited Mar. 13, 2006).

161. *See, e.g.*, Trade Friendly Bands, <http://www.archive.org/audio/etree-band-showall.php> (last visited Mar. 13, 2006); Our Legally Traded Bandlist, <http://furthurnet.org/bandlist/> (last visited Mar. 13, 2006); Jamgrass Recording Guide, <http://nashphil.com/recording.html> (last visited Mar. 13, 2006).

162. *See, e.g.*, Taping Etiquette, <http://btat.wagnerone.com/cgi-bin/forum/ikonboard.cgi?s=4d41637986bd85343f10088f9578d75a;act=ST;f=1;t=1;r=1;&#top> (last visited Mar. 13, 2006).

163. *See, e.g.*, Furthurnet Forums—Untradable Shows, <http://forums.furthurnet.org/viewforum.php?f=18> (last visited Feb. 12, 2006); *see also* etree.org Forums—Legal Inc., <http://forums.etree.org/viewforum.php?f=23&sid=7d91e6608b42276ef1935b9c8fc09150> (last visited Feb. 12, 2006).

164. *See* Internet Archive Frequently Asked Questions, <http://www.archive.org/about/faqs.php#100> (last visited Mar. 13, 2006). Answer to “Why are there no shows by band X?”:

We’d like to make sure that a trade-friendly band would not mind having their shows in the Archive for public download. The best way for us to find out is by getting permission from a band representative or by the band’s having an explicit policy that covers this type of site. If there are no shows by the band, either we don’t have enough of this information to go forward with archiving, or we are ready to accept shows but no one has uploaded anything yet. You can check on the status of bands in the Archive here (and see next FAQ question).

Id.

165. *See* Trade Friendly Bands, <http://www.archive.org/audio/etree-band-showall.php> (last visited Mar. 13, 2006) (section on “Bands that have opted-out of the Archive project” and links therein).

166. For example, these are typical e-mails in which the moderator of etree’s etrade list stepped in to discipline users who were breaking the rules:

On Tue, 20 Jul 2004, Rob Macdonald wrote:
 > I have a long list of phish concerts on CD-R (some from .shn sources,
 > most from mp3, ack.) And a few nice VCD phish concerts. If anyone
 > can help me with this i will be forever indebted to you.

fenses are viewed as grievous enough, they may be labeled “bad traders” and banned from participating in groups or even publicly shamed on “bad trader” websites.¹⁶⁷ Etree declares that its sanctions include “[b]locking the IP address of known offenders from etree.org web and FTP servers,” and “[r]emoving and banning known offenders from all etree.org mailing lists.”¹⁶⁸

One of the most remarkable ways in which the jamband community enforces rules is by working directly with authority figures. Etree notes that it monitors the eBay, Amazon.com, and Yahoo! auction sites for illegal sales of bootlegs.¹⁶⁹ To enable its users to report illegal activity, it provides e-mail links to the proper authorities at eBay, Amazon.com, and Yahoo!, and also to the legal teams for several bands.¹⁷⁰ A recent news item on the Jambands.com website (an online jambands magazine) is indicative of how jamband fans work with bands on legal enforcement matters:

Have You Seen *The Gregg Allman Anthology*?

The Allman Brothers’ website is asking for fans’ help in tracking down bootleg copies of *The Gregg Allman Anthology*. It is believed that records were illegally manufactured in Mexico, Singapore or Thailand. If you have purchased a foreign manufactured copy of the album, contact lanam@allmanbrothersband.com. The site also states that anyone who turns in an illegal copy of the album, “will be rewarded by Gregg.”¹⁷¹

Trading video is strictly forbidden by etree.org (as well as by Phish).

Trading illegally at etree.org will get you banned - so don't do it!

E-mail from E. Damien Raba, etree Moderator, to Rob MacDonald and etree.org etrade mailing list (July 21, 2004, 6:58 PM) (on file with author).

On Tue, 20 Jul 2004, Bob Bonham wrote:

> okay, I think I got exchanged my phish, Smiths, Black Crowes, Cat
> Stevens, Herbie Hancock, Jefferson Airplane, Led Zep, Miles Davis,
> Bob Marley, Doc Watson, Old and In the Way

Sorry - you managed to name quite a list of illegal music there. Trading illegal music will get you banned. It endangers etree.org. Stop it now.

E-mail from E. Damien Raba, etree Moderator, to Bob Bonham and etree.org etrade mailing list (July 21, 2004 6:56 PM) (on file with author).

167. See, e.g., The Traders’ Den—Good & Bad Traders, <http://www.thetradersden.org/forums/forumdisplay.php?f=60> (last visited Feb. 12, 2006); see also Phishhook.com—Vine Killer List, <http://www.phishhook.com/board/viewtopic.php?t=468561&sid=f96c91887a7177b49963252a3400e96a> (last visited Feb. 12, 2006).

168. Etree.org Legal, <http://etree.org/legal.html> (last visited Mar. 13, 2006).

169. *Id.*

170. *Id.*

171. Jambands.com, News Section, Feb. 28, 2000, http://www.jambands.com/NewsArchives.phtml?newsfile=redesign_news28.html.

One Grateful Dead fan even took it upon himself to hire a lawyer and sue eBay for allowing people to sell bootleg recordings on its site (he lost).¹⁷²

Contrast the image of jamband fans working cheerfully with band management and legal teams to catch bootleggers and rule breakers with the mutual antipathy between mainstream music fans and “the music industry.”¹⁷³ Jamband fans seem to view band management as people who work for the artists and themselves as part of a community that includes the band.¹⁷⁴ Mainstream music fans, on the other hand, often portray band management as part of a ruthless industry that merely employs musicians and mistreats fans and musicians alike.¹⁷⁵

The jamband community also helps to enforce rules through software code, building file-sharing programs that are not amenable to illegal copying. These software programs provide a nearly perfect example of what Larry Lessig described in his book *Code and Other Laws of Cyberspace*:¹⁷⁶ software that controls behavior by eliminating the option not to comply. The programs created by the jamband community, however, are an interesting twist on this concept. While Lessig assumes that code will

172. *Judge Says eBay Not Liable for Bootleg Music*, TELEGRAPH HERALD, Nov. 10, 2000, at B5.

173. *See* Yu, *supra* note 22, at 721-28 (noting distrust of mainstream music fans for industry).

174. *See* BUDNICK, *supra* note 95, at 209 (describing extensive business enterprises of the String Cheese Incident, which runs the businesses on its own behalf).

175. Over the last several years, consumers' opinions of record labels and the music industry have grown more and more negative. *See, e.g.*, Fredric Paul, *Why Everyone Hates The Music Industry*, <http://www.techweb.com/wire/172300219> (last visited Mar. 13, 2006); National Purchase Diary Group, *Consumers Delete Large Numbers of Digital Music Files From PC Hard Drives*, Nov. 5, 2003, available at http://www.npd.com/dynamic/releases/press_031105.htm (“Two-thirds of consumers who had recently shared files on P2P networks reported that the lawsuits caused them to have a ‘much more’ or ‘somewhat more’ negative opinion of record companies in general.”). In addition, a recent survey of music executives in Europe indicates that seventy-three percent of those surveyed believe they must change current consumer perceptions of the industry in order to reduce casual copyright infringement. Macrovision, Digital Play Research, <http://www.digital-play.net/form1.htm> (last visited Mar. 13, 2006). When questioned whether “stopping people from freely sharing copyrighted music files through a file-sharing network is the honest and fair thing to do,” twenty-three percent of recent file-sharers agreed, while forty-two percent of those who had not downloaded music in the previous four weeks did not agree. National Purchase Diary Group, *RIAA Lawsuits Appear to Be a “Win” for the Record Industry, but Winning Back the Hearts of Consumers is Another Matter*, Nov. 5, 2003, available at http://www.npd.com/press/releases/press_031105.htm.

176. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

be imposed upon people,¹⁷⁷ the jamband community imposes code upon itself. The most copyright friendly of these programs is a file-sharing application called Furthurnet.¹⁷⁸ Furthurnet is built on an “opt-in” model—only bands that allow taping can be shared on Furthurnet.¹⁷⁹ Furthurnet confronts all users—uploaders and downloaders—with a drop-down menu that contains only bands that permit file-sharing. Uploaders cannot share a file from a band that does not permit taping and downloaders cannot even search for files from a band other than the “taper friendly” ones on the list.¹⁸⁰ Furthurnet also allows users to report improper files (e.g., commercial releases), keeps track of “off limits” shows from otherwise taper friendly bands, and cooperates with bands in removing improper material.¹⁸¹ The Live Music Archive also has similar policies, in that it only allows people to upload shows from bands that have granted permission to be included in this on-demand archive.¹⁸²

Another file-sharing program written for the etree community is BitTorrent,¹⁸³ currently the hottest new file-sharing program.¹⁸⁴ Intrigued by the problem of limited bandwidth faced by his friends in the jamband community, Bram Cohen created a powerful solution with BitTorrent.¹⁸⁵

177. *See id.* at x-xi.

178. *See* About Furthurnet, <http://www.furthurnet.org/about/> (last visited Mar. 13, 2006).

179. *See* Furthurnet Frequently Asked Questions, <http://www.furthurnet.org/community/etiquette.html> (last visited Mar. 13, 2006).

180. *See id.*

181. *See id.*

182. *See* Internet Archive Frequently Asked Questions, <http://www.archive.org/about/faqs.php#115> (last visited Mar. 13, 2006).

183. When Bram Cohen was developing BitTorrent during the summer of 2001, he created an e-mail list for communication between him and others who were coding and testing BitTorrent. As he noted in an early version of the FAQ posted to the list, “BitTorrent’s customer is etree. Etree is a loose-knit community of people who distribute live concert recordings online. They never charge money, and only distribute recordings of bands which give permission. Etree suffers from not having nearly as much upload offered as there is download demand, a problem BitTorrent is intended to solve.” Posting of Bram Cohen, to BitTorrent@yahoogroups.com (July 29, 2001), *available at* <http://groups.yahoo.com/group/BitTorrent/message/62>.

184. BitTorrent accounted for fifty-three percent of all P2P traffic in June 2004. Johan Pouwelse, *The BitTorrent P2P File-sharing System*, http://www.isa.its.tudelft.nl/~pouwelse/Bittorrent_Measurements_6pages.pdf (last visited Mar. 13, 2006). Since then, many major P2P systems have moved to incorporate BitTorrent into their technology. John Borland, *P2P rivals flock to BitTorrent*, CNET NEWS, Feb. 10, 2005, http://news.com.com/P2P+rivals+flock+to+BitTorrent/2100-1032_3-5571354.html?tag=st.rm.

185. *Id.*; *see also* Seth Schiesel, *File-sharing’s New Face*, N.Y. TIMES, Feb. 12, 2004, at G1 (stating that Cohen “was intrigued by a problem familiar to many internet users and felt acutely by friends who were trading music online legally: the excruciating wait while

As the New York Times described it, “BitTorrent . . . uses what could be called a Golden Rule principle: the faster you upload, the faster you are allowed to download. BitTorrent cuts up files into many little pieces, and as soon as a user has a piece, they immediately start uploading that piece to other users.”¹⁸⁶ This architecture allows for faster downloads and fits the jamband community’s norms of sharing quite well. The jamband community helped test BitTorrent in the summer of 2002 and then quickly adopted it and spread it throughout the jamband community and beyond.¹⁸⁷ Since then, users have widely employed it for other legal purposes, such as distribution of Linux kernel releases and other open source programs,¹⁸⁸ and illegal purposes, including distribution of pirated movies, television shows, and software.¹⁸⁹

Cohen cites etree in defense of the legality of his work and motives.¹⁹⁰ He claims that BitTorrent is best suited to legal applications, like etree.org, as it is not at all anonymous and its use is easily traceable. As Cohen stated in a New York Times interview, “[i]t amazes me that sites like Suprnova continue to stay up, because it would be so easy to sue them.’ . . . Using BitTorrent for illegal trading, he added, is ‘patently stupid because it’s not anonymous, and it can’t be made anonymous because it’s fundamentally antithetical to the architecture.’”¹⁹¹ Etree uses this transpar-

files were being downloaded.”), available at <http://www.nytimes.com/2004/02/12/technology/circuits/12shar.html?ei=5007&en=da75cefbee224928&ex=1391922000&partner=USERLAND&pagewanted=all&position>.

186. *Id.*

187. Hamilton Interview, *supra* note 143; Douglas Volk, *Brand-New Lag*, VILLAGE VOICE (Apr. 27, 2004).

188. *See, e.g.*, The Linux Mirror Project, <http://www.tlm-project.org/> (last visited Mar. 13, 2006). The use of BitTorrent has been credited with greatly easing the burdens associated with the massive distribution of new versions of the Linux kernel.

189. *See* Clive Thompson, *The BitTorrent Effect*, WIRED MAG., Jan. 2005, available at <http://www.wired.com/wired/archive/13.01/bittorrent.html>.

190. Slashdot, Interview Responses from BitTorrent’s Bram Cohen, <http://interviews.slashdot.org/interviews/03/06/02/1216202.shtml?tid=126&tid=185&tid=95> (last visited Mar. 13, 2006). Cohen and his fellow developers did indeed seem to have jamband show trading in mind when developing BitTorrent. Their earliest test files were concert recordings from various jamband heroes. *See, e.g.*, Posting of Sarah Tohnen, to BitTorrent@yahoogroups.com (July 6, 2001, 9:05 pm) (providing upload of all-star jam recorded at H.O.R.D.E. tour, which included jamband stalwarts John Medeski and John Popper), available at <http://groups.yahoo.com/group/BitTorrent/message/25>; Posting of Sarah Tohnen, to BitTorrent@yahoogroups.com (July 22, 2001, 4:35 pm) (distributing various jamband concert files recorded by the poster), available at <http://groups.yahoo.com/group/BitTorrent/message/46>.

