

Pirate Nation

How Digital Piracy is Transforming Business, Society and Culture

Darren Todd



Pirate Nation

How digital piracy is transforming business, society and culture

Darren Todd

Pirate Nation by Darren Todd is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 Unported License.

Permissions beyond the scope of this license may be available at http://www.piracyhappens.net.



CONTENTS

Acknowledgements 8

Introduction 9

01 The copyright players 14

The copyright oblivious 15
The copyright rich 22
The copyright poor 28

02 Copyright terms 36

Copyright terms in literature 37
All rights reserved alternatives for software 42
Perspectives on copyright terms in film 46
Copyright terms and short-lived media 49
Expanding copyright coverage in music 52

O3 Piracy in the digital age 57

The move to digital media 58
Peer-to-peer networks 62
File-sharing and popular opinion 66
The rise of Pirate Party politics 70

04 Responses to the pirate problem 74

Rights-holder reactions 75 State-sponsored anti-piracy efforts 79 Copyright and internet business 84 Internet service providers 88 Literary defence of thick copyright 92

05 **Pirate economics** 98

The first-sale doctrine in digital media 99
The economics of the music CD's decline 107
Consumption patterns across media 110
Piracy's economic impact 114
Corporate works-for-hire 121

06 **Digital piracy in Asia** 124

Discovering counterfeit causes 125
Tracing the bootleg source 130
Counterfeit pharmaceuticals 135
Brand hijacking and the consumer costs 140
The USTR watch list 144

7 The idea-expression dichotomy 147

Imitation and intimidation in literature 148
Tributes and disputes in film 152
Inspirations and borrowing in music 159
Patent coverage of computer code 162

08 Creative piracy 168

Fan fiction blurs the pirate line 169
Disparity in the modern hacker image 173
User-generated film 178
Remixing the music industry 181
User-generated modifications in the video game market 185
Reinventing cinema through video games 188

09 New models for skirting piracy 193

Using piracy to grow business 194
Edge marketing meets with mixed success 198
Pornographic industry turns piracy into profits 202
Moving from static to streaming media 206
Food patents paint a bleak picture of IP control 210

Conclusion 214

Glossary 217 References 221 Further reading 236

ACKNOWLEDGEMENTS

No book worth reading comes together without the author owing gratitude to several people, a truth I freely admit now. First, I thank those reading these words. Without your dedication (for a few pages or several read-throughs) any impact would begin and end at the keyboard.

I thank all of those people who offered feedback or ideas, Chris, Greg and Stumper especially, but also friends around the poker table or strangers at a yard sale. Copyright and piracy remain issues about which one must pry opinions from some while they flow freely from others. All have proven invaluable.

Hearty thanks to my blog readers, scant as they are at times, and for all the writers at Tech Dirt, Ars Technica, Torrent Freak and Slashdot: comprising a fine dashboard for all IP news.

To my co-workers at Carilion Clinic for enduring long and likely boring lunchtime discussions of copyright.

I believe firmly in using the right tool for the job, and – sorry Bill – Word falls short. So thank you to the hard-working and talented developers at Scrivener, Evernote, Dropbox and OneNote (much better, Bill). All programs that – in full disclosure – only received my money once they had proven their merit. They have done so many times over, and have a customer and an advocate for life.

To artist Nina Paley for the hilarious and poignant comic strip, 'Mimi and Eunice', preceding each chapter.

Sincere and deep thanks to Susannah Lear for helping me put together a great proposal.

To my family: to Dad and Marcia for hosting the household and giving me weekends of solitude. To my brother Brandon for being a media encyclopaedia. To my cousin Debbie for reading while pregnant and insanely busy. To Mom, for several late nights of reading and rereading, and overriding maternal approval to express constructive criticism.

Lastly, I thank my wife Serena and my infant son Beckett. Without their sacrifice, without having to leave me to the book for countless, priceless hours, this project would have remained only and always in my head alone, doing no one any service, and spreading no seeds of curiosity and doubt.

INTRODUCTION

When people asked – often with genuine interest – what my book was about, I delivered a canned response: 'It's about copyright law and digital piracy.' By the end, many were already nodding off or peering at something more interesting over my shoulder. Other times they retained some cordial interest, but seemed unsure of how to feel about the subject.

Still other times, they congratulated me on tackling internet piracy, because it's clearly ruining culture, and nothing good comes from stealing.

So, a more accurate response would be that this book is about... well, those very responses. It is my attempt to interject on water cooler dialogues, where only the smallest, approved, pre-packaged opinions of piracy crop up amid more prevalent topics. Because where copyright and piracy go now has become more important than where they have been, though that history provides a revealing guidebook. Some of our paths appear already beaten, but those warrant the greatest caution. Because when it comes to controlling information – and let's have no illusions: copyright is control – herding to fixed paths can cause greater harm to the growth and dissemination of our art and culture than blazing through an uncertain, wild route without the same guides we've come to expect. Guides called law, government and mainstream media.

The impression so many people have of copyright merits addressing straight away. Historically, copyright did not act as a legal barrier so artists and inventors received payment for their work. However, most people keep this impression about copyright today, and for good reason. Rights-holders spend a lot of money creating a copyright climate where infringement appears to hurt content creators – the starving artists, the impoverished inventors, the musicians living in vans just to bring their art to the people.

This is a dangerous misconception for a few reasons. Foremost, it begets the view that the current body of literature, film, music, inventions and even computer code is the result of a system that protects and incentivizes the creator. This is not the case. Not historically, and not now.

Copyright began before it really began, at least before our modern idea of copyright. Before the Statute of Anne protected English printers from Scottish pirate editions of printed works, there was copyright absent the name alone. Protection really began with royal patronage to select printing guilds (even before the printing press). The guilds profited through stateenforced monopolies. The crown benefited from being able to censor what the guilds printed. Where did writers come into this? Nowhere, really. They lost their rights the moment the book was published.

Even after the Statute of Anne, copyright laws protected industry and business, not content creators. Our ideas of protecting the writer are far more modern than industry rhetoric would have us believe. It is dangerous, after all, for trade organizations hinging on a continued public opinion of the virtues of copyright for the public to discover that our culture arose without or even despite these laws. That these laws benefited a few at the expense of the many, just as they do today.

Indeed, a legal response to technology that makes copying as simple as clicking a button seems logical. But that legislators worldwide have resorted only to extending copyright terms and coverage speaks to a shortfall in critical analysis. Copyright remains a weighty, blunt instrument, one that governments should use sparingly. Alas, these state-monopolies expand in uncertain times but fail to recede when continued creation and thriving media quell such fears.

But what some have dubbed the 'copyfight' is as much a battle over semantics as anything else, because colluding with citizens to control information means cleverly using collective terms to apply blanket judgments. Both the copyright and the copyleft use this, though it is safe to argue that the copyright stakes a clear advantage, both in public acceptance of their terminology and the means to spread such an agenda. Therefore, I want to clarify some common misnomers and weighted terms surrounding copyright and intellectual property. This should promote a better understanding of the book's message.

1. The word 'illicit' is not interchangeable with 'illegal' since the former implies not only illegality, but also immorality or acts counter to custom. Digital piracy has nothing to do with morality, no matter how hard industry trade groups try to make that connection. 'Illegal' simply means that it is against the law. Murder is illegal, but so is jaywalking. In San Francisco, it is illegal to mimic an animal on a

public street, but no one would consider such an act 'illicit'.

- 2. I will avoid talk of 'benefiting the artists' or 'going back to the artists' with the money that copyright monopolies bring. Because corporations own most enforceable copyrights (either through transfer of copyrights or by funding corporate works-for-hire), I feel it is a misnomer that produces feelings of suffering artists instead of a corporation's bottom line. There is nothing wrong with corporate copyright, but to assume that all copyright infringement is 'taking money away from artists' or 'hurting the little people' is to misunderstand the way that copyright currently performs. For this same reason, I will avoid using 'artists' or even 'content creators' as interchangeable with 'copyright holder' or 'rights-holder' since the two groups are not mutually inclusive.
- 3. While copyright trade organizations would have people believe that all infringement holds intimate links, there are many differences between counterfeiting (bootlegging) and file-sharing. I will use the terms bootlegging and counterfeiting interchangeably, and more loosely the terms file-sharing, infringing and piracy (which sans counterfeiting ties need not bear the negative weight typically assigned to it).
- 4. The corporations holding copyrights, patents, trademarks or other intellectual property (IP) I will often refer to as 'big media', though most often for the largest media conglomerates such as Viacom, Disney, AOL/Time-Warner and Comcast. Much like the more typical terms 'big business' or 'big pharma', I do not mean to present corporate copyright holders negatively. I will also make clear the distinction between big media and their partner trade organizations such as the British Phonographic Industry (BPI), the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA). The latter represent the former for a cut of profits, typically, but that does not imply their opinions or actions dealing with IP infringement align.

- 5. Probably most complicated is the phrasing in making, receiving or sharing a copy without holding the copyright. While the term 'sharing' may sound mollified, calling it 'theft' or 'stealing' is a misnomer, and conjures images that simply do not apply to file-sharing. But while 'sharing' may sound soft, it is far closer than 'stealing', and until a word for it becomes mainstream I will avoid the more criminalizing nomenclature.
- 6. Fair use, clearly framed in section 107 of the US Copyright Act of 1976, under fair dealings in the Canadian Copyright, and currently under strong consideration by UK Prime Minister David Cameron (Burns, 2010), is often mistakenly called 'fair use defence'. This makes fair use appear illegal automatically, and only by the grace of courts is it considered legal. In short, a privilege instead of a right, and privileges may be taken away. Yet, if that provision of the copyright act holds no legal power, then how can any other facet of the act? We cannot choose to enforce one section while failing to enforce another.
- 7. For reasons clear to those who follow copyright debates, I will avoid the word 'free' unless talking about this debate. While many misunderstand this term, others use it as ammunition against those opposing thick copyright. Industry lobbyists insist that this means the opposition wants all content to be free as in free beer, not free as in free from control. To avoid blurring such an enormous distinction, I find it easier to avoid the term altogether, and will instead use 'no cost' or the like.

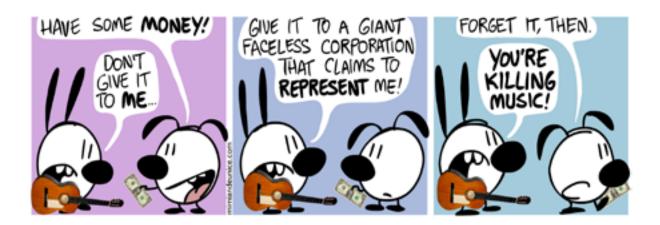
Semantics offer a single bone of contention in my attempt to dispel prevailing copyright culture. The real copyfight wages over public opinion, to which laws, prevailing business models and all media must kowtow. No one book

13 introduction

can challenge conventional wisdom everywhere intellectual property touches, so instead I hope to create an acceptable lens through which to filter copyright issues. Or – at the least – to encourage readers to discard the array of lenses already firmly in place.

The Copyright Players





Understanding the current copyright culture means knowing who is involved. Generically, they are the copyright rich, copyright poor and copyright oblivious. While their numbers and influence vary, the groupings mostly reflect knowledge and incentives. Few in Hollywood or other intellectual property institutions would favour the same freedoms the copyright poor demand. Likewise, for someone who creates art by building on copyrighted works, it would be irrational to want indefinite copyright terms or broader patent coverage. For the largest group – the copyright oblivious – staunch opinions on copyright should prove sparse, since neither their income nor their creative endeavours are at stake.

However, hard facts seldom bolster a hard-liner stance. Just as the West remains polarized on issues such as stem-cell research and gay marriage, copyright law and digital piracy create strong opinions with little understanding. After all, while laypeople are ignorant of the science behind stem-cells, they need only ally with political party lines to enjoy the support and backing of millions of people. Piracy can

drudge relentless opposition or fervent support despite limited knowledge of IP law – current or historical.

Many copyright oblivious harbour unduly orthodox opinions on copyright law, usually to the conservative. Arguably, this reflects indoctrination by the copyright rich of pro-industry propaganda. It could also stem from simply having no working knowledge of what copyright covers. Fear replaces reason, and fear leads to misguided and staunch beliefs. So here – with the copyright oblivious – we'll begin.

The copyright oblivious

This world in which we pretend we're not all copyright criminals is like the Victorians who pretended that they didn't all masturbate.

- Cory Doctorow, RiP!: A Remix Manifesto (Gaylor, 2008)

You are a pirate.

I can write this with full confidence without assuming that you have downloaded this book from the internet or photocopied it from the library. I do not assume you have shared music, ripped rented DVDs or bought bootlegs. Mostly, I apply this negative moniker because copyright culture would have you believe that anyone who has violated copyright laws is a pirate. Piracy is stealing, and stealing is against the law.

How can I make such a claim without even knowing you? Well, I have to assume that – if you are reading this – you are at least one year old. You have had at least one birthday, and at that birthday someone sang a song that went something like this:

Happy birthday to you.

Happy birthday to you.

Happy birthday dear (your name).

Happy birthday to you.

And the self-proclaimed clever guy in the singing party said: 'And many more...'

This song is copyrighted, and at birthday parties where anyone but family and friends can hear, singing aloud is a public performance of 'Happy Birthday'. Everyone sings without permission from the copyright holders or having paid for proper licensing. Warner-Chappell makes several million dollars a year from royalties on 'Happy Birthday' so do not fool yourself by saying that no one pays to use it. You might also assume that this is simply too farcical a case, even when this century-old song still makes money. Well, neither Britain's PRS for Music (formerly Performance Rights Society) nor the American Society of Composers, Authors and Publishers (ASCAP) thinks so.

PRS for Music owns a laundry list of absurdity. While indeed a not-for-profit organization, they respond to economic incentives just as much as for-profit businesses. While non-profits conjure images of soup kitchens or emergency aid organizations, PRS for Music's sole concern is making people pay for musical performance. This often means hiring 'investigators' to troll businesses for performance violations, complete with bonuses for investigators able to sell enough licences. In a vacuum, affordable licensing to play copyrighted music seems realistic, but when applying the letter of the law on public or private performance, the world becomes rife with pirates.

Creating a culture that supports music artists through licensing fees is one thing, but trolling society for any performance right violation borders on predatory. Consider some of PRS for Music's less-than-glamorous moments of the last few years. A bevy of PRS for Music investigators call small businesses – from hospitals to pubs – and listen for music playing in the background. If detected, they insist the business must buy a copyright licence if anyone else can hear the music, legally a 'public performance' (Watts and Chittenden, 2009).

That PRS for Music allows negotiation of licence fees as one expects of debt collectors bargaining payment for purchased debt speaks to a practice more akin to extortion than licensing. One cannot negotiate the price of a driver's licence or a business license. Such dealings discredit an already shady business model.

Another case involved demanding food store stocker Sandra Burt pay £1,000 because singing to herself while working was a public performance for the store's customers. This came after PRS for Music ordered the store to buy a licence to play

the radio or suffer fines. Burt told the BBC: 'I would start to sing to myself when I was stacking the shelves just to keep me happy because it was very quiet without the radio' (BBC News, 2009b). PRS for Music threatened thousands of pounds in fines.

Of course, they have the legal backing to file such suits, and this affords them self-assured browbeating tactics. No doubt, the only reason that PRS for Music recanted, writing to Sandra Burt 'we made a big mistake' and sending flowers, was that the public eye had turned on them (BBC News, 2009b). PRS for Music also eventually withdrew demands of payment from a cattery and a dog rescue, originally told to get a licence despite the only listeners being on four legs (Watts and Chittenden, 2009). Obviously media exposure of such heavy-handed tactics begets looser enforcement. But since more than a few of these cases have occurred, it is equally obvious that PRS for Music is apologetic and reasonable only if their actions come under public scrutiny.

On the other side of the pond, in 1996, seeking payment for public performances of copyrighted songs, ASCAP set its sights on summer camps. They warned the Girl Scouts of America that they were violating copyright by not buying performance licences for their scouts to sing protected songs while roasting marshmallows (Bannon, 1996). Scores of campfire songs still bear all rights reserved copyright, which protects any performance 'where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered' (Washburn University, nd). So while you could get away with singing to a group of immediate friends and family, doing so during a party at your favourite restaurant is illegal. They imposed hefty fees per camp, or required that – on scouts' honour – the girls could only sing songs residing in the public domain. Despite this law being on the books since 1909, ASCAP holds the honour of making sure everybody pays – even little girls.

Of course, this quickly became a media debacle, and ASCAP reneged, saying they never planned to sue little girls. They also promised to return the money already collected from camps fearing lawsuits (Ringle, 1996). ASCAP and BMI (Broadcast Music Inc) are among the largest companies handling performance rights, and should make licensing easier for everyone involved. If a radio station had to clear rights to every song they played, they would spend all their time doing only that. Since ASCAP represents several labels, they act as speedy intermediaries to ease licensing. Usually.

Economic intermediaries by day can mean irrational money-grubbers by night, it

seems. A more recent case saw ASCAP proposing that music ringtones of copyrighted songs were violating artists' rights by not having public performance licences for each time the song plays (Elinson, 2009). Never mind that ringtones have become a profitable business for artists, and represent a facet of music to which consumers remain price insensitive. If people had to pay for ringtones each time a call came in, quickly the only people with rocker ringtones would be pirates. Fortunately US District Court Judge Denise Cote ruled against ASCAP, though such cases will undoubtedly enter court again.

These are outlier cases, but they illustrate an important point: that current 'thick' copyright culture will not tolerate any violation. They will not give an inch, even to little girls who just want to sing campfire songs. Because giving in – just a little – admits that even when people violate copyright, movies still make money. Science continues to thrive. Artists still make art. Writers write, and musicians still pour their souls into music.

The result of a culture in which any infraction is criminal is that we are a society full of copyright criminals. Consumers finger-wag at others for assumed infractions while committing different infractions: condemning friends who rip their CDs while using a copyrighted song to spice up a corporate slideshow. Ignorant of what is legal and what is fair use, consumers often err on the side of accusation or refuse to do anything but consume media for fear of infringement. The copyright rich are the only benefactors when conventional wisdom says 'when in doubt, don't do it'.

What the oblivious do not realize is that everyone violates copyright, and daily. Mostly, it is non-commercial and arguably harmless. The copyright rich want consumers to believe that any violation does harm, and maintain this illusion with propaganda and lawsuits. Consider a few more examples.

E-mailed poems, jokes or news stories shoot in and out of inboxes throughout the work week. While many are wrongly attributed, completely false or hopelessly trite, some can make the workday a little brighter. So people send them to a few friends or co-workers for the same reason they came to them. However, they did not get permission to make a copy of that material from the copyright holder. Forwarding an e-mail with written material (credited or not; marked with copyright or not) to nine buddies is the same as making nine illegal copies. Data gain copyright the

moment one fixates them to a tangible medium of expression, and a digital document certainly counts.

Likewise when forwarding an e-mail with a funny or inspiring image – whether a spring morning, a celebrity or a mock motivational poster. The sender does not have the permission and therefore has no copyright to forward that message. And yet people do forward copyrighted material all the time without believing themselves copyright criminals. However, ignorance of infringement holds little weight in court. Despite the cryptic and arcane nature of copyright law, the oblivious ostensibly know these statutes and how to keep from violating them. A teacher reads aloud to her students: fair use. A speaker at a funeral recites a Sylvia Plath poem: infringement. A restaurant owner plays a radio in his office: fair use. The same restaurant plays the radio over the loudspeaker to the dining room: infringement.

Many detest piracy because they believe it hurts the little people – the individual artists, writers, musicians and inventors. Piracy of someone else's creative expression seems in bad taste, unoriginal and lazy. Why can't pirates get their own ideas? But there are a few complications when considering these points of conventional wisdom.

The first widely held belief is that individuals hold most copyrights, trademarks and patents, and the second is that those intellectual properties are original. In reality, however, copyright protection has long benefited corporations as much as individuals, perhaps more. In Britain and the United States the copyright term spans the life of the copyright owner plus 70 years. For corporations it runs a comparable 95 years. Any works-for-hire people create while working for a corporation (so long as it is within the scope of the creator's job description) belongs to the corporation, not the individual. The corporations have the money, resources and connections that make production possible. Artists are free to create their work and then enjoy their country's copyright protection, but they seldom command the influence and exposure that media corporations easily manage. So what seems more probable: that artists create their work and enjoy personal protection, or that they see that working for corporations on reliable salary remains the only way to make a living with their art? Copyright protection then reverts to the corporation for which they work. As Siva Vaidhyanathan writes in his work *Copyrights and Copywrongs*: "The creation

of [US] corporate copyright in 1909 was the real "death of the author." Authorship could not be considered mystical or romantic after 1909. It was simply a construct of convenience, malleable by contract' (Vaidhyanathan, 2003: 102).

Even though copyrights for musicians' work may eventually revert to them, a part of signing a recording contract is signing over rights. Even if artists create independently, say, writing a book on spec or patenting a new design for the portable fan, again the odds remain high that they will need corporations for exposure, distribution and financing. This results in creators signing their rights over to corporations to see their art succeed, the blowback being that one can expect the corporation to reap most of the profits it generates. So while *The Simpsons* has been around more than 20 years, it is not creator Matt Groening who reaps all the financial rewards, but Fox Entertainment Group – the eventual owners of the copyright.

This is not to infer that corporate copyright is unfair – either to the consumer or to the creator. Rather, the imbalance of corporate rights-holders compared with individual rights-holders is a reality the copyright oblivious should understand. This way, they can form their own opinions about what digital piracy means for the future of media instead of buying the simple notion that all piracy hurts individual artists. That industry trade organizations fund most anti-piracy propaganda tells against the fallacy of IP resting solely in the hands of individuals. If piracy harmed small artists and freelance media creators the way that industry rhetoric would have people believe, then small artists would universally endorse such messages. They would march on Washington and London demanding tighter copyright control. These 'little people' would speak out against file-sharing, torrent trackers such as The Pirate Bay, and get involved in the unending copyright infringement court cases. But the truth remains: 'little people' seldom have their material pirated the way the mainstream, corporate media are pirated. More importantly, only corporate copyright culture views piracy as unequivocally negative.

In a press interview for his movie *Sicko*, film-maker Michael Moore, when asked for his reaction to people pirating his film, said: 'I don't have a problem with people downloading the movie and sharing it with other people'. He also added: 'I don't agree with the copyright laws' (Sciretta, 2007). His only issue is with someone making money from his work without compensating him, a reasonable response.

Famed author JK Rowling shows similar acceptance toward fan fiction – non-commercial, fan-written stories that take place in the Harry Potter world – even to the point of tacitly encouraging it. When she announced in an interview on the series that she thought of Hogwarts Headmaster Albus Dumbledore as gay, she joked: 'Just imagine the fan fiction now' (Smith, 2007). No one – particularly fan fiction authors – would expect Rowling to abide by someone writing an unauthorized sequel to *Harry Potter* and selling it on Amazon. But it remains an important and telling fact that her reaction to using her characters and concepts smacks not of exclusion and heavy-handed protection, but of acceptance and even joy.

However, there are no nightly news specials or mainstream docudramas about accepting piracy – only its consistent condemnation. So it is natural that most people feel confused about digital piracy, both in their own lives and in their business dealings. The hard-liner opinions of the copyright oblivious come from misgivings on intellectual property issues. This makes sense, of course, since it would be as illogical for someone unexposed to tax law to maximize tax breaks as it would for the average citizen to understand fully the nuances of copyright law. The danger comes when so many grow defensive at their understandable ignorance, and decide to make the copyright rich's fight their own. This, too, is no wonder, since big media and their trade organizations have long fed citizens puppy-eyed propaganda about how piracy hurts the little guy, stops art and media from being made, and costs hundreds of thousands of jobs. If the copyright poor had the same budget for propaganda, no doubt citizens would hold staunch views on the stuffy nature of thick copyright or the potential dangers of food patents.

The copyright oblivious mostly respond to anti-piracy messages with distaste for the pirates, if not for piracy, since such bombast does little to cut out passive and everyday infringement in their own lives. They do not connect common, non-commercial infringement and what alleged 'pirates' do. This is in contrast to big media, which views all forms of copyright infringement as equally criminal and immoral – often with undeniable flair.

The copyright rich

This is a loophole larger than a parade of eight-wheelers through which a dam-busting avalanche of violations can rupture the purpose of your bill every day.

- Jack Valenti, congressional testimony on internet service provider copyright immunities (House Committee on the Judiciary, US Congress, 1996)

The copyright rich – rights-holders of marketable intellectual property – are a lot like the financially rich. They care less about good or bad, creative or destructive, but rather how to make the most money, and how to lose the least. You could say that since the advent of digital technology, the copyright rich are not playing to win, but rather playing not to lose.

Industry propaganda, news articles and interviews feature spokespeople claiming that big media stands on the forefront of innovation. But rights-holders really want things to stay the same, because 'the same' is where they are making money. And this makes perfect economic sense; this does not make them bad people or shady businesses. It is sensible to cling to a model that makes money and shy away from models that may not. So the copyright rich ride the old models for as long and as fervently as they can. Since innovating means going from a model that used to work to one that will likely work, this tends to scare big media (and their shareholders).

Programmer Paul Graham, in his insightful book *Hackers and Painters*, describes one such model for software. He calls web-based applications 'an ideal source of revenue. Instead of starting each quarter with a blank slate, you have a recurring revenue stream... You have no trouble with uncollectible bills; if someone won't pay, you can just turn off the service. And there is no possibility of piracy' (Graham, 2004: 73).

Preceding this description is the assertion that 'Hosting applications is a lot of stress, and has real expenses. No one will want to do it for free' (Graham, 2004: 73).

He wrote those words in 2004, and in 2011, already we have seen the rise of free online productivity applications such as Google Documents, Evernote and Zoho. Granted, these companies make money from advertising or premium packages. However, where Graham was off on the free part, he was spot on with this software evolution. So if established software makers refuse to move away from fervently protecting a client-side product, more agile companies will slide past them. Already, financial software and proprietary databases in healthcare and banking have become the norm over housed databanks. But many companies still condemn piracy and yet refuse to employ new models. While digital delivery is often available for new versions of popular software, this is as forward thinking as many mainstream software companies have grown.

Graham goes on to write how some degree of piracy is even a boon to software developers. 'If some user would never have bought your software at any price, you haven't lost anything if he uses a pirated copy. In fact you gain, because he is one more user helping to make your software the standard – or who might buy a copy later, when he graduates from high school' (Graham, 2004: 73).

Even as far back as the late '90s, industry giants such as Bill Gates understood this connection. Gates did not decry piracy of Windows software in Asia, but recognized that it meant they were at least Windows users, telling attendees of his speech at the University of Washington: 'As long as they're going to steal it, we want them to steal ours. They'll get sort of addicted, and then we'll somehow figure out how to collect sometime in the next decade' (Grice and Junnarkar, 1998).

Now options for change are more stable than ever. Ubiquitous internet has birthed myriad successful free-to-premium models such as DropBox and Evernote and a thousand private companies creating reliable revenue with hosting applications. Even piracy of the offline market often acts as a long-term economic boon. So why are software companies still hanging their heads, enacting fiercer digital rights management (DRM), and making convicts out of customers?

Unfortunately, even when the big elephant in the room is technological advancement, the industry refuses to change. Unlike an elephant, they have short memories and forgot that the last time they finally embraced new technology, they made money. Instead, they claim outrageous losses, personal hardships and rampant

suffering by using colourful metaphors and wild, incredible scenarios.

Emotional language is hard to ignore. Consumers are human, after all. No matter how different their backgrounds, if people can tap into their hearts, fears and prejudices, then they need no facts, data, sources or even credibility. Few know this better than lobbyists, and fewer still better than those speaking for big media.

Consider these emotional means of arguing used against thick copyright, specifically against the golden calf of big media: the celestial jukebox. The idea is simple: a device in each home through which any media may flow. It charges per use, and ownership remains with the rights-holder. This cuts out lending, piracy, secondary sales and even libraries. The downsides of such a device are legion. For one, it would deal remix culture a devastating blow. With no endowment effect coming from owning physical media, some consumers would lose interest. And such a service would cater to only the wealthiest of nations, depriving poorer countries of global culture.

But instead of providing facts, what if the only messages were laden with emotion and rhetoric? If objections compared pay-per-use over ownership as 'Odysseus bound to the mast, hearing the siren song only when the money was flowing', then they would solicit a much more emotive and impulsive disdain for it. Or to scare those consumers concerned for privacy by saying that: 'when all data flows through one spot, that will be the very spot through which hackers will glean every detail of your credit cards, bank accounts and all they need to hijack your identity as if holding you at gunpoint and demanding it outright'. The library becomes a 'collection of dusty books old enough to be in the public domain, but of little value for research, study or current events' and online retailers 'the last bastion against imprisoning monopolies'.

While such phrasing sounds convincing, it conveys no information, only emotions. While the celestial jukebox indeed would cause a shortfall of creative material and easily control information, it would no sooner hold its customers at gunpoint than it would bankrupt them. Alas, this is the language that big media mouthpieces use to turn a business agenda into a set of values.

Consider an excerpt from US Supreme Court transcripts during an appeal Lawrence Lessig made about Congress's further extension of the term for copyright, an extension that few could argue reflected any real incentive to content creators but much to the copyright rich.

