Introduction

Diego Gómez, a conservation biology student at the University of Quindío in Colombia, decided one day that another researcher's master's thesis could greatly benefit other researchers. Without the author's permission he shared it online with a study group, thereby violating Colombian copyright law. Aside from facing potential civil litigation, Mr. Gómez faced criminal charges. If convicted, he could spend eight years in prison simply for sharing an academic work without permission.[1]

After almost three years of court proceedings in Colombia, Mr. Gómez was eventually acquitted.[2] While ending well for Mr. Gómez, his story sheds light on the potential criminal aspects of copyright law. Individuals in modern society could potentially face substantial prison time for infringing copyright, sometimes even without gaining any direct financial benefit from their actions. In other words, in legal jurisdictions where criminal copyright exists, policymakers made a statement: on meeting a certain criterion, enforcement of copyright infringements should enter the public realm – and more specifically – the criminal law realm. By this approach, under certain circumstances the state is tasked to protect its citizens from copyright infringements.

Whether or not Diego Gómez's actions should be lawful is debatable. On the one hand, sharing content, specifically academic research, could greatly benefit society and enrich individuals' knowledge and perhaps should therefore be permitted by the law. On the other hand, much like almost any copyrighted work, academic research also necessitates incentives (monetary or otherwise) in the form of intellectual property (IP) rights. Beyond potential economic incentives, sharing one's colleagues' master's theses could greatly harm those individuals, especially if they are

[1] *See* Kerry Grens, *Student Could Be Jailed for Online Post*, The Scientist (Aug. 1, 2014), www.the-scientist.com/?articles.view/articleNo/40666/title/Student-Could-Be-Jailed-for-Online-Post.

[2] *See* Kerry Grens, *Grad Student Acquitted in Thesis-Sharing Case*, The Scientist (May 25, 2017), www.the-scientist.com/?articles.view/articleNo/49514/title/Grad-Student-Acquitted-in-Thesis-Sharing-Case.

aspiring academics. But even if Mr. Gómez should be held accountable for his alleged wrongdoing – without delving into theories that could help determine if criminal law should apply in his case – one feels intuitively that he should not have been treated as a criminal to begin with.

The case of Diego Gómez clearly illustrates how the use of criminal copyright could be absurd. It does not, however, imply that copyright law must remain only civil or even administrative in nature. There are instances where private enforcement is rather limited, and public enforcement should be considered instead. For instance, the operators of online mega platforms that knowingly host and perhaps even encourage individuals to infringe copyright might deserve interference on the state level or even the international level, especially when private enforcement could not prevail. Indeed, in recent years we have witnessed large-scale international operations against the founders and operators of platforms that enabled copyright infringements. Famous examples include Kim Dotcom, founder of the file-hosting service Megaupload, the founders of The Pirate Bay, and Kickass Torrents' alleged owner Artem Vaulin. But even if these cases change our attitude to criminal copyright, it should take more than intuition to decide whether criminal law is the panacea for the copyright infringement puzzle in the digital era.

To understand the digital challenges to copyright protection and the potential use of criminal law as a panacea for infringements, we must first understand copyright law's origins, which trace back to long before the invention of digital technology. Initially, modern copyright law was a matter of civil law. Only in 1862 in the United Kingdom, and in 1897 in the United States, was copyright first criminalized. This was the birth of *criminal copyright*. However, in its infancy, criminal copyright was rather narrow and limited. From its emergence to the 1970s, in both the United Kingdom and the United States, criminal copyright made rare legislative appearances; its scope was limited and was usually applied to specific types of works with relatively light criminal sanctions. However, in the 1970s criminal copyright gained a more dominant role in copyright law. While policymakers extended its scope to additional types of works and raised criminal penalties higher, criminal copyright was only applied to commercial infringement. More recently criminal copyright has become more dominant than ever before: many policymakers have expanded it repeatedly and extensively to cover most types of works and actions and have instituted monetary and nonmonetary sanctions. In some jurisdictions criminal copyright now also covers infringements without commercial gain. In other words, individuals could potentially serve time simply for downloading protected content.