191. Schiesel, *supra* note 185.

ent architecture to its advantage, diligently policing and preventing posting of illegal seeds on its BitTorrent tracker site.¹⁹²

Finally, it should be noted that the jamband community buys into the rules set by artists and their right to set the rules. Fans are willing and active participants in this system. Personal websites frequently refer to the rules, making it clear that any trades must comply. Community members frequently encourage one another to buy jambands' commercial releases.¹⁹³ E-mail lists and forums contain careful discussions of the rules and angry flames of those who challenge the community's norms. Unlike the mainstream music world, copyright holders and fans peacefully co-exist in the jamband community.

5. *A Reciprocal Relationship*

Jambands and their fans have a healthy reciprocal relationship that goes beyond the bands giving away music and the fans respecting and enforcing artists' rights. Jamband fans are incredibly loyal and passionate about the bands they follow. They will travel great distances to attend shows. They will often follow the band on tour, just as Deadheads followed the Grateful Dead. They will proselytize for their favorite bands

192. See bt.etree.org Community Tracker, <http://bt.etree.org/> (last visited Mar. 13, 2006) (emphasizing that all seeds added must be "trade friendly," i.e., sanctioned for trading by bands).

193. One fan's note exemplifies this common practice and the underlying concern and gratitude toward musicians. In a review of a live recording of singer-songwriter Jack Johnson available at the Internet Archive: "One more thing, live recordings are great and all but PLEASE make sure you buy the original albums . . . I want [Jack Johnson] to be around to make many more albums. THANKS!" Show Details for Jack Johnson: 2002-11-11, Posting of Acoustic Dreamer to <http://www.archive.org/audio/etree-details-db.php?id=3820> (Mar. 16, 2004). Umphrey's McGee, an up and coming jamband, recently suffered a premature leak of its latest commercial release, enabling fans to download the recording for free two months before its release. Fans hotly debated the ethics of downloading the album early, but largely urged one another to pay for a legitimate version once it became available. See, e.g., Umphrey's McGee Miscellany, Posting of Justin Ward to LiveMusicBlog, <http://www.livemusicblog.com/music/06/02/17/umphreys-mcgee-safety-in-numbers-info-snucka-easter-eggs.php> (Feb. 17, 2006, 20:08 EST) (urging fans of Umphrey's McGee to "support the artist by purchasing this album" even though it had been leaked and available for illegal download two months prior to release); Patience is a True Virtue, Posting of "Sumbodyelse" to The Bort, <http://umphreaks.com/forums/index.php?topic=46302.0> (Feb. 19, 2006, 17:45 EST) (writing in Umphrey McGee's fan forum that "Support for a band comes in many forms . . . emotional is a huge one, but financial is also important . . . if we want them to continue putting out high quality products, the support must be there."). This typical, oft-repeated statement is noted at the Internet Archive in connection with a Grateful Dead show: "Please support the artist and their commercial releases." Show Details for Grateful Dead: 1991-03-31, <http://www.archive.org/audio/etree-details-db.php?id=13559> (last visited Mar. 13, 2006).

endlessly, often volunteering to help promote the band by plastering the town with posters.

The bands do a great deal to foster this loyalty and sense of community. They pay attention to the comfort and enjoyment of their fans, holding festivals in pleasant places and setting up travel tour packages for fans traveling to shows.¹⁹⁴ Band management communicates directly with fans on e-mail lists and websites. Fans are offered chances to purchase concert tickets early, and tickets are generally less expensive than mainstream concerts. Many bands also give away music directly—they seed high quality live recordings to the fan community or make them available on their websites.¹⁹⁵

Fans may also feel more loyal toward jambands because they feel closer to them. As described above, jambands often control their own destinies. In contrast to the mainstream music business, jamband fans are less likely to be separated from bands by a vast industry of middlemen.

6. *New Distribution Models*

The trust engendered by this reciprocity between jambands and their fans has allowed jambands to exploit digital distribution channels with unique success. They have used distribution models that most other musicians dare not try. The bands attribute this success to the bond of trust they have with their fans.

The most prominent experiment has been with the sale of high quality live recordings. Phish,¹⁹⁶ the String Cheese Incident,¹⁹⁷ the Dead,¹⁹⁸ and others have all begun to sell fans copies of every show on their recent tours. The bands have made these CDs available through downloads as well as through traditional retail distribution channels. The downloads are in the lossless FLAC compression format created by the jamband community, and contain no copy protection or digital rights management. The bands also allow fans to continue making and trading recordings of these shows.

These live releases have been very successful, quickly growing from experiment to institution. Phish's service, known as Live Phish, "generat[ed] more than \$1 million in revenue via several hundred thousand

194. See BUDNICK, *supra* note 95, at 209.

195. See, e.g., SCI Sounds, <http://www.stringcheeseincident.com/copy.sounds.htm> (last visited Feb. 27, 2006).

196. See Live Phish, <http://www.livephish.com> (last visited Feb. 27, 2006).

197. See Live Cheese, <http://www.livecheese.com/> (last visited Feb. 27, 2006).

198. See Grateful Dead Store, <http://gdstore.com/> (last visited Feb. 27, 2006).

successful downloads” during the first seven months after its launch in January 2003.¹⁹⁹

Other jambands have begun to sell studio albums via downloads as well.²⁰⁰ These downloads are also in the FLAC format, and contain no copy protection or digital rights management technology.²⁰¹ The mainstream music industry has been wary of such wholesale, non-copy protected online distribution. Many entertainment industry executives are certain that unprotected downloads will lead to widespread file-sharing.²⁰² It is considered a testament to the clout and persuasiveness of Apple CEO Steve Jobs that he was able to persuade so much of the music industry to participate in i-Tunes with its limited, albeit persistent, copy protection.²⁰³

Why can jambands use such a form of digital distribution where other bands dare not? As Forrester analyst Josh Bernoff noted of Phish, “Phish has the kind of fans who would download these files and pay for them . . . [i]t shows an enormous amount of trust in the fan base to put these recordings out there in MP3 format.”²⁰⁴ The Live Phish website makes it clear that trust is the basis of this venture: “Live Phish Downloads relies on an honor system, and we ask that you do not abuse the unrestricted nature of these files. If you would like to see this type of delivery of shows continue and flourish, please respect our taping policy and don’t abuse the system.”²⁰⁵

Another reason that jambands can experiment with digital distribution is that they control their own destinies far more than most bands. Big labels typically do not let bands determine policies regarding concert recordings or try new methods of distribution. As noted earlier, Phish has

199. Josh Grossberg, *Phish Spawning Big Music Downloads*, E! ONLINE NEWS, Aug. 8, 2003, <http://www.eonline.com/News/Items/0%2C1%2C12295%2C00.html>.

200. See, e.g., Yonder Mountain String Band, <http://www.livedownloads.com/stash.asp?artist=1> (last visited Mar. 13, 2006).

201. See id.

202. Jon Healey, *Big Music Labels Have Digital Trust Issues*, L.A. TIMES, July 4, 2005, at C1 (“The major labels have declined . . . entreaties [to allow unprotected downloads] in part because they do not trust their online customers not to sabotage their business.”).

203. See Jeff Goodell, *Steve Jobs: The Rolling Stone Interview*, ROLLING STONE, Dec. 3, 2003, available at http://www.rollingstone.com/news/story/5939600/steve_jobs_the_rolling_stone?rnd=114&rnd=1142310630610&has-player=true&version=6.0.12.1040.

204. *Phish Fan’s Devotion Offers Lucrative Net Opportunity*, USA Today, Aug. 5, 2003, available at http://www.usatoday.com/tech/webguide/internetlife/2003-08-05-phish_x.htm.

205. Livephish.com Frequently Asked Questions, <http://www.livephish.com/faq.asp> (last visited Mar. 13, 2006).

always been a special case for its label, Elektra.²⁰⁶ Elektra has made an exception for taping and trading by Phish fans and also consented to Live Phish (in exchange for a share of the profits). SCI did not need to get permission for digital distribution, as they own their own record label. The same is true of smaller bands like Yonder Mountain String Band, which now sells its studio releases via download.²⁰⁷

7. Summary

The jamband community thus offers an intriguing example of how things could be different for the mainstream music industry. Bands and their fans have a mutually beneficial, reciprocal relationship. The fans get a lot of free music and decent treatment. The bands get loyalty, voluntary compliance with and enforcement of their intellectual property rights, and unique business opportunities. Fans support the right of the bands to set limits on the use of their intellectual property, and the bands set limits that are viewed as not only reasonable, but generous. The key question to ask, however, is whether this model is transferable. Is it unique to the jamband community, or is it based on principles that can be applied elsewhere? The next Part discusses explanations for the norms of the jamband community that indicate there are some general lessons that the rest of the music industry could draw from the jamband experience.

IV. EXPLAINING THE SOCIAL NORMS OF THE JAMBAND COMMUNITY

The social norms of the jamband community seem to defy expectations. In the view of some, the opportunistic behavior of mainstream file-sharers seems far more natural. Much of the recent legal scholarship that explores social norms would tend to agree. The law and norms literature often explains norms as a product of clearly self-interested behavior, like the satisfaction of pecuniary interests or the desire to advance social or economic status.²⁰⁸ The norms of the jamband community do not comfortably fit this model, as jambands and their fans cooperate and behave with apparent altruism even where personal gain is uncertain or unlikely.

One might resolve this puzzle by concluding that the jamband community is simply an all-too-rare example of a community that practices

206. See *supra* note 99.

207. See, e.g., Yonder Mountain String Band, <http://www.livedownloads.com/stash.asp?artist=1> (last visited Mar. 13, 2006).

208. See *infra* notes 220-235.

what it preaches.²⁰⁹ Ever since the Grateful Dead posed the lyrical question “Let me know your mind . . . what I want to know is, are you kind?”²¹⁰ the jamband community has embraced the ideal of “kindness” as a catch-all concept encompassing generosity, benevolence, and sharing.²¹¹ One could thus conclude that the behavior described in Part III of this Article is interesting and perhaps even charming, but destined to be confined to this unique subculture.

This explanation has some superficial appeal, but its dismissal of the jamband phenomenon is too facile. It wrongly assumes that opportunistic behavior is the rule, while the kind of pro-social, cooperative behavior exhibited by the jamband community is a quirky, unpredictable exception. Common experience, confirmed by field studies and laboratory research, says otherwise.²¹² Although examples of selfish motivations and behavior abound, people also provide volunteer services, give to charities, and help strangers with no appreciable expectation of any sort of personal gain.²¹³ Ernst Fehr and Klaus Schmidt have summed up the seemingly conflicting evidence: “Some pieces of evidence suggest that many people are driven by fairness considerations, other pieces indicate that virtually all people behave as if completely selfish, and still other types of evidence suggest that cooperation motives are crucial.”²¹⁴ Fehr, Schmidt, and other scholars have determined that this distribution of outcomes is not as random as it may seem. Rather, it results from a set of behavioral characteristics commonly grouped under the label of “reciprocity.”²¹⁵

209. The problem with this assertion is that to the extent that many think of jamband fans at all, they retain a stereotype of neo-hippies. One might expect them to share, but be surprised that they also embrace the property rights of bands. One might also expect them to embrace community, but be surprised to find them so *responsible*, enthusiastically embracing rules and cooperating with authorities.

210. David Dodd, The Annotated “Uncle John’s Band,” <http://arts.ucsc.edu/gdead/AGDL/uncle.html> (last visited Mar. 13, 2006).

211. See Art O’Sullivan, *Miss Him When He’s Gone*, METRO SANTA CRUZ, Aug. 3, 2005, available at <http://www.metroactive.com/papers/cruz/08.03.05/garcia-0531.html> (“The Grateful Dead’s spiritual vision embodied freedom and kindness—celebrated at the concerts and carried beyond.”); Grateful Dead, Posting of J. Loftus to Crowdcafe, <http://www.crowdsafe.com/whathap.asp?ID=38> (Jan. 24, 1998, 09:08 CST) (“I was impressed at the way the fans took care of each other. I do believe that this kindness and respect really cut down on the need for security and police. It was their own society separate from the world.”).

212. See *infra* notes 254-259.

213. See *id.*

214. Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition and Cooperation*, 114 Q. J. OF ECON. 817, 818 (1999) [hereinafter *Theory of Fairness*].

215. *Id.* at 855-56.

Reciprocity motivates people to repay the actions of others with like actions—value received repaid with value given, kindness with kindness, cooperation with cooperation, and non-cooperation with retaliation.²¹⁶ Under favorable conditions, it takes only a minority of people influenced by reciprocity to push a group to a sustained equilibrium of cooperation.²¹⁷ If conditions favor opportunism, however, reciprocity may actually hasten the demise of cooperation by causing people to withhold cooperation.²¹⁸ A number of laboratory and field experiments have helped researchers to identify the conditions under which reciprocity is most likely to facilitate cooperation.²¹⁹ As discussed below, it appears that the jamband community has happened upon a way of doing things that taps into reciprocity to create norms that encourage fans to respect copyright restrictions. This observation holds promise for the mainstream music community. If it can reproduce some of the conditions that allow reciprocity to encourage pro-copyright norms in the jamband community, it may be able to change mainstream norms that currently favor illegal file-sharing.

This Part begins by briefly reviewing the law and social norms scholarship, explaining why the dominant self-interest based models do not satisfactorily explain the social norms of the jamband community. It then delves into behavioral and experimental economics research that supports and explains the existence of reciprocity in order to better understand how reciprocity generates support for law in the jamband community and elsewhere.

A. Signaling and Esteem as Sources for Social Norms

Beginning with Robert Ellickson's now-classic 1991 study of social norms among cattle ranchers in Shasta County, California,²²⁰ a large body of legal scholarship has examined social norms.²²¹ Ellickson's study

216. See Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. OF ECON. PERSP. 159, 159-60 (2000) [hereinafter *Economics of Reciprocity*].

217. See Armin Falk, Ernst Fehr & Urs Fischbacher, *Appropriating the Commons—A Theoretical Explanation*, in THE DRAMA OF THE COMMONS 157, 158-59 (Elinor Ostrom et al. eds., 2002) [hereinafter *Appropriating the Commons*].

