

## Curbing Consumer Complicity for Counterfeits in a Digital Environment

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# Curbing Consumer Complicity for Counterfeits in a Digital Environment

## I. INTRODUCTION

THE GLOBAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS ON the Internet is a problem that involves business managers, government policymakers, and legal advisors. The use of the web provides a portal for any consumer to discover markets, gather information, and conduct transactions.<sup>1</sup> However, the growth of this digital network allows unscrupulous consumers to disregard a firm's intellectual property rights and obtain fake products through downloading.<sup>2</sup> The overall positive growth in global technology, such as Internet penetration rates, has also paradoxically created a lucrative distribution channel for the counterfeit trade that with the continual advent of new web technology, such as streaming, has created a quagmire for enforcement agencies.<sup>3</sup> According to the Internet World Stats,<sup>4</sup> the percent of the 2011 global population distribution of Internet users in the world is comprised of these regions: Asia (44%), Europe (22.7%), North America

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1. See WILLIAM ANDREWS SAHLMAN, *THE ENTREPRENEURIAL VENTURE: READINGS SELECTED* 101 (2nd ed. 1999) (explaining that the Internet provides opportunities “for direct, ubiquitous to links to anyone anywhere, [allowing] companies [to] build interactive relationships with customers and supplies, and deliver new products and services at very low cost”).

2. See Debra Wong Yang & Brian M. Hoffstadt, *Countering the Cyber-Crime Threat*, 43 AM. CRIM. L. REV. 201, 204 (2006) (explaining that the entertainment and software industries are frequent victims of cyber crime through the illegal downloading, copying, and online distribution of copyrighted materials); Jason J. Lunardi, Note, *Guerilla Video: Potential Copyright Liability for Websites That Index Links to Unauthorized Streaming Content*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1077, 1078–80 (2009) (discussing streaming videos' increase in popularity and the ease with which websites can post infringing content).

3. See Lunardi, *supra* note 2, at 1080 (discussing the ease at which new video streaming websites emerge once others are shut down); Sanjay Jain, *Digital Piracy: A Competitive Analysis*, 27 MKTG. SCI. 610, 610 (2008) (“With the growth of the Internet, piracy is becoming even more prevalent because copying of intellectual properties is becoming easier and more difficult to prevent.”). Cf. Yang & Hoffstadt, *supra* note 2, at 207 (discussing the policy considerations of “*who* should be responsible for protecting American industry against cyber-attacks and . . . who should bear the losses associated with such attacks”) (emphasis in original).

4. See INTERNET WORLD STATS: USAGE AND POPULATION STATISTICS, <http://www.internetworldstats.com> (last updated Aug. 20, 2011) (reviewing current statistics on the Internet and world Internet penetration data).

(13%), Latin America/Caribbean (10.3%), Africa (5.7%), the Middle East (3.3%), and Oceania/Australia (1%).<sup>5</sup> However, a closer look at these statistics reveals that the regions of Africa, the Middle East, and Latin America are the fastest emergent markets with growth rates of over 1,000 percent in the past decade.<sup>6</sup>

The augmentation of legislation designed to curb Internet piracy, such as the Digital Millennium Copyright Act (DMCA),<sup>7</sup> has ignited controversy surrounding its enforcement, especially regarding the “safe harbor” provisions.<sup>8</sup> The divergent outcomes of the litigation filed against eBay for selling counterfeit goods at its Internet auction site by both Tiffany’s and Louis Vuitton is testimony to the dilemma facing firms that goods are sold by way of the Internet.<sup>9</sup> In July 2008, after four years in the U.S. court system, a U.S. judge ruled that eBay was not liable regarding counterfeit jewelry sold at its site.<sup>10</sup> However, in June 2008, a French court awarded Louis Vuitton €38 million for eBay’s failure to block the sale of its luxury good items.<sup>11</sup>

According to the Business Software Alliance (BSA),<sup>12</sup> the consumption of fake computer software is related to a variety of factors that include consumer education, enforcement of the laws protecting intellectual property, and the

5. *Internet Users in the World: Distribution by World Regions - 2011*, INTERNET WORLD STATS: USAGE AND POPULATION STATISTICS (Mar. 31, 2011), <http://www.internetworldstats.com/stats.htm> [hereinafter *Internet World Stats Penetration Rate Survey 2011*] (reporting the results of 2,095,006,005 Internet users on March 31, 2011).

6. *See id.* (reporting internet usage for Africa: 2,547.4%; Middle East: 1,987.0%; and Latin America: 1037.4%).

7. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter DMCA]; *see also Executive Summary: Digital Millennium Copyright Act*, U.S. COPYRIGHT OFFICE, [http://www.copyright.gov/reports/studies/dmca/dmca\\_executive.html](http://www.copyright.gov/reports/studies/dmca/dmca_executive.html) (last visited Sept. 17, 2011) (summarizing how the DMCA addresses infringement in a digital environment).

8. *See* Trevor Cloak, Note, *The Digital Titanic: The Sinking of YouTube.com in the DMCA’s Safe Harbor*, 60 VAND. L. REV. 1559, 1569–70 (2007) (discussing the DMCA’s safe harbor provisions’ vague language and susceptibility to multiple interpretations). The safe harbor provisions of the DMCA protect Internet service providers from liability in copyright infringement claims so long as they meet certain qualifications. *Id.* at 1561; *see also* 17 U.S.C. § 512 (2006) (explaining the activities which will qualify Internet service providers for limitations on liability).