The expansion of criminal copyright to cover most types of works and acts of infringement could potentially mark a paradigm shift in copyright law toward a criminal-oriented legal right, and raises further important questions about the protection of IP in the digital era. What is the scope of the expanding global copyright criminalization trend, and what implications could it carry for end users? What is the scope of criminal enforcement, and is it in line with the wide-ranging

criminal copyright legislation? Is criminal copyright justified by copyright and criminalization theories? What are the potential ramifications for day-to-day activities in the online environment and vis-à-vis the development of technology and civil rights and liberties? And what does the future hold for criminal copyright infringement?

Criminal Copyright tells the story of how a legal right deriving from a private commercial interest slowly integrated into the penal system of various jurisdictions by diverse means. It is a story of legislation, regulation, market forces, politics, technology, and society. It is also a story of human behavior and whether it can be shaped by the various modalities that regulate it. The potential paradigm shift to public enforcement of copyright law, more specifically to criminal copyright, must be further explored to understand its historical origins, politics, theoretical background, and justifications; criminal copyright could have huge ramifications for the legal system, technological developments, and society. On a broader, normative scale, telling the story of criminal copyright may further illustrate an important facet of the interface between criminal law and technology.

It is not, however, a story (to date) wholly untold. IP criminalization has been widely researched and explored in the academic literature. Simply to illustrate the academic scope of this matter, some scholars have compared the criminalization process in different types of IP. For example, Irina Manta made an important contribution to the discussion on IP criminalization. She argued that criminal law sanctions the violation of only some forms of IP, such as copyright and trademark, but fails to criminalize patent infringement.[3] Some scholars focused on economic justifications and ramifications: for example, Andrea Wechsler, who discussed the state of economic research in criminal enforcement of IP law;[4] Steven Penney, who explored the impact of digitization on the economics of copyright enforcement and recommends restrained expansion of criminal copyright law;[5] and Jonathan Masur

[3] Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 Harv. J.L. & Tech. 469 (2011). *See also* Grace Pyun, *The 2008 Pro-IP Act: The Inadequacy of the Property Paradigm in Criminal Intellectual Property Law and Its Effect on Prosecutorial Boundaries*, 19 Depaul J. Art Tech. & Intell. Prop. L. 355 (2009); Ronald D. Coenen Jr., Jonathan H. Greenberg & Patrick K. Reisinger, *Intellectual Property Crimes*, 48 Am. Crim. L. Rev. 849 (2011).

[4] Andrea Wechsler, *Criminal Enforcement of Intellectual Property Law: An Economic Approach*, in Criminal Enforcement: A Blessing or a Curse for Intellectual Property? 128 (Christophe Geiger ed., 2012); Robin Andrews, *Copyright Infringement and the Internet: An Economic Analysis of Crime*, 11 B.U. J. Sci. & Tech. L. 256 (2005).

[5] Steven Penney, *Crime, Copyright, and the Digital Age*, in What is a Crime? Criminal Conduct in Contemporary Society 61 (Law Comm'n of Canada ed., 2004); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 Am. U. L. Rev. 783 (2005).

and Christopher Buccafusco, who offered an economic analysis of criminal copyright (and IP) infringement.[6]

In scholarship on criminal copyright specifically, Trotter Hardy proposed an important theory to explain the public attitude, which is based on the *harm principle* in criminal law, and concludes that the public's acceptance of criminal copyright depends on its admission of a "pure" property-like view of infringements.[7] Geraldine Moohr examined criminal copyright through both the *harm principle* and *wrongfulness*.[8] Diane L. Kilpatrick-Lee, in a notable input to the criminal copyright discussion, argued that the basis for criminalizing conduct is twofold: the conduct is morally wrong and a harm is associated with it.[9]