218. See *id.* at 159-61.

219. See *infra* note 262.

220. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

221. For a comprehensive survey of the literature, see generally Richard McAdams & Eric B. Rasmusen, *Norms in Law and Economics*, in THE HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell, eds., forthcoming 2006), available at <http://www.rasmusen.org/papers/norms.wpd> (describing biological, religious, philosophical, and cultural explanations for the origin of norms). There is an older body of

awakened interest in the fact that social norms often regulate human behavior more powerfully than law.²²² Since then, law and social norms scholarship has addressed the origin and evolution of norms,²²³ the mechanisms by which they affect behavior,²²⁴ and how law interacts with social norms.²²⁵ Social science has advanced many possible sources for social norms—mutual self-interest, culture, religion, education, psychology, and evolution are all candidates.²²⁶ Recent law and social norms theorists, however, have largely favored rational choice theory, focusing on game theory and rational self-interest to explain how social norms influence behavior.²²⁷

Many law and social norms scholars thus eschew explanations for social norms that rely on altruism, psychology, or cultural forces. Instead, they contend that people enforce and comply with norms as a result of self-interest expressed through mutually beneficial cooperation.²²⁸ This

legal literature that examines social norms in the field of law and society. See Mark Tushnet, “*Everything Old Is New Again*”: *Early Reflections On The “New Chicago School”*, 1998 WIS. L. REV. 579 (1998). The more recent literature, which started with Ellickson’s *Order Without Law*, tends not to address this earlier literature. See *id.*

222. Ellickson’s seminal study was a prime example—hence the title, *Order Without Law*. The cattle ranchers he studied resolved property disputes according to norms in ways that differed from applicable laws (of which they were largely ignorant).

223. See, e.g., ERIC POSNER, *LAW AND SOCIAL NORMS* (2000); McAdams, *Norms*, *supra* note 68. See generally McAdams & Rasmussen, *supra* note 221.

224. See, e.g., Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1662 (1996); Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997). See generally McAdams & Rasmussen, *supra* note 221.

225. See *supra* note 68.

226. See McAdams & Rasmussen, *supra* note 221, at 15-16. One reason there are so many plausible possibilities may be that the definition of social norms is very broad. Richard McAdams offers a typical formulation of social norms as “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of fear of external non-legal sanctions, or both.” McAdams, *Norms*, *supra* note 68, at 340.

227. This includes Robert Ellickson’s work, see Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998), the empirical work of Lisa Bernstein on the norms of close-knit commercial groups like the diamond and cotton industry, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001), and the theoretical work of Eric Posner, see POSNER, *supra* note 223, and McAdams, *Norms*, *supra* note 68.

228. See, e.g., POSNER, *supra* note 223. The treatment is not entirely consistent. Sometimes, norms are treated as a given, exogenous variable. People comply with the

work owes much to Robert Axelrod's groundbreaking study in game theory, *The Evolution of Cooperation*.²²⁹ Axelrod used computer simulations to show that rational actors were likely to cooperate under conditions where a "tit-for-tat" strategy could produce a stable equilibrium of pro-social, cooperative behavior.²³⁰ The necessary conditions include the possibility for mutually beneficial exchange, repeat interactions among the actors, knowledge of how actors behaved in the past, and the ability to withhold cooperation from actors who had failed to cooperate in the past (i.e., to react "tit-for-tat").²³¹ A group of rational actors will thus engage in cooperative, other-regarding behavior when conditions are such that it is in the self-interest of all actors to do so.

A number of law and norms theorists posit that other-regarding, cooperative social norms are manifestations of the kind of equilibria that Axelrod described. In this view, norms emerge from and are reinforced by tit-for-tat behavior and self-interest. For example, Eric Posner asserts that complying with norms, and punishing those who do not, serves as a signal.²³² Through these actions, one informs one's peers that one is a "good type" with a "low discount rate," i.e., someone with whom one might want to engage in future transactions.²³³ Richard McAdams offers a similar, but slightly different theory, contending that esteem is a primary motivation for complying with norms.²³⁴ People want the esteem of their peers. They fear that they will lose the esteem of others if they violate norms, and hope to gain esteem by complying with and enforcing norms.²³⁵

Two important features of these models limit their usefulness for explaining the social norms of the jamband community. First, they tend to look to some form of rational self-interest, narrowly understood, to explain the content of norms.²³⁶ Second, they work best to explain the origin and

norm because it is in their self-interest to do so, which explains the persistence of a norm but not its origin.

229. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1985).

230. *Id.* at 173-91.

231. *Id.*

232. *See* POSNER, *supra* note 223, at 19-27.

233. *See id.*

234. *See* McAdams, *Norms*, *supra* note 68, at 340.

235. *Id.* Note that the peers who or may not be people who our actions have directly affected or will directly affect, but we behave because we value their good opinion.

236. *See, e.g.,* POSNER, *supra* note 223, at 19-27 (describing rational self-interest as the source of norms). By rational self-interest, Posner usually appears to mean self-regarding behavior that very directly benefits the actor by improving status, material well being, or the like. *See id.* This Article's reliance on reciprocity does not per se conflict with rational choice theory, as rational choice models can accommodate other-regarding preferences and preferences for fairness. Nevertheless, the dominant rational choice mod-

evolution of social norms within small, close-knit groups where people repeatedly interact with one another.²³⁷ The norms of the jamband community are difficult to explain completely and plausibly in terms of rational self-interest. In any event, the jamband community is not the type of small, close-knit community likely to maintain adherence to norms through the prospect of repeat interaction.

Rational self-interest cannot fully explain the social norms of the jamband community. The seemingly altruistic, other-regarding behavior of jambands and their fans is not easy to reconcile with a narrow understanding of rational self-interest. Nevertheless, Posner and others might theorize that jamband community members engage in pro-social behaviors to gain future benefits or avoid sanction. They thus might propose that bands allow taping, tapers distribute recordings, fans abstain from copying commercial releases, and community members promote and enforce rules against unauthorized copying in order to gain and maintain the good opinion of their peers. There are two difficulties with such an explanation. First, it does not tell us why the jamband community values such behavior while the mainstream music community does not. Both groups appear to have the same pecuniary interests: revenue maximization for bands and inexpensive or free music for fans. Self-interest thus cannot account for all of the difference.²³⁸ Second, many of the behaviors encouraged by the norms of the jamband community are relatively costly with an uncertain payoff. While each community member might hope that *other* members of the community comply with restrictions that bands place on copying and

els of social norms such as Posner's typically assume more self-regarding behavior and preferences than those embodied in reciprocity.

237. See Strahilevitz, *Social Norms*, *supra* note 10, at 359-60.

238. This inability to explain differences between the norms of similarly situated groups is a drawback of rational choice models of social norms in general. They explain why a group might *maintain* a particular equilibrium that is embodied in a norm—because the group values a particular behavior and members wish to signal certain qualities or gain the esteem of others. They do not, however, explain why the group values the behavior in the first place. For example, Posner discusses racial discrimination and nationalism. See POSNER, *supra* note 223, at 132-47. He offers a few speculative reasons for the content of such norms: “historical accidents” that cause people to perceive the target group as a threat, *id.* at 135; competition for scarce resources such as jobs, *id.*; and norm entrepreneurs who propagate racist ideologies to support a need for national unity, *id.* at 142. The difficulty with such explanations is that as Posner notes, an “array of equilibriums [is] possible.” *Id.* at 136. Posner relies on self-interest as the equilibrium selection mechanism, but self-interest hardly explains why similarly situated groups with similar interests settle on different equilibria. The jamband community appears to have settled on a much more other-regarding equilibrium than the mainstream music community. The question is why the difference?

trading lest the bands choose to cut off the supply of free music, there is little incentive for each individual to comply with or enforce rules personally. The community is set up so that it is quite easy to collect free music quietly while leaving the work of building the community and enforcing its norms to others.²³⁹ One's peers are unlikely to know that one has refrained from unauthorized copying or has corrected others who are not complying with the rules,²⁴⁰ because the jamband community exists largely online.

In a loose-knit, partly anonymous community like the jamband community, self-interest alone is unlikely to maintain compliance with social norms.²⁴¹ The jamband community is a large, diverse group that exists across many e-mail lists, online message boards, cooperative efforts like etree and the Internet Archive, and small social groups that meet in person at shows or in particular communities. As with any large, online community, identities are often pseudonymous and people can easily come and go anonymously, with little repeat interaction. In such a large, loose-knit group, it is difficult to establish the conditions for an Axelrod type tit-for-tat game. People engage in many interactions with people they may not see again or in situations where no relevant peers can observe their actions.²⁴² There is great incentive to "cheat" in such situations because of the absence of the signaling or esteem benefits proposed by Posner and

239. Indeed, some members of the community bemoan the fact that the ease of downloading shows—as opposed to the more personal trading of tapes or CDRs through the mail—has detracted from the sense of community. See Wren Interview, *supra* note 130. For this reason, some bands like the jazz trio Medeski, Martin, and Wood limit trading to more personal forms. See Hamilton Interview, *supra* note 143. In fact, members of the Grateful Dead organization cited this lack of community as a reason for their recent decision to end free, easy downloads of high quality soundboard recordings from Internet Archive. Jeff Leeds, *Deadheads Outraged over Web Crackdown*, N.Y. TIMES, Nov. 30, 2005, at E1.

240. Violators are often rebuked privately and discretely, Hamilton Interview, *supra* note 143, and reports of misbehavior to community administrators are also private, Wren Interview, *supra* note 130. There is not much opportunity to signal to others or gain esteem in such situations.

241. The "loose-knit" terminology was coined by Lior Strahilevitz: "Loose-knit groups are clusters of individuals among whom information pertinent to informal control does not circulate easily." Strahilevitz, *Social Norms*, *supra* note 10, at 359-60. The significance of loose-knit groups is that they do not create favorable conditions for tit-for-tat models of social norms: "These loose-knit groups are typically composed of members who do not expect to be repeat players or who are unable to gather accurate information about another member's reputation even if repeat-player interactions do occur." *Id.*

242. See Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367, 376 (2002).

MacAdams.²⁴³ For a large, loose-knit group like the jamband community, something more than rational self-interest is thus necessary to explain the emergence and maintenance of social norms.

Recently, law and social norms scholarship has begun to focus on social psychology to explain the norms of large, loose-knit groups.²⁴⁴ Of particular promise is work that focuses on a human behavioral trait known as reciprocity.²⁴⁵ These scholars contend that under the right conditions, reciprocity fosters norms that promote pro-social, cooperative behaviors.²⁴⁶ Although reciprocity is certainly not the only source of social norms, this behavioral trait appears to explain a great deal about how social norms develop in situations calling for collective action and social and economic exchange.²⁴⁷ A survey of the extensive research on the nature of reciprocity in the next Section confirms that it accounts for many of the differences between the norms of the jamband community and the norms of the mainstream music community.

B. Reciprocity: What It Is and How It Works

At first glance, the norms of the jamband community seem to defy expectations. The jamband community provides a contrast to the behavior of the mainstream music industry and its fans, as jambands and their fans seem more cooperative and less self-interested than either common experience or some theoretical models would predict. Nevertheless, the norms of the jamband community are not at all extraordinary.

243. Strahilevitz, *Social Norms*, *supra* note 10, at 362.

244. See, e.g., Kahan, *Trust*, *supra* note 10; Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 *CHL.-KENT L. REV.* 1257 (1998); Geoffrey P. Miller, *Norm Enforcement In the Public Sphere: The Case of Handicapped Parking*, 71 *GEO. WASH. L. REV.* 895 (2003); Neel P. Parekh, Note, *When Nice Guys Finish First: The Evolution Of Cooperation, The Study Of Law, And The Ordering Of Legal Regimes*, 37 *U. MICH. J.L. REFORM* 909 (2004); Strahilevitz, *Charismatic Code*, *supra* note 10; Strahilevitz, *Commodifying California's Carpool Lanes*, *supra* note 10; Strahilevitz, *Social Norms*, *supra* note 10; Katherine J. Strandburg, *Privacy, Rationality, and Temptation: A Theory of Will-power Norms*, 57 *RUTGERS L. REV.* 1235 (2005).

245. See Kahan, *Trust*, *supra* note 10; Strahilevitz, *Charismatic Code*, *supra* note 10; Strahilevitz, *Commodifying California's Carpool Lanes*, *supra* note 10; Strahilevitz, *Social Norms*, *supra* note 10, at 364-65.

246. See Strahilevitz, *Social Norms*, *supra* note 10, at 364-65.

247. See Kahan, *Logic of Reciprocity*, *supra* note 9 (describing reciprocity as the behavioral trait that determines whether or not people will cooperate in collective action situations); Vernon L. Smith, Inaugural Pope Lecture: Some Economics and Politics of Globalization 4-5, Mar. 2, 2005, available at [http://www.mgt.ncsu.edu/pdfs/pope-smith SomeEconomics.pdf](http://www.mgt.ncsu.edu/pdfs/pope-smith%20SomeEconomics.pdf) (describing reciprocity as the fundamental norm governing economic and social exchange, beginning with primitive societies).

Every day, people cooperate with and behave kindly to strangers, even those they will likely never see again.²⁴⁸ A group of scholars studying such pro-social, cooperative behavior has described its pervasiveness and importance thus:

Despite its reputation for fostering competitive behavior, the contemporary market economy sustains important forms of cooperation. Employees cooperate with one another and with management in the enterprise, agents are more or less trustworthy in exchange situations, family members provide for one another, people give to charity, volunteer for public service, and support government redistributive expenditures.²⁴⁹

Many scholars trace the origin of such cooperative behavior to a deeply held human behavioral trait known as reciprocity. Reciprocity dictates that people's actions should be repaid with like actions—value received repaid with value given, kindness with kindness, cooperation with cooperation, and non-cooperation with retaliation.²⁵⁰ People are thus conditional cooperators. They are willing to cooperate, but their continuing cooperation depends on what others are doing, the intentions of others, and how well others are doing (for better or worse) relative to themselves.²⁵¹ Ernst Fehr and Simon Gächter have described the strong case for the existence and strength of reciprocity: “There is now little disagreement among experimental researchers about the facts indicating reciprocal behavior.”²⁵² They “now agree that reciprocity is a rather stable behavioral response by a non-

248. See Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 138 (2000) (“such cooperative behavior is widespread, although far from inevitable”). A classic example of such “irrational” generosity is the act of leaving a tip at a restaurant far from home. See, e.g., Fehr & Gächter, *supra* note 216, at 161. There would seem to be little benefit from leaving a tip if one is alone and never expects to return to the restaurant. The tipper has no incentive to show his peers that he is generous or secure good service upon a return visit, and yet people do it anyway. Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 737 (1986) [hereinafter *Entitlements in the Market*] (revealing from a telephone survey that people are likely to leave the same tip in a restaurant in another city as one they visit frequently). Anonymous giving to charities is another example of seemingly irrational generosity.