9. *See* Tiffany (NJ) Inc. v. eBay, Inc., 576 F. Supp. 2d 463, 470 (S.D.N.Y. 2008), *aff’d in part*, 600 F.3d 93 (2d Cir. 2010) (affirming that eBay was not liable for direct trademark infringement in allowing counterfeit jewelry to be sold in its internet-based auction marketplace). The Second Circuit remanded Tiffany’s cause of action for false advertising. *Tiffany (NJ) Inc.*, 600 F.3d at 114. *But see* SA Louis Vuitton Malleter v. eBay, Inc., Tribunal de Commerce [TC] [commercial court] Paris, June 30, 2008, First Section B, No. 200607779, *available at* [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=2353](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2353) (ordering eBay to pay over €38 million in damages to French manufacturers for allowing the sale of counterfeit products); *see also* Elizabeth K. Levin, Note, *A Safe Harbor For Trademark: Reevaluating Secondary Trademark Liability After Tiffany v. eBay*, 24 BERKELEY TECH. L.J. 491, 493–94 (2009) (comparing eBay’s liability for selling counterfeit products in courts in Europe and in the United States).

10. *Tiffany*, 576 F. Supp. 2d at 470.

11. SA Louis Vuitton Malleter, First Section B, No. 200607779; *see also* Doreen Carvajal, *French Court Tells eBay to Pay for Counterfeits*, N.Y. TIMES, July 1, 2008, at C1 (describing the French court’s order that eBay pay €38 million, nearly \$61 million, to Moët Hennessy Louis Vuitton).

12. BUS. SOFTWARE ALLIANCE, <http://www.bsa.org> (last visited Sept. 12, 2011).

simplicity of retrieving pirated software.<sup>13</sup> In previous studies, the BSA has also reported the role that culture, institutional effectiveness, and geography can play in curbing software piracy.<sup>14</sup> Obviously, the increased use of the Internet, broadband access, and peer-to-peer networking in emerging markets such as Brazil, Russia, India, and China (BRIC) have affected the growth of digital piracy.<sup>15</sup>

In 2011, the BSA trade alliance reported in its *Eighth Annual BSA Global Software Piracy Study* that an estimate of \$59 billion of software was illegally obtained in 2010 with an overall 42% global piracy rate.<sup>16</sup> The BSA cautions the growth in software piracy in emerging markets by reporting that, “[j]ust six years ago, the commercial value of the PC software that was being pirated in emerging economies accounted for less than a third of the world total. Last year [2010], it accounted for more than half -- \$31.9 billion.”<sup>17</sup> According to the BSA:

*[T]he basic method for coming up with the piracy rate and commercial value of unlicensed software in a country is as follows: 1) Determine how much PC software was deployed during the year; 2) Determine how much was paid for or otherwise legally acquired during the year; and 3) Subtract one from the other to get the amount of unlicensed software. Once the amount of unlicensed software is known, the PC software piracy rate is computed as a percentage of total software installed.*<sup>18</sup>

In the next two sections of this article, a brief review of a recent case against British Telecom in the United Kingdom (UK) and the pending legislation in the United States, *The Commercial Felony Streaming Act* (S. 978),<sup>19</sup> is given to highlight recent events designed to curb consumer complicity in a digital environment.<sup>20</sup>

13. PEGGY CHAUDHRY & ALAN S. ZIMMERMAN, *THE ECONOMICS OF COUNTERFEIT TRADE: GOVERNMENTS, CONSUMERS, PIRATES AND INTELLECTUAL PROPERTY RIGHTS* 140 (2009). See *Third Annual BSA and IDC Global Software Piracy Study*, BUS. SOFTWARE ALLIANCE, at 9 (May 2006), <http://www.bsa.org/country/Research%20and%20Statistics/~media/C9DA2873DCB84135957CB39B9FA2B666.ashx> [hereinafter *Third Annual BSA Survey*].

14. CHAUDHRY & ZIMMERMAN, *supra* note 13, at 140. See *Third Annual BSA Survey*, *supra* note 13, at 9 (“We also see issues such as culture, institutional effectiveness, and even geography having an impact on the ability of countries to decrease piracy.”).

15. CHAUDHRY & ZIMMERMAN, *supra* note 13, at 140. See *Third Annual BSA Survey*, *supra* note 13, at 9 (predicting that over 100 million new Internet users will emerge from China, India, and Russia by the end of 2009); see also *Eighth Annual BSA Global Software 2010 Piracy Study*, BUS. SOFTWARE ALLIANCE, at 3–6, 16 (May 2011), [http://portal.bsa.org/globalpiracy 2010/index.html](http://portal.bsa.org/globalpiracy%202010/index.html) [hereinafter *Eighth Annual BSA Survey*] (comparing mature markets, such as the U.S. and Japan, with emerging markets such as “the so-called ‘BRIC’ economies of Brazil, Russia, India and China, which are the world’s fastest-growing technology markets but also home to rampant piracy”).

16. *Eighth Annual BSA Survey*, *supra* note 15, at 2.

17. *Id.* at 1.

18. *Id.* at 12.