Other scholars have discussed the effects of criminalization on copyright policy and its justifications. For instance, Geraldine Moohr reviewed criminal law theory and copyright principles, suggesting that the result of criminalization of personal use of copyrighted works is inconsistent with copyright policy.[10] Lydia Pallas-Loren discussed the American constitutional compatibility of criminal legislation in copyright and seeks the proper constitutional balance.[11] Eric Goldman analyzed the ramifications of the potential paradigm shift in American criminal copyright legislation through the No Electronic Theft (NET) Act, and offered insights on copyright criminalization.[12]

Much more important scholarship exists on this and related topics, which is set forth throughout this book. The purpose here is to provide, for the first time, a more inclusive analysis of criminal copyright. The book will further develop these and other arguments that have been raised in the literature, while also revealing many untold aspects of copyright criminalization. For a better understanding of the copyright criminalization process, it will analyze the circumstances, ramifications, and justifications of the criminalization process of copyright law. This book will also examine the criminalization process in different countries and from distinct aspects: historical, practical, legal-political, and theoretical.

Chapter 1 outlines distinctions between criminal and civil law on the one hand and public and private enforcement on the other. This discussion serves as an

[6] *See* Jonathan S. Masur & Christopher Buccafusco, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. Cal. L. Rev. 276, 295–96 (2014).
[7] I. Trotter Hardy, *Criminal Copyright Infringement*, 11 Wm. & Mary Bill Rts. J. 305 (2002).
[8] Geraldine S. Moohr, *The Crime of Copyright Infringement and Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. Rev. 731 (2003).
[9] *See* Diane L. Kilpatrick-Lee, *Criminal Copyright Law: Preventing a Clear Danger to the U.S. Economy or Clearly Preventing the Original Purpose of Copyright Law?*, 14 Balt. Intell. Prop. L.J. 87 (2005).
[10] Moohr, *supra* note 8.
[11] Lydia Pallas-Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 Wash. U. L.Q. 835 (1999).
[12] Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 Or. L. Rev. 369 (2003).

introduction to understanding copyright criminalization. To place criminal copyright in its broader context, the chapter proceeds with a discussion of international efforts to criminalize copyright infringements. It reviews, inter alia, the TRIPS Agreement, the Anti-Counterfeiting Trade Agreement (ACTA), and the Trans-Pacific Partnership (TPP), all of which require enhanced criminal IP enforcement. This chapter also extensively reviews the informal pressure to criminalize copyright law in foreign countries through the United States Trade Representative (USTR) "Special 301 Report," issued annually since 1989.

The purpose of this chapter is to lay the foundation for the core argument of the book: that copyright law is in the midst of a criminalization process that could result in a paradigm shift from civil to *criminal copyright*. It will acquaint the reader with the international context for criminal copyright and proper tools to evaluate the movement toward public enforcement models as exemplified by the case studies of the United Kingdom and the United States.

Chapter 2 provides an analysis of the criminalization process in the United Kingdom. Chosen mainly for its past imperial influence over copyright legislation in numerous overseas territories, the United Kingdom serves as an important case study in criminal copyright. Chapter 2 reviews copyright criminalization since its inception in 1862 and well into the twenty-first century. This chapter will show that since 1862, when the United Kingdom introduced criminal copyright for the first time, its scope and sanctions have repeatedly increased. While at first the United Kingdom reserved criminal copyright for unauthorized usage of painting, drawing, or photographs, since 1982 criminal copyright has been repeatedly and widely extended to include additional types of works, new acts of infringement, and higher monetary and nonmonetary sanctions.

Within the historical review, this chapter outlines potential technological and social influences on legislation, and strives to highlight the perceived motives behind such legislative acts. The proclaimed reasons were: (1) a rise in copyright infringements and infringers, due mostly to technological developments, which are not deterred by civil sanctions; (2) national interests; (3) international movement promoting criminal copyright; and (4) political forces.