249. Samuel Bowles et al., *Homo Reciprocans: A Research Initiative On The Origins, Dimensions, And Policy Implications Of Reciprocal Fairness* (working paper, 1997), available at http://www-unix.oit.umass.edu/~gintis/homo_abst.html.

250. See Fehr & Gächter, *supra* note 216, at 159.

251. *Id.*

252. *Id.* at 162 (emphasis omitted).

negligible fraction of the people that can be reliably elicited under appropriate circumstances.”²⁵³

Social scientists have studied and confirmed reciprocity in laboratory settings through a variety of experimental games. These social dilemma games—including the ultimatum game, the public goods game, and the dictator game—are set up to pose a variety of scenarios where people have the choice of cooperating for mutual benefit, acting opportunistically, and/or acting benevolently. The Sections below examine the research confirming and describing reciprocity in greater detail.

1. *Evidence for Reciprocity*

Evidence of reciprocity comes from a number of sources. Scholars tend to cite three categories: common experience, historical evidence and field research, and experimental games.²⁵⁴ The evidence is strong and widely accepted. Its interpretation is debated, but broad areas of agreement have emerged.

The scholarship on reciprocity often begins by noting common examples of cooperative and benevolent behavior. As noted above, people leave tips and donate money to charity. Others have observed that “people vote, pay their taxes honestly, participate in unions and protest movements, or work hard in teams even when their pecuniary incentives go in the opposite direction.”²⁵⁵ Other examples include support for social welfare programs,²⁵⁶ volunteer service, and care for family members.²⁵⁷ Some have also noted that cooperation is not always “nice.” People will cooperate and incur a cost in order to punish others—for example, socially snubbing somebody who violates community norms or taking a risk to steal from an employer who is perceived as unfair.²⁵⁸ This common experience is con-

253. *Id.* at 163.

254. Bowles and Gintis sum up the evidence: “The experimental evidence, casual observation of everyday life, ethnographic and paleoanthropological accounts of hunter-gatherer foraging bands from the late paleolithic to the present, and historical narratives of collective struggles—these have combined to convince us that strong reciprocity is a powerful and ubiquitous motive.” Samuel Bowles & Herbert Gintis, *Is Equality Passé? Homo Reciprocans and the Future of Egalitarian Politics*, BOSTON REV., Dec. 1998/Jan. 1999, at 23, available at <http://www.bostonreview.net/BR23.6/bowles.html> [hereinafter *Future of Egalitarian Politics*].

255. Fehr & Schmidt, *supra* note 214, at 818.

256. *See generally* Bowles & Gintis, *supra* note 254 (discussing reciprocity’s effect on support for and opposition to social welfare programs).

257. *Id.*

258. Fehr & Schmidt, *supra* note 214, at 818.

firmed more rigorously by fieldwork and historical examples from various disciplines such as ethnography, anthropology, and social psychology.²⁵⁹

Although common experience and field studies indicate the existence of reciprocity, they do not tell us exactly how it works. We know that people also behave selfishly under many conditions. The “bewildering variety of evidence” calls for controlled study and detailed models.²⁶⁰ Although common experience and field studies indicate that institutions and behavioral factors affect how and whether reciprocity influences human behavior, “it is . . . almost impossible to isolate the impact of individual factors. This is why we need controlled laboratory experiments”²⁶¹

Researchers have indeed performed hundreds of such experiments,²⁶² setting up social dilemma games in the laboratory that participants must solve by cooperating or declining to cooperate. The social dilemma games most relevant to this Article’s discussion of reciprocity are the public goods game, the ultimatum game, and the dictator game. The following subsections describe these experiments and what they tell us about reciprocity.

a) The Public Goods Game

The public goods game is one of the most important for understanding the nature of reciprocity. In the public goods game, a group of players has the opportunity to benefit from a common resource—i.e., a public good. Its conditions evoke the central problem of cooperation: while we all gain from cooperating, each individual has an incentive to free ride on the ef-

259. See Bowles & Gintis, *supra* note 254, at 4-15 (describing reciprocity as the result of 100,000 years of human cultural evolution and discussing laboratory, field, and historical research by primatologists, anthropologists, economists, psychologists, and others validating reciprocity); Ernst Fehr & Simon Gächter, *Reciprocity and Economics: The Economic Implications of Homo Reciprocans*, 42 EURO. ECON. REV. 845 (1998) [hereinafter *Homo Reciprocans*] (discussing studies). See generally JOSEPH HENRICH ET AL., FOUNDATIONS OF HUMAN SOCIALITY: ECONOMIC EXPERIMENTS AND ETHNOGRAPHIC EVIDENCE FROM FIFTEEN SMALL-SCALE SOCIETIES (2004) (collecting papers describing such evidence). Nobel Prize winning economist Vernon Smith suggests that “exchange had its origin in reciprocity and sharing norms in the family, the extended family and tribes,” and ultimately produced market economies. Smith, *supra* note 247, at 4.

260. Fehr & Schmidt, *supra* note 214, at 818.

261. Falk et al., *supra* note 217, at 157.

262. *Id.* at 180 n.3 (“The importance of reciprocity has been established in dozens if not hundreds of experiments.”). For overviews of the literature on experiments regarding reciprocity, see Colin F. Camerer & Ernst Fehr, *Measuring Social Norms and Preferences Using Experimental Games: A Guide for Social Scientists*, in FOUNDATIONS OF HUMAN SOCIALITY 55 (Joseph Henrich et al., eds., 2004); Fehr & Schmidt, *supra* note 214.

forts of the other players. The game is “designed to illuminate such problems as the voluntary payment of taxes and the restriction of one’s use of an endangered environmental resource.”²⁶³ These problems have certain parallels to compliance with copyright law. Choosing not to pay taxes is like choosing not to pay for copyrighted works—the consequences of getting caught are undesirable, but unlikely to occur. Similarly, one who downloads free music is in some sense like one who uses an environmental resource—in the aggregate such actions may “deplete” the resource (by undermining incentives to create), but one’s individual actions increase one’s own welfare without having a tremendous impact on the whole. Each file-sharer free rides on the work of those who create and the willingness of others to compensate that creativity.

In the public goods game, the public good to which players may contribute is typically a pool of shared money.²⁶⁴ Each player is given money at the start of each round and must decide how much to contribute to the pool. The benefit of contributing is that each contribution is matched by the experimenter, and the increased pool is divided among the players. The catch is that the increased pool of money is shared by all players, without regard to whether they contributed or not.

This is how a typical variant²⁶⁵ of the public goods game works, with ten players:²⁶⁶ at the start of each round, each player is given \$1, and may anonymously contribute any portion of that \$1 to the common pool. The experimenter then divides the amount in the common pool in half, and gives that amount of money to each player. If all 10 players contribute \$1 each, the common pool is \$10, and they each receive \$5. The optimal outcome for the group as a whole occurs when everyone contributes all of their money to the common pool. For example, after 10 rounds each player would have \$50 in exchange for a \$10 contribution (\$1 each round).

The problem that the public goods game presents is the potential for free riding: the selfish player²⁶⁷ or “rational egoist”²⁶⁸ can do better by

263. Herbert Gintis, *Cultural Darwinism*, BOSTON REV., Feb./Mar. 1998, at 23, available at <http://www.bostonreview.net/br23.1/gintis.html>.

264. Sometimes the money is real, sometimes it consists of imaginary “monetary units,” depending, one might suppose, on the generosity of the funding of the researcher. See John O. Ledyard, *Public Goods: A Survey of Experimental Research*, in HANDBOOK OF EXPERIMENTAL ECONOMICS 111-12 (John H. Kagel & Alvin E. Roth, eds. 1995) (providing overview of public goods experiments).

265. This variant is a “linear public good” game. Ostrom, *supra* note 248, at 139.

266. This scenario is described by a number of authors. See *id.* at 139-40; Bowles & Gintis, *supra* note 254, at 10-11.

267. Bowles & Gintis, *supra* note 254, at 10

268. Ostrom, *supra* note 248, at 139.

contributing nothing, provided that the other nine players do contribute.²⁶⁹ In that scenario, the selfish player keeps his \$10 plus the \$45 that results from the contributions of others, for a total of \$55. If everyone does this, however, the common pool is empty and each player ends up with only \$10. The worst outcome would occur if a player contributes \$1 and nobody else does, in which case the player receives back only \$.50. Absent the opportunity to communicate and make enforceable agreements, the expectation is that a rational player will desire the optimal outcome (\$55), want to avoid the worst outcome (\$.50), will expect other players to see things the same way, and will thus contribute nothing.²⁷⁰ The predicted outcome is thus “an ‘iterated prisoner’s dilemma’ in which self-regarding players contribute nothing.”²⁷¹

This prediction is not borne out when the game is actually played, which tells us some interesting things about human behavior. The experiment has been run often enough with sufficiently consistent results that it is now possible to make generalizations.²⁷² During the first round, people contribute on average about half of their money to the common pool.²⁷³ This contribution rate occurs even in one round, “one shot” games where there is no potential for future cooperation.²⁷⁴ If the game is played for several rounds under the standard conditions of anonymity, cooperation deteriorates.²⁷⁵ Nevertheless, in the last round, where there is no longer a possibility for future cooperation, over 25% of subjects still contribute something.²⁷⁶ The experimental evidence thus only partly confirms the

269. This is, of course, the problem of collective action, as defined by Mancur Olson in his seminal work. *See* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOALS AND THE THEORY OF GROUPS* (1965).

270. Bowles & Gintis, *supra* note 254, at 11; Ostrom, *supra* note 248, at 139. For the mathematical expression of the dominant strategy, *see* Falk et al., *supra* note 217, at 176.

271. Bowles & Gintis, *supra* note 254, at 11; *see* Ledyard, *supra* note 264, at 112 (discussing how economics and game theory predicts free riding in this context). Ostrom notes that these predictions are “based on the assumptions that all players are fully rational and interested only in their own immediate financial payoff, that all players understand the structure of the game fully and believe that all other players are fully rational, and that no external actor can enforce agreements between the players.” Ostrom, *supra* note 248, at 139-40.

272. *See* Ostrom, *supra* note 248, at 140; Fehr & Schmidt, *supra* note 214, at 838 (summarizing, in chart form, results of various public good experiments in various different countries).

273. *See* Ostrom, *supra* note 248, at 140.

274. *See* Fehr & Schmidt, *supra* note 214, at 838.

275. *See id.*

276. *See id.* (meta study of twelve experimental studies). Still, it is significant that without the opportunities for communication and punishment described below, 73% choose the strategy of complete free riding (zero contribution). *Id.*

prediction of an iterated prisoner's dilemma. Some people free ride, but not all do. Free riding may cause cooperation to deteriorate, but never completely eliminates it.

When the rules of the game reduce anonymity, cooperation increases. Simply allowing players to observe each other silently increases cooperation.²⁷⁷ More important, if players are allowed to communicate, they coordinate their efforts and make agreements; as a result, cooperation increases dramatically and free riding declines.²⁷⁸ These benefits continue, even into the last round.²⁷⁹ Communication improves cooperation even in one round games,²⁸⁰ which contradicts the standard model.²⁸¹ These results are surprising, because without enforcement of agreements, it is easy to make and break promises.²⁸²

When the rules of the game are further refined to allow people to punish others for non-compliance, cooperation increases even more dramatically. People will punish non-cooperators, even at a cost to themselves.²⁸³ In a series of experiments, Ernst Fehr and Simon Gächter introduced the opportunity to punish non-cooperators.²⁸⁴ There is a cost to the punisher, but the cost to the one punished is even greater. The self-interested model of behavior would predict that such an opportunity for punishment would not change the outcome because a rational actor would not incur a cost to punish others.²⁸⁵ People might hope that other players would punish bad behavior, but would not voluntarily give up their own income to do so. Rational players would anticipate that motivations would play out this way, so they would not alter their contributions.²⁸⁶ But people do not behave according to this prediction. The availability of punishment increases and sustains high levels of contribution. In fact, many players incur a cost

277. See Iris Bohnet & Bruno S. Frey, *The Sound of Silence in Prisoner's Dilemma and Dictator Games*, 38 J. ECON. BEHAV. & ORG. 43, 44 (1999) [hereinafter *Sound of Silence*].

278. See Elinor Ostrom & James Walker, *Neither Markets Nor States: Linking Transformation Processes in Collective Action Arenas*, in PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 61-67 (Dennis C. Mueller, ed., 1997) [hereinafter *Neither Markets Nor States*] (exploring the role of face-to-face communication in various common-pool resource settings).

279. *Id.*

280. See Ledyard, *supra* note 264, at 121.

281. *Id.* at 156-58; Ostrom, *supra* note 248, at 140-41.