19. For an in-depth overview of U.S. legislation in intellectual property enforcement, see the reports, OFFICE OF THE IPEC, EXEC. OFFICE OF THE PRESIDENT, 2010 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR ANN. REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT (2011), [http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec\\_annual\\_report\\_feb2011.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_feb2011.pdf), and OFFICE OF THE IPEC, EXEC. OFFICE OF THE

## II. THE ROLE OF AN INTERNET SERVICE PROVIDER TO REDUCE COMPLICITY: THE CASE OF BRITISH TELECOM IN THE UK

In 2011, Jonathan Fildes of the British Broadcasting Corporation (BBC) in the UK reported on the dilemma of litigating against Internet service providers as a way of monitoring consumers' illegal activity on the web, and British Telecommunications (BT) seeking a temporary moratorium on assisting anti-piracy measures.<sup>21</sup> Basically, anti-piracy firms have been partnering with the music and film sector to use software to monitor file-sharing sites to identify the Internet protocol (IP) addresses used to share the content of these rights-holders.<sup>22</sup> Law firms in the UK can then apply for a court order to obtain the mail address of these consumers whose IP address has been used to obtain illegal content on the web.<sup>23</sup> A letter is sent to the alleged pirate to either pay a one-time fee or settle in a UK court.<sup>24</sup> The controversy reported by Fildes is that an IP address can be spoofed and does not identify a personal computer, just an Internet connection that can be shared by several consumers, "hijacked," and/or used without consent.<sup>25</sup>

On June 28, 2011, Josh Halliday of *The Guardian* in the UK reported on the landmark legal case against BT, the largest Internet service provider (ISP) in the UK, to shut down the site Newzbin2 that allegedly provides several illicit versions of films, such as *The King's Speech*.<sup>26</sup> The recent court case was launched by major

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PRESIDENT, ADMIN. WHITE PAPER ON INTELLECTUAL PROPERTY ENFORCEMENT LEGIS. RECOMMENDATIONS (2011), [http://www.whitehouse.gov/sites/default/files/ip\\_white\\_paper.pdf](http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf) [hereinafter ADMIN. WHITE PAPER].

20. See also Peggy E. Chaudhry et al., *Piracy in Cyber Space: Consumer Complicity, Pirates and Enterprise Enforcement*, 5 ENTER. INFO. SYS. 255, 260 (2011) (discussing the Digital Millennium Copyright Act and the No Electronic Theft Act as examples of legislation designed to deter piracy).

21. Jonathan Fildes, *BT seeks moratorium on internet piracy cases*, BBC NEWS: TECH. (Oct. 4, 2010, 2:17 PM), <http://www.bbc.co.uk/news/technology-11467347>. The article also discusses how anti-piracy firms and rights holders use consumers' Internet protocol (IP) addresses to compile lists of digital pirates and apply for court orders to obtain their physical addresses. *Id.* (citing Rory Cellan-Jones, *ACS:Law: The Leaked List and the Digital Economy Act*, BBC NEWS: DOT.RORY (Sept. 28, 2010, 5:18 PM), <http://www.bbc.co.uk/blogs/thereporters/rorycellanjones/2010/09/acslaw.html>).

22. *Id.*

23. *Id.*

24. *Id.*

25. See *id.* ("The BBC has been contacted by a number of people saying they were wrongly accused by [a law firm attempting to enforce copyrights]."). An IP address can give law enforcement incomplete or misleading information regarding who is responsible for illegal activity. See Marcia Hofmann, *Why IP Addresses Alone Don't Identify Criminals*, ELEC. FRONTIER FOUND. (Aug. 24, 2011), <https://www.eff.org/deeplinks/2011/08/why-ip-addresses-alone-dont-identify-criminals> (stating that agents from Immigration and Customs Enforcement conducting a criminal investigation seized an individual's hard drives using a warrant based on his IP address). The individual was allowing other consumers to route their traffic through his IP address so that they could hide their IP addresses. *Id.* The agents later returned the individual's property after they determined he was not responsible for the criminal activity in question. *Id.*; see also Ernesto Van der Sar, *Pirate Bay Tricks Anti-Pirates with Fake Peers*, TORRENTFREAK (Oct. 20, 2008), <https://torrentfreak.com/the-pirate-bay-tricks-anti-pirates-with-fake-peers-081020/> (noting that one torrent website inserts fake IP addresses when a program requests a list of current users).

26. See Josh Halliday, *Film Studios Want BT to Block Website Offering The King's Speech*, THE GUARDIAN (June 28, 2011, 9:16 AM), <http://www.guardian.co.uk/technology/2011/jun/28/bt-newzbin2-king-s-speech> (explaining that the website, Newzbin2, contained 75 pirated versions of *The King's Speech*). Newzbin2 and its

film studios, such as Disney, Fox, and Paramount Pictures, and is being represented by the Motion Picture Association (MPA).<sup>27</sup> The site Newzbin2 has an estimated 700,000 members and was reported to have a profit of £1 million by providing 115,000 films and 320,000 television shows.<sup>28</sup> In just one month, the film industry won this landmark case of making Internet service providers, such as BT, block access to these illicit websites, with the High Court judge ordering BT to disallow its customer access to the Newzbin2 site.<sup>29</sup> Mark Prigg, Science and Technology Editor of the London Evening Standard asserted that:

*[t]he test case result, the first of its kind against an ISP, could now see other sites banned amid a major crackdown on online piracy. It means tens of thousands of people will no longer be able to visit Newzbin2, which is hosted abroad, and represents a watershed moment over access to downloads.*<sup>30</sup>