Chapter 3 analyzes the criminalization process in the United States. This country was chosen for its key role and influence on the formation of contemporary international IP treaties, its global enforcement of IP, and its economic and cultural influence on domestic legislation in several countries. Recognizing various movements that led to copyright criminalization in the United States (including, but not limited to, technological developments), this chapter divides the criminalization process into two separate phases: the *low-tech phase*, at the end of the nineteenth century, and the *high-tech phase*. The latter is further divided into two sub-phases: an *analog phase*, from the beginning of the 1970s until 1992, and a *digital phase*, which began in 1992.

This chapter identifies and analyzes every Congressional Act relating to criminal copyright since its inception in 1897. It shows that during the low-tech phase and the

high-tech analog phase criminal copyright mainly targeted large-scale infringers, while the onset of the high-tech digital phase – which still prevails – marked a legislative shift to small-scale infringers. Much like Chapter 2's historical analysis of the United Kingdom, this legislative overview reveals some of the reasons behind the criminalization process: (1) a rise in copyright infringements and infringers, mostly due to technological developments that remained undeterred by civil sanctions; (2) national interests; (3) international movement toward criminal copyright; and (4) political forces.

Chapter 4 examines the hypothesis that copyright is undergoing a paradigm shift toward criminal-oriented law. Essentially, this chapter questions whether the increase in criminal provisions in copyright law leads to the changed perception of the law from a civil-focused to a criminal-oriented law. As our perception of criminal copyright also depends on practice – not solely on legislation – this chapter moves on to review enforcement and practical use of the legislative increase of criminal copyright. I present statistics on filings and prosecution of criminal copyright cases following the initial enactment of criminal copyright in the United Kingdom and the United States to assess whether litigation parallels legislation.

After establishing that the ongoing legislative process of copyright criminalization is not being enforced, or at least not to the extent expected, considering the marked expansion of criminal legislation, I search for possible explanations for what I term the *criminal copyright gap* – namely, the gap between the scope of criminal copyright liability/penalties and the infrequency of prosecution/punishment.[13] Finally, this chapter summarizes the discussion and returns to the questions it has examined: (1) is criminal copyright undergoing a paradigm shift? and (2) what are the possible reasons for and implications of the criminal copyright gap?

Chapter 5 searches for viable explanations for – and examines what led to – the copyright criminalization process, focusing on and classifying internal reasons. It conceptualizes the internal reasoning for copyright criminalization as an important piece of a broader movement of *copyright expansion*. Under this conceptualization I argue that, within copyright law, criminalization is one piece of an ongoing expansion of copyright holders' rights that have gradually increased over the years, especially in recent decades.

First, I briefly review the movement of copyright expansion to give a general background (apart from copyright criminalization) and then locate criminal copyright within the expansion movement. Next, I explore three major reasons for copyright expansion, which are linked to copyright criminalization – the foremost being the negative financial impact on rights holders, which is attributed mainly to the potential (if not actual) increase of copyright infringements. I then explore

[13] This chapter builds upon a previous work dealing with the criminal copyright gap in the United States. *See* Eldar Haber, *The Criminal Copyright Gap*, 18 Stan. Tech. L. Rev. 247 (2015).

various reasons for this: namely, technological developments combined with globalization, accessibility, and a social norm that favors infringement (without a moral standard that opposes it). I locate criminal copyright within this movement, and argue that the actual and potential harm of copyright infringement has resulted in legislative and non-legislative responses, while criminal copyright is both a preemptive and a reactive measure of copyright infringement.

Second, I discuss the potential shift toward a pure property paradigm, i.e., the transformation of copyright law from a limited set of exclusive rights granted for purposes of market regulation, to a property regime. Under this argument, copyright criminalization is directly linked to copyright's (assumed) paradigmatic change into a property regime by transforming the current (low) protection of copyright into a regime resembling tangible property, inter alia, through criminal sanctions.