282. See Ledyard, *supra* note 264, at 156; Ostrom, *supra* note 248, at 140.

283. See Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 AM. ECON. REV. 980, 993 (2000).

284. See generally *id.*

285. Camerer & Fehr, *supra* note 262, at 68.

286. *Id.*

to punish non-cooperators and 82.5% of the players cooperate fully—contributing all their resources to the common pool.²⁸⁷ This effect is so strong that even in the final round of the game, where future punishment is no longer a threat, players still contribute 90% on average.²⁸⁸

Several models have emerged to explain the behavior of people in public goods games.²⁸⁹ These models fall into two broad categories—“models of inequality aversion and models of reciprocity. In inequality-aversion [also called inequity aversion] theories, players prefer more money and also prefer that allocations be more equal.”²⁹⁰ Under inequity aversion theories, people have a preference for equitable outcomes and are willing to act on those preferences.²⁹¹ Reciprocity theories are a bit more complex, as they posit preferences that focus on the intent and actions of others.²⁹² If people perceive others to be behaving kindly, they will reciprocate with kind behavior.²⁹³ If they perceive others as behaving unkindly, they will retaliate.²⁹⁴

Falk, Fehr, and Fischbacher have proposed an integrated model to fully account for pro-social behavior in social dilemma situations.²⁹⁵ They contend that people are conditional cooperators.²⁹⁶ People are willing to cooperate provided that others cooperate and outcomes are equitable.²⁹⁷ If people are convinced that others will contribute to the public good, they will contribute too.²⁹⁸ If they expect that some free-riders will holdout, however, their aversion to inequity will cause them to withhold cooperation.²⁹⁹ They are also willing to punish others, both to achieve more equitable outcomes, as well as to reciprocate unkind behavior.³⁰⁰

287. See Falk et al., *supra* note 217, at 176-77.

288. See Fehr & Gächter, *supra* note 216, at 166.

289. See Falk et al., *supra* note 217, at 159-60 (describing and summarizing various models); Camerer & Fehr, *supra* note 262, at 78-84 (same).

290. Camerer & Fehr, *supra* note 262, at 80.

291. *Id.*

292. *Id.* at 82.

293. *Id.*

294. *Id.*

295. See Falk et al., *supra* note 217 (integrating inequity aversion model with reciprocity model). At times in the past, all three had proposed both inequity aversion and reciprocity theories. See *id.*

296. *Id.* at 179.

297. *Id.* at 176-79.

298. *Id.*

299. *Id.*

300. *Id.* Herbert Gintis and Samuel Bowles label this behavior “strong reciprocity.” Herbert Gintis & Samuel Bowles, *The Evolution of Strong Reciprocity: Cooperation in Heterogeneous Populations*, in 65 THEORETICAL POPULATION BIOLOGY 17, 18 (2004)

The conditional cooperator model has been tested further in laboratory and field experiments. Fischbacher, Gächter, and Fehr examined these tendencies in a unique public goods game that specifically measured how much people's willingness to cooperate was based on the cooperation of others.³⁰¹ In this game, people were given the opportunity to fill out a table of contributions, indicating their preferred contribution based on increasing levels of average contributions by the group.³⁰² The experimenters found that most people were neither free-riders nor pure altruists.³⁰³ About 50% were conditional cooperators, increasing their contributions in proportion to the contributions of others.³⁰⁴ About 30% of the subjects turned out to be free-riders.³⁰⁵ In a field experiment designed to test conditional cooperation, experimenters informed students about the contributions of others to a voluntary social fund.³⁰⁶ People who were informed that contributions were higher than they expected tended to increase their contributions.³⁰⁷ The data thus supported the conclusion that "people behave pro-socially conditional on the pro-social behavior of other persons."³⁰⁸

b) The Ultimatum Game

The ultimatum game is another social dilemma game that focuses specifically on people's propensity for benevolent and vengeful behavior. In this game, the experimenter selects random pairs of people and gives them

[hereinafter *Evolution of Strong Reciprocity*]. A plethora of labels exists in this area. For simplicity's sake, this paper labels inequity aversion, strong reciprocity, and other such behaviors that are conditioned on what and how well others are doing as "reciprocity."

301. Urs Fischbacher et al., *Are People Conditionally Cooperative? Evidence from a Public Goods Experiment*, 71 *ECON. LETTERS* 397, 397-98 (June 2001), available at <http://sciencedirect.com>.

302. *Id.* at 400.

303. *Id.*

304. *Id.*

305. *Id.* at 401

306. Bruno S. Frey & Stephan Meier, *Social Comparisons and Pro-social Behavior: Testing "Conditional Cooperation" in a Field Experiment*, 94 *AM. ECON. REV.* 1717, 1719 (2004).

307. *Id.*

308. *Id.* at 1720. Researchers obtained similar results in a Minnesota Department of Revenue experiment that has been much discussed in the tax law and law and social norms literature. See, e.g., Kahan, *Trust*, *supra* note 10, at 340-44. Taxpayers were informed that the overwhelming majority of people do not cheat on their taxes. Taxpayers who received the letter paid taxes at a higher rate than the control group, which did not receive the letter. STEPHEN COLEMAN, *THE MINNESOTA INCOME TAX COMPLIANCE EXPERIMENT: STATE TAX RESULTS* 18-19, 25 (1996), http://www.taxes.state.mn.us/taxes/legal_policy/research_reports/content/complnce.pdf.

a sum of money to divide.³⁰⁹ One player—the Proposer—is given the power to propose how to divide the money.³¹⁰ The Proposer can make only one offer and cannot negotiate with the other subject—the Responder.³¹¹ If the Responder accepts, then she may keep the amount offered.³¹² If the Responder rejects the offer, however, then both get nothing.³¹³ Standard assumptions about rational self-interest lead one to expect that the Proposer would offer as little as possible—e.g., one cent—and the Responder would accept, since something is better than nothing.³¹⁴

In this game too, however, people's behavior defies expectations, thus supporting the inequality aversion and reciprocity models. This experiment has been performed many times in different cultures, with different amounts, and with different procedures.³¹⁵ While there are almost no offers over 50%, the vast majority of Proposers offer between 40% and 50%, with almost no offers below 20%.³¹⁶ Responders often reject low offers (e.g., less than 30%), and the likelihood of rejection decreases with the size of the offer.³¹⁷

The ultimatum game thus demonstrates that people will cooperate at a cost to themselves and will punish others at a cost to themselves.³¹⁸ The behavior of Responders particularly supports the existence of reciprocity. They are willing to incur a significant cost³¹⁹ in order to punish what they perceive as unkind behavior.³²⁰ People are far more spiteful than most

309. This game was first developed and employed by Werner Guth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEH. & ORG. 367 (1982).

310. See Bowles & Gintis, *supra* note 254, at 9-10.

311. See *id.*

312. See *id.*

313. See *id.*

314. See Camerer & Fehr, *supra* note 262, at 69.

315. See Fehr & Schmidt, *supra* note 214, at 825-26.

316. *Id.* Fehr and Schmidt aggregated the results of ten studies conducted in Indonesia, Germany, the United States, Slovenia, Israel, Japan, and Slovakia, and determined that 71% of offers were between 40% and 50%. *Id.* at 827. The aggregate result also showed that only 3.8% of offers were for less than 20%. *Id.*

317. *Id.* at 825-27.

318. See *id.* at 827-29; Bowles & Gintis, *supra* note 254, at 9-10; Camerer & Fehr, *supra* note 262, at 69-72.

319. The amounts vary, but in one study conducted in Indonesia the total amount was the equivalent of three months' wages. See Lisa Cameron, *Raising the Stakes in the Ultimatum Game: Experimental Evidence from Indonesia*, 37 ECON. INQUIRY 47, 47 (1999). In any event, since the money is all surplus, willingness to forego it shows that people are willing to incur a cost to back up their preference for reciprocity.

320. See Fehr & Schmidt, *supra* note 214, at 827-28; Gintis & Bowles, *supra* note 300, at 17-18.

standard economic models predict.³²¹ The actions of Proposers also support a preference for equity, but they may just be acting strategically.³²² Proposers bring their knowledge of human nature into the laboratory. They know that people are willing to punish behavior perceived to be unfair, so they know they may end up with nothing if their offers are too low.³²³

c) The Dictator Game

The dictator game drastically simplifies the conditions of the ultimatum game to isolate the behavior and motivations of Proposers. The Proposer decides how to split the money provided by the experimenter.³²⁴ The other player is not a Responder in the dictator game because he has no opportunity to respond.³²⁵ Instead, the other player is a Recipient—an anonymous person in another room.³²⁶ It is completely left to the Proposer's discretion whether to give the Recipient any money.³²⁷ "Dictator games are an interesting vehicle for studying the meaning and interpretation of 'fairness'" because they "control[] for strategic behavior in the ultimatum game."³²⁸ At this point, self-interest might be expected to come to the fore because the Proposer can simply walk away with all the money.³²⁹

Once again, the result defies the predictions of the self-interest model. At least some Proposers still give Recipients money.³³⁰ Perhaps unsurprisingly, the allocations are much lower than in the ultimatum game. On average, Proposers dictate an allocation between 10% and 25% to the Recipient.³³¹ This result indicates that some of the generosity displayed by

321. See Bowles & Gintis, *supra* note 254, at 9-10.

322. See Camerer & Fehr, *supra* note 262, at 71-72.

323. *Id.*

324. The dictator game originated in Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. OF BUS. 285 (1986) [hereinafter *Assumptions of Economics*].

325. See Elizabeth Hoffman et al., *Social Distance and Other-Regarding Behavior in Dictator Games*, 86 AM. ECON. REV. 653, 653 (1996) [hereinafter *Social Distance*].

326. *Id.*

327. *Id.*

328. *Id.*

329. See Camerer & Fehr, *supra* note 262, at 72.

330. *Id.*

331. See *id.* at 16-17 (using data from NATALIE HENRICH & JOSEPH HENRICH, *EVOLUTION, CULTURE AND THE CHALDEAN*, available at <http://www.anthropology.emory.edu/FACULTY/ANTJH/Chaldeanbook/Table%20of%20Contents.htm> (last visited Mar. 13, 2006)).

Proposers in the ultimatum game is motivated by fear of rejection.³³² On the other hand, since many Proposers offer something in the dictator game, at least some Proposers in the ultimatum game may be motivated by preferences for equitable outcomes.³³³

The generosity of the Proposers also varies based on the degree of social distance between the Proposer and the Recipient or others who know about the Proposer's actions. "Social distance can be defined as the degree of reciprocity that subjects believe exists within a social interaction."³³⁴ In the standard dictator game, the Proposer knows that the experimenter will know whether he allocated any money.³³⁵ One group of experimenters set out to determine how much generosity in the dictator game was influenced by observation of the experimenter.³³⁶ The group created a double-blind procedure that assured the Proposer of anonymity. Nobody else, including the experimenter, could observe or find out what the Proposer chose to do.³³⁷ In the double-blind experiment, 64% of the offers were \$0 and only 8% offered 40% or more.³³⁸ The differences between these outcomes and those in standard dictator experiments were statistically significant—in the standard dictator experiment, 18% offered \$0 and 32% offered 40% or more.³³⁹ In a later set of experiments, the researchers changed elements of the language and procedures to vary social distance.³⁴⁰ They found that changing the degree of social distance changed the outcome, with the distributions becoming more generous as social distance decreased.³⁴¹ In another experiment where Recipients gave a short description of themselves heard by Proposers, the average allocation rose to 50%.³⁴² Context can further increase allocations by making the recipient more "deserving" or sympathetic—as in an experiment where the Recipient was the Red Cross.³⁴³

332. See Camerer & Fehr, *supra* note 262, at 72.

333. See *id.*; Fehr & Schmidt, *supra* note 214, at 827-28.

334. Hoffman et al., *Social Distance*, *supra* note 325, at 654 n.3.

335. *Id.*

336. See Elizabeth Hoffman et al., *Preferences, Property Rights, and Anonymity in Bargaining Games*, 7 GAMES & ECON. BEHAV. 346 (1994) [hereinafter *Preferences*].

337. See *id.*

338. See Hoffman et al., *Social Distance*, *supra* note 325, at 653-54.

339. See *id.*

340. See *id.*

341. See *id.* at 654 tbl.1, 658.

342. See Iris Bohnet & Bruno S. Frey, *Social Distance and Other-Regarding Behavior in Dictator Games: Comment*, 89 AM. ECON. REV. 335, 338-39 (1999) [hereinafter *Social Distance and Other-Regarding Behavior*].

343. See Catherine C. Eckel & Philip J. Grossman, *Altruism in Anonymous Dictator Games*, 16 GAMES & ECON. BEHAV. 181 (1996). In that experiment, which duplicated the

d) Summary

Research indicates that reciprocity is a powerful, but not inevitable, influence on human behavior. Preferences for cooperation appear to be common, but there are also people who will prefer to behave in a “selfish” manner. If the institutions—or “rules of the game”—tend to allow reciprocity to induce and foster pro-social behavior, then cooperative outcomes are more likely.

2. *How Reciprocity Explains the Behavior of the Jamband Community*

Reciprocity appears to explain the most important characteristics of the social norms of the jamband community. The following Sections describe the most salient features of reciprocity, how they can foster cooperative behavior under the right conditions, and how the jamband community taps into reciprocity to foster such behavior.

a) (Some) People Are Pre-Disposed to Play by the Rules

Some people are pre-disposed to cooperate and treat others kindly. The theoretical models that explain reciprocity posit the presence of three different types of people: conditional cooperators, willing punishers, and rational egoists.³⁴⁴ Conditional cooperators will start out cooperating if they anticipate that others will do so, and will continue to cooperate if others do so and if the outcomes remain fairly distributed.³⁴⁵ If others do not cooperate, however, they will begin to reduce their cooperation. “Without communication or institutional mechanisms to stop the downward cascade, eventually only the most determined conditional cooperators continue to make positive contributions.”³⁴⁶ The rational egoists or “selfish types”³⁴⁷

double-blind procedure of Hoffman et al. in *Social Distance*, see *supra* note 325 and accompanying text, the Red Cross received an average of around 30% (with several Proposers donating all of the money), in contrast to the standard double blind version in which Recipients received about 10%. See Eckel & Grossman, *supra* at 187. In a prisoner’s dilemma game, experimenters similarly manipulated social distance and found that participants were less likely to defect when other participants were fraternity brothers, as opposed to police officers or students at other universities. See Peter Kollock, *Transforming Social Dilemmas: Group Identity and Cooperation*, in *MODELING RATIONAL AND MORAL AGENTS* 186 (Peter Danielson ed., 1997).