### III. THE COMMERCIAL FELONY STREAMING ACT IN THE UNITED STATES

In March 2011, the Executive Office of the President of the United States published its report *Administration's White Paper of Intellectual Property Enforcement Legislative Recommendations* that proposed three legislative changes to assist enforcement agencies in battling infringement as follows:

*1) Clarify that, in appropriate circumstances, infringement by streaming, or by means of other similar new technology, is a felony; 2) Authorize DHS [Department of Homeland Security], and its component U.S. Customs and Border Protection (CBP), to share pre-seizure information about, and samples of, products and devices with right holders to help DHS to*

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predecessor/successor Newzbin1 index a part of the Internet called Usenet. See *Twentieth Century Fox Film Corp. v. British Telecomms. PLC*, [2011] EWHC 1981 (Ch) [26] (explaining the development of Newzbin). Newzbin allows individuals to see the location of copyrighted material, and members can download and create a file that links to copyrighted material. *Id.* at [30]–[32], [35]. Once the file is opened, the individual can download the actual copyrighted material from its Usenet location. *Id.* at [25]–[36], [40], [47]–[49]; NEWZBIN, <http://www.newzbin.com> (last visited Sept. 6, 2011); *Newzbin: NZB Specs*, NEWZBIN, [http://docs.newzbin.com/index.php/Newzbin:NZB\\_Specs?printable=yes](http://docs.newzbin.com/index.php/Newzbin:NZB_Specs?printable=yes) (last visited Sept. 6, 2011).

27. See *Twentieth Century Fox Film Corp. v. British Telecomms. PLC*, [2011] EWHC 1981 (Ch) [1] (explaining that this lawsuit was brought by “six well-known film production companies or studios . . . [and] are members of the Motion Picture Association of America Inc.”). The applicants in this case were: (1) Twentieth Century Fox Film Corporation; (2) Universal City Studios Productions, LLLP; (3) Warner Bros. Entertainment, Inc; (4) Paramount Pictures Corporation; (5) Disney Enterprises, Inc.; and (6) Columbia Pictures Industries, Inc. *Id.*

28. See *id.* at [30] (“Newzbin Ltd had around 700,000 members . . . [and] had a turnover in excess of £1 million and a profit in excess of £360,000.”); see also Halliday, *supra* note 26 (“Newzbin2 currently helps distribute about 115,000 illegal versions of films and 320,000 TV shows.”).

29. See *Twentieth Century Fox Film Corp. v. British Telecomms. PLC*, [2011] EWHC 1981 (Ch) [11]–[13], [204] (granting the plaintiff studios’ requested order that BT prevent its customers from using Newzbin and Newzbin2).

30. Mark Prigg, *BT Ordered to Block Film Piracy Site*, THE STANDARD (July 28, 2011), <http://www.thisislondon.co.uk/standard/article-23973619-film-studios-await-landmark-Internet-piracy-ruling.do>.

*determine whether the products are infringing or the devices are circumvention devices; and 3) Give law enforcement authority to seek a wiretap for criminal copyright and trademark offenses.*<sup>31</sup>

Based on the first recommendation, Senators Amy Klobuchar, John Cornyn, and Christopher Coons have sponsored *The Commercial Felony Streaming Act* (the Act) to address the need to make the act of illegally streaming copyrighted content a felony.<sup>32</sup> The Motion Picture Association of America, Inc. described the problem that this new legislation addresses as:

*[w]hile existing law provides felony penalties for willful copyright infringement, such penalties only apply to defendants who illegally reproduce or distribute copyrighted work. Due to technological advances since enactment of these penalties, copyrighted content can now be illegally streamed, not just downloaded, online. However, it is unclear whether Internet streaming constitutes distribution of copyrighted works, and therefore eligible to be prosecuted as a felony.*<sup>33</sup>

Sandra Aistars, Executive Director of the Copyright Alliance, in her testimony to the Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet, succinctly stated the problem and the need for legal recourse in her statement arguing that:

*illegitimate distributors are increasingly turning to streaming to deliver works because it is faster, cheaper and more convenient. As a result, at any given time, users are one or two clicks away from listening or viewing any television program, movie, music video or song in the world – all with no return to the creator.*<sup>34</sup>

Sandra Aistars further asserted that this Act will harmonize the penalties in sync with other forms of copyright infringement and would signal to distributors at illicit streaming sites that they can face prosecution.<sup>35</sup> Sandra Aistars also urged the committee on the judiciary to reflect on the fact that several legal alternatives to

31. ADMIN. WHITE PAPER, *supra* note 19, at 2.

32. THE COMMERCIAL FELONY STREAMING ACT, S. 978, 112th Cong. (2011). Senator Christopher Coons (D-DE) was also a cosponsor. *Id.*

33. S. 978: *The Commercial Felony Streaming Act*, MPAA.ORG (May 16, 2011), available at <http://www.mppaa.org/Resources/2f0f3647-2403-40cd-9638-16ee42ec8373.pdf> [hereinafter S. 978: *The Commercial Felony Streaming Act*].

34. *Protecting Legitimate Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Intellectual Property, Competition, and the Internet*, 112th Cong. 3 (2011) (statement of Sandra Aistars, Exec. Dir., Copyright Alliance).