Chief Justice: You want the right to copy verbatim other people's books, don't you?

Lessig: We want the right to copy verbatim works that should be in the public domain and would be in the public domain but for a statute that cannot be justified under ordinary First Amendment analysis or under a proper reading of the limits built into the Copyright Clause (Lessig, 2004: 240).

The more astute and complex verbiage is obvious. The false dichotomy of arguments meant to provoke emotion instead of reason is equally obvious. The chief justice portends that leaving the already grossly over-ex tended copyright law without further extension is tantamount to allowing people like Lessig to copy books word for word. His is the same tired argument: that extending the copyright term protects creativity and stymies piracy.

The logical often find themselves on the other end of ignorant and rhetorical balderdash like the chief justice's statement. Suggest that Britain and the US should leave Iraq and you'll hear: 'You want to let the terrorists roll right into our front yard?' Propose that police traffic stops are to produce revenue and you'll hear: 'You want drunk drivers all over the road killing everybody?' Point out the flawed logic of antipiracy campaigns and you'll hear: 'You want them to just give everything away?'

It is difficult to argue with absolutes. Rhetoric – by nature – undermines facts and reason. Its use in all the above examples, of course, is little more than drivel, but with a likened thread: all fear change. Though Lessig argues for something to stay the same (the term of copyright), he is still arguing for change (curtailing Congress's freedom to grant such extensions).

We could only benefit from a shift in the conventional wisdom about copyright law and digital piracy. A shift from condemning piracy and whatever trade organizations assign to this moniker. A shift from absolute and blind trust of the government, politicians and corporations when it comes to the purpose of copyright. Were citizens to question these organizations with the veracity with which they vilify digital pirates, the smoke and mirrors would falter, and reason would take over.

Congress is no more looking out for individuals and creativity by extending copyright terms than the pirate is harming them by creating mash-ups, sharing information and bypassing copy protection. Every group answers to incentives – economic and otherwise – and none proves surprising when these incentives are scrutinized.

No one has proven able to manipulate language so masterfully to get the US Congress, Hollywood and the American people to rally against the pirate as Jack Valenti, the former President of the Motion Picture Association of America (MPAA). A congressional lobbyist, Valenti embodied the pontificating, bombastic speech that made films like *Mr Smith Goes to Washington* classics. Never without a colourful metaphor, Valenti turned piracy into a four-letter word. His language resembled a sensational daily newspaper. One session, he might offer a rant so riddled with horrors, ultimatums and bleakness that all of Congress bows to his wishes. The next session, when his eloquently described fears have not come to pass, he would not recant. Rather, he presented new horrors demanding the world's attention and citizens' deepest loyalty.

In a 1982 testimony to the House of Representatives, he said: 'I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone' (Corliss, 2007). This imagery stimulates the imagination, and plays off a societal fear to present an economic one. Valenti did not want to ban the VCR, just as he had no desire to ban the internet. He just wanted to squeeze as much money from them as possible. For the VCR, this meant a proposed tax on all blank tapes and VCR units that would go to the Major Motion Picture Society (MMPS) under the assumption that consumers would use the VCR to 'pirate' content. And yet the aftermarket VHS tapes soon proved more profitable than theatres. So much so that Valenti himself said: 'It's the... aftermarket where you make your profits' (Rojas, 2004), 22 years after assuring congress that VCRs were 'a great tidal wave just off the shore' (Committee on the Judiciary House of Representatives, 1982).

Another testimony to congress reads: '[It is] a huge parasite in the marketplace, feeding and fattening itself off of local television stations and copyright owners of copyrighted material. We do not like it because we think it wrong and unfair' (Corliss, 2007). This sounds like the same language Valenti has long used to describe bootleggers, but in this case he is talking about the cable industry. The industry that

brought billions of dollars to Hollywood – again, after they embraced the technology instead of fearing it.

More recently, the language remains the same, with Valenti calling the internet and file-sharing 'mysterious magic', as if a sharp, intelligent man such as Valenti could not grasp it (House Appropriations Committee, 2002). The victim of such magic and sorcery becomes the underdog for the American people to rally behind, fostered by an attachment to old ideals, values and the mythical 'simpler time'.

No stranger to Valenti's inflated arguments, Tarleton Gillespie, in his book *Wired Shut*, writes: 'This kind of rhetorical strategy replaces rational debate with the politics of fear, and replaces discussion with a flight-or-flight response' (Gillespie, 2007: 125). Indeed, during a debate with the founder of Creative Commons, Lawrence Lessig, Valenti did little to shed the showmanship that made up his rhetorical style. Missing Lessig's argument, Valenti said that 'it seems to me that if Larry had the fortitude of his convictions, he would have told his publisher to give [his book] away' (A Debate on 'Creativity, Commerce and Culture', 2001).

Valenti by no means has the monopoly on hyperbole, however. In the Canadian documentary *On Piracy*, an interview with Graham Henderson, the head of the Canadian Recording Industry Association (CRIA), also reveals emotive rhetoric when dealing with the complicated nature of digital information (McArdle, 2007). Henderson says sampling is like going into a store and stealing a sweater, going into another store and stealing another sweater, and then finally buying a third sweater somewhere else. Of course, if someone steals a sweater, the shop is less one sweater. They are less what it cost them, and the cost of stocking, pricing, moving and advertising it. If you download a song on a file-sharing site, no one is less anything. That is a fact that is difficult to argue with, no matter what inane real-world analogies one uses.

Henderson goes on to assert that piracy has full responsibility for declining CD sales. His sole reason is that file-sharing was the overwhelming answer Canadians gave when surveyed about why they are buying less music. He falls back on pathos and ethos, not empirical evidence. An on-the-street poll is simply not accurate enough to determine causality, as other industry spokesmen admit. In an interview for BBC documentary *Attack of the Cyber Pirates*, John Kennedy, then president of Universal

Music International, responds to the proposal that sampling music leads to buying music, saying 'whilst opinion polls suggest that it's true, I simply don't believe opinion polls' (Monblat, 2002).

Valenti actually had a slew of figures at his fingertips, but they were either from studies the MPAA or other trade groups had funded, or from thin air. For example, he claimed the rating system is no less prone to giving the dreaded NC-17 rating to action films than films with sexual content, saying: 'As a matter of fact, there's probably less violence in movies today than before'. But when asked 'Where do you get that from?' said: 'My own assessment. Where does anybody get anything from?' (Bernstein, 2006).

In many ways it is worse to present data out of context. This leads to the question of whether something represents correlation or causality. Big media cares little for this distinction, however, and offers piracy as a scapegoat simply because of a questionable correlation. They show no interest in proving causality. Alas, so long as big media lobbyists and trade organization campaigns employ emotion, rhetoric and hyperbole, the copyright oblivious will likely favour their message. After all, it is the only one most ever hear.

The copyright poor

Everyone has been bombarded with media enough that I think we've almost been forced to kind of take it upon ourselves and use it as an art form... If they were passing out paints on the street for free every day, I'm sure there'd be a lot more painters out there.

- DJ Girl Talk, Good Copy, Bad Copy

Few would argue that piracy stems from need. Of course, people do not need to be creative, either. We do not need art and music and poetry to survive. Yet piracy has become systemic, affecting every facet of society in all economic strata. Perhaps what people ought to consider alongside industry arguments about starving artists

and economic hardship is whether piracy developed because of copyright, or copyright itself made pirates of people who – regardless of law – would unfailingly avail themselves of any available information. Most piracy represents wants even if it means creating something that would not otherwise exist, or projects that eventually benefit many others. So why would people who do not need something risk civil and even criminal prosecution?

Consider the risks for a moment. These include not only the legal repercussions of violating copyright, but also the social and moral stigma that comes with piracy. This judgement – contrary to reason – has little to do with economics. People do not tie greater social stigma to higher-priced products. The associations are much subtler than price.

One parallel is to look at other illegal acts that have accrued (or been assigned) moral and ethical judgements over time. Considering how and why we assign or withhold judgement is key to understanding how copyright law works. Take jaywalking for example. Jaywalking is against the law. If police officers see someone jaywalking, they can stop the person and write a citation. But we do not place any immoral or unethical stigma on jaywalking. If we see someone jaywalking, we do not pass judgement. There is not even any social stigma that goes with jaywalking. You do not think that a jaywalker is being rude or acting criminally. And yet the jaywalker has committed a misdemeanour that arguably everyone knows is against the law.

Exceeding posted speed limits is similar. Not much moralizing; almost the reverse, where other drivers even feel sorry for the guy pulled over. There is rarely an attitude of preconceived judgement, or the declaration that the driver deserves whatever the officer is going to dish out. We feel kinship with those caught speeding because – at some point – we have sped too. Speeding bears a fine, though it depends on the infraction. It can easily lead to arrest if the person is intoxicated, driving too far over the limit, or does not treat officers with what they perceive as due respect.

But what are the social impacts of these 'analogue' crimes? Jaywalking kills several people each year. When you read about a jaywalking fatality you often read about how tragic the accident was or whether the driver will be charged with a crime; perhaps some rhetoric about the dangers of jaywalking, but nothing moralizing against the jaywalking 'criminal'. Speeding kills many more people – 40,000 a year in

the US alone. But it remains free of any moral judgements.

Let's turn this back to piracy. We obviously moralize some crimes and not others, whether in terms of social impact or monetary punishment. Digital piracy crimes work the same way. It is acceptable to loan a CD to a friend who did not pay for it. It is equally acceptable to rip your CDs and put them on your iPod. Yet it is not acceptable to download music you did not pay for. But what if you download songs from a peer-to-peer (p2p) file-sharing network for CDs you already own and then put them on your iPod? The same physical act as the previously accepted scenario, but tying in a morally unacceptable act. Perhaps this is why the music industry has brought successful lawsuits against companies providing exactly this service. In *UMG Recordings, Inc. v MP3.com, Inc.*, a company allowed users to upload their ripped CDs and listen to them from the site. Despite no decisive evidence of lost profits, the judge awarded UMG Recordings \$53.4 million, even though mp3.com did not earn anywhere near that amount from its service (Samuelson and Wheatland, 2009: 13).

When patrons check out CDs from the library, rip the songs, and put them on their iPods, it is the same logistically as getting them from a p2p site. Someone on the p2p site paid for them, just as the library did. But the library patrons or file-sharers paid nothing. Perhaps the anonymity ripping CDs provides in contrast to monitored file-sharing sites decriminalizes the act. No one sends cease and desist letters to library patrons after all. The lack of potential punishment makes infringement seem natural.

Apply this logic to the moralized, controversial downloading of pirated movies. Copyright allows people to have friends over for movie night, even though they did not pay for the film. The courts consider this a 'private performance'. The only needed performance right is for public performances. Projecting the film on an abandoned drive-in theatre screen for anyone to watch obviously meets this definition. But having eight friends over to watch a film is indistinguishable from those eight friends downloading a pirated copy and watching it. Logistically and economically, the same action occurred: nine people saw this movie and only one paid for it. And yet how would people feel if they discovered their friends pirated movies and were collectively destroying the movie industry?

Video games offer another excellent example. It remains legal for stores to rent games, even if this means fewer retail sales. Consumers may also loan games to

friends, even though the friends did not pay for them. And yet if those same friends downloaded games instead of borrowing them, they would be committing an illegal and immoral act. They would be putting hard-working video game makers out of work and ensuring that soon there will be no more video games made, at least according to industry rhetoric.

But how would conventional wisdom change if the gaming industry could stop the game resell market? Long have game manufacturers loathed the idea that consumers can buy games that sell new for \$60 as 'previously played' for \$30 just a month later. This is the real reason for DRM in games. Under the guise of stopping piracy, game manufacturers have even embedded limits on the number of times owners can install games, despite the first sale doctrine ensuring this right. DRM has largely affected the PC game market, but may well spread into the console market. If copyright law made it a violation of copyright to resell a game, then immediately trade organizations would work to moralize and criminalize the act to society. People would eventually begin to ascribe the same criminalization to reselling.

Just as with the 'analogue' examples, the difference is in what mainstream media tell consumers to moralize, despite legality. There is no gimmick or mascot for jaywalking, just as there is not for speeding. And yet people openly detest those who drink and drive: they are the most irresponsible, terrible people to get behind the wheel of a car. They deserve jail-time, to have their licences taken, and to pay hefty fines for what they could have done. But then, that is how we are told to feel about them. By that same token, there are no mascots speaking out against pirating AutoDesk's \$2,000 software suite. Thus, few pass any moral judgement. Yet the guy selling DVDs on the city corner is an immoral man committing an illegal act – he is the one putting people out of work, and making prices so high, right?

So why would people who do not need what they are pirating risk so much? It is only perceived risk that pirates skirt, quickly filtering and ignoring moral and legal ambiguity. Pirates make it their business to understand what the proselytizing and propaganda are all about. This makes the pirate ambivalent to the moral, ethical and legal ramifications of digital piracy. Western mores on this issue are as liquid as the law, which alters continuously what courts can and cannot punish. Neither act as an effective guide for right and wrong because copyright crimes are so relative. Burglary

and violent crimes – crimes that deal with what did happen, not what could have happened – are far easier to judge.

Another issue that muddies the waters for the copyright poor is the advantage in remaining ignorant of IP law. Obviously, the industry prospers from collective ignorance of such laws, but consider who loses for knowing the laws and still going against them. 'Some unquestionably wilful infringers (eg counterfeiters) have been required to pay fairly minimal statutory damages,' write Samuelson and Wheatland (2009: 12) 'while other ordinary infringers, including putative fair users, have found themselves held liable as willful infringers, and subjected to maximum awards in circumstances when a rational assessment of damages would have been minimal to non-existent, and hence, a minimum award would have been more appropriate'.

This causes two effects simultaneously. First, by putting copyright infringement (wilful or not) on a par with counterfeiting, there is no margin for the fines associated with the crime. This causes a leapfrog effect where courts find counterfeiting is worse than infringement, and the cap for counterfeiting fines increases. When a judgment again considers wilful infringement the same, the fines match those of counterfeiting, and on and on.

Second, this spells out that actual damages are inconsequential to the industry. If courts treat those who have – knowingly or not – shared music on a p2p site the same as those selling bootleg CDs in the street, then courts cannot argue that the matter is actual damages. While bootlegs could conceivably result in lost sales, there is scant empirical evidence showing causality between p2p sharing and declining CD sales. In other words, the idea that someone selling a bootleg CD represents the same threat to industry profits as someone downloading 12 or 13 songs on a p2p site is ridiculous.

A subset of pirates ignored both in industry rhetoric and in many legal actions are those who endure all the potentially negative outcomes of copyright violation in order to create. These 'creative pirates' resemble the artists and inventors that copyright law purportedly protects far more than most modern rights-holders. They are small-time, independent artists – the same artists that anti-piracy propaganda would have people believe are the main victims of piracy.

The free-to-download documentary *Good Copy, Bad Copy* follows two such creative forces in music: pirate DJ Girl Talk and the Brazilian remix phenomenon

Techno Brega (Johnsen et al., 2007). Girl Talk weaves scores of songs together into fast-paced, energetic techno that smacks of familiarity. But as he notes in the film: 'You can hear people with their songs on the radio right now with riffs that sound just like Black Sabbath. More so than me cutting up Bachman-Turner Overdrive will sound like Bachman-Turner Overdrive'. The film creators visit Bridgeport Music, the copyright holder for 'Get Off Your Ass and Jam' among many other rap titles and winners of the watershed legal case *Bridgeport v Dimension Films*, which decided that 'If you sample get a licence' (Lemire, 2007). Janet Peterer of Bridgeport Music shows little concern either for public opinion of the case or what the infringed artist (George Clinton) thought about the outcome. And for someone in the business of copyright her reaction is understandable, but she is not an artist, or creating anything.

Girl Talk knows how to license a sample. But his mixes use such tiny portions from so many songs that to license a single track could cost millions of dollars. As he says during an interview in *Good Copy, Bad Copy*, even if he could license so many samples, it would take years. What good is that for a song mixed on Friday to debut on Saturday? By the time he could license the songs for his remix, the remix would be artistically irrelevant. Organizations such as ASCAP are meant to ease licensing. But in terms of price and ease, within our current copyright climate Girl Talk simply cannot make art.

In Brazil, public markets sell bootleg CDs at cut-rate prices. These contain songs mixed from existing international pop music as well as local artists. The result is a unique mixture of techno and cheesy, funky beats called Techno Brega. While the CDs only make money for the vendors selling them, they act as a means of marketing enormous outdoor events. Here, DJs, local artists and even sound system manufacturers make their money.

Those mixing Techno Brega use the same p2p file-sharing sites popular on college campuses and in homes worldwide. The difference is that whatever remixers download, they turn into something else – another final product. In other words, there is no difference between – as the film shows – a Brazilian downloading a copy of Gnarls Barkley's 'Crazy' and him ripping the song from the CD. Either ends in the same place: blaring from huge speakers adorning a Techno Brega dance party. The difference is in what the remixer adds to it, takes away from it and mixes into it. The

result sounds familiar, but represents a new product, much like how last season's runway debuts are this season's K-Mart specials.

That is not to say that creative pirates have no desire to make money. Girl Talk charges to DJ a party just as it costs to attend an event playing Techno Brega music. The creators feel that they are selling another product entirely, one made with the same amount of creativity and hard work that it took to make the original, protected works they sample. But so much remixing remains free from any profit motive that arguments calling remix culture purely capitalistic falter.

In this vein, video game modding (modification) is almost exclusively pro bono. Modders spend countless hours poring over lines of code to tweak the smallest facets of gaming experience, all to release it to fellow gamers free. While textbook copyright violation, and without a fair use exemption, modders take the risk and skirt the law to create, and often improve, copyrighted work. To be fair, modders suffer far less legal backlash, arguably because they give away their creations and encourage game sales.

Such is also the case with fan fiction writers, who write unique, independent works of fiction based on copyrighted works and trademark characters. There is no lack of originality in fan fiction, merely a tribute to an existing work that already has a fan base. For small-time or hobbyist writers, fan fiction offers an attentive, interested audience for their work based on subject matter, setting or character alone. Is it legal? Certainly not. But since it stays nearly all non-commercial, many authors and publishers turn a blind eye.

The life of a pirate is not without its dangers. Infringers can lose their internet provider, receive legal threats, and even suffer fines or imprisonment if picked as an example to others. Public opinion may rally against them, and yet pirates enjoy many unique benefits as well. Despite critics claiming that the digital age is killing creativity, the pirate knows differently, with every creative endeavour simply waiting for its turn. The fields of music, movies, publishing, hacking, linguistics, architecture, drafting, art and photography wait at the fingertips of all pirates. They need not wonder if they have enough money or even desire to follow through with learning a new craft or art, but can simply experiment at will using the finest tools in the industry.

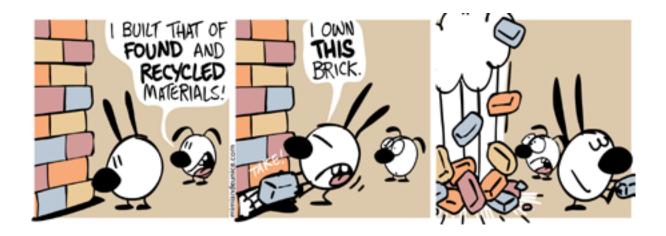
Other pirates would probably bear a different name in an age less concerned with criminalizing them. As author Paul Craig notes of some game crackers: 'Successful

crackers possess a common semi-autistic personality. The process of cracking involves thinking in a highly illogical, almost backward manner. The process is so confusing that even the most experienced computer programmer can fail to understand the principles. You must be born a cracker; it is impossible to be trained to think like one' (Craig, 2005: 62). This remains problematic for mainstream society to understand: that some pirates are born. That external causes or individual choice may have little to do with it. What is potentially even more disturbing is that piracy is the result of making the most of one's development and potential – that, without piracy, a fertile mind would lie fallow and fail to flower at all.

After all, what is the alternative to piracy? Consuming media in a traditional fashion does little to further development, but remains a passive act. Most consumers relegate themselves to viral videos, e-mail and social networking, none of which border on the potential even the meanest of pirates may enjoy.

A pirate may learn new languages and gain an understanding of photography, non-linear video editing, music mixing, graphic design, game creation and writing. They do not squander their lives, living in their mothers' basements where they grow fat on Redbull playing pirated video games and looking at pilfered porn. The fact remains that pirates – at whatever orthodoxy and under whatever set of rules they have chosen – lead lives enriched by easier access to information.

Copyright Terms



Among the most contested facets of copyright law is the term for which protection applies. Arguably the first copyright legislation was the Statute of Anne in 1709. It gave rights-holders a 14-year copyright term, with a possible 14-year extension if they were alive to renew it. So no matter what, a work fell into the public domain (which then simply meant that others could print it) after 28 years. Even this protection, short compared with today's 'life plus 70 years', was more about control than ensuring just compensation for an author's work. Printing companies were as powerful then as trade organizations such as the BPI, RIAA and MPAA are today. Had they not contested 'unauthorized' copies of the books for which they enjoyed a monopoly on printing and pricing, it is unlikely any such statute would have existed. And perhaps it did not need to exist. After all, the world benefits from stores of literature written before 1709.

Though the United States historically adopts European copyright practices, the right people can indeed incite stricter copyright legislation. While today a hodgepodge

of media conglomerates and trade group lobbyists fight for protection from the digital age, historically lobbyists were not only printers and distributors. Once marquee authors realized that market demand for their works extended beyond the original copyright terms, they voiced a vested interest in furthering the terms as far and as broadly as possible.

Instead of presuming that current copyright models make a good fit, some content creators build their own licences. Other media simply dissolve long before copyright ends, so rights-holders have to feel out a reasonable solution. In film, copyright terms draw poignant criticism, and in music, copyright's growing footprint means hardship for new artists. The only certainty with copyright terms is that their potential benefits bear steep costs.

Copyright terms in literature

Wouldn't creativity flower if unfettered by fears of petty lawsuits by relatives who contributed nothing to the creative process in the first place? What public interest does it serve to enrich the heirs of Irving Berlin, Vladimir Nabokov, Martha Graham, or Gilbert O'Sullivan? Which system would better promote art: one in which anyone with a good idea for a James Bond story could compete in the marketplace of ideas for an audience or one in which those who control Ian Fleming's literary estate can prevent anyone from playing with his toys?

- Siva Vaidhyanathan (2003), Copyrights and Copywrongs

If you make a dollar, I should make a dime.

- Dexter Scott King, on licensing his father's 'I have a dream' speech (Firestone, 2000)

Few sought to alter copyright terms as drastically as Samuel Clemens, better known as the beloved Mark Twain. Source documents such as letters and essays, both published and unpublished, speak of Twain's strong but contradicting opinions on copyright throughout his life. But his final word on the term for which copyright should extend was clear: he wanted author's rights to hold indefinitely. He proposed several sensible ideas about why this should happen and how, such as mandated discount editions after so many years at premium prices.

One cannot regard as coincidence, however, that Twain grew more keen to extend copyright toward the end of his life. He became concerned about taking care of his children – wanting to see his writing provide for them, and their children, and so on. However, these natural emotions do not lead to good and fair practice. No more than the frustration that older authors express today when talking about the unauthorized reproduction of their works. Fundamentally, such ideas oppose the free market – the crowning force in dictating price.

Indeed, while Twain's work sells many volumes even now, he was a rare and popular writer. For every Twain there are thousands if not tens of thousands of writers whose work holds little to no market value after their deaths – particularly a century after their deaths. In those cases, what would unending copyright do?

Enter the lawsuits and the droves of lawyers willing to push them. If no work went into the public domain, the number of available idea expressions would so quickly become protected by unending copyright that any expression would mean copyright violation. Under this idea, Disney would likely not exist in its present form, since most of the early works (and even many today) are retellings of *Grimm's Fairy Tales*, which are in the public domain. If these remained copyright protected and the brothers Grimm's family had demanded excessive payments for the use of their forebears' work, it is likely Disney would never have created movies such as *Cinderella* and *Snow White*.

The more obscure a protected work, and the wider the net of protection it casts, the more dangerous this idea becomes. Imagine writing a book, publishing it and then having an author's family demand that you retract it or pay royalties because your book is clearly a retelling of their forebear's copyrighted work from a century ago. A work so obscure there is nearly no probable market value. So long as such work remains 'all rights reserved' it becomes irrelevant whether defendants have even read what they are accused of violating.

And yet, what many modern supporters of thick copyright also overlook when citing Twain as an avid supporter of copyrights is context. Twain enjoyed enormous popularity, but – for good or ill – the copyright climate undermined his monopoly in a few ways. Notably, while he set his US works at premium prices, he competed with works from England with little or no copyright protection. Thus, US readers could buy Hardy or London at a fraction of what it cost to buy Twain. Publishers did not have to pay Hardy or London for those copies sold. The reverse also held true. While Twain sold for a premium price in the US, presses bootlegged his works mercilessly in Canada and England and the books sold at a fraction of their US price.

So let us be clear: Twain opposed bootlegging – hard goods piracy – not our modern interpretation of copyright violation, which includes sampling, remixing and mashups. Twain himself admitted many times to using ideas, stories, phrases and concepts not his own. Even by today's definition, expressing those ideas made them his. But at times Twain committed what today's copyright climate would find criminal. His honestly-titled 'A True Story, Repeated Word for Word As I Heard It' was the story of a slave woman during the Civil War. The woman held no copyright because she did not fix her oral story 'to a tangible medium of expression' and so received no compensation, while *Atlantic Monthly* paid Twain more than they had ever paid for a single piece (Diffley, 2002: 23). In this way, Twain was as piratical as Walt Disney, Elvis and Stan Lee, or any creator working from existing ideas. It is debatable if there are any original ideas – only original (and valuable) expressions of ideas.

So while it is understandable that Twain would oppose hard goods piracy – the exact duplication of his work for sale at a discounted rate while he received nothing – this differs from our concept of copyright violation. Now rights-holders demand \$10,000 for a four-second background shot of *The Simpsons* in a documentary that has nothing to do with *The Simpsons* (Ramsey, 2005). Musicians face lawsuits for using a one-second sound byte that resembles a one-second sound byte from an earlier work. These are not cases of piracy, but of imitation, retelling and remixing. These are examples of taking what exists and making something new, not of taking something that has an existing market demand, copying it and selling it without paying the creator.

As with many of today's thick copyright proponents, Twain admitted seeing no difference between intellectual property and physical property. Speaking to Congress,

he said: 'I am quite unable to guess why there should be a limit at all to the possession of the product of a man's labor. There is no limit to real estate' (Congressional Joint Committee on Patents, 1906). This reflects both the MPAA and RIAA's ideas of IP as physical property. Author Mark Helprin (2009), in his pro-thick copyright work *Digital Barbarism*, also thoroughly exhausts the real estate analogy. It is more understandable for Twain, however, since copying of work implied a physical, wilful act to put a cheap product on the market by sidestepping payments to the creator. For media today it becomes much more difficult to view intellectual property as physical property – by right or by definition. A computer's Random-Access Memory (RAM) copies information the moment users access it. Peers copy data millions of times on a file-sharing site, often without anyone profiting.

So despite Twain's good intentions toward authors and their lineages, there is no way that he could have foreseen the current corruption of copyright law that we commit today – even without his proposed unending copyright term. While his ideas may have suited his purposes, they would prove restrictive and heavy-handed in a culture where so few are able to create market demand that extends beyond a few years (if they can create demand at all). Many of this week's *New York Times* best-selling authors will be complete unknowns 20 years from now, let alone 100 years. Twain himself recognized this, saying: 'It is only one book in 1,000 that can outlive the forty-two-year limit' (Congressional Joint Committee on Patents, 1906).

British author Charles Dickens suffered the same fate of having his books bootlegged in the US, while still having to compete with cheap bootlegs of Twain and other US authors in England. Like Twain, Dickens called for an international copyright, and even asked his US readers to buy genuine copies of his books. That his work was so quickly bootlegged in the US even affected his subject matter, as with the serial novel *Martin Chuzzlewit*, where he portrayed US customs and mores negatively. Again, Dickens grew more fierce in his stance against piracy the larger loomed his family's need for money. Smacking largely of Twain's concern for leaving his family in good stead, it was not until Dickens earned large sums from his reading and speaking tours in the US that his anger abated.

And yet, were it not for the cheap copies of his books available in the States, Dickens would not have enjoyed the fame that allowed him to tour in the US so successfully. While no one expects that Dickens should have thanked piracy, just as today no one expects Bill Gates to laud piracy of the Windows operating system, the benefits that piracy gave both is clear. Fame for the former and familiarity for the latter both spell financial gain and mass exposure in the long term.

For the US, the Constitution clearly states that copyright terms shall have limits. So unending copyright was never, and is not currently, at stake. But even copyright's present length should prove a testament to how dangerous extending the term or inclusions of copyright further would be. Instead of one creator holding one copyright, multiple family members and multiple corporations would share the copyright, and must agree to terms of use. And with copyright term extensions in both 1976 and 1998, infinite copyright is nearly in place already. All Congress need do is continue to extend copyright terms, and protection grows indefinite. If an individual produces a work today protected for life plus 70 years, it is historically predictable that Congress will extend the copyright terms again within that time frame. So new work never makes it into the public domain. But because it is still technically for a limited time, Congress can claim compliance with the constitutional decree of limited copyright.