344. These terms come from Ostrom, *supra* note 248, at 142. Bowles and Gintis use terms with very similar meanings: “Cooperators,” “Reciprocators,” and “Selfish Agents.” See Bowles & Gintis, *supra* note 300, at 18. Fehr and Gächter divide the world into “reciprocal or selfish types.” Fehr & Gächter, *supra* note 216, at 160; see also Falk et al., *supra* note 217, at 179.

345. See Ostrom, *supra* note 248, at 142; Falk et al., *supra* note 217, at 179.

346. Ostrom, *supra* note 248, at 142.

will act opportunistically for their own benefit, unless something constrains them.³⁴⁸ The willing punishers may supply such a constraint. Their preferences for reciprocity and equitable outcomes are so strong that they are willing to punish those who they perceive as unkind or uncooperative, even at a cost to themselves.³⁴⁹

Too many have viewed the file-sharing problem with something akin to pure pessimism.³⁵⁰ The existence of these three behavioral types indicates that we ought to view people—including music fans—more realistically. “[I]nstead of pure pessimism or pure optimism,”³⁵¹ one must recognize that people have both the potential to behave well and the potential to behave badly. Neither the rule-breaking of mainstream file-sharers nor the compliance of jamband fans should surprise us, since conditional cooperators and selfish types are present in both populations. Although this point may seem utterly prosaic (some people are cooperative, others are not), it is worth making. The outcomes in both the mainstream music community and the jamband community are both plausible; neither one is inevitable.

The challenge is setting up conditions that encourage compliance. Cooperation is more likely to prevail when conditions allow conditional cooperators and willing punishers to get the upper hand.³⁵² If conditional cooperators perceive that others are cooperating, they will continue to do so. The jamband community fosters a perception of cooperation, as examples of highly visible compliance abound. Compliance is even more likely if willing punishers are able to exercise their preference to punish opportunistic behavior.

b) Under the Right Conditions, Conditional Cooperators Will Play by the Rules

People are conditional cooperators. In situations that call for cooperating and playing by the rules, people’s cooperation depends on whether

347. Falk et al., *supra* note 217, at 179.

348. See Ostrom, *supra* note 248, at 139-42; Fehr & Gächter, *supra* note 216, at 160.

349. See Ostrom, *supra* note 248, at 142; Fehr & Gächter, *supra* note 216, at 160.

350. See *supra* notes 4-5 and accompanying text.

351. Ostrom, *supra* note 248, at 154.

352. See Ostrom, *supra* note 248, at 142-43. As Fehr and Gächter state: “[d]etails of the institutional environment, like the presence of incomplete contracts or of costly individual punishment opportunities, determine whether the reciprocal or selfish types are pivotal.” Fehr & Gächter, *supra* note 216, at 160; see also Bowles & Gintis, *supra* note 300 (setting forth a model simulating how a predisposition to reciprocity may have evolved based on the presence of some reciprocators or willing punishers in the population); Falk et al., *supra* note 217, at 179 (noting importance of “institutional set-up”).

they perceive a situation as fair.³⁵³ Such perceptions of fairness are based on whether or not others are receiving a windfall from behaving opportunistically. Even if an individual receives some benefit from cooperation, she will judge an outcome to be unfair if others are free-riding or receiving more than their “fair” share. Thus, she will withhold cooperation in a public goods game if others are free-riding³⁵⁴ and will punish a proposer in an ultimatum game if she believes the proposer is keeping more than a fair share.³⁵⁵ On the other hand, if she perceives outcomes to be fair, she will cooperate.³⁵⁶ Unlike the mainstream music industry, jambands create conditions that encourage cooperation. They benefit from conditional cooperation, as fans perceive their behavior as fair and because they perceive that other fans are playing by the rules.

Significantly for copyright owners, preferences for fairness appear to influence market behavior. Daniel Kahneman and others have studied how consumers’ perceptions of fairness with respect to factors like pricing, profit margins, wage setting, and rent influence their economic behavior and, in turn, constrain the behavior of other market actors.³⁵⁷ What is “fair” is a matter of subjective perception: people have some subjectively fair reference transaction in mind against which they measure the fairness of a transaction.³⁵⁸ Such perceptions of unfairness matter because they

353. See Falk et al., *supra* note 217, at 179.

354. See *supra* Section III.B.1.

355. See *id.*

356. See *id.*

357. See, e.g., Kahneman et al., *Entitlements in the Market*, *supra* note 248, at 738-40 (using results of consumer survey on fairness in various transactions to explain apparent anomalies in market behavior); see also ARTHUR OKUN, *PRICES AND QUANTITIES: A MACROECONOMIC ANALYSIS*, 139-55 (1981) (discussing fairness as a constraint on price setting for concert tickets, popular new cars, and other scarce consumer products); Bruno S. Frey & Werner W. Pommerehne, *On the Fairness of Pricing - An Empirical Survey Among the General Population*, 20 J. ECON. BEHAV. & ORG. 295 (1993) (providing survey research on perceptions of fairness in pricing); Daniel Kahneman et al., *Assumptions of Economics*, *supra* note 324, at 285 (discussing how perceptions of fairness fit into standard economic markets); Robert M. Solow, *On Theories of Unemployment*, 70 AM. ECON. REV. 1 (1980) (discussing fairness as a constraint on wage reduction during times of unemployment); Lan Xia et al., *The Price is Unfair! A Conceptual Framework of Price Fairness Perceptions*, 68 J. MKTG. 1 (2004) (discussing effect of marketing and framing on perceptions of price fairness).

358. See Kahneman et al., *Entitlements in the Market*, *supra* note 248, at 729 (describing the reference transaction, a relevant price or wage to which people compare other transactions, as a “central concept in analyzing the fairness of actions in which a firm sets the terms of future exchanges”). As Fehr and Schmidt note, that reference point cannot be predicted theoretically, but rather must be determined empirically. Fehr & Schmidt, *supra* note 214, at 818.

strongly influence behavior. People are willing to pay “fair” prices and allow companies “fair” profits.³⁵⁹ However, if they believe a company is exploiting market power or acting opportunistically,³⁶⁰ they are willing to punish the company even at a cost to themselves.³⁶¹ In a real life example of ultimatum game-type retaliation, Kahneman’s research indicated that people would be willing to drive an extra five minutes to avoid patronizing a more convenient store that mistreated its workers or raised its prices to take advantage of the closing of a competitor.³⁶²

Retaliatory behavior in the marketplace is quite relevant to the problem of file-sharing. Consumers are infamous for their antipathy for the music industry.³⁶³ They assert that the prices for CDs are “too high”; that the industry rips off artists; and that CDs contain only a minority of worthwhile songs.³⁶⁴ These complaints are all offered as reasons or excuses for file-sharing. Although one may dismiss these assertions as mere rationalizations, the research on reciprocity suggests there may be greater significance to these complaints. Regardless of their validity, perceptions of unfairness are important because people are willing to punish companies for them. When people can choose whether or not to pay for a product, being despised as unfair can have serious economic consequences.

359. As Kahneman notes, “[n]ormative status is not claimed for” the label of fairness; rather it is shorthand description for the subjective perception of people about what is fair. Kahneman et al., *Entitlements in the Market*, *supra* note 248, at 729. Perceptions of fairness can result from a previous transaction setting the standard or from framing effects. *See id.* at 729-32.

360. *Id.* at 734-36.

361. *Id.* at 736.

362. *Id.* Kahneman also ran an ultimatum game variant experiment where people were given a choice of splitting \$10 evenly with somebody who treated others fairly or \$12 with somebody who had treated others unfairly. *Id.* Three-quarters chose to get half of \$10 rather than half of \$12 to avoid benefiting an unfair actor. *Id.*

363. *See supra* notes 173, 175, and accompanying text.

364. *See, e.g.*, MusicIndustryLaw.com, Nine Things the Record Industry Should Note about the Future of Music, <http://www.musicwars.net/ninethings.html> (last visited Mar. 28, 2006) (explaining that in order to play fair, the music industry should rid itself of “7-album deals, bogus royalty reductions, excessive recoupables, controlled composition clauses, [and] domain name hi-jacking”); Paul, *supra* note 175 (“music lovers – don’t call us consumers; music can’t be consumed – see the record companies as greedy, clueless profiteers quick to jack up prices while placing limits on what music gets released and how you can listen to it”); Jonathon Dee, *The Summer of Screamo*, N.Y. TIMES, June 29, 2003, § 6 (Magazine), at 26 (describing views of musician Beck, who asserts that the music industry is the most poorly run, most unfair industry in the world, since major-labels saturate the music scene with bands, only to drop them when they don’t succeed, leaving them “with nothing”).

Conversely, being viewed as fair has some economic benefits. People come to the jamband community pre-disposed to cooperate. When they find the bands to be generous—allowing trading and copying and treating fans well in other respects—they reciprocate by treating the band fairly in return. A telling moment occurred recently when the Mermen, a band that tours modestly sized clubs nationally, had its equipment stolen. Fans rallied to raise money for new equipment. As one fan on a message board said in urging others to donate money: “While I have never seen the band, I have heard them many times through this site. . . . These types of bands are small and not wealthy but let us listen to their music for free.”³⁶⁵ Note the willingness to reciprocate with a band with which the fan had no other connection than free music. Although this example is one of charity for a smaller band,³⁶⁶ other examples abound.³⁶⁷ The perception of fair treatment of fans inspires fair treatment in return. Jamband community members often urge one another to play by the rules and buy the bands’ commercial releases to show appreciation for all the free music. The perception that jambands behave fairly appears to inspire at least part of the remarkable cooperativeness of the jamband community.

As noted above, conditional cooperators care not only about “fairness” but also about whether other people are playing by the same rules they are. As the results of public goods games show, people will withhold cooperation if they perceive that others are reaping a windfall from free-riding.³⁶⁸ “Individuals dislike being a so-called ‘sucker,’ i.e., being the only one who contributes to a public good while the others free ride.”³⁶⁹ On the other hand, “[t]hose who believe that others will cooperate in social dilemmas are more likely to cooperate themselves.”³⁷⁰ This is the behavior that charities try to evoke with challenge grants or depictions of busily ringing phones in public television pledge drives.³⁷¹ As discussed earlier,

365. Mermen Equipment Stolen, Internet Archive Forums, <http://www.archive.org/iathreads/post-view.php?id=37225> (last visited Feb. 27, 2006).

366. Small, but not penniless—the stolen equipment was valued at \$60,000. *See* Mermen’s Gear Stolen in Las Vegas, <http://www.mermen.net/equip.shtml> (last visited Mar. 13, 2006).

367. Besides the example of fans following, advocating, and helping to enforce bands’ rules regarding copying, which is the most important example for this paper’s purposes, jamband fans show an almost fanatical dedication, promoting bands on a volunteer basis and pouring labor into community related projects like open source software and online archives. *See supra* notes 176-182 and accompanying text.

368. *See* Ostrom, *supra* note 248, at 140.

369. Frey & Meier, *supra* note 306, at 17.

370. Ostrom, *supra* note 248, at 140.

371. *See* Strahilevitz, *Charismatic Code*, *supra* note 244, at 572 n.3.

people react well to cooperation by others: they will indirectly reciprocate by also cooperating. They are also averse to inequity, however, and in the presence of free-riding will withhold cooperation or punish others if the opportunity is available.³⁷²

Reciprocity may explain compliance or non-compliance with certain laws. As conditional cooperators, people tend to do what they see others doing. Dan Kahan has thus proposed that reciprocity explains why people voluntarily comply with tax laws.³⁷³ Citing a study sponsored by the Minnesota Department of Revenue, Kahan contends that people are more or less willing to obey tax laws depending on their perceptions as to what other people are doing.³⁷⁴ If they perceive that others are complying, they are likely to comply; if they perceive that others are not complying, they are less likely to comply.³⁷⁵

This phenomenon appears to be at work in both the mainstream music industry and the jamband community. People take cues from the behavior of others.³⁷⁶ When they are exposed to wide-spread file-sharing, their “propensity to file-share [is] reinforced” notwithstanding legal condemnation.³⁷⁷ The perception and reality are mutually reinforcing, as ever-increasing amounts of file-sharing trigger increasing awareness of rule-breaking, thus engendering “reciprocity cascades.”³⁷⁸ By contrast, the jamband community has created conditions that encourage compliance with copyright restrictions. Through the etree.org website, on discussion forums and e-mail lists, and on fans’ personal websites the message is pounded home: the jamband community is not a place where unauthorized

372. See Ostrom, *supra* note 248, at 140; see also *supra* notes 298-308, 318-323, and accompanying text.

373. See Kahan, *Trust*, *supra* note 10, at 340-41.

374. See *id.* (citing COLEMAN, *supra* note 308).

375. See *id.*

376. See *id.*

377. Strahilevitz, *Charismatic Code*, *supra* note 244, at 567-68.

378. See *id.* at 567-71. This is a secondary point made by Strahilevitz, who was primarily interested in why people upload or “donate” files on file-sharing networks. He concluded that uploading is a cooperative behavior promoted by reciprocity. See *id.* at 560-71. Among mainstream file-sharing networks like the old Napster and Gnutella, “charismatic code” deceived people into believing that many people were sharing files, thus encouraging greater voluntary compliance with the norm of “sharing” (i.e., uploading copyrighted works). See *id.* at 550-51. Strahilevitz earlier described a similar phenomenon with respect to carpool lanes in San Diego. The government began to allow solo drivers to pay to use carpool lanes. Once the program was implemented, it was impossible for other drivers to tell whether solo drivers in the carpool lane were breaking the rules or simply paying the fee. Compliance with carpooling laws rose. See Strahilevitz, *Commodifying California’s Carpool Lanes*, *supra* note 10, at 1249-55.

copying is tolerated or common. In the jamband community, reciprocity thus causes compliance to beget compliance.

c) Reduced Social Distance Encourages Cooperation

Decreasing social distance makes reciprocity more likely to influence people's behavior. People are more likely to cooperate and treat others well if they are not isolated and alienated from those who are affected by their actions.³⁷⁹ For example, in the dictator game, people are more likely to act kindly when their acts are known to others or when recipients are made more sympathetic.³⁸⁰ Similarly, when players were allowed to communicate or even to simply observe one another in the public goods game, they were far more likely to cooperate.³⁸¹ Reciprocity is thus related to sociality. The more one is isolated from others, the less likely it is that reciprocity will engender benevolent, cooperative behavior.