35. *Id.*

video streaming are available to consumers, such as Sony’s Music Unlimited or Major League Baseball’s MLB.com.<sup>36</sup>

The possible penalties for piracy under this Act are fines and jail sentences if a consumer streams ten or more television episodes or movies in a 180-day period, and if the retail value of the digital content is more than \$2,500 and the licenses greater than \$5,000.<sup>37</sup> This Act is supported by the U.S. Chamber of Commerce, the Motion Picture Association of America, the Independent Film and Television Association, Directors Guild of America, International Alliance of Theatrical Stage Employees, Screen Actors Guild, American Federation of Television and Radio Artists, Ultimate Fighting Championship, National Association of Theater Owners, and the Recording Industry Association of America.<sup>38</sup> So, how will this legislation act as a deterrent to curb consumer complicity? In the next section, an overview of academic research in consumer complicity debates this question.<sup>39</sup>

#### IV. CONSUMER COMPLICITY FOR FAKES

The academic literature in the fields of business ethics, marketing, international business, and the like is replete with studies that aim to describe the different variables that either define the complicit consumer (e.g., age, income), their attitude towards illicit goods (e.g., an anti-big business sentiment), an ethical perspective (e.g., piracy is an immoral act), or other variables that stimulate the illicit act, such as the ease of downloading or streaming illegal content.<sup>40</sup> Table 1 is based on what we deem intrinsic (e.g., personal characteristics of the consumer) versus extrinsic (e.g., the virtual shopping environment) that shape the overall demand for complicity of fake goods.<sup>41</sup>

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36. *Id.*

37. THE COMMERCIAL FELONY STREAMING ACT, S. 978, § 1(a)(2)(A)–(B), 112th Cong. (2011).

38. *See S. 978: The Commercial Felony Streaming Act*, *supra* note 33 (listing the supporters of the Act).

39. *See infra* Part IV.

40. *See, e.g.*, Peggy E. Chaudhry & Stephen A. Stumpf, *Consumer Complicity With Counterfeit Products*, 28 J. CONSUMER MKTG. 139, 139–51 (2011) (examining factors which contribute to consumer complicity, such as “ethical ideologies, the cultural value of collectivism, hedonic shopping, ethical concern, and perceived product quality”); Stephen A. Stumpf, Peggy E. Chaudhry & Leann Perretta, *Fake: Can Business Stanch the Flow of Counterfeit Products?*, 32 J. BUS. STRATEGY 4, 4–9 (2011) (discussing meaningful distinctions between authentic and counterfeit products, and the reasons consumers are complicit); Peggy Chaudhry & Stephen Stumpf, *Getting Real About Fakes*, WALL ST. J., Aug. 17, 2009, at R4 (2009) (reporting the results of a survey of what makes Brazilian, Russian, Indian, Chinese, and American consumers buy counterfeit products).

41. *See* CHAUDHRY & ZIMMERMAN, *supra* note 13, at 63–74 (explaining that consumer complicity to buy counterfeit products is a result of both intrinsic and extrinsic factors).



TABLE 1. VARIABLES THAT INDUCE CONSUMER COMPLICITY  
TO PURCHASE COUNTERFEIT GOODS<sup>42</sup>

<i>Intrinsic Determinants</i>	<i>Extrinsic Determinants</i>
<b>Demographics of Consumer</b>	<b>Product Attributes</b>
Age, income, level of education, gender	Image/Perceived fashion content
High vs. low spenders of counterfeit goods	Price, Quality, Performance
Level of disposable income	Investment-at-risk
Other psychographic variables [e.g., risk-taker]	Purpose [personal use vs. gift]
<b>Attitude towards Counterfeiting</b>	<b>Shopping Experience</b>
Anti-big business sentiment	Location [e.g., Internet, flea market]
Social benefit of dissemination	Situation [e.g., holiday trip in China]
Attitude of counterfeits in a product category [movies vs. pharmaceuticals]	Ease of accessing counterfeits [e.g., Internet downloads]
<b>Cultural Value</b>	<b>Social Marketing Communications</b>
Individualism vs. Collectivism	Effectiveness of anti-piracy ads
<b>Ethical Perspective</b>	
Attitude towards morality and lawfulness	
Idealism and Relativism	

In 2005, the Motion Picture Association (MPA), in their study on the cost of movie piracy, found that the typical consumer of fake goods was aged 16-24, male, and lived in an urban environment.<sup>43</sup> This very general depiction of the complicit consumer based on a few demographic characteristics reveals a youthful generation willing to play in an internet piracy game.<sup>44</sup> A 2007 study conducted for the BSA by Harris Interactive, involving 1,644 youth (aged 8-18), reported the percentage of respondents freely admitting to downloading music (30%), software (11%), games (14%), and movies (8%).<sup>45</sup> The sentiment amongst these youths was that their major concerns about downloading software, music, or movies *without paying for it* were accidentally downloading a virus onto the computer (62%), getting in trouble with the law (52%), accidentally downloading spyware onto the computer (51%), and getting in trouble with their parents (48%).<sup>46</sup>

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42. *Id.* at 68, Table 5.3.

43. MPA & L.E.K., *The Cost of Movie Piracy: An Analysis Prepared by LEK for the Motion Picture Association*, 11 (2008), <http://mpa-i.org/pdf/leksummaryMPA%20revised1.2008.pdf>.