Third, I explore rights holders' increasing and effective political influence over legislatures, resulting in criminal legislation. This third reason for copyright expansion is not based on political means only, which rights holders obviously use to advance criminal copyright, but also serves as an important explanation of the process in itself, as public choice theory implies.

Chapter 6 continues to explore the criminalization of copyright law, and adds external, non-copyright explanations to the picture. It examines whether copyright criminalization is also affected by external reasons linked to other global criminalization processes, and if so, to what extent. In this analysis, the chapter locates criminal copyright in three main legal frameworks: first, an *IP framework*, which places copyright criminalization in a broader IP legal framework; second, a *technological framework*, which views copyright criminalization as part of various legal fields now criminalized due to similar technological developments; and third, a *legal framework*, which locates copyright criminalization in the wider context of general criminalization of the law, and covers both the IP and the technological frameworks. I argue that criminal copyright, with its internal dynamic toward criminalization, is at the same time part of other external frameworks that sometimes affect each other, and all of which are part of the general criminalization legal framework. Thus, criminal copyright is a part of both IP and technological frameworks, which in turn are all part of general criminalization movements.

Chapter 7 explores both criminal and copyright law theories to determine whether copyright criminalization complements them. This chapter provides a descriptive analysis of current theories of both criminal and copyright laws. I examine the main theoretical frameworks of criminalization as discussed in the criminalization literature, beginning with single-element approaches, namely the harm principle and/or wrongfulness requirement. After concluding that single-element approaches are insufficient in providing an adequate criminalization theory, I proceed to evaluate multiple-element approaches to criminalization as suggested by Feinberg and further developed by Simester and von Hirsch. Then I review criminalization theories (formulated by Schonsheck and Husak) that are based primarily on *principled*

approaches to criminalization. By isolating the main elements that are relevant to copyright criminalization, I suggest an integrated approach to criminalization and prepare the ground for a normative evaluation, which is conducted in Chapter 8. Arguing that any criminalization theory should adapt to criminalized law theories, the chapter goes on to explore the main theories of copyright law. I briefly review copyright's main theoretical frameworks: the *incentive/utilitarian* theory, the *personality* theory, the *labor-desert* theory, and the *users' rights* theory.

Chapter 8 suggests a heuristic for policymakers under the various criminalization approaches, and chiefly evaluates whether copyright criminalization is vindicated. To assess whether copyright criminalization is justified from the perspective of criminal law, this chapter examines copyright criminalization through an integrated approach. I examine it on four consecutive measures: (1) harm and wrongfulness (examined separately or combined); (2) substantial public interest; (3) efficiency of criminalization; and (4) the consequences of criminalization. Satisfaction of the four measures could support criminalizing copyright infringements. However, as this theory integrates different approaches to criminal law, each policymaker should separate the theory's measures and apply only those that accord with its legal system's view of criminal law. Criminal law theories are only one prong of the analysis. A second prong requires that we examine criminal copyright under the main copyright law theories and distinguish infringements for commercial advantage or financial gain from those not for commercial advantage or financial gain, while also separating small-scale from large-scale infringements.

The first measure of the integrated approach examines whether copyright infringement is harmful or wrongful, or both. I argue that copyright infringement can cause various players both financial and social harm, and can therefore potentially satisfy the harm principle requirement. Nevertheless, infringements for commercial advantage or financial gain are not necessarily harmful in the same sense as infringements without such advantage or gain. Accordingly, not every act meets the harm principle requirement. Examining the wrongfulness of copyright infringements – *mala prohibita* conduct (wrong because prohibited) and not *mala in se* conduct (wrong in itself) – leads to the conclusion that infringement could be wrong to some extent, but not necessarily wrong for every type of infringement. Not every act of infringement meets the wrongfulness requirements. Thus, some types of copyright infringements will pass the first measure of evaluation. But it is highly doubtful that all types of infringement will pass all the measures, which indicates that not all types of infringement are justifiably criminalized.