With derivative rights, excessive rights-holders both individual and corporate loom inescapable. A creator must spend time and money contacting these multiple holders, which will invariably increase over longer periods of time. Already this has made the idea of using a portion of a well-known, older work, which is still under copyright but has become increasingly popular, impractical for all but the most staffed and well-funded projects. For example, using Tolkien's *Lord of the Rings* would demand far more effort than simply contacting the person to whom Tolkien bequeathed the copyright. It would mean negotiating with multiple family members and media groups, all wanting money and each with veto power over the work.

Of equal importance is when Twain and Dickens lived and what media meant at the time. They lived before ubiquitous theatres and the ambiguous, troublesome ideas of author compensation for derivative works such as movies made from books. They lived before widespread recorded music, which has undergone enormous changes with every musical media and progressing technology. They lived before computers and programs, digital media, and point and click duplication. And yet the industry has reacted to each of these changes in largely the same way that Twain and Dickens reacted to literary piracy: by extending the scope and term of copyright. Yet every step

every change to copyright law – needs the same debate and consideration about what possible effects extension has not only on the public then, but also on those who create thereafter. Because changes of media and dividing pre-existing copyrights have made copyright alter from protecting the author to protecting the rights-holder. This remains true whether the copyright holder creates or not. Whether they are individuals, or faceless corporations seeking only monetary gain while neither contributing anything of cultural value nor ensuring the progress of content creation.

Indeed, making any changes to terms has historically considered only the customers and sellers of media, not future content creators. Today, the customers are the creators, making any copyright conversations centred solely on consumption problematic.

All rights reserved alternatives for software

There is... a myth that innovation comes primarily from the profit motive, from the competitive pressures of a market society. If you look at history, innovation doesn't come just from giving people incentives; it comes from creating environments where their ideas can connect.

- Steven Johnson, Where Good Ideas Come From (2010)

The FBI or Interpol piracy warning has appeared before consumers so often that its message is lost, even when DVDs forbid skipping it. The warning assumes that the media on which it features bears 'all rights reserved' copyright. The message tells viewers that the 'unauthorized reproduction, distribution or exhibition' of media can mean prison time and enormous fines. What it does not cover is what makes up authorized uses. Consumers must guess at their rights instead of feeling certain about what they can and cannot do with their rented, bought, borrowed or even created media.

So when the internet allowed for file-sharing, modding, remixing and new distribution models, the limited, cloak-and-dagger method of the all rights reserved protection scheme began to grow impractical. Rights-holders continue to uphold

this restrictive model, even in societies where so many create, contribute and share. But during the 1980s the first alternatives to this heavy-handed protection scheme began to emerge. These alternatives did not begin for film or music, however, but for software.

The General Public License (GPL) was created in 1989 by a coder named Richard Stallman. The gist of the GPL is that one cannot impose stricter limits on any later or derivative works than the licence for the original work entailed. One must also reveal the source code for the program this licence protects. This is the licence the Linux operating system employs (and many other software applications).

Despite then Microsoft CEO Steven Ballmar telling the *Chicago Sun-Times* in June 2001 that the licence (as it works for Linux) is 'a cancer that attaches itself in an intellectual property sense to everything it touches,' one must consider the source. This came from a company that historically makes money by restricting access and forbidding code sharing. Neither is 'right' because copyright is not a moral debate. They simply represent two different business models.

Three of the six main GPLs are non-commercial, but still allow making money or suing for licence infringement, such as a 'downstream' company using the code and then failing to release the source code for their work. Non-commercial GPL code can still make money from donations, consulting work resulting from the product's release, download fees, or user options such as installing the Google Toolbar or Google homepage supporting the software's creator. The GPL spells out how and when others can use a program or the code behind a program. There are several different iterations that have occurred since 1989, and many combinations of licences one can impose on a work, while still fostering creativity, remixing, and a virtual public domain of code.

The GPL is largely the product of the 'copyleft' movement, which built on top of the existing copyright model to ensure that whatever creators release under the GPL remains free from restrictions such as closed source code. In this way, it accepts the power of current copyright controls, but uses them to ensure perpetuation, not limitation. One need only look to the Linux operating system to see the licence's power in action. While Microsoft may publicly scoff at the operating system, Linux runs Tivo, Google, Amazon and many hand-held devices.

As Kenneth Rodriguez notes in the *Journal of High Technology Law*, GPL has little to no legal precedent (Rodriquez, 2005). This could eventually spell disaster for companies using Linux if, for instance, courts decide that Linux (and thus other GPL-licensed software) do not have a legal leg to stand on. The upshot remains that if software licensed under GPL continues to eke into popular technology, companies that depend on that technology could rally behind it in court. So long as both sides have equally deep pockets, GPL may well hold up despite not forcing the rigidity on users that all rights reserved copyright and closed source codes currently employ.

Similar to the GPL, the Creative Commons license is an overlay of current federal copyright. It was developed and spearheaded by renowned copyright lawyer and writer Lawrence Lessig (among others) in 2001. Again like the GPL, the Creative Commons bevy of licences do not imply that the works they protect are not-for-profit. Content creators can use the licences in many ways. The main purpose is to forbid exploitation through bootlegging, unauthorized copying (say, for distribution or sale without compensation to the copyright holder), and anything that would bind the work more strictly than the original licence. The positive outcome is that if creators want to allow non-commercial remix, mashup or derivative works, they could do it. If they want the licence to mandate contacting the creator before any commercial or non-commercial use takes place, it can act that way as well.

What Creative Commons is not is the all rights reserved model, which defaults to a resounding 'no' when any following creators want to use the copyrighted media without a licence. The federal copyright automatically applies to works in a tangible medium of expression. But this binds a restrictive licence on all new media. Combined with the ever-extending copyright terms and the unavoidable increase in the volume of created works, this model ensures a zero-sum game. The longer the current copyright schema remains in place, and the more media created, the more difficult creation without costly and permissible sampling will become. It is this idea – that creation could become more difficult the more copyright law supposedly looks out for creators – that the Creative Commons presumes to buck.

Creative Commons extends beyond the States, as well. More than 50 countries have created Creative Commons licences, including Britain, Australia, Brazil, India and China. Though using US copyright law as a starting point, each country shares in developing and progressing their suite of Creative Commons licences. It is difficult

to predict how useful the licence will become in every nation, since countries such as Nigeria make money from their media without any copyright law, and China has shown little regard for such laws, international or otherwise. However, just beginning from a point of inclusion and with the creators in mind will surely meet with greater acceptance than the all rights reserved model. Such a model does less to protect foreign works from piracy than to force fixed prices on behalf of copyright-rich countries. Countries currently reaping the most benefit from intellectual property and that enjoy superior law enforcement.

The all rights reserved model has other pitfalls. Creators without an existing customer base will likely have to surrender to a corporate entity eventually, to see their creative work gain notoriety, especially so long as the current model of distribution and consumption remains in place. That also means that an all rights reserved copyright implies a surrender of control by the creator to the eventual copyright holder – the corporation they go to for distribution, publishing and manufacturing. This – among many other reasons – has led to the rise of Pirate Party politics.

A point of concern remains whether the Pirate Party agenda would clash with the values of the copyleft movements of the GPL and Creative Commons. The first wants copyright all but dismissed, while the others are essentially overlays on current copyright. It is debatable which would prove easier to manage: a new set of laws written according to the intricacies of the digital age, or a new model that acts on top of the laws already in place, even if copyleft values oppose the hard-line and aggressive stance of all rights reserved copyright.

Both GPL and Creative Commons licence suites also work to preserve what the United States calls 'fair use'. While the pillars of fair use are well known and well publicized, fair use currently acts as a legal defence. That is, when accused of copyright infringement, one can claim fair use, but it does not prevent the accusation. It also does not bypass any complications, losses or delays inherent in the legal process, since it still means the courts settle the matter. Big media has deep pockets and treats most legal cases of copyright infringement as a public deterrent of piracy, so fair use defences remain impractical for many individual creators. Law is a long, costly avenue for resolution.

As communication and awareness of intellectual property's importance increase,

so will the copyright rich's attempt to exert greater control. But thanks to greater communication and the explosion of user-generated content, alternative licensing should increase in parallel. While few would expect media conglomerates to adopt an alternative to the all rights reserved model, the more content creators employ such freer protections, the stronger they will become.

Perspectives on copyright terms in film

It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.

- Lord Thomas Macaulay, Speech to British House of Commons against copyright term extension, 1841

Thank God for the residuals.

- Ingrid, Uptown Girls

One benefit of fair use is that satirists can criticize protected works without clearing rights. Otherwise, they would meet refusal at every turn. But sometimes criticism erupts from the industry itself. Despite trade organizations such as the MPAA upholding total resistance to any copyright infringement, those in the industry have often parodied the impact of intellectual property laws gone awry, and in self-effacing and comical ways.

One such allegory of how living off another's creation inhibits personal growth and social contribution is the story of Molly Gunn, played by Brittany Murphy in the film *Uptown Girls*. Molly is a spoiled and directionless young woman in her early 20s. Her father was a famous musician who died, leaving heaps of royalties to Molly. She lives lavishly off these until a lawyer given power of attorney makes some bad investments and skips town. Molly faces the reality that even future residuals will

only go to clear the estate of its now enormous debt.

This forces her to find a job babysitting young but mature-beyond-her-years Lorraine Schleine, played by Dakota Fanning. Viewers could interpret that it is Lorraine who causes Molly to grow up and face the adult world, just as Molly makes sure that Lorraine learns how to enjoy being a kid. However, it is the loss of her unearned, never-ending income that forces Molly to grow up and develop as a person and a designer. Only then – through fashion – does she contribute anything and move on with her life. While this is similar to other 'rich girl grows up' stories, it is a telling portrayal of the dangers of living off another's creation.

In a similar thread in Mark Twain's life, he admits: 'I can get along; I know a lot of trades. But that goes to my daughters, who can't get along as well as I can because I have carefully raised them as young ladies, who don't know anything and can't do anything. I hope Congress will extend to them the charity which they have failed to get from me' (Congressional Joint Committee on Patents, 1906). It is likely that with Twain's indefinite copyright, he would have several 'Mollys' living off his work, and perhaps not to their own or society's betterment.

Similarly, consider the book-turned-movie *About a Boy*. In it, Will (played by Hugh Grant) not only lives well off his father's music, but from a single song. A Christmas tune so ingrained in British culture that it plays everywhere, and represents the sole source of Will's income. He adores his lifestyle, but feels shame when others ask what he does for a living. He must admit that he does nothing but live off his father's creation. His father had not worked hard his whole life to provide for his family, but rather got lucky by making a single song that took off. That it plays everywhere several months a year means royalties continue to flow indefinitely (or at least until the end of the copyright term).

Will looks only to this money for all he needs and therefore becomes an emotionally stunted human being who contributes nothing to society. When he meets 12-year-old Marcus – no doubt his emotional equivalent – he begins to understand what little this has done for him. His money does nothing to help Marcus's life, just as it has not helped Will. Expensive shoes he gifts to Marcus to make him more popular get him robbed at school, aggravating his problems just as they have Will's. When he finally grows up and outside the shadow of his father's intellectual property, his life improves.

In *Finding Forrester*, Sean Connery's character preserves a life of solitude, living off his royalty cheques from his only novel, *Avalon Rising*. Until a young writer, played by Rob Brown, forces Forrester out of his shell, the money from his creation decades before has left his life without purpose or reward. Once he moves out from under his former success, he completes and releases his second novel (though posthumously).

Alongside meta-theatre portraying copyright law as arcane, restrictive and even silly, others communicate the idea that temporary creativity begets permanent rewards. In *Law Abiding Citizen*, Gerard Butler's character, Clyde Shelton, is able to compose his expensive plans not through hourly wages or continued creative efforts (he is a machinist), but through patents on designs he created long before.

In *Made of Honor*, Patrick Dempsey's character, Tom Bailey, lives lavishly and does not work because he invented the cardboard coffee sleeve. Living off IP in *Romy and Michelle's High School Reunion* seems far easier and more practical than working for a living. In the film *Red Belt*, actor Chiwetel Ejiofor's character Mike Terry seeks a quarter of a million dollars in compensation for an idea that adds an element of chance to a fight. He borrows the idea from the culture of his fighting style, so it is no more his property than the property of the organization that takes it from him.

It is debatable what this says to viewers; whether living off intellectual property is a simple plot device, a way of explaining wealth without having to resort to more complex reasons. It could also represent a misconception by Hollywood writers. For instance, the abnormal amount of movie characters who are successful freelance photographers and writers when – in reality – these are often gruelling, competitive and poorly compensated professions that few endure for long and at which fewer still excel. The result, intended or not, is that intellectual property appears simple: you create, and society compensates. In reality, this is rarely the case, and that playing field grows larger and flatter every day of the digital age.

In essence, it is clear that the current issues surrounding copyright terms, compensation and creativity have leached into film. That such expression in film skirts an all-in-favour view of copyright's terms and conditions speaks of the issue's complexity. It is clearly more complicated than 'if you sample you licence', or responding to the ease of copying in the digital age with broader patent laws and longer copyright terms. These are arguably the band-aids of the outgoing model, and not the pillars of the model yet to develop.

Copyright terms and short-lived media

Kang: And over here is our crowning achievement in amusement technology: an electronic version of what you call table tennis. Your primitive paddles have been replaced by an electronic...

Bart: Hey, that's just Pong. Get with the times, man.

- The Simpsons, 'Treehouse of Horror'

Video games differ from other entertainment media. This manifests in how people use them, why, and through what platforms. And yet current copyright law does not distinguish between games and other media such as books, movies or music. The result of this parallel treatment for unparalleled media means that copyright litigation remains a choice even when the purpose of copyright has long passed.

The US Constitution shaped copyright laws to 'ensure progress in sciences and other useful arts' so innovation and motivation remained intact. As with other facets of shaping the nation, the founders knew what needed protection, and to what degree – hence setting copyright terms as 'limited'. The way that copyright culture has interpreted this small constitutional passage is that copyright should ensure that creators or the corporations who hire creators can make money without fear of direct, detracting competition. This implies that copyright should be in place so long as there is a market for the copyrighted product. Any protection after that makes little sense because the copyrighted work stops making money while still forbidding successive derivative works.

The same applies to rights-holders refusing to offer supply where there is market demand. In gaming culture, fans have long met demand where there is no supply. For instance, Sony released the PSP as a portable gaming platform meant to play the proprietary Universal Media Disc (UMD), whether games or movies. The 'universal' part of UMD is an almost comical misnomer, since consumers had no way of writing to UMDs or even reading them other than on the PSP. The unit also used a proprietary format removable memory card – the memory stick pro duo – which owners could employ for pictures or music. Quickly, hackers found a way to make the PSP play ROMs (Read-Only Memory) games through an emulator installed on the machine's

memory card. The popular duo Pox and Ragable aired their 'PSP Hacking 101' videos all over the internet, showing gamers how to install the emulator, load ROMs and play games. The various emulators could play ROMs from several older game consoles, including Neo-Geo, Nintendo, Super Nintendo, Sega Genesis and Amiga. While Pox and Ragable did not endorse playing licensed games on the PSP emulator, the program's creators left out licence verification or other protective measures from the emulator. The likely result was that most gamers who loaded the emulator onto their PSPs played copyrighted games illegally.

And yet Pox and Ragable were meeting a demand that the market failed to address. Sony did not sell memory cards with emulators preloaded and then sell licensed versions of these ROMs either as direct download or from their website. They did not sell UMDs with ROM games, though the console could obviously handle the computations and graphics. Possibly, clearing the necessary licensing on all of those games proved too taxing and costly to warrant investing the time and money. Pox and Ragable and the creators of the emulator negotiated no such legal barriers, and so delivered to the gaming public something people wanted, and efficiently.

At every turn, the PSP needed firmware upgrades that disabled the emulators, only to have rogue coders release a new emulator version the next day. However, there are still notable differences in what Sony and the rogue coders provided to users. Anything Sony sold was relegated to UMD format. These were disks that, when inserted into the PSP, had to spin to play. Compared with the memory stick, this meant that UMDs used much more battery life than memory stick emulators. There was also no chance that UMD game packages of older games would have contained as many as the disk could hold. The UMD could hold 1.8 Gbs (dual layer), which is more than enough to hold every Atari, Nintendo 8-Bit and Sega Master System game ever made. But licensing would never allow it; filling a UMD with as many ROM games as it could hold would be a logistical nightmare and far more expensive for licensing than Sony would reap in profits.

Eventually, the PSP became the platform for gamers wanting selection and playing experience that no single unit provided. Thus, while this meant the units sold well, the games did not. This, among other reasons, saw the PSP fall short of the long-term success of Nintendo's rival portable system, the Nintendo DS. Indeed, the following release of the PSP, called the PSP Go, allows downloads onto flash memory, and does

away with UMD games altogether. Sound familiar?

The main reason emulators and ROMs receive so little flak from the gaming industry is that they simply do not compete with what currently makes money. While books, movies and even software from the late 1980s can hold market value, games simply do not have the shelf life of other media. Fortunately, the gaming industry seems aware of this truth and – while still employing lengthy copyright terms – seldom prosecutes rogue gamers. Though reasonable, this still leaves rights-holders the ability to prosecute later. Indeed, waiting to litigate is key in some copyright claims, where rights-holders wait for the infringing company to make it big before seeking a settlement. Of course, waiting for Pox and Ragable to balloon is futile, since neither aspire to compete with the gaming industry in economic terms.

Even better than turning a blind eye, however, is the way that some game manufacturers have gone a step further. Bethesda is arguably one of the most respected and popular game companies today. With big titles such as *Elder Scrolls 4: Oblivion* and *Fallout 3*, there is little argument that Bethesda is at the top of their game and still making successful, popular releases. And yet, in 2009, Bethesda released their 1996 game *Elder Scrolls 2: Daggerfall* at no cost, even sponsoring the download on their website. This was not some cast-off title with no solid history or market. *Daggerfall* enjoyed an enormously successful run, and remains the most expansive episode of the popular *Elder Scrolls* series, with several hundred hours of game play (a feat unheard-of at its release). So why allow users to download, mod, adapt and generally do as they will to a game that had more than 80 years left on its copyright?

Or how about the Source engine, developed by game company Valve for *Counter-Strike: Source* and the legendary game *Half Life 2*? Valve made Source available for use by game modders while still making money on games using the Source engine. Several offshoot mods appeared, all using the engine. The same was true when id Software allowed nearly unlimited use of the hugely successful *Quake 3* engine.

This is a boon not just for PC gamers, but for Mac users as well, where often clever coders have to port games to work on the Mac. Hackers can make anything work on the Mac, but have historically done so from the shadows. With no-cost releases or free-to-use engines, Mac gamers enjoy the same capabilities with legal freedom. That someone will make a Mac port is a given. But whether game companies allow modders and hackers some creative freedom decides how gamers view these

companies in the future.

Other countries have already come to realize the futility of applying a traditional media model to games. South Korea has debuted myriad Massive Multiplayer Online Role-Playing Games (MMORPG) that are free to play. They make money by selling items in the game, such as better weapons, spells or abilities. Companies call these microtransactions, and while games such as *The Sims 3* use this to supplement revenue, other games make money solely using this method. The volume of these games in recent years shows the rampant creativity and drive to create and embrace new models of monetization. It also means that South Korea's copyright terms of life plus 50 years (or 50 years for corporate copyright) is futile and even silly to consider for such games. These games have little use without players and the servers on which the game runs. This ensures that once the game has lived its life and its graphics and content become dated, its presence in the gaming world dissolves. Some games might still enjoy a small following years later. The 1997 hit Blizzard release *Diablo* still enjoys popular online play. But it is more likely that game companies will not tie up resources and server space for a title even ten years old.

Knowing this, it seems absurd to employ the same term of protection for games as for books, movies or music, since the market for older games steadily declines. A consequence of current copyright terms for games is that the foundations of older games remain unused by fledgling game coders for fear of reprisal, even though the game no longer makes any money. Indeed, releasing the engine for a past-its-prime game is an excellent start, and shows clearly that many in the gaming industry understand that such lengthy terms as are applied to other media make little sense for video games.

Expanding copyright coverage in music

You're a slave to the money then you die.

- 'Bittersweet Symphony', Richard Ashcroft (credited to Mick Jagger and Keith Richards)

Just as the range of copyright has grown, its breadth has increased as well. More media enjoy copyright protection than ever before. Often this means legislation protecting unprecedented media, such as computer code or video games. Other times extending protection comes not from Congress, but from the courts. With so many copyright cases each year, inevitably absurd cases set a precedent for further frivolous suits, either through forced settlements or through plaintiff victories. Nowhere is such absurdity clearer than with music.

Creating artificial scarcity by confining music appears throughout Western history. People do not need costly equipment to enjoy music, they consume it repeatedly, and music has spread virally since long before the internet. So it seems a logical fulcrum for control. After all, consumers react to price premiums, impulse buys, loss aversion and other gimmicks all the time. But if rights-holders want customers to pay for easily pirated content, they have to tweak the price, modernize delivery and set the content free from limits of time, space and format.

Adrian Johns suggests that the digital age has no real antecedent (Johns, 2009). This rings true for communication, copying and media availability in even the remotest corners of the globe. However, the shift of business models from premium prices to a technological levelling owns at least one precedent, and with a happy ending. When pianos became affordable for more people in 18th century England, consumer demand for sheet music rose sharply. At the time, an oligarchy of printers controlled and price-inflated most sheet music. Piracy met market demand, and copies of sheet music began cropping up at every street corner at significantly reduced prices. The industry began a propaganda campaign to convince consumers that pirated sheet music would put hard-working artists out of a job, and mean an end to sheet music creation altogether. They lobbied their legislators for protection and enforcement, with limited success.

Finally, after peaking with Gestapo tactics that rallied the public against them, the printers accepted the truth: they would have to change their business model or lose the fight. They made sheet music cheaper and more available, and consumption shifted from pirated music to legit. The only difference was that a few wealthy people at the top of the rights-holding pyramid got a little less from consumers or had to discover another means of collecting a premium.

Today, the propaganda is all about the innate evil of file-sharing. Sampling

between artists – supposed or certain – has little to do with file-sharing, but results in litigation just as vicious and leaves public opinion just as scarred. When the first suits against rap artists sampling older music began, a strong legal precedent followed – for good or ill. When the smoke cleared, cases such as *Bridgeport v Dimension Films* made sampling even three notes require licensing. 'Courts and the music industry could have allowed for limited use of unauthorized samples,' writes IP professor Siva Vaidhyanathan 'if they had considered taking several tenets of fair use and free speech seriously – especially the question of whether the newer work detracted from the market of the original. In fact, as has been shown repeatedly, sampling often revives a market for an all but forgotten song or artist' (Vaidhyanathan, 2003: 144). But Bridgeport Music Inc owner Armen Boladian's reason for filing more than 500 lawsuits against 800 artists had nothing to do with reviving George Clinton's music. Boladian wanted money.

This increased girth of musical copyright protection extends to lyrics as well. Michael Bolton found himself facing a multimillion-dollar lawsuit for using the phrase 'Love is a beautiful thing' in both the title of a song and the chorus. The phrase is common enough, but courts found Bolton liable for plagiarizing the Isley Brothers' tune of the same name. Despite several Isley Brothers' songs topping the charts, 'Love is a Beautiful Thing' did not even make the Top 100. It simply falls short of their best work. Bolton claimed his work was original and that he had been unaware of the same-titled tune, which debuted when he was 13 years old, in 1966, as a single on a 45 record. The original debuted on CD in 1991, the same year as Bolton's Time, Love, and Tenderness album containing 'Love is a Beautiful Thing'. Courts referred to famed infringement case *Bright Tunes v Harrisongs*, where George Harrison 'subconsciously' plagiarized The Chiffons' 'He's so fine' and paid a hefty toll. Setting an aggressive precedent, the courts awarded the last living (and quite bankrupt) Isley Brother \$5.4 million against Bolton and Sony. The sum supposedly reflected 66 per cent of royalties from the song and 28 per cent from the album (*Three Boys Music v Michael Bolton*, 2000).

Such cases ensure a bevy of trivial lawsuits remain on the dockets. This is why musician Samuel Bartley Steele sought a laughable \$400 billion from Bon Jovi for allegedly plagiarized lyrics in the hit song 'I Love This Town' (Perone, 2008). Why Richard C. Wolfe filed suit representing Lil Joe Wein Music against rapper 50 Cent's

song 'In Da Club' for using the common phrase 'It's your birthday' (Alfano, 2006). It does not matter that such suits fail more often than not; they garner media attention for the supposedly infringed, as plagiarism claims against Coldplay and Avril Lavigne showed. If case outcomes suggest that suing pays better than creating – through publicity, settlements or favourable judgments – such litigation will only continue.

Imagine such strict court rulings with other media. Stephen King uses the phrase 'sank gum-deep' to describe a severe bite in his short story collection *Just After Sunset*. What if any later users of that descriptor had to license through Stephen King's attorneys or face a lawsuit? Or how about copyright for a single line of computer code? Coders with access to source code could possibly go on to use it in their own for-profit application. Should not each line receive protection and require licensing?

With this increased breadth, music went from an environment where 'a hundred different people can sing songs about Stagger Lee or John Henry, but the person who sings it best gets rewarded most' (Vaidhyanathan, 2003: 13) to one where clearing rights precedes and restricts creativity. This wider coverage did nothing to incentivize creation, but in fact taxed it, often into non-existence.

Going through proper licensing channels does not ensure protection anyway. While current artists forget historical imitation, they grow stricter and more litigious toward any new music that resembles their work. A shocking example of this was a song entitled 'Bittersweet Symphony' by British band The Verve. The Verve bought rights to sample from Rolling Stones song 'The Last Time', using a part of the song not even included in the original release of 'The Last Time'. But after 'Bittersweet Symphony' began to gain popularity in the US and the UK, ABKCO Records – representing Mick Jagger and Keith Richards – claimed The Verve had sampled too much, and began a legal coup d'état. Not only did ABKCO gain 100 per cent of the royalties from 'Bittersweet Symphony', courts ruled that the authorship of the song now goes to Jagger and Richards, though they had nothing to do with the lyrics. The Verve's Richard Ashcroft wrote every word of the song. One can imagine all manner of ridiculous parallels with other intellectual property: George Lucas green-lighting a novel about the Star Wars universe, and then suing for all royalties and to have his name on the cover when the book grew popular. Or if a US remake of a Japanese horror film borrowed too much, and the original director demanded credit as director of the remake.

The undeniable trend with sampling music is that older, settled artists impede younger, upcoming artists. Where they sampled willy-nilly from blues and jazz musicians, they now demand excessive royalties for licensing, despite often having no claim to originality. As with every matter of copyright, there is a middle ground between profiting from another's work (competing or not) and a freeze on further creativity for fear of litigation. Perhaps part of the solution lies in recognizing that just because music copyrights have grown as wide as they have long, does not mean this recent breadth incentivizes artists or harms the market for the sampled work. UK band M/A/R/S sampled seven seconds from the Stock, Aitken, Waterman (SAW) song 'Roadblock' for their hit 'Pump up the Volume'. The case only came about after co-producer Dave Dorrell mentioned the sample during a radio interview. So despite M/A/R/S distorting the sample to the point where the rights-holder could not even identify it, in an open letter to the press Pete Waterman called it 'wholesale theft' and filed suit.

Copyright's growing midsection affects more than music. The degree to which copyright protects computer code, the written word and 'sweat of the brow' collections of data expands at an increasing rate. While the copyleft and other reformist movements voice constant concern over copyright's elongated term, its expanding breadth warrants the same anxiety and closer consideration.

Piracy in the Digital Age



As important as understanding the players in the so-called copyright wars is knowing what place piracy holds in the digital age – in business, culture and even politics. In many ways, modern digital piracy was shaped by the way that governments deal with copyright issues and businesses profit by state-enforced monopolies. In other ways, digital piracy represents a game-changer, both with the 'crime' of copyright infringement and its potential impact on the future of media.

For 100 years, music – just a series of vibrations through the air – had tangible form on the record, tape or CD, just as film had in the reel-to-reel, VHS or DVD. Copying usually meant a loss of fidelity. Media lacked portability in both content and platform. Now, more digital information than one could consume in a lifetime lives on the internet for all with an interface and access to enjoy. And such interfaces have moved from room-sized machines to personal media devices small enough to fit into a pocket and cheap enough to deploy worldwide.

When formerly bound information throws its corporeal form, sharing becomes unavoidable. The only question becomes whether content creators or pirates will facilitate such sharing. Because of the ebbing nature of bureaucracy and law, usergenerated platforms for file-sharing are not only inevitable, but also may well best legal, sanctioned platforms in speed, ease-of-use and variety. Such platforms beget witch-hunts with the power of law behind them.

History is riddled with government-sanctioned, corporate-sponsored propaganda both to persuade citizens of the path of virtue and to demonize those who act outside the law, ignoring state-enforced monopolies. But the citizen must decipher the validity of these smear campaigns, and discover each party's incentives: economic or otherwise. Consumers must consider how closely the media-driven image of pirates and piracy answers to scrutiny and either find it fitting or dismiss it as misinformation.