Mainstream music fans are not likely to feel much closeness or sympathy for music bands. One fan expressed a common attitude: "I've watched enough MTV to know that most of the rock stars whose songs are being stolen the most live so comfortably that I can't possibly feel sorry for them."³⁸² Rock stars are distant figures, separated by the many layers of distribution and promotion that comprise the mainstream music industry.

In the jamband community, bands have a closer connection to fans. The fans are more tied to one another and to the bands they follow. Fans communicate using a wide array of online tools and meet up at shows.³⁸³ They collaborate on projects together, working together to distribute shows and build a community.³⁸⁴ The bands are also less distant from fans: band members and their representatives communicate directly with fans.³⁸⁵ Business models create both the perception and reality that the band is in business for itself, rather than working for distant, abstract enti-

379. See *supra* notes 334-343 and accompanying text.

380. When people had a description of the recipient, felt some social connection, or the recipient was a charity, they were more likely to behave generously. See *supra* notes 336-343 and accompanying text (citing and describing studies by Hoffman, et al., *Preferences*, *supra* note 336; Bohnet & Frey, *Social Distance and Other-Regarding Behavior*, *supra* note 342; and Eckel & Grossman, *supra* note 343).

381. See Bohnet & Frey, *Southern of Silence*, *supra* note 277 (noting that cooperation increased with observation); Ostrom & Walker, *supra* note 278 (varying the conditions of public goods game to allow for communication).

382. David McGuire, *Downloading: The Next Generation*, WASH. POST, Feb. 28, 2005, at 1, available at <http://www.washingtonpost.com/wp-dyn/articles/A59632-2005Feb28.html>.

383. See *supra* Part III.

384. See *id.*

385. See *id.*

ties like a record label, concert promoters, and Ticketmaster, who take money from fans and give the band a small percentage.³⁸⁶ While the jamband community is not a close-knit group, many mechanisms draw members closer together and help to reinforce norms based on reciprocity.

d) Punishing Non-Compliance Reinforces Cooperation

Models of reciprocity also account for the existence of free-riders.³⁸⁷ Like any other community, the jamband community has free-riders. Partial anonymity makes it easy to free ride by breaking the rules—perhaps by selling concert recordings, or by engaging in illegal trading activity, such as the duplication of commercial releases. Such behavior could quickly destroy the community, as bands might be inclined to withdraw permission to tape and trade. One way to counter the harmful effect of free-riding is by setting conditions so that people can punish non-cooperators.³⁸⁸

The jamband community enables its members to enforce the rules.³⁸⁹ There are many individuals who are willing to enforce the rules. They serve as moderators on e-mail lists and discussion boards, etree administrators, and self-appointed guardians of the group norms. On e-mail lists and discussion forums, they appear swiftly to educate naïve rule breakers or vehemently scold those who flout the rules willfully. There is also the threat of being banished as a “bad trader” or of having one’s internet protocol (IP) address blocked. Such punishment helps to sustain the norms of the community.³⁹⁰

e) Conclusion

The jamband community demonstrates that it is possible to encourage norms that support compliance with copyright by tapping into reciprocity. It is necessary, however, to establish the right conditions. In the context of experimental games, this means changing the rules of the game quite literally. The rules need to be set up so that conditional cooperators are not

386. *See id.*

387. *See id.*

388. Bowles & Gintis have argued convincingly that the presence of even a few strong reciprocators in a group helps to stabilize the behavior of the group at an equilibrium of pro-social behavior. *See Gintis & Bowles, supra* note 300. Strong reciprocators thus help to establish and sustain norms that benefit the group.

389. Mike Wren, who played a key role in creating Furthurnet and etree.org, notes that he endeavored to make it easy for community members to detect and report rule breaking. Wren Interview, *supra* note 130.

390. It is interesting to note, however, that severe punishment does not appear to be a frequent occurrence in the jamband community. Social rebukes seem to be sufficient. In addition, order is also fostered by the strong conforming effect of widespread compliance. *See supra* notes 373-378 and accompanying text.

discouraged from behaving pro-socially. The conditions of the game need to be set up so that conditional cooperators do not perceive selfish types as gaining the upper hand. Allowing communication, reducing isolation, and evoking sympathy for the other party are also important. Opportunities to punish also improve outcomes.

The jamband community offers a real life example of how important institutions are to tapping into reciprocity to support compliance with copyright laws. Many of the conditions are the same as those of the mainstream music industry: the laws are the same, the subject matter is the same, and the fans are drawn from the same wide spectrum of American culture, including both selfish and cooperative individuals.³⁹¹ What make the difference are the business practices and rules set by the bands, and the social networks they support and encourage.³⁹² These institutions foster the formation of social norms that support copyright. The next Part discusses how the mainstream music industry might learn some lessons from the jamband community in order to write new rules of the game that allow reciprocity to encourage cooperation.

V. LESSONS LEARNED

Since the voluntary compliance of jamband fans with copyright law ultimately flows from the deeply rooted, universal behavioral trait of reciprocity, it may be possible to export the success of the jamband community. This Part discusses the lessons to be drawn from the jamband experience and how they might be applied to the mainstream music industry.

A. Don't Assume the Worst About Music Fans

In light of the millions of people engaged in illegal file-sharing, this statement might be hard to swallow for both the music industry and those who see themselves as realists. Nevertheless, consider that although the

391. Some self selection is likely at work in the jamband community. People may join the jamband community because it appeals to their cooperative nature. It is unlikely, however, that every member of the jamband community is a conditional cooperator and thus naturally inclined to cooperate. Rather, those who are less naturally cooperative become inclined to cooperate because conditions allow the conditional cooperators in the community to set the tone and direction. Conversely, there is no reason to believe that conditional cooperators are absent from the mainstream music community, and thus unable to lead others to compliance under the proper circumstances. *See supra* notes 353-374 and accompanying text.

392. *See* Falk et al., *supra* note 217, at 179-80. "In the presence of reciprocal and selfish subjects, institutions determine which type of preference is pivotal for the equilibrium outcome. In a sense, institutions select the type of player that shapes the final result." *Id.* at 179.

music industry appears to have lost sales to file-sharing, it has not lost the majority of its sales. Most people are still buying music legally. It seems likely that at least some of those people could download music illegally if they chose to do so.

Although the focus on massive non-compliance with copyright law is understandable, the phenomenon of massive *compliance* with copyright law deserves some consideration. Illegal file-sharing is a large problem, but still marginal. The challenge of reducing file-sharing is second in importance to ensuring that most people continue to comply with copyright law most of the time. Most people obey the law because of social norms. Therefore, the music industry should focus on developing and maintaining social norms that encourage widespread voluntary compliance. If most people are persuaded by social norms to comply with copyright law, the music industry and authorities could focus their efforts more efficiently on a handful of people who are not.

The example of the jamband community thus offers reason for copyright owners to consider how they might win people over to their side. If copyright owners pour most of their efforts into enforcement, they will miss the opportunity to encourage voluntary compliance by fostering pro-copyright social norms. In the long term, business practices and rhetoric that encourage voluntary compliance appear to be the most viable solutions to the file-sharing problem.

B. Build Communities Based on Sustained Relationships Between Fans and Bands

As the example of the jamband community shows, people are more likely to cooperate with others when they are in a social context³⁹³ and have reason to find the other party sympathetic.³⁹⁴ As copyright compliance becomes largely a matter of choice, people need to be treated as more than anonymous consumers. People participating in a loyal fan community are far more likely to perceive themselves as having a reciprocal relationship with the artist.

Quality music, consistently delivered over time, is most likely to generate the sort of loyal following that is found in the jamband community. Fans need a reason to be loyal, and loyalty needs time to develop. Jambands pride themselves on their improvisational prowess, long shows, endless tours, and ever-changing setlists. While this style of music may

393. See *supra* notes 379-386 and accompanying text. As the dictator game experiments of Hoffman et al., show, the less isolated people are, the more likely they are to treat others benevolently. See Hoffman et al., *Social Distance*, *supra* note 325.

394. See *supra* notes 379-386 and accompanying text.

not be to everyone's taste, a general lesson can be drawn: put the music first and keep giving fans plenty of what they like. One-hit wonders are unlikely to prosper in such a world.

Just as important, jambands build communities by engaging their fans directly. Smaller bands communicate directly on message boards and through e-mail. Bands with larger followings do not engage in as much personal communication, but members of their organizations are active participants in online discussions, providing news and soliciting fan opinions. Perhaps more compellingly to some fans, bands also give fan communities preferred access to free recordings and videos, special limited commercial releases, early ticket sales, and fan appreciation shows. When artists connect so directly and positively with fans, fans are more likely to heed artists' calls to forego illegal downloads.

Increasingly, bands who desire a tighter relationship with fans are using social sites favored by young people, like myspace.com.³⁹⁵ Myspace.com allows individuals to build webpages containing personal photographs, blogs, and message boards where friends leave messages.³⁹⁶ Users then designate others as being in their network of friends. Myspace creates a vast online social scene. Bands have stepped into this social scene, building pages that look a lot like those of individual users.³⁹⁷ They communicate with fans directly through these pages in the apparent hope of being perceived as peers by their fans.³⁹⁸ Interestingly, fans seem to respond, leaving messages that are personal in nature.³⁹⁹

395. See Myspace Music, <http://music.myspace.com/index.cfm?fuseaction=music> (last visited Mar. 10, 2006).

396. See Myspace.com: A Place for Friends, <http://www.myspace.com/> (last visited Mar. 10, 2006).

397. See, e.g., Matisyahu's Page, <http://www.myspace.com/matisyahu> (last visited Mar. 13, 2006). Matisyahu is, perhaps, the perfect example of a non-mainstream musician who is using unconventional tactics to build a loyal community of fans. Matisyahu is a reggae-hip hop artist, who also happens to be a dedicated Hasidic Jew who sings and raps about his faith and refuses to perform on the Sabbath. Teresa Wiltz, *Funny, He Doesn't Look Jamaican*, WASH. POST, Feb. 19, 2006, at N04. Despite this unlikely profile for a pop music star, his albums currently (spring, 2006) sit at the top of the reggae and college music charts. He has built his following through an array of now familiar jamband tactics: relentless touring, allowing people to tape and trade his shows, and availing himself of community building forums like myspace.com.

398. See, e.g., Drummer Jonah Checks in From the Road Between Bonnaroo and Wakarusa, Posting of Matisyahu's drummer to blog.myspace.com, (June 20, 2005, 5:10 pm), <http://blog.myspace.com/index.cfm?fuseaction=blog.view&friendID=14225079&blogID=32345252&Mytoken=ECF2496D-1268-13FB-7F34156B49B4212B27259216>.

399. See *id.*

Other bands stay connected by releasing weekly or monthly podcasts.⁴⁰⁰ These podcasts typically contain news, updates, and about forty-five to sixty minutes of music, usually taken from a band's live performances. These podcasts keep bands in touch with their fans and provide fans with another legal way to spread the news about their favorite bands.

Fans also may feel more connected with jambands because the artists are often directly involved in all aspects of the music fan's experience. Jambands are often quite entrepreneurial, owning their own record labels and production companies and selling concert tickets directly to fans when possible.

Some of these lessons are among the most difficult to translate to the mainstream music industry. Its current business model centers on discovering a band or musician and turning it into a mass marketed star. Grass roots communication takes much more detail work, and the economies of scale that currently benefit the mainstream music industry are not present. Of course, the music industry can adapt and change its business model. In the end, organizations rewrite the rules of the game to suit new circumstances.⁴⁰¹ Often, new organizations rather than existing ones produce the change necessary to adapt to changed circumstances.⁴⁰² If the music industry does not adapt, then it may be organizations like the jamband community that step into the breach.

C. Improve Perceptions of Fairness

The music industry would benefit greatly from being perceived as fair. One might be tempted to rephrase that statement as "the music industry must behave more fairly," but objective fairness is not what matters. As research by Daniel Kahneman and others shows, people will alter economic behavior when they perceive that the other party is being unfair.⁴⁰³

400. See, e.g., Umphrey's McGee Podcasts, <http://www.umphreys.com/music/#podcasts>; Tealeaf Green Podcasts, <http://www.tealeafgreen.com/music.php#podcasts> (last visited Mar. 10, 2006).

401. See Douglass North, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 73-82 (1990) (describing organizations as the principal agents of institutional change).

402. Paul Ingram, *Changing the Rules: Interests, Organizations, and Institutional Change in the U.S. Hospitality Industry*, in THE NEW INSTITUTIONALISM IN SOCIOLOGY 258, 258-59 (1998).

403. Kahneman et al., *Entitlements in the Market*, *supra* note 248, at 729; see also *supra* notes 357-362 and accompanying text.

“Fairness” may be a soft concept,⁴⁰⁴ but it has real economic consequences.

The music industry already has some familiarity with the problem of perceptions of fairness from its experience with pricing concert tickets. The existence of scalpers shows that ticket prices are set “artificially” low.⁴⁰⁵ Concert promoters could charge much more for tickets than they do.⁴⁰⁶ Kahneman and others who have examined this seemingly puzzling phenomenon have proposed that the music industry is constrained by consumers’ notions of fairness.⁴⁰⁷ People might resentfully pay a “scalper” what they consider an unfair price to see their favorite band. But if that favorite band acted with similar unfairness, it probably will not stay a favorite for long. Mistreating fans has long term costs.