The second measure examines whether the state (or society) has a substantial interest in the statute's objective. This step identifies the interest, determines its legitimacy, and decides whether that interest is substantial. I argue that criminal copyright meets this requirement upon concluding that the state's interest – to protect the creation and dissemination of copyrighted works for both authors' and the public's welfare – is both legitimate and substantial.

The third measure tests whether criminal law will directly advance the substantial interest, and whether it is more efficient than other measures (e.g., civil or administrative law). Under the third measure, policymakers must assess and identify alternatives to criminal law and examine whether they are more efficient. Here I use two different forms of evaluation: an *ex-ante* evaluation, based on an economic analysis of crime, and an *ex-post* evaluation, based on evidence from implementing criminal copyright in the past and evaluating whether the results of such an imposition agree with the efficiency stage requirements. I argue that criminal law can advance the state's interest in some types of infringements (e.g., some large-scale infringements with financial gain), but that criminal law is not necessarily the optimal enforcement mechanism to curtail other forms of infringements (e.g., small-scale infringements without commercial advantage or financial gain).

Finally, the fourth measure examines the consequences of criminalization. This requires that the legislature examine the consequences of imposing criminal law using cost-benefit analysis. Under the fourth measure, criminal copyright is not always justified as the potential drawbacks for some activities support non-criminalization as they outweigh the potential benefits.

Examining criminal copyright through the integrated approach reveals that copyright criminalization is not always justified. Importantly, each legal system's approach to both criminal and copyright law will yield different outcomes. To illustrate, a *natural-right* philosophy of copyright will justify criminalization more than an *incentive/utilitarian* or *users' rights* approach. Moreover, scrutinizing the various types of copyright infringements under the *incentive/utilitarian* approach might lead to different outcomes, depending on the type of infringement. Accordingly, this chapter concludes that copyright criminalization requires careful implementation, and only when the integrated approach supports it.

Chapter 9 discusses criminal copyright in the broader context of the law and technology paradigm. It revisits the main challenges to law enforcement caused by digital technology and distributed networks. It evaluates the future of copyright protection under a rapidly changing technological era that enables faster, cheaper, and wider dissemination of protected works, along with new emerging technologies and social networks that make enforcement and detectability nearly impossible and implausible. This chapter evaluates the potential benefits of public enforcement; it asks whether administrative law should be deployed to challenge infringements, and if so, when.

The purpose of this chapter is to discuss the challenges to the protection of copyright in a rapidly changing digital era and to take a brief look at the future of criminal copyright in this era. While it cautions against the use of criminal copyright as ineffective and unjust in dealing with the many types of infringements online, it offers optimistic suggestions on how to better protect works in the future. Ultimately, Chapter 9 serves as a call to policymakers and stakeholders to reconsider their current criminal copyright laws, recalibrate them, and adhere to other forms of protection that could greatly benefit all of us.

The final chapter summarizes the main arguments of the book, while holding that copyright is undergoing a global criminalization process. Yet, as Chapter 4 shows, the ongoing increase in criminal copyright legislation is rarely applied in practice, resulting in a *criminal copyright gap* between the scope of criminal copyright liability and actual penalties, and infrequent prosecution and punishment. Furthermore, the motivation for criminal copyright is not always known and should therefore be analyzed thoroughly to uncover the broader meaning of the process – a task that my book undertakes. Examining copyright criminalization through criminal and copyright law perspectives leads to the conclusion that copyright criminalization is too broad and not always justified, and that the process has negative ramifications for copyright law, the legal system at large, and society's interests. By this evaluation, I conclude that *criminal copyright* should be revisited and revised to align it with both criminal law and copyright law theories. I propose that policymakers limit criminal copyright to instances supported by the fields of criminal and copyright law alike. Finally, this last chapter warns against over-criminalization of daily activities of end users online, which would endanger the development of new technologies, the improvement of existing ones, and the rights and liberties of individuals in democratic societies.