What governments and corporations prove willing to do to force their monopolies is too close to censorship and unjustified surveillance for some citizens to accept, particularly given piracy's lack of obvious societal harm. When copyright issues enter the political fold with all the subtlety of a group calling themselves the Pirate Party, it becomes clear that intellectual property disputes hold more complexity than media trade organizations would have consumers believe.

The move to digital media

I go to Tiffany's and steal a diamond necklace and put a picture of it on the internet and promote it, does that mean I didn't steal, because Tiffany's became more well known after I stole their necklace? See, some of the arguments make no sense.

- LL Cool J (Committee on Governmental Affairs, 2003)

Internet piracy is theft, pure and simple.

- Cindy Rose, Managing Director, Disney, UK and Ireland (Monblat, 2002)

Author and essayist Malcolm Gladwell discovered a 'theft' of his work when the Broadway hit *Frozen* took specific lines from a piece he had written for *The New Yorker*. His first reaction echoed the industry's canned response: punish as swiftly and severely as possible. The play was discontinued. The author, Bryony Lavery, suffered disgrace not only for lifting Gladwell's work, but also for taking many details from Dorothy Lewis's autobiography, *Guilty by Reason of Insanity*, for use in the same play.

In hindsight, Gladwell came to realize that many of the 'stolen' portions smacked more of typical, factual, less stylized phrases (Gladwell, 2004). One example was the phrase 'The difference between a crime of evil and a crime of illness is the difference between a sin and a symptom'. He not only found evidence of this phrase in prior writing, but also saw it used afterward in another work, again without attribution. He even came to feel that this was more tribute to him (accredited or not) than it was a merciless theft of his efforts. Gladwell's conundrum reveals the enormous rift between physical and intellectual property. While Gladwell comes across as a compassionate man in his writing, it is unlikely that he would have shown such understanding if Lavery had broken into his home and stolen his flat-panel television. Or – if applying the legal price tags to IP – Lavery stealing Gladwell's car, art collection and antique furniture would be more comparable. This is more than just confusion about the true value of IP. Rather, reactions such as Gladwell's reveal misgivings about to whom IP belongs, and to what degree – a greyness seldom seen with larceny.

This is why – among several other reasons – piracy began to rise with digitizing formerly physical media. The music industry and their trade organizations would have consumers believe that file-sharing music is the same as going into a store and stealing a CD from the shelves. But there are clear legal, social and semantic contrasts. From a purely legal standpoint, those who commit larceny often spend time in jail with fines of no more than a few thousand dollars. Larceny is a criminal charge.

Digital piracy, in contrast, could mean a £50,000 fine in the UK or \$150,000 fine in the US for each infraction. Yet infringement cases rarely see the accused spend time in jail because it is most often a civil matter. 'Theft is theft' – a favourite slogan of the copyright rich – holds no legal power. A robber who wrenches a bag from an elderly woman cannot compare himself to a kid stealing bubble gum by simply stating 'theft is theft' in court.

Every society's courts have varying degrees of theft, and what one nation considers theft often fails to align with another's definition. Historically, Saudi Arabia did not punish stealing a book as it would theft of property, because the book contained ideas, and ideas were no one's property. As Lewis Hyde points out, however, one nation's ideas of property can infect and overtake another's. Western ideas of intellectual property now make stealing a book in Saudi Arabia a bad move (Hyde, 2010).

Her Majesty's Revenue and Customs (HMRC) in the UK and the Internal Revenue Service (IRS) in the US hold conflicting views on physical and intellectual property as well. If IP is the same as physical property, then why do content creators not pay a tax on their IP holdings as one pays taxes for physical property such as a home or car? Just as with property tax, the government could scale an IP tax according to the market value of the property. One cannot argue that income tax alone answers, since sellers pay the tax (as buyers do sales tax) on sales of either physical or intellectual property. The reason is clear: IP is not the same as physical property.

Socially, too, there are myriad differences in physical and digital goods. Few newspapers or media outlets would defend thieves of physical goods, yet journalists often defend those sued for file-sharing music or movies. They portray them – accurately or not – as victims of copyright trade groups such as the BPI, RIAA and MPAA. This holds especially true in cases where the accused claims ignorance (an elderly woman indicted for downloading rap songs), where the fine is abnormally high (a middle-class mother of four sued for millions of dollars), or where the defendant makes a fair use argument unsuccessfully (creating a program to allow DVDs to play on Linux machines).

In addition, one cannot exercise fair use of private property. A teacher could no sooner steal a coat for a demonstration of insulators than a satirist could hijack a car as a part of a parody skit. With personal property, the law calls trying to penetrate security breaking and entering. But fair use allows and encourages this with digital media to bolster copy protection. It is important to understand the dangers of the hard-line verbiage big media uses. It leaves little wiggle room for interpretation or case-by-case judgement, but treats all levels of infringement as inherently criminal.

Of course, copyright infringement existed before digital media. Even a few years ago, consumers would use two VCRs to make copies of rented movies, or use

tape decks and turntables to make mix tapes for friends. These acts saw almost no social and little legal backlash. Now file-sharing has gone digital, and copying data is easier and of a higher quality than ever. But is it a lack of respect for 'property' that drives infringement, or the absence of social values in today's youth? Or perhaps infringement has merely grown alongside available media, and the technology with which one may copy, remix and distribute it.

The industry views the physical/digital problem too pragmatically. They believe that if consumers get the same media for which they once paid \$20 (a CD of 13 songs, for example), then they should be willing to pay the same price for having it digitally delivered. This ignores the savings to the manufacturer and distributor implicit in such a model. Occasional industry-driven stories claim selling digital media costs as much as its predecessor. But it is unlikely that a CD from a store could or should cost the same as bits moved through cable. After all, Shawn Fanning certainly could not claim that it cost millions of dollars for Napster to work, and it was the largest compendium of music ever created. The difference lay in e-commerce and copy protection, which – for the consumer willing to pay for content – is not their problem, but a problem of updating business models.

Another effect of digitization is that people who have used p2p programs to share media have a high digital recidivism rate. That is, once they have tasted of the p2p apple, they are unlikely to return to the old model of consuming media. Someone who did not grow up with mp3 players but bought records, tapes and then CDs often has solid, sometimes immutable ideas about enjoying media. In effect, ripping, burning, copying and sharing – legal or not – are often lost on such people. But to others, file-sharing has revealed that media can go anywhere. That they can store, organize and play it in countless ways. That the most effective of these distribution models happens to be illegal is of no consequence. Of course, the success of iTunes proves that such models do not have to be illegal and can still turn profits.

Today, consumers – especially youth – also have different ideas of ownership, just as they have different ideas of the value of digital information. The RIAA tries to tap into the base part of our nature that covets physical objects, but now music and information is not physical, but ethereal. This manifests not only in rampant, thoughtless sharing, but in altered views of loss as well. How many consumers have lost 100 CDs' worth of songs when their iPod or other mp3 player was lost, stolen

or broken? Even when the loss is monetary, it simply is not the same as losing 100 physical CDs. And nor would anyone treat this the same. A police officer taking a report about stolen property would not consider a fully loaded iPod the same as several hundred CDs being stolen, though the two containers hold the same data. Neither do insurance companies handling property claims.

The same holds true for movies as for music. Though a DVD's contents are similar to what one can download, the physical product is not the same. With a store-bought DVD come plastics – the case, the transparent cover and the DVD itself. There is cover art and often silkscreen art on the DVD. These represent several costly efforts that are not applicable when downloading a movie. The DVD had to be shipped, handled multiple times, and the store needed paid employees to sell it, which all factor into the price. Even the rent and other operating costs of the business selling the DVD alter the price.

Perhaps the biggest irony lies in the mixed messages trade organizations present. On the one hand, theft is theft, so any unlawful copying mimics stealing a DVD or a jacket. On the other, licensing agreements on consumer media pound in the idea that consumers do not own media. They only own a licensed copy that bears several restrictions with severe penalties for violation.

It remains problematic for big media to insist that consumers are only licensing media and enjoy no ownership, and then expect them to value the media as personal property. A lesson many car buyers have learned is to avoid buying used cars from rental companies. Consumers simply do not treat rented material as they would their own stuff. Digital media will overtake physical media in time. If rights-holders continue a crusade of licensing as a means of limiting the number and the means of usage, the view of intellectual property as physical property will continue to diminish.

Peer-to-peer networks

It's this peer-to-peer technology approach that basically has formulated opportunities for people like never before. And we're moving more and more into peer-to-peer technology.

- Senator Orin Hatch, Introducing Napster creator Shawn Fanning at a Senate

Judiciary Committee (Refe, 2009)

Napster was so clearly wrong that we should have been able to close it down overnight.

- John Kennedy, President, Universal Music International (Monblat, 2002)

The advent of digital music was unavoidable. The only variable was whether it would spawn from piracy or from the music industry. While the film industry had no direct involvement in the debut of the VCR, the MPAA and film production companies could have seized the opportunity for home videos right away. Instead, they fought against allowing the VCR at all; another in a long line of resistances to technology that continues just as vigorously today. When the first mp3 players hit the market, industry trade groups fervently clung to the CD, forgetting the recent lessons of the VCR and VHS tapes, and insisting that mp3 players only encouraged digital piracy. Then-president and CEO of the RIAA Hilary Rosen claimed that they wanted to work with companies to release digital music in a way that 'protects the rights of the artists' (Business Wire, 1998). But the RIAA filed suit against mp3 player pioneers Rio, claiming that their player violated the Audio Home Recording Act. The BPI responded in much the same way, petitioning ISPs to penalize known p2p users before a viable, legal download service was available.

The increasing number of homes enjoying broadband internet by the end of the 20th century also meant that digital music would make its way onto a sharing platform. Again, the music industry had a real opportunity to be at the forefront of such technology and ensure that it launched in a fair and efficient way. This did not happen. Instead, with no legal alternative for sharing and downloading mp3s, piracy met market demand.

In 1999, Napster debuted as the pet project of Shawn Fanning, a college student

who created a file-sharing platform that reached 25 million users and contained 80 million songs. It was the largest and most complete collection of music that has ever been compiled before or since. Despite Fanning trying to negotiate with artists to pay them for the music on Napster, the industry considered the amounts too low and eventually saw the site shut down in 2001 (Ingram, 2000).

Ten years later, still nothing compares to the original Napster, and the industry – after failed attempts laden with DRM – continues to indict Napster p2p offshoots for projected losses. In an editorial written for the BBC Geoff Taylor, the CEO of BPI record label in the UK, calls Napster the 'Rosetta Stone of digital music' (Taylor, 2009). Yet he also recognizes that such a platform could never have turned legal because of the difficulties of licensing and royalties. Napster was easy to use, safe and offered unparalleled variety. No wonder it became so popular. And yet the music industry still – more than a decade later – tries to clear rights to create something as profound and functional as Napster. Even with sites such as Limewire meeting threats of cancellation from ISPs and RIAA lawsuits, people still flocked to it. In 2010, when a court order saw Limewire shut down, users simply began using Frostwire or some other program tapping into the Gnutella network. Are such programs popular because the content costs nothing or because Napster presented a model of what digital music could be, and still is not?

Napster showed that a compendium of music could work logistically, and – if left to flourish – may well have shown it could work commercially. Peter Jenner of Sincere Management frames one such model in *Good Copy, Bad Copy* (Johnsen et al., 2007). If 600 million people (a fraction of the total number of people currently consuming music) paid \$50 a year to subscribe to a total music compendium, the music industry would match its current over-the-counter market – all with digital distribution. There are problems with adding an externality charge to internet service, but to illustrate the point, this would mean adding a few dollars a month and avoiding immeasurable legal battles and an enormous grey area in modern media consumption. While the logistics seem endlessly complex, Fanning created this in mere months. One single college student compared with the research and development of the entire music industry.

Such a platform would provide 80 per cent more music than a record store, since only 20 per cent of all music is for sale at a given time. It would mean a safe, legal,

diversified means of enjoying music, pulling most retail customers and those now trolling p2p sites to this compendium. So why has the industry not embraced such an idea? Again, it is supposedly a logistical quagmire. Graham Henderson, head of the Canadian Recording Industry Association (CRIA), responds to this idea in an interview for the documentary *On Piracy* (McArdle, 2007). Emotionally, he posits the rhetorical question of who would decide what to do with the money – where would it go? This is a tacit acknowledgement that such a model would prove financially successful, but logistically difficult. However, this would be no different from the complexities of the current model, where labels, artists, distributors, retailers and trade organizations calculate cost and profit division. The challenge of building a new, digital infrastructure is hardly justification for clinging to the CD retail market, to DRM, and to suing customers.

Perhaps the continued failure to monetize the Napster model is less a matter of logistics as it is a fear of change. Only the naive would figure current conflicts over copyright have to do with creativity or even piracy; they are about change.

Digital film piracy is a more recent issue than music, simply because of the need for a broadband connection to download a full-length film in any reasonable amount of time. While p2p programs such as Grokster and KaZaA could handle film downloads, it was the bit torrent protocol that made digital movie sharing mainstream. Without an internet connection, consumers could digitize their DVDs using a decrypting program such as DeCSS or (later) DVDShrink. Portable movies then became a reality. Sure, portable DVD players quickly became affordable, and despite the drain on battery life, people could always take DVDs on the go via laptop. However, with the rise of portable digital players such as the Archos and iRiver players, the allure of portable film grew. Once the iPod Video entered the picture, consumers wanted their movies as portable as their music.

Yet the same problems occur now with films as in 2000 with music. No legal substitute for digital movies compares to what people can download using bit torrent or p2p technology. In 2005, iTunes began selling films for the iPod, but with a catch. The film prices remained high – as high as one might expect to pay for a DVD in a retail store. And yet, iTunes made transferring movies difficult. Consumers could not enjoy a purchased film in any way and on any media they wanted (called 'space-shifting'). Later, renting films from iTunes offered a lower-priced alternative, but

compared with \$1 RedBox rentals or unlimited views via Netflix's streaming service, these alternatives arguably only compare to piracy in the loosest definition, and mostly appeal to price insensitive consumers.

Often, instead of versatility, the market responds with exclusivity: the BluRay and now-defunct HD-DVD technology. Sure, low-priced BluRay players and disks coupled with price insensitive consumers' wish to supplant their DVD collections will create a heyday for BluRay – for now. But refusal to accommodate the price sensitive and more on-the-go consumers with a digital alternative means that film downloads will only continue.

This needs no other proof than the slew of sites making money from memberships and adverts showing low-quality, camcorded films. Not all consumers care about HD or 3-D technology; price and ease of use are still giant motivators. In fact, most films available for download on popular torrent tracker site Demonoid are 700 MB or less (ostensibly to allow users to burn the media onto a conventional CD instead of the more expensive DVD). Those touted especially for the iPod are often even smaller – as low as 400 MB – since the definition can be much lower when the film plays on a small screen.

Executive Vice-President and Secretary of Viacom Michael Fricklas is correct in wanting to lower the costs of digital distribution through renting films instead of selling them outright (Fricklas, 2009). But if iTunes prices for film rentals and the inherent DRM of iTunes media management are any indication, such models have a long way to go.

File-sharing and popular opinion

Captain Norrington: You are without doubt the worst pirate I've ever heard of. Jack Sparrow: But you have heard of me.

- Pirates of the Caribbean: Curse of the Black Pearl

It is a mistake to quash the pirates' purpose simply because they are pirates.

Indeed, a prevailing ignorance of pirate principles and values has made the industry's War on Piracy a failure – at least at dissuading infringement. Much copyright infringement resembles licensed use. Both use existing ideas, media and content to create something new. Often the difference is merely that the latter paid the copyright holder and the former did not. If looking at the act of using another's work, NWA's use of a riff from George Clinton's 'Get up and dance' is indistinguishable from Jay-Z's use of 'Hard Knock Life'. But the former was sued for sampling without payment; the latter paid and was not sued.

Often a creative pirate – that is, one who remixes media regardless of copyright or pirates software to aid in that creation – has the same ends as content creators doing corporate works-for-hire. Pirates also want exposure for their work and the satisfaction that comes with creating it. They want unfettered access to what has come before, as well as the latest tools for media creation. Such pirates show universal disregard for copyright: once at the back-end, when they borrow others' media or pirate programs for content creation, and then again at the front end, when they release their work to the world. They seldom seek protection for works created from protected works, for instance. Were it the norm to try to claim copyright on, say, a song that clearly borrowed illegally from a copyrighted tune, and then to profit from that song in a marketplace in which it competed with the original, then the current industry response would be warranted.

However, the only possible way in which a no-cost remix competes with the original is with empirical proof that fans of the remix then refused to buy the original. And that is only if they intended to buy the original to begin with. Yet the exact opposite has often come to pass: remixes create interest in the original works, as shown by DJ Danger Mouse's The Grey Album. Not only did it not hinder sales of its forebears – Jay Z's The Black Album and The Beatles' The White Album – but it increased exposure and interest in both earlier works. No one expected The White Album's copyright holders EMI to contact Danger Mouse and thank him for infringing on their copyright, but threatening to sue – while standard fare – seems poor practice here. Were Danger Mouse blatantly charging for his creation or doing some harm to either inspirational work through market competition, then a cease and desist order would make more sense.

Of course, not all pirates create. Many openly and wilfully violate all copyrights,

not for money, but rather for the freedom of information and ideas. No-cost information, even in the digital age where it is so cheaply shared and perused, runs counter to the dominant model of IP. Media bear a price, no matter how subtle; this is the schema under which the information age now performs. Even if that price is watching a 20-second advert preceding a 10-minute video or enduring pesky banner ads to read formerly pay-for news content.

And yet, for pirates determined to enjoy freedom of information, the idea that one would wilfully limit information for the sake of profit is as absurd as giving media away would be to Time-Warner. Complete freedom – just as complete information lock-down by magically granted ubiquitous copyright protection – becomes a polemic issue for the pirate. It seems impossible to imagine a Hollywood blockbuster without a good chance of high return on a studio's investment. The pirate ignores this.

Despite evidence that quality, independent film on a shoestring budget can entertain, enlighten and still preserve motivation for the makers, modern movie studios might ask: what is the film industry without \$300 million movies? Pirates give little regard to budget, return on investment, or the 'sweat of the brow' inherent in film when they share it online or download their own copy instead of buying one. However, they would do the same for the independent film as they would for the multimillion-dollar blockbuster: the lack of adherence to copyright principles is identical.

The industry responds according to the money they wish to recover from a project, among other measures, of course. The pirate responds precisely the same in all cases: information wants to be free. One has to ask too what motivates pirates to suspend their efforts. Mainstream media tell them that if they keep pirating, no one will make music anymore. No one will make films or write books or invent. And yet, year after year, this assertion proves false. In fact, with a lower financial barrier to entry in many fields such as film and music, more people are creating now than ever before. User-generated media will always fall behind blockbuster budgets, staffing and technology, but that gap has grown smaller in the digital age. Now, game-inspired fan-films look and feel as real as multimillion-dollar B-movies. Perhaps they trail industry blockbuster quality, but they run close enough behind to earn favour from the public.

The message to today's pirates is that any day now, they will cause the end of

media. To the pirates creating media, this assertion must ring even more hollowly than it does to much of the public. Only scant and unreliable evidence even suggests declines in media investment and production. While industry rhetoric tells sob stories of formerly prolific artists now forced to tour longer or jobless film industry workers, it overlooks the growth of media creation as a whole. Now growth occurs more among creators seeking payment in different ways. A band that pays the bills with CDs sold at concerts instead of at retail stores may not make record labels wealthy, but they still create income by making music. And their fans – doubtless riddled with pirates – who come to shows but refuse to rush to Virgin Records to buy the CD push less money through the RIAA, but still keep the bands rockin'.

The industry-driven image of pirates as loan rogues, organized crime syndicates or even terrorist rings ignores the fact that much copyright infringement falls to legitimate businesses. Recently, powerhouse Google, Inc fell under the pirate umbrella, pushing for greater access to copyrighted works. Before looming as the business behemoth they now represent, Google was already trying to fill their servers with information. Public perception – especially among writers – held that Google was scanning all written works, protected or not, and pasting them online for all to see. This was indeed the case with works in the public domain in both England (in the University of Oxford) and in several university libraries in the US.

Google limited the scans of protected works to a few lines based on user searches. Opposition argued that because Google made a copy (redacted or not) they violated copyright, no matter what the result, and also that public domain works in one country might retain copyright in another. Perhaps a simple agreement whereby site visitors selected their country (or more exclusively, where code checked the IP address for the visitor's location) could have solved the latter issue. But no one could argue with the first point – the program did make a copy, even if limited on the front end.

But is this another case of copyright culture shooting itself in the foot? Wouldn't widespread but redacted access to publications mean more exposure and thus sales of those works? Alas, just as the MPAA is unlikely to admit that the unauthorized prerelease of *X-Men Origins: Wolverine* increased its box office bottom line (Parfitt, 2009), copyright holders denied that Google's scanning project could increase exposure and sales while still clearly violating copyright. This would be tantamount to admitting

that copyright law contains fundamental flaws, particularly in the digital age. That every moviemaker's worst nightmare – the leak of the film to pirate networks before it even premieres – could prove a boon for return on investment. That an author could benefit from allowing non-paying eyes a glimpse at their magnum opus.

Even the supposed paragon of anti-piracy, the MPAA, has admitted to illegal copying of a film. When film-maker Dick Kirby submitted his documentary *This Film Is Not Yet Rated*, he received word from an MPAA attorney that they had indeed copied the film for distribution among MPAA rating board members. 'It's pretty disturbing,' Kirby says in an interview with Slant Magazine 'because here's an organization that spends all this time on anti-piracy, and their own definition of piracy is "any single unauthorized duplication of a copyrighted work". Which is, of course, my film. They, by their own definition, have engaged in piracy' (Schager, 2006).

In all of these examples, the industry image of the pirate fails to align with copyright infringement reality. There are indeed counterfeiting rings and consumers who pirate what they might otherwise have purchased, but this is only part of the picture. So many infringers create in the same way as licensed content creators, or use piracy as a means to create. Other cases of infringement are not the product of ostensibly recalcitrant consumers, but rather businesses or even the same organizations that otherwise vilify infringement.

The rise of Pirate Party politics

The arguments for every individual step towards a monitoring society may sound very convincing, but we only have to look at the recent history of Europe to see where that road leads.

- Pirate Party manifesto (Jones, 2006)

Intellectual property issues are irreversibly conjoined with politics. So long as big media can afford more lobbyists, the copyright climate remains unlikely to thin out, and prone to favour only corporate interests. Considering this rather bleak scenario, forming Sweden's Pirate Party seemed fated.

The Pirate Party's politics are only radical when compared with the current copyright and patent laws. If introduced to someone with no exposure to the current way that information flows in post-industrial nations, the party's ideas about shorter copyright terms and revision (or even dismantling) of patent law would not seem so radical. After all, we live in a time when the rise of stardom bears a distinct bell curve over an ever-increasingly short period of time. It was obviously important for Hanson to retain protection for their one hit 'MMMBop' while it was rising in popularity, at its peak, and during its certain decline. Now, however, there is much less ground to argue that a label should be able to sit on the copyright to that song for another 85 years. On the surface, the only reason would be to collect a little money here and there if someone used the song in a film or other media.

This same idea holds true with patent law. While a patent offers all sorts of protections, it does not require the filer of the patent to take any action. What could be the possible motive in completing the lengthy patent process and doing nothing to put the design to market? Again, the ability to troll the current market in search of any technology that might be infringing on that patent has now become a market in itself. People need not create anything if they can simply sit back on a stack of patents and wait for others, busy creating and trying to bring fresh ideas and innovations to the world, to infringe on their patents and then force settlements.

One of the central platforms of opposition to the Pirate Party (largely from industry trade groups) is to dismiss it entirely. They claim that no party with so moderate and specific an agenda can possibly become a political force worthy of attention. Director of anti-piracy operations for Warner Bros Entertainment for Europe, the Middle East and Africa, Christian Sommer, offers such a waving off, saying: 'Their current agenda is too narrow to attract a broader electorate,' and that 'if the Pirate Party widened the scope of its political agenda, it would lose its identity' (Meza, 2010: pA4). That Sommer thinks he can so easily dismiss the party is rather convenient. It seems all one need do is pretend IP law is a small issue, and that each nation's current legislation deals with it just fine. Then opponents can banter about arbitrary issues such as abortion, the death penalty and religion – the softballs of the bipartisan systems. But IP is no softball. The information age will only grow in speed and importance, outstripping moral, hot-button topics such as abortion that have little bearing on a society's economic or artistic contributions.

The Pirate Party gained a seat in the European Union in May 2009, gaining more than 7 per cent of Swedish votes. This won them worldwide clout as a political platform, no matter how many some try to marginalize them. When the Lisbon Treaty was ratified in December 2009, the Pirate Party received a second seat. The party itself – while still fledgling, even in Sweden – has begun a steady rise that has seen it surpass several other parties to become the third largest in Sweden.

In purely logistical terms, ignoring whether the party is politically effective, the party appeals to an age group of voters tired of partisan agendas. A group that copyright culture treats as little more than consumers, despite being among the largest contributors. The Pirate Party is sure to increase in power and pull so long as it can keep a foothold and retain the attention of young voters. For others, public support of The Pirate Bay (TPB) by the Pirate Party is their chief rationale in favouring the party. While the copyright rich universally condemn TPB, file-sharers worldwide know of and benefit from the large volume of files TPB represents. They remember how political and economic pressures saw US law enforced on Swedish soil from a streaming security camera during the raid on TPB servers in May 2006. Sites such as Napster and Supernova have become so much legal chaff in their current forms. But TPB refuses to go away, and that a political party not only refuses to condemn them but lauds them publicly is refreshing, no matter what the other implications.

While any political party must kowtow to online privacy to some degree, the Pirate Party has made protecting privacy a leading issue. Continued widespread surveillance in the UK, despite enormous costs with little empirical proof of return on investment, and egregiously severe legislation such as the Patriot Act in the US, make privacy an ever-growing undercurrent in the digital age. The Pirate Party's concern for protecting individual privacy while touting administration transparency appeals greatly to voters tired of carte blanche legislation for defence or crime control.

In Germany, the Pirate Party quickly gained a foothold when former MP Herbert Rusche, also co-founder of the German Green Party, joined the Pirate Party in 2009. While still falling short of what Reuters calls 'the five per cent hurdle needed to enter parliament' it is the fastest growing party in Germany. Even considering an aging population, youth concerns over Draconian copyright laws and privacy could mean a swell in political clout in short order.

More than 30 countries now have Pirate Parties. As UK Pirate Party leader Andrew Robinson puts it, the various parties are 'structurally and financially independent' (Espiner, 2009), but that they are cropping up worldwide shows a common desire to see copyright laws reformed. As Robinson said: 'The government is saying that there are seven million people that share files in Britain, and that file-sharers should be punished with a maximum fine of £50,000. The fact that the government has threatened to bankrupt up to 10 per cent of the population shows the need for a party that understands technology'.

Perhaps it is not news when the Pirate Party spreads to other nations. After all, most nations have communist and anarchist parties that offer little threat to the established, often bipartisan groups. The US has a party to bring back prohibition that has little chance of passing any agenda. However, the short-term growth of Pirate Party supporters and election to legislative bodies could speak of an inexorable rise in their numbers and influence.

Responses to the Pirate Problem



No single response to piracy transcends all players. With so many economic incentives, business strategies and even ideologies at work, reactions to copyright violation remain varied and often polemic. The copyright rich – industry rightsholders – expect broad compliance to their government monopolies, even at others' expense. Alongside constant legal action against businesses, a more personal, drastic set of lawsuits targeted individuals. Here, the unfortu`nate digital pirates act much like the hanged pirates outside ports of old – as a sign of intolerance and punishment.

Amid industry pressures and an overall failure to police piracy to the degree big media might like, rights-holders turned to governments – their own and those of foreign states – to enforce their copyrights. With tax money and trade leverage, both nationwide and international laws governing IP were passed by legislatures, often with less thought for the effects on civil liberties than for corporate bottom lines.

With the rise of internet business came the threat of accountability for the pirate problem. Industry concerns over bootlegs, file-sharing and copyright violation spawned finger-pointing at internet businesses for allowing any violations. Costly, heavy-handed and often automatic controls debuted to keep lawful internet enterprise from becoming a haven for roaming pirates and bootleggers. But as piracy continued, the focus also extended to ISPs for supplying the bandwidth by which pirates could share files, upload infringing content and even sell bootlegs. With the threat of lawsuits proving an ineffective deterrent, the industry-led governments promised to take internet connections away from repeat offenders, even with scant proof of copyright violation.

Content creators responded as well, some with fervent opposition not only to piracy, but also to the digital age. Such reactions solidify the already hard-line stances on both sides of the pirate issue. The only common thread through all of these reactions is self-interest, leaving no one able to claim the moral high ground.

Rights-holder reactions

We know that we will never stop piracy. Never. We just have to try to make it as difficult and tedious as possible.

- Dan Glickman, former Chairman and CEO of the MPAA (Johnsen et al., 2007)

Average people with average resources were finding themselves on the other end of... very expensive lawyers and unlimited resources, and it felt like terrorism.