The music industry needs to extend this fairness to other aspects of its business model. It cannot afford to dismiss complaints about CD prices, product quality, and poor treatment as mere rationalizations for file-

404. Perceptions of fairness are subjective—people feel entitled to some particular price or particular type of treatment and are willing to incur a cost to punish firms that deviate from these norms of fairness. See Kahneman et al., *Entitlements in the Market*, *supra* note 248, at 729 (stating that if notions of fairness restrict actions of profit-seeking firms, more detailed economic analysis might be useful). What these reference points are is a matter for empirical inquiry. That task should not be too daunting for the entertainment industry, concerned as it is with market research and catering to and influencing tastes.

405. Not all concerts sell out—it is often hard to set the “right” price for a one-time event. Nevertheless, many bands consistently sell out, but never raise ticket prices to a level that precludes scalping. “Persistent pricing of tickets at a level that permits scalping is a puzzle for neoclassical economic models of concerts. Why don’t performers or promoters raise the price of tickets and capture some of the revenue from the secondary market for themselves?” Marie Connolly & Alan B. Krueger, *Rockonomics: The Economics of Popular Music* 25-26 (Nat’l Bureau of Econ. Research, Working Paper No. 11282, 2005), available at <http://www.irs.princeton.edu/pubs/pdfs/499.pdf>.

406. Connolly and Krueger surveyed 858 fans at a 2002 Bruce Springsteen concert. *Id.* at 27. They found that 20-25% of tickets had been purchased from scalpers at an average price of \$280. The face value of the tickets was \$75. *Id.* at 27-29. If Springsteen and his band could have sold all tickets for the show at the market price of \$280, they would have made \$4 million more (($\$280 - \75) x 19,738 tickets) on that single concert! *Id.* Even if they could not have sold all tickets at the \$280 price, it appears that scalpers took between \$1.1 to \$1.4 million that the band could have obtained instead. *Id.* In any event, the foregone revenue opportunities are sizable, considering the actual face value must have grossed about \$1.5 million. These opportunities would seem to be present frequently, considering that one-third of concerts sell out and ticket brokers are widespread. *Id.* at 25.

407. Kahneman et al., *Entitlements in the Market*, *supra* note 248, at 729; OKUN, *supra* note 357, at 139-55. Connolly and Krueger discuss a few other possible explanations, including Gary Becker’s theory that demand for concerts increases as the number of people attending grows. Connolly & Krueger, *supra* note 405, at 25-26.

sharing. These perceptions make a difference in how people behave. Now that people essentially have a choice as to whether to pay for music, it is best to avoid provoking the retaliatory spirit of punishing those who are unfair.

To achieve a perception of fairness, the music industry ought to consider both a public relations makeover and a change in attitude. Jambands treat fans with the hyper-sensitive care of the service industry. While the mainstream music industry also cares what fans think, it seems more oriented toward marketing products than ensuring that fans have a good overall experience. This difference in orientation appears to make a difference in how the fans perceive the bands, which in turn appears to make a difference in their willingness to follow rules.

Jamband fans view jambands as motivated, in part, by the interests of fans. The bands work hard to provide fans with a positive experience.⁴⁰⁸ String Cheese Incident is perhaps the paradigmatic example.⁴⁰⁹ It ensures that fans have a high quality experience through its extensive business organization, which includes a record label, a ticketing agency, a travel agency, and a charitable foundation.⁴¹⁰ Its concerts are described as “an effort to transform the traditional concert environment,” with festivals held in beautiful locations, high quality sound, lower ticket prices, and artistic events in which the fans participate.⁴¹¹ The band has even set itself up as an advocate for fans by making “a commitment to take on the Empire when it filed a lawsuit against Ticketmaster.”⁴¹²

A prime example of fairness on the part of jambands is allowing fans to tape and distribute concert music. These recordings serve as the basis of a community, they provide free advertising, they feed the obsession of the most intense fans, and they make fans more favorably inclined to bands overall. Allowing trading of live recordings and older, less profitable material could go a long way toward increasing perceptions of fairness.

408. As discussed in Part III, jambands provide their fans with generous benefits. Most obviously, they allow fans to record and distribute concert tapes. They also try to make the concert experience as pleasant as possible. For one thing, concert ticket prices are, on average, lower than the mainstream prices. Where possible, jambands circumvent the Ticketmaster monopoly and its resulting high fees. They pay attention to the quality of venues, concert sound, and lighting. They hold festivals in pleasant vacation-type settings and bill them as celebrations of their fans.

409. See BUDNICK, *supra* note 95, at 209.

410. See *id.*

411. *Id.* at 207.

412. *Id.* at 209.

The little things also count. Recently, the band Government Mule bundled a year-old CD with a new EP. Fans generally resent bands bundling a small amount of new material with old songs, forcing them to pay full price for a release that contains only a few new songs. Jambands do things differently. As the online magazine Jambands.com put it: “Before you get mad and think that the Mule has done an (Elvis) Costello and is forcing diehards to repurchase their original purchase, the band has taken care of matters. Those who don’t have a copy of the group’s last album, *Deja Voodoo*, should find the EP bundled with that release. Those who already bought that 2004 disc can place it in their computer in order to access a ‘secret website’ via Sony Connected technology.”⁴¹³ Note that Government Mule is on a major label—Sony—but this behavior is not typical of major labels. Jambands who sign with major record labels often have to fight to get the record labels to treat their fans well.⁴¹⁴

Understanding the relationship that bands have with their fans may be an urgent business priority for the music industry. As the industry already understands from the experience of concert ticket pricing, they may have to forego some revenue opportunities to keep fans coming back in the long run. Treating customers right is always important, as they almost always have a choice as to whether to buy one’s product. But treating customers well is especially essential when they can choose not to pay and obtain the product for free. To make fans happier, the music industry can start by addressing common complaints about CD pricing, quality, and opportunistic business practices like bundling small amounts of new material with old.

D. Give People a Chance to Comply and More Will Follow

Our position, from the beginning, was that 80% of the people stealing music online don’t really want to be thieves. . . .

[I]t’s just wrong to steal. Or, let’s put it another way: it is corrosive to one’s character to steal. We want to provide a legal alternative. And we want to make it so compelling that all those people out there who really want to be honest, and really don’t want to steal, but haven’t had a choice if they wanted to get their music online, will now have a choice. And we think over time, most people stealing music

413. John Patrick Gatta, Review of Mo’ Voodoo EP, http://www.jambands.com/CDReviews/content_2005_07_07.15.phtml (last visited Mar. 13, 2006).

414. The most well-known example was Phish’s negotiation to continue to allow taping when it signed with Elektra. See *supra* note 99 and accompanying text.

will choose not to if a fair and reasonable alternative is presented to them. We are optimists. We always have been.

Steve Jobs

Founder and CEO of Apple, Inc.

December 3, 2003 Interview, *Rolling Stone*⁴¹⁵

Is Steve Jobs right? Do people really just need to be given a chance to comply with copyright law? One might predict that very few people would use Apple's iTunes music service if they are at all guided by rational self-interest.⁴¹⁶ If one has the means and knowledge to install and use iTunes software, then one could just as easily do the same with file-sharing software. Given the choice between free music and paying, with an extremely small chance of being sued for infringement, one might predict that potential iTunes customers would opt for free music instead. This prediction is contradicted by a billion paid downloads from iTunes as of February 23, 2006.⁴¹⁷ The success of iTunes shows that mainstream music fans can be persuaded to restrain themselves from infringing behavior. It also represents the music industry's most successful contribution so far to fostering pro-copyright norms.

To create the right conditions for cooperative behavior, people first need a chance to comply. Many people are inclined to cooperate, as shown by the results of experimental games and other instances where people choose not to act opportunistically.⁴¹⁸ For this reason, iTunes and other services are more viable than they might have first appeared. Although it is difficult to compete with a free product, a reasonably priced alternative will dissuade many from breaking the law.

It is also important to give people a prominent example that others are complying. To some extent, people take their cues from the behavior of others.⁴¹⁹ Others will follow the good example of cooperators, if that example exists. People also prefer that outcomes are fair. Not only do they need to feel they are getting a fair deal, but they do not want to be disad-

415. Jeff Goodell, *Steve Jobs: The Rolling Stone Interview*, ROLLING STONE, Dec. 25, 2003, at 31, available at http://www.rollingstone.com/news/story/59396001/steve-jobs_the_rolling_stone_interview.

416. If self-interest is narrowly equated with pecuniary interests—here getting music for free—the actions of iTunes users do not make sense. However, if one considers that people have preferences for reciprocal behavior, then use of iTunes makes sense as a rational way to fulfill those reciprocal preferences.

417. See Apple Website, Apple iTunes: 1 Billion Songs, <http://www.apple.com/itunes/1billion/> (last visited Feb. 26, 2006).

418. See *supra* notes 368-378 and accompanying text.

419. See *id.*

vantaged compared to others.⁴²⁰ People are pre-disposed to obey the law, but nobody wants to be the last sucker who is actually paying for music.

Because people need to know they are not alone in complying, the recording industry needs to reconsider its message to the public. The rhetoric about file-sharing often veers into hyperbole, portraying millions of people breaking the law and the industry's fate hanging in the balance.⁴²¹ That rhetoric may be appropriate for litigation and lobbying purposes, but it does not give people the impression that compliance is common. Portraying the music industry as a victim fighting an uphill battle against massive infringement is more likely to encourage non-compliance than engender sympathy. People need to know *both* that they are not alone in complying and that the music industry is vigorously pursuing infringers. This more confident message would communicate that compliance is the norm, but that those who infringe do not have an unfair advantage over those who comply.

The iTunes example shows that the recording industry can win by serving its customers well. Give people a chance to comply, and some will do so. They will set a good example for others, provided that this example is highlighted rather than undermined by discussions of massive infringement that make one seem foolish for complying with copyright law.

420. *See id.*

421. *See, e.g.*, Resolution of Music United, <http://www.publicknowledge.org/doc/20050909-music-united-resolution.doc>, Sept. 15, 2005 (asking Congress to grant FCC authority to regulate digital radio). The music industry resolution uses typically apocalyptic rhetoric, asserting that:

[D]igital theft of music has caused extreme harm to the American music industry over the past five years. . . [It] stifles the careers of new artists, betrays the songwriters and recording artists who create it and threatens the livelihood of . . . thousands of working people—from recording engineers to record-store clerks—who are employed in the music industry.

Id.; *see also* *Hollywood takes on Web Pirates*, CNN.COM, Dec. 15, 2004, <http://www.cnn.com/2004/BUSINESS/12/15/film.piracy/index.html> (regarding BitTorrent, Edonkey, and DirectConnect, Malcolm, head of worldwide anti-piracy at the Motion Picture Association of America, stated: "This is another category of pirate. . . . These people are parasites leeching off the creativity of others."); Rachel Ross, *How Copy Protection Works and Doesn't*, TORONTO STAR, Mar. 1, 2004, at D02 ("This is a war says Rob Brooks, vice president at EMI Music Canada . . . thousands and thousands of people in the music industry are losing their jobs . . .").

E. Let the Fans Do Some of the Work

Many have heralded the possibilities of “peer production”;⁴²² the jam-band community demonstrates the potential of “peer consumption.” Peer production harnesses networked communications and new forms of social organization to enable groups of volunteers to produce remarkable products, like the Linux operating system.⁴²³ As powerful as peer production can be, it likely is not the best model for the music industry. Amateur production has its limits, and not everyone wants to or can collaborate voluntarily to create music and entertainment.⁴²⁴ Some, however, are willing to cooperate to help the professionals who create music by distributing music, promoting musicians, paying for their commercial releases, and helping to ensure that others play by the rules by paying for commercial releases. As the jam-band community shows, consumer collaboration—or “peer consumption”—can be a powerful addition to strategies employed to persuade people to comply with copyright voluntarily.

Artists should thus find ways to get fans involved in distribution and promotion as much as possible. Ceding control to fans makes them active participants in enforcing copyright restrictions. Some people have such a strong preference for reciprocity that they are willing to incur costs to monitor the behavior of others and punish them. If they are placed in a context where they can monitor and sanction others, they will do so.⁴²⁵ Such a role for fans helps to push the community equilibrium toward compliance far more deftly than the slow, heavy machinery of legal department review, subpoenas, cease-and-desist demands, and lawsuits. Some ways to accomplish this goal include encouraging fans to start groups that run e-mail lists, fan websites, and online forums. If those

422. See Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L. J. 369, 376-77 (2002) (describing how peer production enables individuals to overcome collective action problems to collaborate voluntarily on open source software and other information projects).

423. *Id.* at 380.

424. As Professor Jane Ginsburg describes, “sustained works of authorship” like books, movies, and music, which require a substantial investment of time by one or a few individuals, are often best produced by professionals who use their control of copyright to ensure remuneration. Jane C. Ginsburg, *Putting Cars on the “Information Superhighway”*: Authors, Exploiters, and Copyright in Cyberspace, 95 COLUM. L. REV. 1466, 1499 (1995).

425. Costs cannot be too high. Mike Wren reported that in the jam-band communities he helped create—including etree.org and Furthurnet—he made sure that reporting and sanctioning mechanisms were easy to access and use. This ease of reporting and use has helped ensure that people actually take advantage of the opportunity to monitor and sanction others. Wren Interview, *supra* note 130.

groups are then given concert recordings or podcasts to distribute, they might take responsibility for encouraging enforcement.

In sum, focusing on the highest intensity fans is likely a winning strategy. Even if it does not result in widespread copyright compliance, an artist is likely to cement his or her relationship with fans by involving them in distribution and compliance efforts. Such intense fans may be more willing to spend money to support an artist by buying limited run CDs, t-shirts, and other additional items.

VI. CONCLUSION

So far, the music industry's strategy of instilling fear in potential file-sharers has had limited success. Deterrence has its place, but laws that try to alter the behavior of millions of people require widespread normative support. Support will only come if people are convinced that complying with copyright law is the right thing to do. The music industry would thus do well to look to the example of the jamband community. The social norms of the jamband, rooted as they are in the common behavioral trait of reciprocity, offer a model to which to aspire. The task for the mainstream music industry is to consider how to make reciprocity work in its favor too. The experience of the jamband community indicates that changing people's behavior will require the music industry to build sustained communities around artists and to foster and maintain a better, closer relationship with its fans.