44. Chaudhry et al., *supra* note 20, at 262.

45. *Youth and Downloading*, BUS. SOFTWARE ALLIANCE, Table 1 (2007), available at [http://www.bsa.org/country/Research%20and%20Statistics/~/\\_/media/03EF7894F6A3488D97673F1B1BB29DCF.ashx](http://www.bsa.org/country/Research%20and%20Statistics/~/_/media/03EF7894F6A3488D97673F1B1BB29DCF.ashx).

46. *Id.* at Table 2.

It is clear that there are complicit consumers that are frequently downloading or streaming illicit digital content, yet, there have been relatively few studies conducted on how companies can curb this illicit demand by way of demarketing techniques.<sup>47</sup> In the book *The Economics of Counterfeit Trade: Governments, Consumers, Pirates and Intellectual Property Rights*, the authors review previous anti-piracy advertisements that have used role models, peer pressure, education, fear, negative association with distributors of fake products, and rewards through whistle-blowing to question whether any of these demarketing messages have effectively curbed consumer demand.<sup>48</sup> An example of using both education and role models to sway consumer opinion on obtaining fakes was the “Mission to Stop Piracy” campaign launched featuring both Jackie Chan and Arnold Schwarzenegger in various media spots to denounce piracy.<sup>49</sup> This campaign was launched by the Intellectual Property Department of the Hong Kong Special Administrative Region that even included a webcast of Jackie and Arnold acting out their fictional mission to stop piracy on motorcycles in a scene that links the piracy trade to organized crime.<sup>50</sup> The Business Software Alliance hosts a unique website, [cybertreehouse.com](http://www.cybertreehouse.com) that has been designed to educate young cyber consumers to better understand the value of intellectual property.<sup>51</sup> For example, at this site, a link named “Smart & Uncool” cautions a young consumer that “It’s UNCOOL to use the Internet to ... download or share copyrighted software programs, music, movies, or games without paying for them.”<sup>52</sup> Other demarketing techniques, such as reward, are illustrated at this website at the “Be Cyber Safe” link that lists the “Cyber Ethics Champion Code” that allows the young consumer to print out a certificate that reveals that he or she is a savvy cyber kid.<sup>53</sup>

Marketing professionals have established that using a demarketing tactic such as fear can be a successful disincentive to reduce consumer complicity with illicit

47. One of the few works to address this issue is the book *The Economics of Counterfeit Trade: Governments, Consumers, Pirates and Intellectual Property Rights*, by Peggy Chaudhry and Alan Zimmerman. See CHAUDHRY & ZIMMERMAN, *supra* note 13, at 75–91 (discussing anti-piracy marketing strategies to curb consumer complicity to counterfeit goods).

48. *Id.* at 75. The book illustrates various demarketing advertisements designed to curb illicit demand from the Business Software Alliance, the Motion Picture Association, and the like. *Id.* at 81–89. The book also illustrates pro-piracy advertisements that have been placed on the Internet to mock these campaigns. *Id.* at 90–92.

49. *Id.* at 82.

50. This campaign was targeted at consumers in the Asian market and the webcast was broadcast in English and in three Chinese dialects. *Id.*; see *Mission to Stop Piracy*, THE INFO. SERV. DEP’T, THE GOV’T OF THE HONG KONG SPECIAL ADMIN. REGION, [http://www.isd.gov.hk/eng/tvapi/05\\_ip19.html](http://www.isd.gov.hk/eng/tvapi/05_ip19.html) (last updated Dec. 6, 2005) (displaying the video and a transcript of dialogue between Jackie Chan and Arnold Schwarzenegger condemning the purchase of pirated material); see generally INTELLECTUAL PROPERTY DEP’T, THE GOV’T OF THE HONG KONG SPECIAL ADMIN. REGION, <http://www.ipd.gov.hk/eng/home.htm> (last updated Sept. 12, 2011) (the sponsoring organization of the “Mission to Stop Piracy”).

51. See CYBER TREE HOUSE, BUS. SOFTWARE ALLIANCE, <http://www.cybertreehouse.com> (last visited Sept. 10, 2011) (depicting how the Business Software Alliance is reaching out to young cyber-citizens).

52. *Id.*

53. See *id.* (promoting the idea that “[b]eing a smart cyber kid means respecting other people’s creativity”).

products.<sup>54</sup> Some demarketing campaigns, such as the Motion Picture Association's "You Can Click But You Can't Hide" campaign used the potential of legal prosecution as a viable tactic to slow the growth of consumer demand.<sup>55</sup> Ironically, this advertisement actually drew several blog rebuttals and advertisements against anti-piracy on the Internet, such as "You Can Sue But You Can't Catch Everyone."<sup>56</sup> The monitoring of ad campaigns on the web posted by pro-piracy advocates is an important phenomenon for companies to gauge whether future anti-counterfeiting maneuvers will actually work to alter public awareness of the protection of intellectual property rights.