- Michael Fricklas, Executive Vice-President and Secretary of Viacom

Litigating for what the industry now calls intellectual property crimes is nothing new. Since the advent of patents, there have been patent lawsuits. Since widespread book printing, authors and printers alike have used the courts to enforce their monopolies. Historically, however, copying media was outside the ability of most

individuals, let alone the average consumer. Copying needed distribution channels and cost-prohibitive equipment, and remained the work of pirate rings selling knockoffs. Creating bootlegs for personal use proved impractical until well into the second half of the twentieth century with the arrival of photocopying, magnetic tape and personal video equipment.

The difference in the digital age is that copying has become so cheap, fast and easy that no real barrier remains. The result is that now individual consumers may commit copyright infringement several times a day with no intention of either depriving content creators or rights-holders of money or monetizing the copied media. Litigation against businesses or economic sanctions against nations remain an oftused if ineffectual means of punishing infringement. But industry-sponsored reports from groups such as the Business Software Alliance (BSA) and the International Federation of the Phonographic Industry (IFPI) show billions in supposedly lost revenue not only from bootlegs, but also from individual file-sharing.

The RIAA decided to take the fight to the individual infringers in hopes of creating a clear legal deterrent and effectively scaring consumers back to the retail CD. This would make more sense if suing individuals made money that then went back to rights-holders and – ostensibly – the artists. Even after many sticky fingers reached into such a pot, that some compensation reached musicians might glean public approval, even if under seemingly predatory circumstances.

As cases went, those not settled out of court (as the overwhelming majority were), often garnered much media attention, most of it negative. The lawsuits that immediately created flashbulb memories in consumers' minds and typified the individual lawsuit scheme may have been outliers. More importantly, though, is that they all fell well within the bounds of current copyright laws. Such lawsuits nested into one of two categories: socially predatory or financially absurd. In 2003, Brianna LaHara was a 12-year-old living in a New York City Housing Authority apartment with her 71-year-old grandmother. The RIAA sent out a bevy of letters threatening legal action for file-sharing copyrighted tunes, and LaHara was among the unlucky 261 recipients. Eventually, the RIAA agreed to settle out of court for \$2,000 (Borland, 2003a). Despite the size of the settlement reflecting a price tiered for LaHara's age, the case became a beacon for anti-lawsuit sentiment and the heartlessness of the music industry.

P2P United, a trade organization representing Limewire, Grokster and other p2p platforms, even came forward to pay LaHara's settlement. P2P United's Executive Director, Adam Eisgrau, said: 'Someone has to draw the line to call attention to a system that permits multinational corporations with phenomenal financial and political resources to strong-arm 12-year-olds and their families in public housing' (Borland, 2003b).

At the same time, the RIAA accused senior citizen Sarah Ward of file-sharing songs on KaZaA, despite her owning a Macintosh for which the p2p program did not exist. Moreover, many of the songs were rap (Borland, 2003c). The RIAA later dropped both cases, but the damage to public opinion remained. Despite the industry view that anyone who violates copyright is a criminal, the public did not have little girls or senior citizens in mind.

Long after the LaHara and Ward cases came those not settled out of court, which traversed the full legal gamut through a federal trial by jury. A jury found Jammie Thomas-Rasset guilty of file-sharing 24 songs and ordered her to pay \$1.92 million. The Native American mother of four worked as a natural resources coordinator, with no assets to pay such a judgment. That the plaintiffs eventually offered a settlement of \$25,000 – far more reasonable than nearly \$2 million – failed to stick in people's minds or appear in later news stories (McHugh, 2010). Similarly, when Sony BMG sued Joel Tenenbaum for file-sharing, the jury award of \$675,000 stuck in news stories and public discourse, not the decrease to \$67,500 – still considerably inflated. The music industry made Tenenbaum a martyr, refusing his efforts to settle out of court. This inexorably led to making Tenenbaum a cultural icon of us versus them.

One serious problem with music industry lawsuits is that suing individual infringers results in a net loss. The only people profiting from suing music fans are the lawyers and companies such as SafeNet who do the investigations to identify file-sharers. Despite thousands of lawsuits, the resulting balance sheet looks grim. The RIAA spent \$64 million only to recover \$1.3 million, while watching their public approval plummet (Kravets, 2010). If anyone has become the poster child for how not to deal with piracy it is the RIAA, and this sacrifice did nothing to fill their coffers, but actually represented a sharp loss. If file-sharing is the music industry's Moby Dick, the RIAA is clearly Captain Ahab. Just like Ahab, the RIAA lawyers abused the resources of their supporters to try to stop an indefatigable and spectral enemy.

With the money spent on lawsuits, the RIAA could have researched alternative models for their clients' music. Their supposed justification for stopping individual lawsuits – a drop in piracy and an increase in digital music sales – likely had more to do with available DRM-free alternatives at affordable prices than with the efficacy of such suits.

Jonathan Lamy, Senior Vice President of Communications at the RIAA, said: 'Before we announced the lawsuits, we spent years on various educational campaigns. PSAs. Magazine advertisements. Artists speaking out. Instant messages to millions of KaZaA users. You name it. We made extensive efforts to engage fans and inform them about the law. It made a little difference' (Ernesto, 2010).

For the RIAA, the singular goal is to stop music file-sharing, not necessarily to create marketable alternatives. But the RIAA chose to view money pit lawsuits as wise investments based on the file-sharing such cases deterred. In contrast, they might also view every dollar that legal digital platforms earn as funds that might otherwise not have come in at all. Every file sold, a file not downloaded and shared. In other words, when dealing with a perceived threat and estimated losses, a countering approach (legit digital music services), impacts just as much as a legal deterrent that bleeds valuable public approval.

While individual lawsuits have slowed because of popular opinion and trade group policy, the absurdly bloated judgments are unlikely to lessen, especially in the US. Of the members President Barack Obama assigned to the Department of Justice (DOJ), five are ex-RIAA lawyers, despite dozens of public interest groups asking Obama for more non-biased appointments. While supposed to avoid conflicts of interest, the DOJ showed quick support of the maximum fine of \$150,000 per copyright violation, and made the controversial Anti-Counterfeiting Trade Agreement classified. Despite a more balanced appointment to Intellectual Property Enforcement Coordinator or 'Copyright Czar', lawyers notorious in high-profile cases against file-sharing platform Grokster and Capital Records' case against Jammie Thomas-Rasset assumed high-ranking roles in the DOJ.

Lawsuits against businesses will continue until a fundamental change in intellectual property law occurs. Suing individuals, however, has never proved an effective reaction to piracy, either by deterring file-sharing or recovering supposedly lost revenue. As author and pirate DJ Matt Mason notes: 'If suing customers for

consuming pirate copies becomes central to a company or industry's business model, then the truth is that that company or industry no longer has a competitive business model' (Mason, 2008: 59). Sensational and absurd judgments against individuals for millions of dollars may have seemed a sound method for making other consumers afraid to violate copyright and continue consuming by approved platforms. But such cases also make victims of copyright infringers, and heroes of the copyleft.

State-sponsored anti-piracy efforts

At this critical time for our economy, it's important to send a message that the jobs created and maintained by the protection of intellectual property is a national priority.

- Dan Glickman, former CEO and President of the MPAA (Albanesius, 2008)

See, in my line of work you got to keep repeating things over and over and over again for the truth to sink in, to kind of catapult the propaganda.

- Former US President George W. Bush

Unlike businesses, governments often act contrary to the citizenry's wishes. For the copyright rich, having the state push down anti-piracy policy is preferable to angering and alienating their customers.

When French President Nicolas Sarkozy was told he had illegally used a piece of music in a UMP national congress meeting, his party amiably offered to settle for one Euro. This is what a copy of 'Kids' by US indie rockers MGMT cost to download legally. MGMT lawyer Isabelle Wekstein said: 'This offer is disrespectful of the rights of artists and authors. It is insulting' (BBC News, 2009a).

Later, Sarkozy and the UMP chose to impose the three-strikes ruling, which would give internet users two warnings from their ISPs about file-sharing or other copyright violations and then stop their connections after the third infraction. The UMP settled with MGMT for 30,000 Euros, enough to claim they respected copyright laws to their

fullest. Sarkozy's one-Euro gesture made clear that he thought the 53 Euros he paid for licensing was enough, no matter what the nature of later uses of the song online. The resulting settlement did not come out of his pocket, though it is large enough to prove cost-prohibitive for most people. If Sarkozy's settlement represented the norm, pirate DJs would owe countless sums, and everything from baseball parks to corporate PowerPoints would become grounds for millions in settlements. While France's three-strikes tactic came after other government responses to digital piracy, it embodies a fundamental flaw: when your own president thinks copyright is a joke, how can citizens take government copyright enforcement schemes seriously?

Historically, governments defend businesses even at the expense of their citizens. Perhaps this is because citizens have little say in whether to pay taxes, but businesses can leave countries they find unfavourable for more obliging nations. Many nations' legal reactions to the digital age fall in line with this historic schema: in defence of current big business, laws can exploit individuals or stymie new businesses.

The recent Digital Economy Act in the UK, passed in 2010, is another government effort to minimize file-sharing. The act enjoyed only modest support, coming from the typical bevy of trade organizations and copyright holders. It endured political opposition from the liberal, green and pirate parties. Britain's two largest ISPs, BT and TalkTalk, opposed the act for obvious reasons, since it relies heavily on ISPs for enforcement. Once rights-holders contact them with lists of IP addresses committing potential copyright infringement, the ISP must send out notices to their customers, tally the number of notices, and report to the copyright holders periodically.

The act uses a graduated response, where the ISPs and rights-holders meet subsequent violations with ever-increasing penalties. The ISP may cut off service, and the rights-holders will fall back on lawsuits. Of course, a negative result of this is that otherwise law-abiding citizens will have copyright violation act as a black mark on their identities. Personal information has already grown cheaper and more accessible, with little regard for privacy or outcomes such as identity theft or harassment. When 'pay-up-or-else' law firm ACS: Law demanded personal information from BT, the latter sent it in an unprotected Excel spreadsheet later leaked online by hackers dipping into ACS: Law servers (Halliday, 2010). When ISPs offer up customer information for copyright enforcement, whether because of government acts or threats of litigation, it spells danger for personal privacy.

Other than from economically vested entities, the only support for the act was from the Design and Artists Copyright Society and the British Association of Picture Libraries and Agencies. These organizations got on board because the act was supposed to allow greater access to orphan works: media where the copyright holder is unknown and cannot be found. This part of the act (Clause 43) was not included in the wash-up session to pass the act, ostensibly because of opposition from organizations with their own economic incentives. Photographers and other content creators believe that allowing anyone to use orphan works after a search for the rights-holder would threaten their current market demand (Coulter et al, 2010: 29).

Government collaboration on enforcing IP law has historical precedent. Now, however, when everyone is a potential copyright criminal, the effectiveness of such legislation and cooperation should remain suspect.

The international Anti-Counterfeiting Trade Agreement (ACTA), which entered its final draft phase late in 2010, reads as more concerned about international trade and hard-goods piracy than individual copyright infringement. However, what has many people concerned are the changes to border control. While dramatics by mainstream media portray ACTA as allowing border agents to seize, sift through and potentially destroy iPods that may have pirate media, in practice it will prove far tamer. That does not mean, of course, that it will be any less a violation of personal privacy, or that border agents are any judge of fair use. They will certainly err on the side of caution, seizing and destroying private property, even if only in outlier cases.

Canadian copyright activist Michael Geist suggests that it is the almost complete lack of transparency of ACTA that has allowed the rumour mill to create a dystopia of copyright enforcement (Geist, 2008). The US claims that releasing details of ACTA before passing the act would compromise national security. In effect, impressions and guesswork about how the act will perform default to a wary, reluctant scrutiny, and with good reason.

Observing the act may be voluntary, but that does not mean that countries refusing to recognize it will suffer no penalties. As with prior trade acts, ACTA will benefit the copyright-rich countries by making copyright-poor countries (mostly developing nations) enforce foreign copyright controls with limited benefit. In short, ACTA may well be to developing nations what the Digital Economy Act is to ISPs. What the DMCA (see below) is to software developers. What the copyright laws themselves

are to new content creators.

Above all others, one piece of government legislation stands out as purportedly well-intended, but with decidedly negative outcomes. Passed into US law in October 1998, the Digital Millennium Copyright Act (DMCA) forbids bypassing any copy protection scheme or Technical Protection Measure (TPM) that safeguards copyrighted information. This means anything from bypassing DVD encryption to reprogramming consumer electronics. Consequentially, it blurs a legal line between commercial and non-commercial use of media, especially fair use.

Corporations quickly adapted the new DMCA protection to ensure greater profits through proprietary formatting. Since the DMCA impeded not only bypassing TPMs but also whatever TPMs protected, companies began to use the DMCA to secure the aftermarket. For example, Lexmark claimed that when a rival ink cartridge maker created a cheaper cartridge, it had bypassed Lexmark's TPM (Calandrillo and Davison, 2008). The competing cartridge had to fool the printer into thinking it was a Lexmark-brand cartridge to work, and thus had bypassed a TPM used for authentication. However, the only reason Lexmark would employ such a TPM would be to sell price-inflated cartridges, not to protect against piracy.

But the DMCA goes beyond obstructing commercial innovation. The Sony Aibo was an electronic toy dog made from 1999 to 2006. The Aibo responded to certain voice commands and even visual cues via an infrared sensor. A hacker calling himself AiboPet pushed the technical boundaries of the toy to find something he could improve. AiboPet began to make tweaks to the Aibo's coding that made the pet reach beyond the scope of the early design. He posted these on his website, but left out the Aibo source code. Alas, despite the success of the site and the implication that such success meant site visitors owned an Aibo, Sony did not appreciate someone bypassing their TPMs. So, despite no commercial intent and the site positively affecting Aibo sales, Sony Entertainment Robots America ordered that AiboPet remove all hacks and mods from the internet, telling him that he had violated the DMCA. Yet when Sony suffered immediate public outcry over forcing AiboPet's hacks off the internet, they reneged and even released an Aibo programmer's pack that owners could use for non-commercial purposes. So what began as a case against bypassing copy protection ended with encouraging it.

By making it illegal to bypass copy protection, violations became removed from

infringing copyright and more concerned with averting TPMs. The only legal battle rights-holders had to win involved bypassed TPMs, not copyright infringement. The DMCA forbidding technology to overcome copy protection in effect sidestepped fair use. Stopping technology that bypasses protection may prevent pirates from making perfect copies, but this cannot be separate from a program that allows for making fair use backup copies. Similarly, when no reason warrants bypassing TPMs, it weakens the foundation on which the protection stands. Then, even bypassing TPMs for security purposes becomes suspect.

In a popularized case, Ed Felten and his team accepted a challenge presented by Secure Digital Media Initiative (SDMI). They had three weeks to remove the watermark from an audio file, and they succeeded. They had refused to sign the confidentiality agreement with SDMI so they could then publish how they removed it. When Felten was to present the paper at a conference, however, SDMI and the RIAA threatened legal action (King, 2001). The irony was that because of the ambiguous nature of the DMCA, Felten did not know if he had a legal leg to stand on. He did not present the paper or publish it until a year later, when the justice department assured him that doing so would not be illegal. So a team encouraged to employ a fair use bypass of DRM could not share findings with the academic world, despite what SDMI inevitably learned from their research. Duke University law professor James Boyle created a fitting farming allegory where the produce is digital media: 'By using digital barbed wire, the content companies could prevent citizens from making the "fair uses" the copyright law allowed... Cutting barbed wire became a civil wrong, and perhaps a crime, even if the wire blocked a public road' (Boyle, 2008: 87).

Thankfully, the US Congress stepped up and voted in legislation amending the DMCA. It is now permissible to bypass TPMs so long as the purpose falls under fair use. So, stripping the copy protection from a DVD is sound so long as consumers intend to make a legal backup copy, and not because they want to create copies to sell for profit. Also, these changes legally allow for software companies to release programs that remove such TPMs. They work with the understanding that their customers are using the software for fair use purposes and not violating copyright. Before these amendments, courts could hold a company whose product might have led either to bypassing TPMs or violating copyright accountable for their customers' actions. This could have resulted in statutory damages capable of bankrupting the

software companies, and inevitably meant that few were willing to take the chance. Thus, creativity and innovation suffered. Now, courts cannot hold companies liable when customers use their products to violate copyright if violations are a potential happenstance of the product and not its only use. These amendments also extend to web services such as Google, who claim they are not infringing copyright by posting thumbnails of images. Sites such as eBay do not hold sole responsibility for housing infringing content so long as they respond to takedown notices within a reasonable amount of time.

Callandrillo and Davison (2008) point out that even though legislation has come forth to ensure that fair use can still reign over TPMs in the digital age, these proposals have all but fallen by the wayside. A daily scan of IP news reveals copyright holders' continual attempts to thwart these new fair use allowances. Perhaps so long as companies can sell programs to bypass copy protection for fair use, Congress believes that all is well. But it is the conventional wisdom of society that matters here, not what those immersed in copyright culture understand to be their rights. Just because the minority knows they can strip copy protection for backups, education, parody or other fair use purposes does not mean the average citizen understands this. Without a clear, resounding voice telling the public their rights, they will err on the side of conservative, restrictive uses for fear of legal backlash. Consumers are well versed in what they cannot do, but have little understanding of what they can do. And so long as that remains true, limitations will prove the overwhelming default.

All of these examples are about restriction, not freedom. That is not to say that they will not incentivize some creation, but they will undoubtedly prevent other creation. With IP, it is always a matter of balance. And so long as governments remain to some degree the servants of the people, the balance may teeter from control to freedom when incentivizing the few turns to restricting and criminalizing the many.

Copyright and internet business

The decision whether to buy a pirated Louis Vuitton bag is not a moral one, but one about quality, social status, and risk reduction.

- Chris Anderson, *Free: The Future of a Radical Price* (2009)

Piracy funds organized crime and will destroy our film and video industry. Piracy costs jobs and will destroy our music and publishing industry. Piracy funds terrorism and will destroy our development and your future enjoyment. Don't touch the hot stuff.

- Australian anti-piracy advertisement

Much as copyright-rich governments use economic sanctions to persuade copyright-poor countries to enforce their IP laws, so rights-holders in each country make policing piracy the problem of business platforms that handle copyrighted content. Trade organizations and governments put just as much pressure on businesses they believe to be violating or allowing copyright violation as they do 12-year-olds and senior citizens. Policing the internet has many fulcrums of leverage, and chief among them is the constant threat of lawsuits. The popularity of an internet business directly affects its importance as a target for anti-piracy lobbyists, not necessarily the nature of the infringement.

The enormously popular auction site eBay offers a fine example. When a US District Court judge in Los Angeles rejected film-maker Robert Hendrickson's attempt to sue eBay for copyright violation for selling purportedly bootleg DVDs, it marked a notable turn of events. The judge ruled that given the nature of eBay as an auction intermediary and not a liable seller, it fell under DMCA protection, just as ISPs enjoy protection. In short, the ruling considered eBay not responsible for pirate goods on their site, just as ISPs were not responsible for file-sharing. But eBay did not then become an auction site for all manner of fakes. Such a move would mean great legal pressure from rights-holders far more powerful than Hendrickson, and the DMCA

would not protect eBay in every case.

eBay's answer to addressing auctions or sellers who violate copyright was Verification Rights Owner (VeRO), a program to report infringement and for rights-holders to create 'about me' pages regarding permissions. Especially with infringement of an individual creator's work, the several-day lag time on addressing claims met intense dislike. It may have come across as a double standard, since any large corporations sending takedown notices likely met no such barriers.

And yet, from another angle, eBay might seem a bastion of copyright, pulling any auctions that even approach infringement. They employ hundreds of people who traverse thousands of auctions solely to stop sellers from hawking infringing material. eBay also relies on buyer and seller finger-pointing. A customer receives a bootleg copy of a film instead of the original, reports the seller, and eBay stops their auctions or even cancels their seller accounts. Unfortunately, the result is that merchants selling competing items will stop smaller sellers from taking hold by claiming that their auctions violate copyright. Having eBay paint a seller with the pirate brush begets varied and unpredictable outcomes. Not only can eBay pull auctions, but if they suspend an account, accounts that follow bearing any ties to the one that purportedly violated copyright will eventually and erratically suffer suspension as well.

Alas, there is little technical support with a service as automated as eBay. There is simply not enough time to consider copyright issues on a case-by-case basis, so the default is to cancel any auctions that someone says may violate copyright. For instance, some sellers auction paintings based on others artists' work. Anna Conti is an independent artist who makes her living selling her original paintings as well as prints. Her originals, of course, carry a premium compared with prints of the same work. She found artwork on eBay where 'the underlying structure of the image is an exact duplicate' of her work. She theorized the seller had 'downloaded a copy of the image from the web, printed it on canvas, and did a quick paint-by-numbers kind of thing over the surface' (Conti, 2004). Even if the case, this comes far closer to plagiarism than to copyright infringement. The latter is against the law and eBay policy; the former is regarded as unethical and unprofessional, but not illegal. To punish the two with the same penalty (removing the auction and eventually banning the seller) seems heavy-handed and runs contrary to eBay policy.

In other cases, eBay enforces not copyright but the supposed violation of software

licence agreements. Sellers have long auctioned freeware, software that is free to use. Most freeware enjoys protection under a licence agreement that forbids anyone from selling what are supposed to be no-cost programs.

But does enforcing copyright law provide eBay sellers and buyers with a better environment? Few would argue that unfettered content – bogus or not – would do the most good for the most people, not when so many buyers value authenticity and view owning bootlegs as passively criminal. It seems likely that fewer bootleg items will reach customers with this takedown model. Of course, so long as someone wants to sell bootlegs and another wants to buy them, counterfeiting will remain nearly impossible to wipe out. Such internet bootleg sales are safer on smaller sites, however, and eBay likely loses little business for enforcing copyright in this way.

But what about cases such as the supposedly plagiarized art? Or auctions where already no-cost software would enjoy greater exposure? Would such high-handed penalties not easily extend to a photographer claiming that stock photos selling on eBay were too near his intellectual property, only to guarantee less competition in his chosen market? Or to a legal sale of a used copy of Microsoft Office, protected by the first-sale doctrine, being pulled when Microsoft claims a violation of their licence agreement?

But should it be eBay's responsibility at all, and what does this do to eBay's operating costs? Obviously, despite the expense of the hundreds of employees tasked with removing infringing material, eBay still manages to turn a profit. Indeed, since eBay cannot stop all infringement, it is safe to assert that eBay profits from pirate sales and copyright infringement, though likely nowhere near enough to cover their anti-piracy expenses. This alone should convince content creators that eBay has as little desire to carry infringing material as the rights-holder does.

eBay is not alone in having to ensure copyrights remain intact. The popular personal ad site Craigslist presents a tempting platform for bootleggers. But with the absence of eBay's volume of sales, and since Craigslist makes no money from the exchange, these are not so contested. There are few 'power sellers' on Craigslist, which means less peer finger-pointing. Taking down possibly infringing material is more complaint driven, or the responsibility of the rights-holder to ask Craigslist to remove the ad. The site has no automatic code to detect possible infringement, but sticks to its dated but effective format.

The Google-owned video site YouTube, while a haven for user-generated content, also inevitably houses copyrighted material without permission. A video in which film-makers embed copyrighted songs to play in the background is different from selling bootleg copies of expensive software. Often, this does not mean that rights-holders act any more practically. Even if videos contain copyrighted material as a complement to something else, they are often still removed by rights-holder request or even automatic code.

However, YouTube now uses a program called Content ID that allows copyright holders to search for their content and either remove it by sending a cease and desist letter, or something much more reasonable. Instead of taking down creative content that contains copyrighted material, why not monetize the video by embedding an advert to sell the song playing in the background? This is the power of Content ID: to allow user-generated media that violates copyright, but still makes money for rightsholders.

Media companies view Content ID with mixed emotions. Warner Bros remains sceptical, and would still see infringing material taken down instead of monetized. But most copyright holders embrace at least the choice of monetizing content, though insist on having the ability to take down content as well.

When internet businesses must survey, remove and police copyright content, their countermeasures should remain second to their business dealings, even if they make money from such content. Just as a factory could go broke trying to enforce every health and safety rule, internet businesses tasked with playing copyright cops have to default to the path of least resistance. Often this is responding to cease and desist letters or creating effective code to deal with and even monetize content. But assuming any complaint justifies removing content, or that code can act judiciously, will result in removing content that does not fall under copyright protection or that is clearly fair use.

Internet service providers

The Internet's gatekeepers, the ISPs, have a responsibility to help control copyright-infringing traffic on their networks. The court has confirmed that the ISPs have both a legal responsibility and the technical means to tackle piracy.

- John Kennedy, Chairman and CEO IFPI (Efroni, 2007)

An ISP has no responsibility for what the customer does on the net.

- Internet Service Provider IKT Norway, in a letter to IFPI (Khoo, 2008)

File-sharing can mean a more individualized, direct form of copyright infringement than selling bootlegs on eBay. And just as rights-holders have looked to businesses to enforce their copyrights, they look for upstream accountability to force anti-piracy leverage. Effective or not, ISPs offer an ideal pivot point on which to focus their legal pressure.

Naturally, ISPs realize that even customers sharing copyrighted files are still customers. So ISPs have grown reluctant to shut off internet service to individuals reported for violating copyright. Such reports are often letters sent to the ISP with details about the purported infringement, and the fated ultimatum. The ISPs may simply ignore notices, pass them along, or actively address the infringement by temporarily or permanently disabling the service.

Ignoring the letter seldom occurs because no ISP wants lawsuits, no matter how badly they want to keep customers. Directly addressing possible infringement can scare straight some customers while angering others. It could mean losing subscribers to ISPs less concerned with anti-piracy tactics. Thus, sending a cease and desist form letter has become the standard. Fear of losing their internet connection is supposed to keep consumers from file-sharing, but is it working?

To answer this, consider a typical cease and desist letter from Cox Communications. It comes by e-mail, a form letter with an ambiguous 'Dear Customer' address. It details how, for example, the Adobe Corporation has discovered that one of the ISP's customers has downloaded and shared what they assume is an unlicensed copy of their product. In the letter, Cox is forthcoming with the choices. The accused can simply leave the program in a shared folder and continue allowing peer access. This means facing potential prosecution by the Adobe Corporation, or providing evidence that the accused has a legal right to share a copy. This is mostly legalese, since 'all rights reserved' implies that only the rights-holders may sanction copying. The other choices are suspending use of the p2p program, or simply removing the file from the shared folder.

For protocol, the message remains ambiguous as to whether to tell Cox, Adobe or the security officer whose number is at the bottom of the form when choosing an action. The path of least resistance, of course, is simply taking the file out of the shared folder. Calling Cox to straighten the matter admits infringement, and the Cox help desk has no protocol to deal with such notices.

Further infringement can mean another letter. It reads the same, with nothing to distinguish it from the first save for the details of the infringed material. At this point, some users might grow wary, wondering if three strikes means harsher action.

Here again, ambiguity creates fear and doubt, both of which beget a tacit obedience to the law. And yet, the notices are little more than forwarded e-mails. Cox gets the notice from the rights-holder and then sends it along. The copyright holders suggest steps that Cox should take, such as making sure the infringer removes the offending material and that they scale punishment for repeat offenders. There is nothing in the notice that implies when Cox intends to stop internet service. This could mean that Cox considers the looming, ambiguous threat of losing internet service as an effective deterrent. It could also mean that Cox harbours less concern for infringement, but concerns themselves much more with keeping customers by not shutting off their service. Cox's subtle and 'good enough' actions are reasonable and make no demands with which customers cannot quickly comply. So, is it working?

It is likely that cease and desist letters dissuade most people from file-sharing, leaving only an unavoidable percentage of further sharing by pirates unconvinced by such deterrents. The question then becomes: is it worth the effort it takes to punish the small percentage of internet users who will infringe on copyright no matter what the penalties?

We have already seen that suing file-sharers is cost prohibitive, unpopular and ineffective. But what about graduated responses such as France's 'three strikes and you're out' tactic, which shuts off internet access after three infringement offences? Is the threat of losing their ISP a reasonable, effective deterrent for those unmoved by letters alone?

As with any anti-piracy measure, the price is restricting information, invading privacy and losing customers, while the rewards remain ambiguous. There is no way of knowing if those cut off from the internet begin to buy what they used to pirate, or if their absence from p2p sites creates a measurable decrease in available pirate media.

Even the threat of turning off internet services holds a couple of flaws. First, it assumes that the accused will take no pains to find a more anonymous means of file-sharing. If file-sharing on the Gnutella network netted two cease and desist notices, switching to the bit torrent protocol could mitigate the dreaded third strike. The accused could also use any number of public or business wifi signals to share files. While the industry has tried to make p2p traffic the responsibility of the wifi provider, this is a more difficult battle to fight. When hundreds of customers each day use the wifi signal of a coffee shop, where internet protocol addresses are assigned on the fly, users enjoy almost total anonymity. Even arbitrary sign-in pages offer little for tracking infringement. But the use of such wifi signals is so overwhelmingly legitimate that courts could find the infringement de minimis.

The second flaw is that booted customers go to a competing ISP and create an account to replace the one they lost. Making such changes is difficult. It could mean more expenses or slower speeds, and there are not an infinite number of ISPs from which to choose. However, no matter what government legislation comes down, if people lose their internet connections and want access badly enough, someone will meet that demand.

ISPs are almost universally protective of their customers' private information, but this does not dissuade trade organizations or rights-holders from trying to get at such data. Requests for personal data may well put ISPs in the hot seat, unsure of what to hand over and how. Copyright holders take no responsibility for what ISPs eventually release, but will ask for and gladly accept private customer information that ISPs have no right or requirement to disclose. The unprotected spreadsheet of customer data

that BT sent ACS: Law provides an excellent example (Halliday, 2010).

Denying internet access might delay sharing, and persuade some either to abandon file-sharing or to stay away from any action the industry might believe violates copyright. But there is no concrete evidence that threat of internet disconnection stops piracy any better than lawsuits. Consider a parallel example: the library.

The library holds vast amounts of information, much of it still under copyright protection. Anyone with a library card may use this media, even if that use violates copyright. No one can stop library patrons from checking out movies, CDs or audio books from the library and then ripping them at home. They could even share this media online and no one would know the source. And while the libraries offer copy machines for fair use, there is nothing stopping patrons from copying entire books, magazines or periodicals. And yet, patrons who violate copyright likely use the library for many legal purposes as well, just as online file-sharers use the internet for much more than violating copyright.

Forbidding access to the library for copyright violation becomes invalid when there is no way to identify infringers, though no one is arguing that the primary reason for library use is infringement. Taking internet access from infringers echoes the library scenario in every way but detection. The relevant question becomes whether the file-sharing stopped by forbidding internet access justifies what it takes away: all the other information and services of the internet. Within the web are of course media and other for-sale items that even those accused of file-sharing certainly bought. As long as the number of those who lose internet service because of infringement remains low, the file-sharing networks will continue to contain stores of data as if no one were missing at all. Yet those missing also no longer visit Amazon, eBay and any other online retailers they would have patronized. Even if cut-off users migrate to a coffee shop to download some music, it remains unlikely they will seek out wifi to spend money online.

Literary defence of thick copyright

If you put your hand in my pocket, you'll drag back six inches of bloody stump.
- Harlan Ellison, on file-sharing copies of his work (Rich, 2009)

While many content creators have embraced the non-commercial, unauthorized use of their content, others hold onto a fervent belief that piracy will beget nothing positive. That user-generated content, licensed or not, contributes nothing to culture and is a reflection of a distracted, immature generation without morals or values.

Speculative fiction writer Harlan Ellison takes any infringement of his copyright as an ad hominem attack. While it is unclear whether his infringement lawsuits against ISPs and individuals have proved financially profitable, Ellison has filed hundreds of them (Rich, 2009). Ellison's stance on originality speaks volumes as well. He filed suit against James Cameron and the film-makers of *The Terminator* claiming the story drew from his work, despite the idea of a robot uprising and time-travelling soldiers appearing throughout science fiction (Sanford, 2010).

Other times, a pro-thick copyright stance manifests in statements about piracy filled with both anger and resentment at file-sharing, remix and the subcultures in which they perform. Uber-famed fiction writer Stephen King said: 'My sense is that most of them live in basements floored with carpeting remnants, living on Funions and discount beer' (Rich, 2009). When someone leaked *Twilight* author Stephanie Meyer's newest work-in-progress *Midnight Sun*, she called it 'a huge violation of my rights as an author, not to mention me as a human being'. She even threatened to cancel the series, writing on her website: 'I feel too sad about what has happened to continue working on *Midnight Sun*, and so it is on hold indefinitely' (Meyer, 2008).

Often, these sentiments parrot big media rhetoric: that theft is theft, any infringement is harmful, and piracy will beget an end to content creation. Few examples reflect this rhetoric like Andrew Keen's *The Cult of the Amateur* (2007). Keen lambasts remix culture. He calls the artists releasing their work for remix 'rather like an expert chef who, instead of cooking a fine meal, provides the raw ingredients for the diner. Or the surgeon who, instead of performing the surgery, leaves the amateur in the operating chamber with some surgical instruments and a brief pep

talk' (Keen, 2007: 59). Keen holds narrow ideas on what makes someone an amateur or professional, though it is debatable whether he qualifies as a 'professional' writer.

Making an argument against today's remix culture and user-generated content in favour of media made and mixed only by established channels holds one important flaw: that others, years earlier, made the same argument against the current, outgoing model in favour of an even older model. Each generation thinks the previous generation is tired and old-fashioned. Then later, they think the new generation has no taste, values or appreciation.

Keen's logic remains popular among the uninformed – those who despise piracy because they cannot understand piracy's place in our culture. Keen offers myriad data about how piracy and the digital age create job losses while ignoring the natural order of progress and technology. Indeed, the decline of CD sales and increase of iTunes downloads and file-sharing has meant the closure of independent record stores. But are people to mourn them any more than the closure of paediatric hospital wings because of Jonas Salk's perfection of the polio vaccine? Robotics has become an integral part of any auto manufacturer's line. Are people to protest lost jobs despite the speed, quality and safety of robotic labour and automation? Curing cancer would cost countless jobs, but we cannot delay distribution of a cure just to keep people in work.

Arguing against automation and digitization for the sake of creating more jobs is an act of fear, not reason. Keen's view of piracy as no less than an 'industry-destroying, paradigm-shifting dismantling of 200 years of intellectual property law' (Keen, 2007: 140) surely means to invite the same fear-laden head nods the rest of his drivel invokes.

And yet, in some odd reversal, Keen devotes the last 30 pages of his book to challenging everything he so emotionally and fiercely argues in the previous 200 pages. He condemns DRM, lauds digital music downloads, and recognizes that the 'professionals' he previously claims are so disenfranchised are seeing the light and moving their writing, media and art to the digital world. Perhaps he spent a year making what he believed was a rock-solid case against technology, but then, just before going to print, saw solutions popping up before his book could hit the shelves claiming the analogue sky is falling.

Alas, his foresight ends there, as Keen lists, among these 'progressive' ideas, antipiracy lawsuits. He cites a case in which Universal Music Group filed suit against MySpace users allegedly swapping music, granting that 'a significant percentage of the site's 140 million users are probably in violation' (Keen, 2007: 199). He overlooks the social impact of taking a platform like MySpace, which has become a boon for new and fledgling artists, and trying to sue them into compliance or non-existence. He writes that 'the more that companies follow this example in protecting the rights of their authors and artists, the more effective they will be in deterring digital piracy' (Keen, 2007: 199).

Of course, forbidding sharing nullifies MySpace's new role as the band and music social network. It is Keen and his ilk's trust in government and distrust of individuals that makes this thinking so destructive. 'We need rules and regulations,' he writes 'to help control our behaviour online, just as we need traffic laws to regulate how we drive in order to protect everyone from accidents' (Keen, 2007: 196). But just as it remains debatable to what degree traffic laws prevent accidents, the same holds true for internet law and other legislation that protects us from ourselves. Any case in which the result of 'protecting' one group allows another to reap enormous profits (law enforcement with traffic laws, and corporate media with copyright) should remain suspect.

Also on the polemic against remix culture and piracy is author Mark Helprin, whose book *Digital Barbarism* (2009) takes aim at any opposition to thick copyright. Helprin elicits nostalgia of some past, bucolic, beautiful time before the internet and digital piracy. A time that 'was friendlier to mankind than is the digital age, more appropriate to the natural pace set by the beating of the human heart, more apprehensible in texture to the human hand, better suited in color to the eye, and, in view of human frailty, more forgiving in its inertial stillness' (Helprin, 2009: 12).

Helprin joined the copyfight after an editorial spawned slews of opposition. He asks about his decision to write on the subject 'who thinks about copyrights other than the few who hold them?' (Helprin, 2009: 27). This alone shows the detachment that Helprin clearly longs for, and has certainly achieved. His idea that an opinion piece on copyright was safe because no one would care reveals a wilful ignorance of how important IP issues have rightly become. Helprin argues that there is a major difference in copyright requirements since the drafting of the US Constitution,

because so few then relied on written works for their livelihood. But he assumes – in spite of the enormous rise of IP as an economic force – that citizens would uphold a wilful ignorance about it.

'Would it not be just and fair,' writes Helprin on copyright terms 'for those who try to extract a living from the uncertain arts of writing and composition to be freed from a form of confiscation not visited upon anyone else?' (Helprin, 2009: 30). And yet no one will force 'confiscation' on him or any other current content creator. His words sound as if creators have their work wrenched from their hands at the peak of their popularity. But as copyright now stands, authors will not see the end of their own copyrights, not by many decades. Helprin will never see his copyrights expire unless he comes back 71 years after his death as a curmudgeonly ghost.

The fact of most importance here is that Helprin's reaction to copyright terms falls directly in line with his profession, and has financial implications. This hinders a closer consideration of copyright terms, since it would be paradoxical for him to question an ever-changing law so long as that law consistently changed in his favour.

When he addresses copyright issues directly, Helprin falls back on two popular misconceptions. First is that those who question and seek revisions to current copyright law, and want to mitigate any further IP controls, want all copyright laws abolished. 'And although they say what they want is ease of access, the revivification of dormant works, and a reduction in costs,' he writes 'the opponents of copyright view these mainly as useful auxiliaries to their argument, the heart of which is that they want to abolish all forms of intellectual property' (Helprin, 2009: 160). His evidence for this statement is two quotes from a single source: a blog about copyright issues. Some copyright opponents indeed favour abolishing copyright laws, but many more seek rational, progressive thinking when applying IP laws, and not merely a well-buttered legislature passing laws written by big media.

The other misconception occurs when Helprin confuses free content with no-cost content. 'Why must one seek not to pay for music or television shows that come over one's iPhone?' he asks. 'Why must content be free?' (Helprin, 2009: 201) There is of course a great difference between free from control and free of cost. When copyright revisionists such as Lawrence Lessig and *Wired* magazine's Chris Anderson author books entitled *Free Culture* and *Free: The Future of a Radical Price*, the impression becomes that they want all IP to have no cost. This is not the case, as both mentioned

titles have differing ideas of free, neither of which fits Helprin's thick copyright ideas about IP without cost or profit potential.

Helprin lumps the new wave of 'barbarians' who have no respect for copyright in with people who 'freely compromise their privacy as if there were no such thing' (Helprin, 2009: 19). However, if pirates own a passion other than copyright reformation, it is the continuation or reclamation of privacy. Sites reporting news on IP developments – Slashdot, Techdirt, Ars Technica and Torrent Freak, to name a few – are just as rife with concern over digital privacy, and with good reason. Often government-sanctioned law enforcement fights counterfeiting and piracy at the expense of personal privacy and liberty.

If any anti-piracy authors harbour goals of ending file-sharing, however, writing inflammatory books is a poor inception. Journalist C. Max Magee interviewed an admitted e-book pirate with the handle 'The Real Caterpillar', who said: 'One thing that will definitely not change anyone's mind or inspire them to stop are polemics from people like Mark Helprin and Harlan Ellison – attitudes like that ensure that all of their works are available online all of the time' (Magee, 2010). Perhaps such strong anti-pirate behaviour has become an identity for some writers, and having their works shared – even works specifically favouring thick copyright and demonizing file-sharing – is so much self-fulfilling prophecy. What it is not, however, is effective at combating piracy, changing minds or furthering discourse.

Pirate Economics





t is as important to understand the economics of piracy as it is any other effect. Even when anti-piracy rhetoric frames monopoly enforcement as looking out for artists, stopping organized crime and terrorism, or upholding social morals, economics underlie all IP matters. Even those who oppose thick copyright often harbour economic incentives.

Today, the copyright rich's incentives are largely extrinsic: money. The copyright poor's incentives are mostly intrinsic: the reward lies in the action or creation. One path is no more morally or ethically superior to another than it is clearly good for society; they both respond to different incentives, and this is the source of their incongruence. This means that no matter how much big media wivshes to demonize piracy, that they believe it an obstacle to their economic survival remains the most telling fact. It also means that when remix artists or file-sharers rally against the copyright rich as oppressors, they oppose an incentive barrier, not a supreme evil.

Behind the economic curtain, however, reside the most revealing of piracy's dark secrets. The supposed smoking guns of piracy's harm. The purportedly obvious evil of corporate copyright. In reality, the pattern of chasing incentives and slandering the opposition is independent of morals or ethics, and seems more like a business model. It is more difficult to rally public support for something as sensible and stale as a business plan, however, so the rhetoric continues. Key to understanding this symbiosis is what the copyfight has caused, what it has allowed to happen, and where it is going. This chapter goes beyond 'piracy means greater exposure' on the one hand and 'theft is theft' on the other; beyond the surface rhetoric that mainstream media presents as the complete story. It is a tale both older and deeper than most have been led to believe.

The first-sale doctrine in digital media

DRM can encourage the best customers to behave slightly better. It will never address the masses of non-customers downloading your product.

- Eric Garland, Chief Executive of peer-to-peer research firm Big Champagne (Greenberg and Irwin, 2008)

HAL: I'm sorry, Dave, I'm afraid I can't do that.

Dave: Why not? What's the problem?

HAL: I think you know what the problem is just as well as I do.

- 2001: A Space Odyssey

Many mistakenly look at the current copyright climate and believe that it reflects a purposeful balance between the interests of largely corporate rights-holders and both new content creators and consumers. More often, however, any leniency in copy protection, any wiggle-room in format, price or access reflects no altruism by the copyright rich, but rather a court case narrowly lost, or a statute fervently opposed. To turn a favourite patriotic phrase: 'Copyright freedom isn't free'. The small and

often shrinking privileges consumers and content creators enjoy and take for granted represent hard-fought battles against the copyright rich. What today big media touts as a feature or benefit to their products was yesterday's gruelling court battle to forbid such features or rights.

What the USA calls the first-sale doctrine and the EU calls exhaustion of rights presents a fitting example. First-sale doctrine means that rights-holders only control how the first sale of their intellectual property occurs. They get no say in how following sales happen, just as long as the seller does not make a copy or violate the patent. This is why online auction site eBay sells thousands of used DVDs, games, books and other media without the copyright holder's permission. Why libraries, video rentals, and game stores can rent (or lend) IP without prosecution.

Most would consider these rights understood; of course we can resell, lend or give away a game or movie. But rights-holders have tried to limit and even destroy the first-sale doctrine since its inception in 1908. The digital age has only increased such efforts.

Landmark case *Sony Corp. of America v Universal City Studios, Inc* found that the VCR held enough non-infringing potential for courts to consider it legal and without tacking on a fee for each blank VHS tape. But this was also about allowing consumers to bypass the hefty prices for VHS films. With widespread VCRs came the demand for videos, but with the prohibitive prices of major studio movies, few could avail themselves of a home theatre. Instead, thanks to the first-sale doctrine, the video rental store met market demand. The studios sold copies at a high premium to the video stores, who then rented the tapes to consumers at affordable prices. Despite the seemingly happy ending, this is not what movie studios had in mind. They were still clinging to cinema revenues so tightly that their main advocate (Valenti) compared the VCR to the Boston Strangler (Corliss, 2007). Consumers should not mistake movie studios now riding the home theatre wave for all it's worth as early compliance or innovation. No, it was technology dragging the industry to the next evolution in film kicking and screaming.

The first-sale doctrine also allows owners to sell their media at any price, even if much lower than the retail price of a new copy. Think of the consequences of this otherwise: a movie studio forbidding sale of their DVDs for less than \$15 – the amount they charge for a new copy. The owner would be stuck with them forever,

since no one would be willing to buy a used DVD for the same price as a new copy. A yard sale with fully priced used books, CDs and DVDs would fare poorly. This would also have a harmful environmental impact, since it requires far more hard goods to meet demand. Those who buy used media may have bought less at retail, but they would have bought some.

Now the same battle continues with video games, where major game labels despise resale markets such as GameStop. They no sooner want gamers to buy used titles than rent them. Neither adds directly to rights-holders' profits. Ideally, media manufacturers set prices with an understanding that a resale market exists and that not all copy-holders bought their copy new. But while the copyright rich have grown notorious for considering negative ripple effects from piracy, they often fail to consider the positive ripples from resale and rental markets. These create interest in games and keep gamers eager for the next generation consoles. They also push new releases through taking reservations.

Alas, fighting piracy in other media has historically allowed all manner of anticonsumer behaviour, and the game industry shows little difference. Game companies tired of losing sales to the resale market have begun to skirt the first-sale doctrine in several ways, largely under the guise of fighting piracy. The first is to embed DRM into games that creates problems for resale, for instance only allowing users to install the game so many times before the serial no longer works. Such was the case with the hit title *Mass Effect*, causing widespread opposition (Marco, 2008). This dissuades buyers who only want to save a few bucks when buying used, and do not want to deal with the hassle of calling the company to try to get a new serial number. If this countermeasure worked solely for fighting game piracy, then why make getting a new serial number so tasking? To dissuade resale.

Another method is limiting gamers' ability to register and enjoy online benefits tied to the game if they bought a used copy. The game might have a unique ID, which may only allow the first buyer to register and play online. Later buyers cannot unlock these features simply because they bought the title used.

Embedding other copy protection, such as mandating the game disk be in the CD-ROM for the game to play, seems a clear anti-piracy measure. But the result seeps into blocking the right to resell as well. It prevents gamers from buying a copy, loading it, and then selling the game used while still being able to play it. At the least, this delays

the number of used games on the market, since most gamers who bought the title new will play it until they tire of it. The further effect here is that disks grow scratched and worn. This negatively affects playability and reliability, and thus resale value. And no matter what DRM game companies use, false negatives occur, locking paying customers out of their legally purchased game.

Game giants such as Electronic Arts (EA) need not wonder whether heavy-handed DRM can foster deleterious effects: they have seen it first-hand. When the hyped, long-awaited game *Spore* debuted, gamers had to activate it online, and were only allowed three installations. So much for allowing resale. While EA communications manager Mariam Sughayer claimed: 'We simply changed the copy protection method from using the physical media...to one which uses a one-time online authentication', gamers remained unconvinced (Greenberg and Irwin, 2008). *Spore* quickly became the most pirated game of 2008, and comments on file-sharing forums and Amazon alike abounded with anger over the game's DRM.

Conflict over the first-sale doctrine is just as fierce when dealing with reselling software. Software manufacturers have devised a deceitful way of skirting the doctrine, however – by using the ubiquitous and wholly ignored End User License Agreement (EULA). This is the agreement that even US Chief Justice John G. Roberts Jr admits ignoring (Weiss, 2010). It is written in legalese so thick and tangled as to appear gibberish to most. 'The convoluted legalese of the "end-user license agreement" or EULA,' write Gantz and Rochester (2005: 18) 'seems designed to discourage the customer from actually reading it and simply accepting the terms'. Other companies opt for length instead of complexity, both to bind buyers' hands and to dissuade customers from reading it before agreeing.

The gist of these agreements is that customers only license the software, they do not buy it. Therefore they have no legal right to resell it. Despite the first-sale doctrine's appearance in the US 1909 Copyright Act and again in the 1976 Copyright Act, the courts have made contradicting decisions on first-sale doctrine cases when dealing with digital-only media. In *MDY Industries, LLC v Blizzard Entertainment, Inc* the court considered consumers mere licensees of software, while in *Vernor v Autodesk, Inc,* such cleverly-worded EULAs had no power (Rotstein et al, 2010). This is infinitely more complicated when considering other countries' copyright laws. While many have some form of first-sale doctrine, such as Exhaustion of Rights in the EU for

patents, when factoring in what constitutes a legally binding contract, the licensing issue grows more complicated. EULAs, in other words, are more specific to a nation's contract laws than their copyright laws, making undermining the first-sale doctrine more effective in some countries than in others.

In response, consumers have fought back against EULAs for the right to sell their copy of the software they protect. Such disputes often end in the highest courts, where it becomes a matter of semantics. Anne Loucks caused a stir online when she created a cardboard overlay to have her cat Simba agree to any EULAs by stepping on the keyboard. Legal hair-splitting abounded.

It seems the more ethereal the media, the more consumers forget about their rights under the first-sale doctrine. This has been the case with digital music downloads on the popular platform iTunes. As with many Apple products, the premise is simple: the same program that plays music is also a private shopping mall for more media. Celebrities touted the technology as easy, fun and freeing. No more being bound to a CD case or home stereo.

So with millions spent convincing consumers that iTunes is so easy and versatile, why is it almost impossible to control the music? Notably, users cannot share music because of the syncing feature, since iTunes deletes all files on the iPod if the user wants to sync it on another computer. The program enables syncing by default, and syncing appears necessary even if adding a single song. With many earlier mp3 players, computers simply saw them as mass storage devices, onto which users could drag and drop anything from audio books to music to pictures and documents. But this did nothing to discourage file-sharing, so such devices met with legal fire from the music industry.

When consumers downloaded a song from iTunes, few understood what they were not buying. They bought the rights to listen to the song, to put it on their portable device, even to burn it to a CD. But the freedom ended there, unlike when ripping a music CD. iTunes songs came in a proprietary format called Advanced Audio Coding (AAC). This disabled certain choices: notably, the ability to make copies or to edit or sample iTunes songs, and what devices users could play their music on. Apple spun these controls as benefits, calling the format 'high-quality' and the platform 'quick' or 'convenient'. Apple portrayed songs forever remaining in iTunes as a boon – far better than a CD collection or even a collection of DRM-free mp3s. The iTunes

EULA also included rules such as only using purchased media on up to five 'Appleauthorized' devices and burning playlists only up to seven times (Apple, 2010).

Eventually, consumers grew tired of DRM on their music, of hitting a wall when trying to share the songs, load them to a non-Mac mp3 player, or change computers. In response to demand for DRM-free music, Apple charged a premium to convert the songs, removing DRM for 30 cents per song. This was on top of the 99 cents each song already cost. Apple did this when they introduced tiered pricing (79 cents to \$1.29 per song), which many record labels had wanted for some time. Supposedly allowing varied prices was the compromise Apple had to make so they could sell DRM-free tracks. Repairing the DRM mistake, it seems, only hurt for consumers stuck paying twice for their music.

iTunes DRM and the EULA still undermine consumer rights to resell purchased tunes. A \$15 CD with a dozen tracks can fetch a few dollars, but those who have tried to sell their iTunes music have met with heavy resistance – legal, logistical and technical. eBay watchdogs quickly pull auctions trying to sell iTunes songs. Now-defunct online service Bopaboo tried to create a platform for selling 'used' mp3s and even compensating the music industry from the resale profits, but quickly suffocated.

George Hotelling, despite the logistical nightmare, sold a single iTunes song successfully. 'I was able to transfer the song,' he said. 'I documented it, and Apple even said it was probably legal. I think the biggest success was raising the issue in a lot of people's minds.' In response to Hotelling's actions, Apple's director of marketing for applications and services said: 'Apple's position is that it is impractical, though perhaps within someone's rights, to sell music purchased online' (Hansen, 2003). This runs counter to Apple CEO Steve Jobs's assertion during the iTunes store opening in April 2003 that people do not want to rent their music, they want to own it (Martell, 2007). But what is ownership without the option to lend, give away or sell your property at any price?

Digital technology has affected first-sale doctrine in publishing as well. As more print books spawn e-book counterparts, the first-sale doctrine creates grey areas. Part of the challenge with e-books is figuring out how to adapt book-lending. Most people have received a book after a friend or relative has finished reading it and have lent books themselves.

Such an act with an e-book presents two obvious problems. First, if the e-book is a simple, stand-alone file, then lending will likely not be lending at all, but copying. Why give a friend the only copy of an e-book when you can easily make an illegal copy and then you both have one? In fact, readers can make copies indefinitely and give them to scores of people. This would surely cost sales eventually, though it might also create interest in a book or series.

Second, lending regular books holds physical limits. One could not lend a book to a friend in another country without expensive and time-consuming mailing. E-book lending nullifies the costs and delays, but then where does the sharing stop?

E-book reader manufacturers know well the potential pitfalls of digital distribution. Historically, Amazon effectively locked e-books into the Kindle with proprietary formatting, no PDF or e-pub support, and no lending. With the arrival of Barnes & Noble's Nook, which reads e-pub files and allows lending, Amazon changed their tune in October 2010, opening up a lending option. Alas, lending is limited to two weeks and by rights-holder discretion. Not at all how hard-copy lending works, but a start. The emerging Google Editions could easily allow for resale based on managing titles in the cloud instead of having client-side files. However, since e-book resales do not degrade the quality or necessitate shipping (as with used physical copies), it is certain publishers will try to impose a clickwrap licence forbidding use of the first-sale doctrine. Just like computer program manufacturers, they will claim the licence allows use of the e-book but does not constitute sale of the item. But this could meet the same end it did with software. In 2008, Timothy S. Vernor v Autodesk Inc upheld that just because you call something a rental does not mean it is. McDonald's could claim its customers were merely renting their drinks and must return them only to McDonald's urinals, but that does not mean it would stand up in court or work in practice.

Governments have not recused themselves from this debate, either. In the US, a 2009 decision in the Ninth Circuit banned the first-sale doctrine on overseas items. This affects the 'grey market' where retailers buy items overseas for resale in the US at prices lower than the manufacturer's retail price. Supposedly resale creates an unfair advantage, but the penalty is arbitrary control over the free market. Consumers buying Omega watches in Switzerland cannot legally sell them in the US, for instance.

So where does piracy come into all of this? Are limits to the first-sale doctrine

having any effect on piracy? In short, no. Pirates have no wish to play by the rules of either first-sale doctrine's limits (such as not copying a work) or clickwrap contracts. Pirates' movies often come at no cost, and digitally, so they do not worry about country codes or whether they may resell their DVDs. Release groups pride themselves on sending only perfectly cracked games to torrent sites, so pirates need not worry about keys, serials or online play. They do not concern themselves with keeping their game disks in perfect shape, on-hand and activated, since they seldom bother with physical media or continuous validation. Their music is in an open format, not restricted in how many times they may burn, copy or move it. Pirates glean songs from p2p file-sharing sites, already free from DRM and in whatever format they want. They use the freeware program Floola for music management. bypassing iTunes' controls completely. They check out CDs and DVDs from the library and rip them as easily as putting them into the computer. They know what plays on their equipment, how best to share with others, and how to transfer between devices. Their e-books are in PDF or e-pub format with no controls to prevent copies, lending or cross-platform use.

In short, just as with so many other media restrictions meant to combat piracy and ensure copyright stays intact, no countermeasures to the first-sale doctrine – EULA, access bottleneck, format or platform – either mitigate piracy or harm the pirates' freedom. They only affect paying customers, and almost exclusively in negative ways.

In fact, as long as the industry responds to digital media with greater controls and no further benefits, piracy may well become the de facto means of reclaiming that control. One could argue that DRM exists not to keep pirates out, but to keep customers in. Keep them from infringing copyright, regardless of consequence. Alas, most DRM schemes punish the legal users while doing nothing to inhibit or penalize piracy. Companies cannot scare off the latter without alienating the former. When consumers discover they cannot share music with friends as they used to swap mix tapes, cannot lend e-books like they could their paper counterparts, cannot watch a movie on a neighbour's television, and cannot resell any media because of licensing issues – well, the freedom, ease and control of pirated media will begin to shine, and it will have nothing to do with the price.

The economics of the music CD's decline

Home Taping Is Killing Music

- 1980s BPI anti-piracy slogan

Anti-piracy arguments claim that the steady decline in CD sales provides the smoking gun for the damage piracy causes the music industry. However, closer consideration begets scepticism. It is far more likely that consumers' money is spreading across the various media now at everyone's fingertips, marginalizing music. Or that artists now reap financial rewards beyond recording contracts or royalty cheques.

There is plenty of evidence that musicians enjoy enormous success touring and selling merchandise. Naturally, trade groups favour CD sales because it makes them more money. So while trade organizations bombard consumers with anti-piracy rhetoric about decimated CD sales, people hear little about the success of touring artists or merchandising. They hear nothing about how other media – from video games to internet social networking sites – imply that consumers are spending less time and money on music.

According to industry-funded studies, all media suffer sharp losses because of piracy, and yet only the music industry claims a steady decline in sales over the last decade. Logically, this raises a red flag. If piracy is the only reason for an overall decline in CD sales, then why is it not also declining long-term DVD, book or video game sales? Video games in particular are a booming industry despite massive piracy. This runs counter to music industry doom-saying.

In reality, there are only so many hours in the day, and so much money consumers are willing to spend. With many other entertainment media, music and movies now have stiff competition. Surely this comes up during industry board meetings and strategy sessions, but it evades the public discourse. Publicly, piracy is the sole reason for declining CD sales.

When research is examined beyond industry-funded studies, the waters grow murky. Felix Oberholzer-Gee of Harvard and Koleman Strumpf of the University of

Kansas conducted an intricate study of file-sharing to discover its relationship with decreased CD sales. They determined that 'the estimated effect of file sharing on sales is not statistically distinguishable from zero' (Oberholzer-Gee and Strumpf, 2007: 3). So perhaps this is a case of correlation, not causality. Just because file-sharing has risen at the same time as CD sales have fallen does not mean the former caused the latter. In the same way, teen video game use has increased alongside ADHD diagnoses, but arguments for causality need much more than timing.

As Oberholzer-Gee and Strumpf (2007) point out, in the US 'households without a computer... report that they reduced their spending on CDs by 43 per cent since 1999'. This study also found that, not surprisingly, the popularity of an album (measured in CD sales) meant a proportional increase in downloads, and that the p2p network the study used (OpenNap) closely reflected songs on the playlists of the top 40 radio stations. This opposes what the RIAA would have people believe: that more downloads mean more lost CD sales. Clearly radio playtime, advertising and a band's popularity dictate CD sales, not illegal downloads.