There has been growth of anti-piracy campaigns in the media using a variety of messages ranging from role models denouncing piracy to interactive websites designed to develop cyber citizens of the future who will respect intellectual property rights.<sup>57</sup> The main concern is whether any of these anti-piracy tactics have actually worked to deter consumer complicity with fake goods. Of further concern is the widespread support for piracy on the Internet and the rebuttals to anti-piracy ad campaigns. The key to studying consumer complicity is to actually test the salience of demarketing messages in various media outlets to determine whether the message appeal actually changes the behavior of the targeted audience.<sup>58</sup>

## V. CONCLUSION

Companies are devoting attention and effort to devising effective ways to decrease Internet piracy, as they acknowledge that the consumer may not be aware of the magnitude of the financial losses that companies attribute to intellectual property theft and the consumer can miscalculate their ability to be prosecuted for this illicit

54. CHAUDHRY & ZIMMERMAN, *supra* note 13, at 85.

55. *You Can Click but You Can't Hide*, MOTION PICTURE ASS'N OF AM. (2004), <http://thomashawk.com/2004/10/you-can-click-but-you-cant-hide-2.html>; see also *You Can Click but You Can't Hide*, [http://en.wikipedia.org/wiki/You\\_can\\_click\\_but\\_you\\_can't\\_hide](http://en.wikipedia.org/wiki/You_can_click_but_you_can't_hide) (last updated March 3, 2011) (giving a brief synopsis of this fear-based demarketing campaign).

56. See, e.g., *Angry Remix of "You Can Click but You Can't Hide"*, <http://boingboing.net/2005/02/14/angry-remix-of-you-c.html> (last updated Feb. 14, 2011) ("You can sue but you can't catch everyone."). Cf. *Parody of MPAA "Click but you can't hide" poster* (Aug. 25, 2011, 6:32 PM), <http://boingboing.net/2004/08/25/parody-of-mpaa-click.html> ("You can click but you can't stop sneering.").

57. See Mark Sweney, *Anti-Piracy Campaign Aims to Win Over Generation Y-pay of Internet Users*, THE GUARDIAN (Sept. 7, 2009), <http://www.guardian.co.uk/technology/2009/sep/07/anti-piracy-campaign-bill-filesharing?INTCMP=SRCH> (describing an anti-piracy campaign aimed at young audiences featuring celebrities sending a positive message that legal downloading will keep the viewer's favorite actors and shows on screen); *The Beatles Back UK Anti-Piracy Music Campaign*, HUFFINGTON POST (Aug. 17, 2011), [http://www.huffingtonpost.com/2011/08/17/the-beatles-back-uk-antip\\_n\\_929631.html](http://www.huffingtonpost.com/2011/08/17/the-beatles-back-uk-antip_n_929631.html) (discussing The Beatles' and other music artists' participation in the anti-piracy campaign, "Music Matters"); see also *Mission to Stop Piracy*, *supra* note 50; CYBER TREE HOUSE, *supra* note 51.

58. See, e.g., R. Craig Lefebvre, *The 4Ps of Demarketing Tobacco Use*, ON SOC. MKTG. & SOC. CHANGE (Sept. 28, 2009), [http://socialmarketing.blogs.com/r\\_craig\\_lefebvres\\_social/2009/09/the-4ps-of-demarketing-tobacco-use.html](http://socialmarketing.blogs.com/r_craig_lefebvres_social/2009/09/the-4ps-of-demarketing-tobacco-use.html) (commenting on the effectiveness of tobacco advertisements in light of the overall positive effect on smokers' feelings about quitting smoking).

behavior.<sup>59</sup> There have been both recent trends which have facilitated the growth of digital piracy in the past decade, as well as enforcement measures acting to curb the spread of piracy.<sup>60</sup> The common denominators to assist the growth of piracy in the global marketplace are namely that, 1) Internet penetration rates are growing, especially in emerging markets, 2) the consumer is willing to download and/or stream illicit products in cyberspace, and 3) the supply of illicit content remains intact to feed consumer demand.<sup>61</sup> A few of the recent legislative and legal developments designed to impede the counterfeit market are the various enforcement tactics, such as the court case against BT in the UK,<sup>62</sup> and pending government legislation, such as *The Commercial Felony Streaming Act*.<sup>63</sup> It can be concluded that managers, lawyers, and government policymakers face a *mêlée* that continues with the same players: the pirates that feed the supply of fake products on the Internet;<sup>64</sup> the consumers who are just a click away from streaming their illicit digital content;<sup>65</sup> and the enforcement agencies that are trying to stop the supply and demand of this trade in fakes with legislation that attempts to keep up with the technology.<sup>66</sup>

Overall, policymakers should be debating how much enforcement is required to seriously demotivate the main suppliers of illegal digital content on the Internet. For example, is *The Commercial Felony Streaming Act* really going to discourage

59. CHAUDHRY & ZIMMERMAN, *supra* note 13, at 141. See Whitney D. Gunter, *Internet Scallywags: A Comparative Analysis of Multiple Forms and Measurements of Digital Piracy*, 10 W. CRIMINOLOGY REV. 15, 17 (2009) (suggesting that punishment does not deter internet pirates or non-pirates because they do not perceive the repercussions to be likely and severe).

60. See Jain, *supra* note 3, at 610 (describing the growth of piracy and companies' efforts to deter pirates, such as "making their products more difficult to copy using digital rights management software").

61. See *Internet World Stats Penetration Rate Survey 2011*, *supra* note 5 (discussing Internet penetration increases throughout the world); see also *Anti-Piracy*, BUS. SOFTWARE ALLIANCE, <http://www.bsa.org/country/Anti-Piracy.aspx> (last visited Sept. 12, 2011) (stating that "availability of pirated software" and "new users from small businesses entering the market for the first time" are factors that contribute to increased piracy rates); Halliday, *supra* note 26 (describing Newzbin2, an Internet website which allows users to access illicit material).