The study also found that 'there is no evidence that albums with more concentrated downloads suffer disproportionately from file sharing' (Oberholzer-Gee and Strumpf, 2007: 33). This implies that more people download albums with better songs, but consumers buy these albums more too. In fact, many albums may only have one or two songs that show up on a p2p site. So when the RIAA suggests that each downloaded song represents a lost CD sale, common sense suggests otherwise. Many songs on Michael Jackson's Thriller album became hit singles, but few people share or show interest in songs other than 'MMMBop' on the Hanson Brothers' same-titled album.

'It is worth stressing,' write Oberholzer-Gee and Strumpf (2007) 'that extended sales slumps are common in the music business, even prior to file sharing. While real revenues have fallen 28 per cent over 1999–2005, real revenue fell 35 per cent during the collapse of disco music in 1978–83. Real sales also dropped six per cent over 1994–97.' This does not even consider the other elephants in the room: how iTunes sales have increased during this slump, and how the Western world still reels from a global recession.

So who is to blame for declining CD sales if not pirates? While the BPI and RIAA have their red herring in file-sharing, there are many other causes to consider. The

economics of CD sales have been the subject of huge numbers of journal articles in respected publications, with little resembling a common thread appearing. Interested parties need only sift through these studies long enough to produce enough evidence for their own argument, whether for or against file-sharing. Some argue that file-sharing has a direct correlation with declining sales, others that sharing stimulates sales, and still others that it is only one of many reasons, and probably not the most significant.

This ambiguity even amid respected, researched and intelligent articles sends an important message: there are no definitive, bulletproof links between file-sharing and declining CD sales. Indeed, one could say the same for file-sharing contributing to greater sales. Instead, consider a few of the other researched culprits for declining sales:

- 1. The sale of other music formats, such as vinyl records, especially in the UK. No doubt if trade groups collated all music formats instead of isolating their cash cow CDs it would make the decline in sales less pronounced.
- 2. Online music sales. So often, gloomy projections and supposed losses presented by trade groups leave out the definitive growth of digital music sites such as iTunes. This is like claiming that buggy sales have dropped because of horse thieves while ignoring the advent of the automobile.
- 3. The rise of other entertainment media such as video games. While annual income and consumer debt have risen in the UK and the USA, so have the available means of entertainment. The same people who used to watch three hours of television a day and listen to the radio cannot now also play video games for three hours a day or watch a DVD a day. The math does not add up. Newer forms of entertainment will inevitably invade older media's time.
- 4. Effective resell markets, such as Half.com and Amazon. Thanks to the first-sale doctrine, consumers can resell most media, and many companies have risen to meet the demand for such business. Formerly, physical stores selling used media were scant

and consumer demand heavily favoured buying new. But the limited number of trade paperback stores and record exchanges were nothing compared to the powerhouse of today's used media sales online.

The only certainty with media sales, whether CDs or e-books, is that no one format, platform or type can reign forever. Whether through emerging technology, consumer behaviour or market competition, the peaks and valleys of media sales remain unavoidable. Looking to piracy as the crowning cause may rally some consumers to choose a side, but will eventually bring disappointment. When the music industry finally unmasks its villain, it is unlikely to reveal a be-patched swashbuckler, and by then everyone else will have moved on.

Consumption patterns across media

The costs associated with Internet2 are so exorbitant... that it would likely take an act of Congress to make it freely available.

- Josh Brandon, PC World (2008)

Since the birth of the internet, trade organizations such as the MPAA have continued their historical predications of impending doom for the film industry. Recently, this apocalypse became certain once consumers gained broadband speed connections. At the turn of the century, as more ISPs began to offer broadband speeds, the fear mounted, culminating in gloom and doom news coverage such as the 2002 BBC documentary *Attack of the Cyber Pirates* (Monblat, 2002). Ostensibly to add timeliness to an otherwise objective programme, it mentions the rising broadband threat. How 'the industry believes that the next few months will be crucial in their battle against the cyber pirates' since 'the cyber pirates think they're gaining the advantage over the industry'. Cindy Rose, Managing Director of Disney in the UK and Ireland, said in the programme: 'We're really at a crossroads, and what industry players and the government does next could very well determine whether the internet ultimately becomes a place for illegitimate commerce or a place for legitimate

commerce' (Monblat, 2002). While this doom-saying remains mild compared with Valenti's 'tidal wave just offshore', it represents another in a line of empty threats by industry lobbyists. The next few months did little to affect the current copyright climate, just as nearly a decade later, the following months will also not decide the fate of the internet as a business or personal communication technology.

Of course, broadband meant users could download more films in less time, but studios kept making films. In fact, the average investment for a film saw no decrease after high-speed internet, but continues to increase, as it has for decades.

Also humming in the background looms the threat of FAST or Internet2. Valenti cited demonstrations he witnessed at Caltech, where 'supersonic download speeds being developed right now' could 'download a DVD quality movie in five seconds' (Levy-Hinte, 2004: 73). This demonstration took place in autumn 2003, and the technology was supposedly rolling out in the next 18 months. In September 2003, he told the US Senate Committee on Governmental Affairs that 'we are under attack'. Of his efforts in response to this attack, he said: 'We have embarked upon a public persuasion and education campaign with TV, public service announcements, trailers in theatres, and an alliance with Junior Achievement with one million kids in grades five through nine studying what copyright means and how it is of benefit to this country, and to take something that doesn't belong to you is wrong, and that no nation long endures unless it sits on a rostrum of a moral imperative, and that is being shattered' (Committee on Governmental Affairs, 2003). Yet now, many years later, no FAST, no Internet2, and internet speeds that few would describe as 'supersonic'.

Other thick copyright supporters argue that it is the exact duplication of media that has them concerned. Viacom lead lawyer Michael Fricklas, in a speech given at Yale University in October 2009, said: 'My issue is with the exact copy' (Fricklas, 2009). This was after – in complete contradiction to the MPAA's doom-saying about broadband meaning the end of the film industry – Fricklas admitted that p2p movie downloads are on the decline. Of course, he went right into setting up the next big threat – streaming video. Ironic, since no industry-endorsed music service ever rivalled Limewire, and yet Netflix arguably offers a streaming service superior to sites streaming pirate content.

Even Valenti historically showed far more concern over 'perfect' copies. Often the film industry sniffs at 'camcording' as merely the chaff of shady ne'er-do-well bootleggers, uncommonly regarded with the same anxiety as exact copies. Indeed, as DVDs (5–7 GB in size) make way for BluRay disks more than 20 GB, the ability to make exact copies for digital distribution has grown more difficult and costly. Even bootlegging hardware needed to make exact BluRay copies costs far more than for DVDs. This means that sharing perfect copies online has grown more difficult as the size of films have exceeded the speed of internet connections. To be sure, connection speeds will increase in time, but so too will film sizes.

It remains unlikely that films of high quality will ever become as simple to download, store, access and manage as music tracks. And no matter how many times people compare downloading films to file-sharing music, there are fundamental differences to consider. In addition, as the ease of copying increases, so too does the potential ease of distribution. Big media seldom embraces opportunities to profit by new distribution models, however. What stopped the music industry from embracing Napster instead of shutting it down was adherence to the current licensing and legal schema. The result of that adherence means no industry-sponsored platforms compare with the ease, efficiency, selection and sheer number of users that Napster created, even now.

These differing consumer habits affect so-called 'hard goods piracy' as well. Bootleg DVDs are everywhere from British boot sales to US flea markets to Thai street vendors. If fakes represent such a threat, it seems counter-intuitive that film studios would invest millions in films that must rely on almost 80 per cent of their revenue coming in DVD and other aftermarket sales. So which is it? Has the internet and the widespread availability of near-perfect counterfeit copies destroyed the film industry? Or do studios still invest millions of dollars per film, with a huge part of a film's profit coming from cinema openings and genuine DVDs? The answer is obvious to anyone who visits the cinema or rents DVDs.

James Boyle presents another notable difference. 'The movie industry's doom-saying aside, there is no exact movie equivalent of Napster and there is unlikely to be one in the near future. This is not just because movies are longer and harder to download than songs. It is because most people only watch a film once. Most people do not want a library of two thousand films to play again and again. Music is a repeated experience in a way that movies simply are not, and that social fact profoundly affects the likelihood of downloading as opposed to rental' (Boyle, 2008:

102). Implicit in this observation is that those who would download a collection of 2,000 films are not the same consumers who would have bought those films, especially movies of a degraded quality.

When considering distribution, adding controls and assessing potential losses, rights-holders must consider the time it takes to consume the media as well. Not only do people not consume films in the repeated fashion that they consume music, but it is impractical to assume they could. Songs are about 4 MB compared with 4 GB for films (ie 1,000 times smaller), and last four minutes compared with two hours. In today's fast-paced world, consumers simply do not have the time to consume films at the same rate as songs, let alone the storage space. But even space matters little sometimes.

Consider the tiny size of a typical e-book in e-pub format. Many are only about 500 KB, meaning that a 1 GB jump drive could hold 2,000 e-books. With the arrival of affordable e-book readers, and with free, easy-to-use e-book reader applications, the ability to enjoy such books is commonplace. So, with such a small file size and so many media able to read e-books, why have all the Waterstones and Barnes & Nobles not shut down? Where is the Napster for e-books?

The answer lies in the time needed to consume a typical book. Reading a book takes days, whereas movies take hours, and music minutes. Also, many readers still prefer the tactile feel of a physical book. They may dislike reading digital text, no matter how easily they could find pirate e-books. So despite the occasional gloomy news story about piracy affecting the publishing industry, it remains debatable that the limited availability of e-books on p2p networks affects sales at all. The most common e-books remain enormously popular titles such as *Harry Potter* or *Twilight*; books with derivative movies, merchandise and offshoot projects.

To whatever degree consumers pirate e-books, the 'sampling effect' is more likely than with other media. Critics hotly debate whether file-sharing begets more or fewer music buys. But downloading music playable on any media is different from downloading an e-book. Reading an entire e-book, especially for consumers without an e-book reader, is less likely than sampling the work and considering buying the hard copy. And research shows that consumers who do have e-book readers buy more e-books than they used to buy hard copies (Frisch, 2010). This has not stopped the publishing industry from playing Chicken Little, much like the film industry.

114 Pirate Economics

Mainstream media coverage offers the same bleak predictions about the advent of the e-book reader as when the VCR debuted.

The video game industry similarly ignores how people consume when considering anti-piracy strategies. 'PC games are massively pirated because you can pirate them,' says Brad Wardell, chief executive of game manufacturer Stardock (Greenberg and Irwin, 2008). By this logic, the ease of use, small size and universal format of e-books would mean no reader would willingly buy an e-book. It ignores how people consume games, but also any strategy to use copyright other than as control. Wardell goes on to argue that pirated games' user-friendliness is a greater factor than their price. But most games, regardless of DRM, have a reliable percentage of copies pirated. If DRM (Stardock uses serial numbers) were an indicator, then games with no protection such as Sins of a Solar Empire would not sell at all.

For big media, perhaps it is time to consider how people consume media, and create the best possible revenue streams based on the technology of ease of use, selection and distribution, not restriction and assumed infringement. Clearly, consumers experience film differently from music, and games differently from literature, so applying identical anti-piracy models will bear dissimilar results. That is, if any industry's anti-piracy tactics are worth emulating to begin with.

Piracy's economic impact

Taken together with the value of domestically produced and consumed counterfeits and the significant volume of digital and fake products being distributed via the internet, the global impact on legitimate business revenue is well over US\$750 billion.

- Business Action to Stop Counterfeiting and Piracy (BASCAP)

Health authorities fear this strain, or its descendent, could cause a lethal new flu pandemic in people with the potential to kill billions.

- *New Scientist* report on avian flu H5N1, which killed 322 people over seven years (Bradford, 2006)

A tenet of the fight against digital piracy is the supposed economic damage it does to both producer and consumer nations. With trade groups such as the BPI and RIAA, a key concern in winning over the public is to appear the victim in the War on Piracy. To seem as if all litigation and countermeasures are in defence. No one would sympathize with or show loyalty to a faceless organization that rakes in millions a year but produces nothing without some serious sleight of hand.

A favourite tactic to rally public support is to claim that pirates steal money and cost jobs. Citizens of post-industrial nations have a soft spot for economic fairness. Stealing is almost universally despised, and jobs are a hot-button topic at every election, so integral to a nation's success that many economists treat unemployment rate as a sure-fire marker for a country's economic stability and where they are trending. Hearing that piracy costs jobs is almost guaranteed to strike a chord with the public.

The Business Software Alliance (BSA) is a private corporation that advocates for their customers' IP. That is all. They are not a government-inspected or approved entity for claiming economic loss because of piracy. Their clients have IP that they want protected from illegal use, so the BSA's best interests are to rally public support against piracy, and keep their clients happy.

The BSA presents many reports on the supposed egregious economic effects of digital piracy. One annual report focuses on lost revenues and the resulting job losses. Those writing on intellectual property issues often cite these BSA reports as valid, objective data from which to make their arguments. However, there are fundamental flaws not only in the BSA's logic, but in any argument that claims economic impacts from piracy, particularly domestic piracy.

For instance, the BSA claims that pirated software and games value at \$51.4 billion annually and cost hundreds of thousands of jobs. This assertion has two important flaws. First, it remains almost impossible to assess piracy losses because software is an ethereal product. The only 'loss' is the money the IP owner could have received from infringers had they not obtained an illegal copy of the software. In other words, unlike a thief stealing a CD from a brick and mortar store, digital piracy is a fluid and wispy thing to calculate. That does not stop organizations like the BSA from

116 Pirate Economics

asserting their findings are accurate, or anti-piracy advocates from using such figures liberally.

How does anyone know how much those who pirated a copy of Photoshop were willing to pay for it? Perhaps they only wanted it at no cost, unwilling to pay anything. Perhaps they only downloaded it for amusement, as a challenge or statement. Maybe they already owned a copy, and wanted a digital copy for backup. Possibly they already had a digital copy, did not have it handy, and decided that downloading another copy was easier than finding the old one. None of these scenarios suggests someone willing to buy the software.

The BSA even admits that their calculated losses reflect retail software prices scaled to each country. 'It does not mean,' the BSA 2009 report reads 'that eliminating unlicensed software would grow the market by \$51.4 billion – not every unlicensed or stolen software product would be replaced by a paid-for version' (Business Software Alliance, 2010: 9). Alas, anti-piracy rhetoric falls back on this magic number of supposed losses as if they represent actual losses.

The numbers hold somewhat more reliability with bootleg sales. Vendors only sell bootlegs to meet market demand for the software. This means consumers will pay something, just not the retail price. Of course, given that bootleggers avoid licensing fees, and that hardware to duplicate physical media is cheap, they can afford large amounts of overstock. So raids on bootleggers inevitably produce bloated figures on how much money rights-holders 'lost'. Most media coverage of bootleg raids will assume that every copy holds the same value as a retail copy, and will – in full earnest – claim many millions of dollars worth of goods seized in a given raid.

Another oft-cited report of piracy's negative impacts comes from the film industry. In 2005, the MPAA hired LEK Consultancy to conduct a survey of their supposed losses to piracy. They estimated \$6.1 billion in losses in 2005, 20 per cent domestic and 80 per cent international, with about two-thirds from hard-goods piracy. Worldwide losses rang in at \$18.2 billion. LEK calculated the losses by polling 'movie watchers' and deciding what they 'would have purchased if pirated versions were not available' (LEK, 2005: 13). Despite the obvious and often enormous rift between what people say they would do and what they actually do, copyright supporters favour this highest figure when arguing economic impacts.

While the BSA covers Europe as well, the EU has its own studies explaining piracy's supposed economic externalities. The Business Action to Stop Counterfeiting and Piracy (BASCAP) released a report in May 2010 with similarly gloomy figures: more than one million jobs at risk in the EU by 2015, and G20 government losses at more than \$125 billion. Even 210,000 jobs lost annually to counterfeit auto parts (Business Action to Stop Counterfeiting and Piracy, 2010).

Even as estimates, the BSA, LEK and BASCAP figures loom large and intimidating. However, the second hole in their logic is that they fail to assert or even consider what happens to this 'lost' money. That is, where does the money not spent on IP go? These loss figures ignore some basic economic truths:

- 1. Consumers do not save money not spent on IP.
- 2. Even saved money has an economic impact.
- 3. Consumers spend money not used for IP in other industries, such as service, clothing, food or entertainment.
 - 4. IP as an industry has less positive economic impact than other industries.

Consider each of these truths. These studies claim that piracy costs many billions of dollars each year. For these losses to have an economic impact, the money would have to remain out of the economy. For instance, if third-party trackers determined that 1,000 copies of Photoshop were pirated at an estimated loss of \$400,000, this could arguably have an impact on Adobe employees on the Photoshop team. It could mean some one-off losses for stores selling the software, trucks moving the boxes, sales representatives, and so on. But the \$400,000 that might have gone to Adobe did not exist, for one, since any person willing and able to pay \$400 for Photoshop would have done so. Also, even if it did exist, when people downloaded or bought bootlegs of Photoshop instead, they did not then stuff the savings into a mattress where it did nothing to aid other economies. Proof of this is legion in developed countries, where consumer debt is at an all-time high. In some countries, citizens' average annual

savings are negative percentages. So one can assume that any money consumers did not spend on Photoshop, they spent elsewhere.

Even saved money serves an economic purpose. It allows banks using the fractional reserve system (for good or ill) to make more loans. It means more businesses will receive start-up capital if the money goes into a mutual fund or the stock market. To pretend that any money not spent on software is money that could have created jobs in IP, but had no other impact, is ridiculous.

The people who did not spend \$400 on Photoshop may have spent \$50 on dinner and a movie, another \$100 on a new outfit, and \$250 on a new netbook. This same logic counters anti-piracy arguments about lost tax revenue as well, since money spent on dinner instead of DVDs still gets taxed. Even the money that goes to bootleggers serves an economic purpose. Big media tries hard to align bootlegging with organized crime and terrorism. Yet many bootleggers are individuals or small operations that – legal or not, justified or not – have food on their tables and money to spend elsewhere because of bootleg sales. Again, that money does not just funnel into some mythical crime syndicate and disappear forever.

These economic impact reports make other claims that demand substantiation. First, claiming massive job loss to piracy. This assumes that consumers who are too price sensitive to buy Photoshop legally fail to create jobs in other sectors. But those 1,000 people who pirated Photoshop went on to support the service industry by eating out, having a few drinks, or staying at a hotel. They bolstered the automotive industry by getting new tyres, the electronics industry by upgrading their computers, or the entertainment industry by going to a movie or playing golf.

Indeed, while the Adobe Photoshop team works hard and deserves the right to sell as many copies of Photoshop as possible, it employs a few people who will create a product with a high rate of return. The Photoshop team comprises a handful of coders, engineers, PR specialists, copywriters and designers. But a few people at the top of that pyramid see most profit from Photoshop sales. It is, after all, digital and therefore cheap to reproduce.

These other industries often work the opposite way: many people work for little return. So the real crux with BSA projections is that money put into the IP industry creates fewer jobs than money put into, say, the automotive industry. Ford cannot

produce cars with a click of a button. They need raw materials, factories and scores of labourers, salespeople and transporters.

The point is that the BSA cannot pick and choose the economic effects of piracy. They cannot claim that it causes financial loss or job loss without addressing that it is a livelihood for some, including hardware companies. After all, blank CDs and DVDs hold copied data, and what are the odds that the person burning the media owns the copyright? But most of all, they cannot pretend that consumers who pirate IP do not spend that money elsewhere. Jobs and profits made from those sales are just as deserving as the IP industry.

This counterargument applies much more to domestic piracy than international piracy. However, all three studies show that despite the lower piracy rates in countries such as the UK and the USA, these 'mature' markets represent disproportionate percentages of those losses. Despite the USA and the UK only having around a 20 per cent piracy rate, because of the huge consumption of media and higher premium prices, the estimated losses are greater than in many other countries, even China. This highlights the weightier nature of domestic piracy.

Then there is the industry rhetoric on job loss. Not just those positions currently filled, but jobs that might exist if this fictionalized money from piracy poured into the economy (which – as mentioned – happens, but in other industries). This also ignores a large elephant in the room: that piracy represents its own economic industry. It borders on ironic that one of the largest divisions of the FBI fights piracy, pulling in huge operating budgets, and necessitating hiring and training new agents and support staff. Even trade organizations – beating their heads against piracy for decades now – would have far smaller roles and budgets without piracy to combat.

In electronic hardware, one-off goods that meet pirate demand must enter this debate. Blank writable media, burning hardware such as CD-ROMs, storage media – all thrive because of copyright infringement. This even applies to mp3 players and other portable media devices. Sony makes more money on their mp3 players than on their media (Gantz and Rochester, 2005) and with iTunes only recently selling unprotected mp3s and few other legal choices, it is certain that file-sharing and music piracy fuelled Sony's sales. The BASCAP report claiming hundreds of thousands of jobs lost to counterfeit auto parts ignores a glaring fact: someone made those parts. Is the difference between those employed making counterfeit auto parts and 'authentic'

or 'approved' auto parts so large as to excuse leaving them from the equation? Doubtful.

The BSA report also makes correlations between lower piracy rates and increasing jobs, without addressing how rising piracy rates might create jobs. They mention this for China and Russia in particular, again falling back on the decrease in security and support for bootleg software as icing (Business Software Alliance, 2010). But where are the figures on what happens to the money funnelling into bootleg rings, or what happens to company and individual savings because of piracy, especially of another country's IP? It seems sensible that one can apply the same argument as above. Russian rupees that consumers did not spend on IP (most of which would go to the West) would funnel into the Russian economy in other ways, through other consumer goods and services.

None of this would matter if both industry and governments viewed anti-piracy reports with proper scrutiny. Alas, Western governments often look to such reports when passing tighter IP controls, creating policy, passing legislation, making court decisions and even affecting public opinion. When US Vice President Joe Biden says: 'Theft of intellectual property does significant harm to our economy and endangers the health and safety of our citizens' (Federal Bureau of Investigation, 2010), it should come from mountains of irrefutable data produced by non-biased investigators. Historically, this is not what happens.

IP's largest beneficiary, the USA, finally began to question industry-funded reports claiming piracy's destructive effects on the economy. In 2010, the US Government Accountability Office (GAO) 'observed that despite significant efforts, it is difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole' (United States Government Accountability Office, 2010: 2). It did not help that the MPAA's commissioned report by LEK Consultancy contained a glaring error, and could tell the GAO little about how LEK calculated losses (Anderson, 2008).

Hopefully, this will mean the beginning of further scrutiny into these studies and greater openness. But so long as big media pays the investigators' bills, expect the same gloom and doom now pervading such economic discussions.

Corporate works-for-hire

I wept no tears for Napster, Grokster, and their ilk. I see no high-minded principle vindicated by middle-class kids getting access to music they do not want to pay for. It is difficult to take seriously the sanctimonious preening of those who cast each junior downloader of corporate rock as a Ché Guevara, fighting heroically to bring about a new creative landscape in music. It is almost as hard to take seriously the record industry executives who moralistically denounce the downloading in the name of the poor, suffering artists, when they preside over a system of contracts with those same artists that makes feudal indenture look benign.

- James Boyle (2008), The Public Domain: Enclosing the Commons of the Mind

The biggest enemy to freedom is a happy slave.

- Anonymous

Modern IP opponents and pirates alike harbour a strong contempt for corporate copyright. It does not take an in-depth investigation to find that copyright protects corporations and businesses more than individuals. No matter what the purpose of its early design, this is the copyright climate in which we live. No amount of anti-piracy propaganda portraying starving artists will reverse this. In reality, the media corporations have the money, power and resources to produce, create, market and deliver media in a way that few individuals could.

However, the idea that corporate copyright squashes creativity, hinders art, or destroys innovation must bear the same scrutiny as anti-piracy propaganda for one to form a balanced understanding of copyright. Corporate works-for-hire may seem soulless to the idealist content creator. And few would argue that media conglomerates do not green-light some truly horrible projects, either to cater to the lowest common denominator among consumers or to make a quick buck off successful advertising campaigns. But this does not mean works-for-hire offer nothing to the creative compendium. As little as copyright reformists like to admit it, corporate copyright may spread more work to more people than any state-sponsored

or individual endeavours have before.

The effects of this differ in the digital age. Where historically one author penned a book, now teams of hundreds create software programs. While it is possible and sometimes profitable for individuals to create software and reap all rewards from its sale, it is far more typical for corporations to hire coders, designers and everyone else to make works-for-hire. The occasional video game will rise from individual work, but blockbuster games incorporate dozens of people who will have no control over the copyright of the finished product. The older and more mainstream media becomes, the more difficult it is for individuals to stand above corporate works.

Consider an example outside digital media. IP concerns and corporate takeovers have infected the superficially placid world of yoga. Multimillionaire and world-renowned yogi Bikram Choudhury upset the yoga community when he copyrighted several poses (supposedly original interpretations of classic poses) and patented doing yoga in a heated studio. Bikram has shown no qualms about suing studios that he felt infringed on his IP, claiming that people were making millions off his ideas (Philip, 2006).

At the same time, yoga has grown into an empire in the West. Its rise as an alternative exercise, and the relatively low financial and professional barrier to entry, have spawned countless studios to meet new demand. Entrepreneurs quickly understood the money they could make by incorporating: enjoying greater exposure, undercutting private studios and minimizing financial risk. Top-down, this is 'McDonaldization' of previously healthy, public domain exercises into mainstream, commercialized and watered-down versions of the ancient Indian art. Such moves – both by budding yoga corporations and Bikram – spawned the term McYoga.

But corporate-hired yogi, despite having to conform to a business model, differ from solo-studio yogi in another way: they bear no responsibility for the success of their company. Alan Finger, a yogi employed by the Yoga Works corporation, lauds the corporate gobbling of smaller studios, claiming it is 'adding stability to the yoga'. He says that having others come in to handle the business and financials 'allows us as yogis to teach well and do what my vision was all along'. He says: 'it's really hard to be in business and then switch over and try to be yogis... It's really hard for me to just sit there and really just worry about this individual and their spiritual growth and not have to think about money' (Philip, 2006).

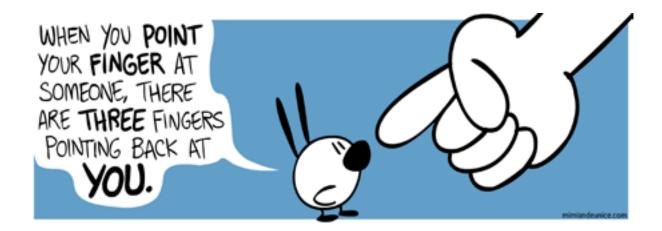
This same relationship has kept self-publishing from overtaking conventional 'big house' publishing, despite a respectable rise in self-publishing worldwide. While many writers easily don the sales, marketing or agent hat, they represent the exception. For every writer by day and marketing guru by night, there are hundreds of writers with no wish to 'manage their brand', blog, tweet, Facebook or make sales calls to bookstores.

Works-for-hire are not without grave injustices, however. Lead singer of alternative rock band 'Hole', Courtney Love, paints a grim and honest picture of what many musicians still consider the brass ring: a recording contract. She mentions revisions to the US Copyright Act of 1976 snuck into the verbiage of The Satellite Home Viewer Improvement Act of 1999 (Love, 2000). Now some musicians will create works-for-hire instead of signing over copyrights to their music for a limited time. This short, concise and out-of-place addition to a bill covering cable broadcast rights came care of the RIAA, an organization ostensibly looking out for musicians. This has some musicians, like those in Love's example, living off wages far closer to rat race workers than rock stars.

Perhaps works-for-hire serve teams better than individuals and better suit some media or markets over others. The point remains that IP abolitionists must consider what it means to have corporate copyright handle the business side of art. That works-for-hire, despite all their flaws, may employ more content creators than individual copyright or no copyright laws at all. Sure, no doubt most of the money media creates does not make it to the artists, but those artists might not have any exposure without corporate backing. So if more content creators make works-for-hire than would enjoy full-time employment from their own copyrights, then works-for-hire can indeed prove a notable boon for such creators. Is this just happiness in slavery? Possibly. But if the upshot of corporate copyright is steady employment for artists and more media exposure, then any revisions must consider this when promising a better tomorrow.

Digital Piracy in Asia





While hard-goods piracy remains under control in the West, counterfeit goods abound in Asia and Eastern Europe. Rights-holders and trade organizations may group all infringement under one pirate flag, but hard-goods piracy, to them, represents a greater economic threat than file-sharing.

Despite media coverage and academic scholarship examining overseas piracy, most of this only focuses on counterfeiting's broad and fast growth. Naim writes that, since the 1990s, 'trade in counterfeits has grown at eight times the speed of legitimate trade' (Naim, 2005: 122). Common reasons include fast money, low overhead, small risk and inconsequential legal backlash. But most coverage ignores why and how counterfeiting occurs in favour of stories rife with organized crime and life-threatening consumer goods.