62. *Twentieth Century Fox Film Corp. v. British Telecomms. PLC*, [2011] EWHC 1981 (Ch) [1].

63. S. 978, 112th Cong. (2011).

64. See Kevin M. Lemley, *Protecting Consumers From Themselves: Alleviating the Market Inequalities Created by Online Copyright Infringement in the Entertainment Industry*, 13 ALB. L.J. SCI. & TECH. 613, 617 (2003) (referring to pirates as "Technology Providers" who "derive pleasure simply from beating protective systems").

65. See *id.* ("In the 'real world', we all follow the maxim that there is no such thing as a free lunch. . . . However, when we go online, we suddenly expect to take whatever we want absolutely free.").

66. See THE COMMERCIAL FELONY STREAMING ACT, S. 978, 112th Cong. (2011) (proposing amendments to the criminal penalty provisions for copyright infringement); see also *Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area*, U.S.-Jordan Free Trade Agreement, 42 U.S. CUST. B. & DEC. 1, art. 24—28 (2008) (demonstrating how intellectual property enforcement provisions are incorporated into free trade agreements); Ugolovnyi Kodeks Rossiiskoi Federatsii [Criminal Code of Russian Federation], [UK RF] [Criminal Code] 1996, art. 146 (Russ.) (discussing an international example of how legislature is struggling to curb counterfeiting of media).

both supply and demand?<sup>67</sup> As discussed in previous work, the suppliers of illicit digital content may not be motivated by financial reasons and release the illicit products on the web as a matter of arrogance in an intricate “digital war” with copyright holders.<sup>68</sup> Ironically, the issue of digital piracy is a paradoxical predicament engulfed by the continual advancement of novel technology designed to give consumers more access to movies, music, games, and the like.<sup>69</sup> On the one hand, the Internet has literally provided us with boundless opportunities to provide for our insatiable demand for entertainment and/or information on our laptops, smart phones, and the like.<sup>70</sup> Could we have conceived or understood a concept like streaming movies on a hand-held device via the web a decade ago? On the other hand, advances in technology that include both our access to the Internet through various hardware (e.g., an iPhone) and the rising Internet market penetration rates will continue to foster a virtual counterfeit market.<sup>71</sup> Such a paradox will continue to stimulate controversial discussion and debate well into the foreseeable future about how to curb consumer complicity for counterfeits in a digital environment.<sup>72</sup>

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67. See *Deja View as Governments Target Illegal Streamers*, THE BABBLING BLOG (July 29, 2011), <http://www.babbletalk.net/2011/07/deja-view-as-governments-target-illegal-streamers/> (tracing examples of how technology has stayed ahead of enforcement efforts). Cf. Lunardi, *supra* note 2, at 1080 (stating that the piracy websites “seem to constantly find new ways to facilitate the location of infringing content”); Jain, *supra* note 3, at 621 (concluding that under certain conditions, copying by pirates can have beneficial effects, such as reducing price competition that outweigh companies’ lost profits); but see Mike Masnick, *Tons of YouTube Users Putting Up Videos in Protest to S.978*, TECHDIRT (July 6, 2011, 3:59 PM), <http://www.techdirt.com/articles/20110706/01485514984/tons-youtube-users-putting-up-videos-protest-to-s978.shtml> (describing the thousands of videos YouTube users posted in disapproval of S.978); *Oppose Congress’ Criminal Streaming Bill*, ELEC. FRONTIER FOUND., <https://secure.eff.org/site/Advocacy?cmd=display&page=UserAction&id=491> (calling for opposition of S.978 because it will “impose a chilling effect around the posting and creation of online video”).

68. See Lemley, *supra* note 64, at 617 (“The main problem with [pirates] is that they are not motivated by financial gains. . . . Their primary goal is to deliver their technologies to consumers absolutely free.”).

69. See Jain, *supra* note 3, at 610 (explaining the positive correlation between the growth of the Internet and piracy).

70. See, e.g., Darla W. Jackson, *Thinking About Technology: Standard Barcodes Beware – Smartphone Users May Prefer QR Barcodes*, 103 LAW LIBR. J. 153 (2011) (discussing “quick response” barcodes, which smartphone cameras can scan to receive information); BILL2PHONE, <http://www.bill2phone.com/> (last visited Sept. 21, 2011). The Bill2Phone service allows online shoppers to check out using only their phone numbers and applies the charges directly to consumers’ phone bills. *Get to Know Bill2Phone: Alternative Online Payment Service*, BILL2PHONE, [http://www.bill2phone.com/get\\_to\\_know\\_bill2phone/](http://www.bill2phone.com/get_to_know_bill2phone/) (last visited Sept. 21, 2011).

71. See Jackson, *supra* note 70, at 154 (reporting that 52% of college students in one survey had phones with Internet access); see also *Apps for iPhone*, APPLE, <http://www.apple.com/iphone/apps-for-iphone/> (last visited Sept. 28, 2011) (boasting over 425,000 applications (“apps”) for use on the Apple iPhone, including barcode scanners for price comparison and a new version of the popular online shopping website Amazon.com); *Internet World Stats Penetration Rate Survey 2011*, *supra* note 5.

72. See, e.g., Chaudhry et al., *supra* note 20, at 266–68 (discussing new technologies, such as digital watermarking and fingerprinting, software splitting, virtual leasing, and brand protection software architecture designed to curb or detect piracy).