The effects entail growing, coalescing, multinational law enforcement, and trying to sort through the tide of foreign goods pouring into all nations and filter out genuine products from the unavoidable fakes. As the corporations grow concerned, the governments tighten controls, penalties and law. But what does counterfeit detection do, and is it working? How did these pirate nations gain the means of counterfeiting anyway? This chapter will examine such questions, and take a closer look at the incentives involved on both sides of the battle.

Discovering counterfeit causes

China is a country where piracy has won.

- Chris Anderson (2009), Free

Father: Where did you get it? Answer me. Who taught you how to do this stuff?

Son: You, alright? I learned it by watching you.

- US anti-drug public service announcement

Everyone knows that piracy runs rampant in Southeast Asia. Bootleggers peddle their wares in plain sight to locals and tourists alike. Everything from music to movies to video games is a copy of a copy, without a penny going back to the rights-holders. But what remains far more important here are the unknowns, the holes in what we think we know, and the varying incentives involved. When television covers bootleg raids, people see well armed teams rushing in to seize pirated material with the same expediency and aggression viewers expect when watching drug raids, hostage situations or shoot-outs.

One such programme on Australian television sets a dark, intriguing tone to antipiracy raids in Manila. Laden with melodrama, the reporter claims that such raids have resulted in violent opposition before, with everything from exchanges of gunfire to acid poured onto law enforcement team members from floors above. The intended message rings clear and is even stated: these are not 'mom and pop' operations. And yet, when the raid is underway, a cadre of over-armed police burst into what look like 'mom and pop' operations. No guns. No drugs. No acid thrown from balconies. Not even a foot-chase ending in violent scuffles. Despite all attempts at making the raid appear both dangerous and warranted, it comes across about as tense as Sunday school.

Just as news coverage of raids on crack houses or meth labs ignore why they exist, only that they exist, mainstream media does not represent the bootleggers' viewpoint. Few if any consider a top-down investigation of why bootleggers continue to peddle fakes. Not why they do, but why they can. Following this up the chain, the first implication in such rampant bootlegging is that it springs only and ever from equally rampant demand for media. The warehouses shown in conspicuous police raids contain 100,000 pirate DVDs only because bootleggers have thousands of customers to buy them. Bootleggers do not invest in replicating hardware and burn truckloads of fakes without knowing consumers demand their products. The media portray them as parasites, but conveniently forget to mention that we are their willing hosts.

So why do consumers in Asia harbour such a fondness for bootlegs? Why do they not buy their media from sanctioned retailers, like most Britons and Americans? Alas, there are several details left out of anti-piracy rhetoric about Asia. First is the assumption that Asians have just as many legal products available to them, and that they must therefore choose to buy bootlegs instead.

No nation in today's global economy wants to wait its turn. Not for media, information or innovation. The same goes for movies. But in China, there is an almost unimaginable cinema bottleneck. China allows only 20 foreign films in its cinemas each year (Wu, 2006). There is only one cinema for every one million citizens. That's like having a single cinema for all of Phoenix, Arizona, or only eight for all of London. The Chinese do not want to wait months to see the latest action blockbuster when the DVD finally hits Asian markets. Instead, they buy bootlegs of films still in American and UK cinemas and watch them at home. Quality does not matter as much as being first to market, and bootleggers beat retail DVD sales by a wide margin. So people must shed the impression that the Chinese have the same media available to them, and that they choose bootlegs.

Other times, it is about choosing the bootleg. In a recent journal article about game piracy in the Philippines, Jennifer Kim Vitale writes: 'Entertainment from video games is commonplace and since most of the population cannot afford to buy the

hardware, software or firmware at legitimate prices, individuals have no choice but to purchase the cheaper, illegal copies... As the video game industry evolves into a multibillion dollar market in the United States and in other countries, the mass production and selling of pirated software and hardware will have a detrimental effect on the copyright holders as well as the entire industry worldwide as it precipitates massive monetary losses' (Vitale, 2010: 298).

These statements – from the same paragraph – contradict each other completely. If Filipinos 'have no choice but to purchase the cheaper, illegal copies' then how is it that piracy in the Philippines 'precipitates massive monetary losses'? They either can afford to pay for a retail copy, in which case buying a pirated copy may represent a loss, or they cannot, in which case the paltry cost of a pirated copy has no economic effect on Western IP sales.

One fact should ring clear: Hollywood does not need greater DVD or cinema sales in Asia to continue making movies. The assertion is nonsensical. If an already vibrant market began to decay into a market rife with bootlegging and with no capacity for cinema releases, it could mean trouble for film studios. But no amount of economic juggling can take nations with pirate rates in the high 90th percentile and claim that their lack of patronage will spell doom for Hollywood. These are booming economies, to be sure, so they represent a tempting market for Hollywood and other rights-holders. However, as long as the piracy rate in the post-industrial nations has stabilized (and even dropped some years), then there is no threat of film studios throwing up their hands and stopping production. There exists only the threat of losing out on growing economies, and the certainty that a nation growing richer means consumption booms.

Look at the Nigerian film industry, often called 'Nollywood'. Here is a country that produces more films each year than either Hollywood or Bollywood in India. It ranks third in film industry revenues (around \$300 million yearly), and employs a million people. Nigeria also casts not a blip on the notorious United States Trade Representative's (USTR) radar, not even on the 'watch list', let alone the dreaded 'priority watch list'. The reason is clear: they have little need for Hollywood bootlegs when their own films sell for \$2 a pop. They do all of this without copyright law. So why – without piracy – does a poor market for Hollywood not mean trouble in Nigeria? Just as with smaller Asian nations, Nigeria represents a minute market for US

films and other media, legal or bootleg. So whether the nation respects international copyright law matters more than the size of the market, it seems. This can mean the difference between using economic sanctions against them and ignoring them altogether.

Economics aside, the nature of Asian culture acts as an important factor in the high piracy rates. In the West, people measure success by individual achievement. Content creators and corporations sponsoring works-for-hire seldom create to better society, but for monetary rewards. This typifies the capitalistic, pull yourself up by the bootstraps culture of the West. And this culture has created a bevy of amazing works. However, this also means Western – especially US – culture protects IP with ferocity. When creators make art for money, interfering with the money undermines the art.

In Asia, the culture simply does not work this way, at least not at first. While Japan has a history of adopting and adapting Western innovation, its industrial and technical growth began years before many other Asian nations, such as China and South Korea. So, one should expect that they have become a more fertile market for Western IP. Despite some game piracy, Japan is no longer on the USTR watch list, but their culture still views IP differently from the West. Their lower piracy rate simply reflects national economic development.

In China, the social implications of piracy are far different from in America. 'A Confucius attitude toward intellectual property' writes Anderson 'makes copying the work of others both a gesture of respect and an essential part of education' (Anderson, 2009: 202). Piracy remains necessary in the Philippines, while in China it both drives technology and fills the gaps in Chinese media. Copyright enforcement and recognition is growing in South Korea and has remained high in Japan. So the degree to which piracy permeates Asian culture reflects not only different values, but also economic development.

An older publication, a guide to conducting business in Asia debuting a few years after Southeast Asia began to impose IP protection, recognized an important principle: that many of what the report calls 'Asian Tigers' – China, Indonesia, Korea, Malaysia, the Philippines, Singapore, Taiwan and Thailand – do not have a history of IP law or enforcement (Deng et al., 1996). To expect countries with a 20-year history of IP law to respect and enforce it in the same way as Western nations that have had some form of copyright for 200 years is ridiculous.

Not only are these developing nations new to IP law, they are still in the heat of their development, enjoying double-digit economic growths each year. In that state: 'The US refused to join the Berne Convention on copyrights in the 1880s, saying that as a newly industrialized country it needed easy access to foreign works. In fact, the US did not become a signatory to the Berne Convention until 1989. Similarly, in the 1950s Japan disregarded IPR legislation and adapted Western technologies' (Deng et al., 1996: 44). So to expect developing nations to adopt heavy-handed IP laws that provide most benefit to IP-exporting nations runs counter to how today's developed nations acted themselves. A classic case of 'do as I say, not as I do'.

During the 1990s in South Korea, Korean businesses could register a trademark, but the nation showed little regard for other nations' trademarks. This should sound familiar. It recalls how, during the 19th century, the UK did nothing to enforce US copyright protection and vice versa. This saw Twain bootlegs abound in the UK and Canada, while Hardy and Dickens gained a large following in the US that did not see a penny go back to the authors. The idea that post-industrial nations have the right to enforce laws on other nations, which in their relatively recent history those nations did not respect, continues a line of hypocritical thinking.

Asian content creators have adapted to this environment. In China consumers have grown accustomed to music at no cost, so artists who try to charge might lose many potential fans. If artists resist the flow of their music on file-sharing networks or bootleg CDs, they actively stop new fans from emerging. Many artists in China use piracy as a marketing tool for where the real money lies: touring, merchandising and endorsements. As Anderson points out, this fame despite no legitimately-sold CDs can even make money through phone ringtones (Anderson, 2009). He goes on to write that: 'In a world where the definition of the music industry is changing every day, the one constant is that music creates celebrity. There are worse problems than the challenge of turning fame into fortune' (Anderson, 2009: 202).

It should be no surprise that models for selling games have changed most rapidly in Asia, where game piracy is legion. Online games making money in different ways from physical game stores is a billion-dollar industry in America, but is more than twice as large in China (Anderson, 2009). So the same country responsible for myriad copyright violations, from bootleg DVDs to pirated copies of Windows, is a more profitable industry for online gaming than the USA, where IP remains fiercely

guarded.

Asian piracy still has effects, just different effects from what most believe. While the impacts on rights-holders' profits take some economic finagling, piracy has a clearer impact on the host nation's trade relations. Doubtless, IP will become further entangled in Western production, from patented machines to patented food, drugs and biotech. And doubtless Asian countries who still refuse or who cannot play nice in stomping out movie or video game piracy may get much less of a crack at trade in patented goods, such as medicine. If this seems like post-industrial, copyright-rich nations leveraging vital trade goods to sell more DVDs, then the image is coming into focus.

Tracing the bootleg source

Our economy is 30 years behind Europe. To us, this is perfectly normal.

- Merchant at Gorbuska Market, Moscow on selling camcorded films in policecontrolled shops (Johnsen et al., 2007)

Long have movies shot on camcorders in cinemas drawn ire from some and jests from others. The idea is simple enough: someone sneaks a video camera into a cinema, centres it on the big screen, and hits record. If the camera stays in focus and the cinema remains docile, the product proves tolerable enough to watch, especially compared to nothing.

Of course, the reality is a little different. Real cinemas mean crying babies, whining kids, bathroom breaks, phone conversations, hearing-impaired viewers who want every line repeated, and hundreds of other distractions. The camcorded film captures these as well as the movie. So during the final fight in *The Matrix*, someone stands in front of the camera or a glow comes from a nearby tween's phone as she texts her best friend. Perhaps first-to-black-market beats quality with camcorded films, though recipient bootleg rings in other countries do not have to pay for shoddy work. As one bootlegger describes in the documentary *Good Copy, Bad Copy* (Johnsen et al., 2007), sellers send the first half of the film, and only if the recipient bootleggers

find it suitable will they send payment and receive the other half.

While many countries lack the equipment or even facilities to present cinema releases as the UK and the US can, quality still plays a role in the behavioural economics of bootleggers' customers. If nothing but camcorded movies preceded DVD releases, it is doubtful demand would remain so high. Of course, few people know where exact-copy DVDs of in-cinema movies come from, and for good reason. The film industry demands that taxpayer-funded law enforcement deals with bootlegging at home, and expect government trade sanctions and international policing to regulate bootlegging abroad. And yet the source of many high-quality pirated movies comes from the industry itself: the DVD screener.

Screener DVDs are movies the industry sends out to critics, award boards and media organizations before cinema release. They are high quality and, despite bearing watermarks, basic TPM bypass equipment can rip and duplicate them. Bootleg DVDs of in-cinema films that do not resemble a shaky mess probably came from a screener. Since so many people receive screeners, at least one inevitably makes its way to a release group. One is all any group needs. In a few hours a cracker will ditch the watermark, bypass the TPM and have it ready for public download from torrent sites. Speed isn't everything; it's the only thing. The faster a release group makes a high quality film available, the more prestige they accrue.

Despite this, the industry still demands the government spend taxpayer money to find, try and prosecute film piracy. This resembles leaving a wad of cash in the seat of an open car and then demanding police spend time and resources finding any thieves. With this metaphor, think of the bills as traceable, since the MPAA hires third-party companies such as CINEA to watermark screeners. Despite this tracing technology cropping up in news stories for the last decade, it remains inadequate. Bootleggers remove or even crop out watermarks as fast as they come. Even if a bootleg is traced to a particular screener, punishing one person, even severely, does not deter further releases.

This is why former MPAA president Jack Valenti lobbied to forbid DVD screeners for award boards and film reviewers before cinema release. Valenti claimed that piracy stemming from screener DVDs justified the move. The proposal failed, but the sentiment remained.

Screeners hold value for mainstream and independent film alike. Indie film-maker Jeffrey Levy-Hinte writes that 'the dissemination of pre-release copies of motion pictures might provide the consumer with more information about the quality of the product than is advantageous to the [film industry] to disseminate – think of it as an early warning system for bad movies' (Levy-Hinte, 2004: 92). There are some reviewers who seem apt to give 'two thumbs up... way up' no matter how awful the film, but others arm consumers with at least some forewarning about how bad the latest special effects-laden blockbuster actually is.

Levy-Hinte wrote from another angle, however: that of the indie film-maker. Stopping screeners, he argued, would cause irreparable damage to indie films because such reviews are often the only means of advertising small films have. Unlike their blockbuster counterparts, indie films have to survive off their own merits, and cinema-goers would know little about such merits if screeners disappeared.

So what about perfect copy bootlegs that compete with retail DVDs? Instead of reacting to film bootlegging with more protective measures or international copyright agreements, perhaps Hollywood should look to media creation and distribution instead of counterfeit rings or individual consumption. In his book Illicit, Moises Naim points out that most bootlegs come from Asia (largely China and Southeast Asia). But what he addresses only in passing is that the most efficient means of producing these bootlegs are by using the same production lines the industry employs to produce genuine products (Naim, 2005).

Jeffrey Scott McIllwain states this more directly: 'The pressing process uses the same DVD replicators that are used by the legitimate DVD production industry to create high quality DVDs. These replicators are either owned by the client (at a cost of approximately \$1 million) or are used with the paid-for cooperation of a legitimate DVD production company during off hours' (McIllwain, 2007: 22). What McIllwain essentially describes here is a process both economical and efficient; a model of speed, cost and distribution that rivals the legal DVD market. And yet, because these bootleg rings pay no content rights, they can undercut legal DVDs, even when the 'real' disks finally reach that country.

How do you compete with such a model? Certainly not through researching greater digital control such as country codes, which bootleggers bypass as quickly as the industry creates them. It seems logical that if the problem comes from security

vulnerabilities in the industry's own production lines, then the industry should plug those leaks at its own expense. But any money saved by off-shoring means money made when the government pays for plugging your information leaks, even far downstream.

The obvious irony here is that movie studios seeking legal protection from piracy willingly have their products created in countries known for bootlegging. This, like so many other dealings, smacks of an internal shortfall – a security breach in industry process. Such a problem is no more the responsibility of US taxpayers than ensuring a product's success in the free market. Cheaper operating costs and more lax environmental standards are among the primary reasons production has moved to Asia. But with those savings comes the added responsibility of ensuring that businesses deal with the predictable and obvious malfeasance such as nationally centred and even nationally sponsored bootleg campaigns as with any other facet of doing business. It is astounding that the burden put on US shoulders means not only having to surrender countless jobs to overseas production, but also suffering the loss of endless tax dollars spent combating counterfeits – a by-product of outsourcing.

Bootlegging is high in the nations that make the products. This point is one that industries leave out of press conferences, rhetoric and propaganda railing against counterfeits. Why is bootlegging so high in China? Because they make everything. How indeed can rights-holders wag a finger at the developing world for counterfeiting when they moved all of their factories there? Those factories churn out fashion accessories such as handbags to company specifications. At some point, the line is seeded with cheaper materials and another run begins the same as before, but now Prada becomes Prado. The workers do not know the difference, and the factory managers are simply moonlighting using the tools given to them.

According to counterfeiting documentary *If Symptoms Persist*, China manufactures 58 per cent of consumer goods and is responsible for 90 per cent of all counterfeit goods (*If Symptoms Persist*, 2008). These numbers have a close kinship. China provides corporations with cheap brand-name goods for which they may charge a premium. For the vast parts of the world that cannot afford that premium, China produces the same goods minus the quality control. That they do so in the same factories should seem a problem, but not a surprise.

Knowing this, it seems audacious for industries to cry to the US government about

stopping piracy when bootlegs roll off the same assembly lines they build, oversee and approve. It takes even more nerve to pretend the weight of creative endeavour, the economy, and thousands of jobs are on the US citizen's shoulders alone. Since demonizing their own business and manufacturing would prove as foolish as it sounds, they revert to criminalizing home-turf piracy, bootlegging and general lack of consumer spending. The reasons for using overseas labour are obvious when considering the pennies an hour workers make in developing countries compared to US wages. Off-shoring also begets many tax breaks, and some big retailers such as Wal-Mart even pressure suppliers to move factories overseas. However, it is curious why industries profiting from IP show so little concern about how their overseas factories are run.

Obviously mainstream media in the US refuses to hold Hollywood at all accountable for leaks in its distribution channels. Objectivity flies out the window when the 60 Minutes special 'Pirates of the Internet' begins with the weighted line: 'It's no secret that online piracy has decimated the music industry, as millions of people stopped buying CDs'. There is no wish to find cause here, but a perfect and unquestioning reliance on industry-pushed correlations. In blatant yellow journalism, the special continues with cleverly cut footage of host Lesley Stahl first clearing her name by saying 'I think I'm the only person who's never downloaded anything', simultaneously admitting complete ignorance of the issue. Then Stahl teams with 20th Century Fox's Peter Chernin in lamenting how teens and college kids 'know it's stealing' and 'don't think it's wrong'. They then turn their collective judgements on Grokster's Wayne Rosso, even introducing him as 'Hollywood's enemy'. Where Stahl's interview with Chernin seeps sympathy for his poor corporation's plight, the interview with Rosso is more the third-degree. Though how Stahl can claim to judge what is wrong after admitting ignorance of it only further annuls the programme.

The only mention of where the pirate material comes from other than camcording is in a short clip about screener DVDs. Chernin explain this by saying it is: 'through an absolute act of theft' such as when 'someone steals a print from the editor's room', absolving any industry complicity. Forget that they send out the screeners, or that they supply Asia with million-dollar pressers to mass-produce DVDs.

In truth, these industries must understand that even piracy happening at the source is still just a symptom. The disease is that they cannot control ideas, whether

designs, music or movies, in the way that they control physical products. It is inconsequential if one widget gets stolen from an assembly line. It is enormously consequential, however, if one copy of software or 2D design of a garment is taken, since it allows for endless reproduction. And as Paul Craig points out in his book *Software Piracy Exposed*: 'Being paid \$7.50 an hour to shove a CD and manual into a box is not an incentive to remain loyal to your employer' (Craig, 2005: 39). Of course, the effects do not necessarily represent lost profits. A pirate film enjoyed by millions who would never have been able to buy it is an enormous consequence as well.

Even if security and the wages of industry workers increased, nothing would completely stop piracy. This is not the message trade organizations and rights-holders wish to convey, however. After all, anti-piracy propaganda does not depict scenarios where piracy occurs organically, like on an assembly line. Instead, they portray it as the work of organized crime and terrorism. Showing piracy stemming from industry-endorsed and distributed screener DVDs, or from the industry's own production lines overseas, would garner little public sympathy. And so, the rhetoric falls to the symptom level: the street vendors, the buyers, and the governments of countries in which bootlegging flourishes. To claim that rights-holders in general and the film industry in particular need some serious introspection holds as true as asserting that if they created the problem, then they should try to fix it. Perhaps a failure to take on the cost of fighting overseas piracy is not rights-holders skirting responsibility so much as a tacit confession that any such fight can never end in victory.

Counterfeit pharmaceuticals

Patent rights typically cause the price of pharmaceuticals to triple.

- Deng et al. (1996)

And there's winners and there's losers / But they ain't no big deal

'Cause the simple man baby pays for the thrills, the bills / The pills that kill

- John Cougar Mellencamp, 'Little Pink Houses'

Today, any attacks on counterfeiting lead quickly to pirate pharmaceuticals. Bootleg shoes may fall apart, but pirate drugs can kill, the media say. Literature on fakes (mainstream as well as respected journals) is almost exclusively negative. Television coverage often features port authorities, undercover buyers and big pharma representatives talking of consumer harm and governments unable to plug the leaks. Naturally, such coverage turns immediately to bogus consumables. Products people rely on to make them healthy and to stave off disease.

However, even counterfeit drugs' dangers need more thorough investigation than buying into branded drug companies simply declaring that pirate pills can kill. Bottled water from the purest Artesian wells can kill. Dolphins can kill. The important question is how they kill. While media coverage often focuses on pills containing boric acid or trace particles of other dangerous chemicals, what fake pills do not contain begets the greatest harm.

Poorer nations remain rife with malaria, tuberculosis and AIDS. When fake pills contain no or (worse) only trace active ingredients, the sickness claims a far higher death toll, with 'rough, yet conservative estimates' of up to 700,000 deaths worldwide each year (Harris et al., 2009: 23). Countries react with tighter inspections or more investigations into counterfeiting rings. Both are symptoms of the same disease, however: a lack of affordable pills from reliable sources. So the victims die from inaction, not action, since the overwhelming majority of those deaths – all but a handful – are due to ineffective drugs, not poisonous drugs.

The consequences of demonizing the counterfeit drug trade remain minimal: who would argue for those profiting from selling ineffective drugs to the sick poor? The real potential harm, however, is tying reverse-engineered or hacked drugs in with all other counterfeits. Few sources differentiate between fake pills and pirated pills. So when the mainstream media, medical journals and government authorities all condemn counterfeit pills in unison, the din is hard to ignore.

Big pharma often remains mute about both the extent of fakes and any benefit of reverse-engineered drugs. Both dilute their premium pill market: the former through causing consumer wariness, where 'they're [big pharma] often the first people to identify fakes, but there's a disincentive for them to declare that because it destroys their market' (Marshall, 2009) and the latter through generic drugs, which ignore patents in order to offer cheap versions of premium drugs.

Pfizer in particular paints itself into the patent corner; much of their research and development focuses on patentable or currently patented drugs, with little regard for drugs no longer protected. Yet these are the drugs that developing nations desperately need. If big pharma shows no interest, however, this leaves a powerful vacuum for either fakes or reverse-engineered drugs. The former are deadly through inertness, but the latter often give hope where little exists.

Mainstream media has no qualms about adopting an inclusive viewpoint that lumps fake pills with pirate pills. When CNBC's show *Crime Inc.* began their programme entitled 'Counterfeit Goods' with the line: 'This criminal underworld puts our economy and our lives in peril' (Todis, 2010), no one expected to hear about the lives reverse-engineered drugs have saved. The programme has John Clark, Vice President and CSO of Pfizer, talking about how bootleggers care only about money, and not the safety of the drugs. How they 'have no regard for the health and safety of the end customer. They're just looking for the money'. This seems somewhat duplicitous given big pharma's own death toll because of abuse, medication errors and side effects, but it certainly edges out any arguments for pirate pills that help people. How 'In India, Brazil, Argentina, Thailand, Egypt, and China, private and staterun enterprises are ignoring international patent laws written in the interests of profit, churning out generic versions of vital drugs at a fraction of the cost, saving and improving millions of lives as a result' (Mason, 2008: 63).

In the same vein, Ghana's non-profit pharmaceutical advocacy group mPedigree produced counterfeit drug documentary *If Symptoms Persist*. It calls fake pill makers 'merchants of death' and 'criminal masterminds' who are 'not the type to repent of their foul deeds' (If Symptoms Persist, 2008). Again, the programme makes no mention of illegal generic pills.

Generic drugs in India provide a fine example of how a too-inclusive view of pill piracy can cause harm. In 1970, then-Prime Minister Indira Ghandi dropped patent coverage on 'products' and left 'process' coverage to stimulate an economy too dependent on foreign chemicals for farming and medicine. The result was a boom in reverse-engineering and generic drug sales, as well as cheaper pesticides. This remained in effect until India reinstituted pharmaceutical patents in 2005 as a provision of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement. During that time, India made between 70–80 per cent of the ingredients

in US generic drugs and around 60 per cent of those for brand-name drugs (McNeil, 2000). So, while the USA and other developed nations benefited from cheap skilled labour, India reverse-engineered all drugs, patent protected or not, for widespread generic sales in-country.

Obviously, big pharma disliked India reverse-engineering their patented pills and selling them at marginal prices. But the reason more than 20,000 drug makers sprouted in India was that making generic drugs of patented pills still obeyed Indian law. And while the industry claimed losses of \$100 million a year, when the average outlay for healthcare per Indian rang in at about \$10 a year, it is easy to see why knock-offs did well (McNeil, 2000). 'India's drug prices were among the highest in the world,' wrote Donald McNeil Jr in 2000. 'Now they are among the lowest. Access to drugs is one reason that average life expectancy has risen to 64 today, just as cheap pesticides based on foreign formulas are part of the reason India now feeds itself.'

This does not sound like the 'merchants of death' who 'have no regard for the health and safety of the end customer'. But some still see reverse-engineering as simple piracy, a view expressed in an article by the conservative, corporate-funded American Enterprise Institute. They free big pharma from any shortfalls in needed medicine and instead claim 'rather, Indian patent law is what constricts India's drug market' (Bate, 2007). Indeed, tighter patent coverage and pulling back the reins on generic, reverse-engineered medicine might stimulate research and development in India by foreign markets. What this new coverage will mean for effective drugs getting to poor people remains unknown. But big pharma cannot spend billions on research and still sell drugs as cheaply as pill pirates while pleasing their investors.

As long as the media portray large pharmaceutical companies as the victims of pill piracy, however, rhetoric about the evils of reverse engineering and generic drugs will prove successful. But realistically, either big pharma makes lots of money or it loses lots of money; the two are mutually exclusive. They cannot treat unrealized income from poorer countries as losses to piracy. And yet, is it moral or ethical to withhold from these countries not only the data necessary to reproduce lifesaving drugs, but also the ability to reverse engineer these drugs? It is one thing to refuse to give something away, even if this means that many people will lose their lives. It is another to manoeuvre prospering IP policies toward greater controls in nations that reverse engineer or pirate drugs that help citizens, especially when such an impoverished

market would not benefit rights-holders to begin with. As McNeil writes: 'It is only when the newest molecules, often made in the same factories, are sold in countries where a patent has not yet expired, that a "generic manufacturer" becomes a "pirate counterfeiter" (McNeil, 2000).

Importantly, one cannot compare big pharma's good works with doing nothing at all. That will always make them appear heroic, kind and concerned only for the welfare of the less fortunate. Instead, we must compare what they are doing with what they could do. Not while going bankrupt, surrendering their IP or firing all their employees, but while still preserving an effective, profitable business. As Indian Minister of Health Dr Javid A. Chowdhury said: 'If they can offer an 80 per cent discount, there was something wrong with the price they started off with' (McNeil, 2000).

The result of universal negative action against all pill piracy continues the game of information keep-away. While no one wants ineffectual drugs mixed with lifesaving antibiotics, the recourse becomes big pharma's excuse for falling back on and trying to extend patent coverage. The brand becomes the safety against fake drugs, so the brand receives vast and growing protections, no matter what the costs. What bolsters brand enforcement for the sake of excising ineffectual counterfeits, companies can then use to combat reverse engineering.

People must understand the difference between pirate pills with no or bad ingredients, and those that are reverse engineered and simply ignore patents. The former can be a problem, the latter's only 'evil' is in depriving corporations of potential profit. If that is a result of saving lives, then few indeed would lump such efforts in with piracy. That so many echelons of journalism and scholarship display a universal opposition and negative regard for pill piracy reveals that even the terms have grown too collective. Such stories typically leave out any caveats to including reverse engineering in with drug counterfeiting or pill piracy driven only by profit motive. When coverage of bogus drugs seeps with claims that pill profits fund organized crime and terrorism, one can only infer that failing to separate counterfeiting for profit from reverse engineering is by design; that the agenda of media coverage of this problem is to present no separation between brand hijacking, counterfeiting, reverse engineering and the basest crimes imaginable.

Brand hijacking and the consumer costs

Millions of consumers are now at risk from unsafe and ineffective products, and governments, businesses and society are being robbed of hundreds of billions in tax revenues, business income and jobs.

- Business Action to Stop Counterfeiting and Piracy (BASCAP)

In light of the current legal climate, it is prudent for companies that regularly import goods from China to assess whether they have meaningful exposure to future lawsuits and, if they do, to take proactive measures now to protect themselves against, or at least limit, any future liability.

- The law firm of McDermott Will & Emery

The single feature of any product or service that allows counterfeiting to succeed is the brand. Historically, there has been no shortage of knock-off Rolexes, bootleg films or fake Nikes. However, just as fakes have increased with off-shoring, high-quality media duplication and the internet, brand hijacking has become a pivotal part of moving bootlegs.

A brand's purpose remains straightforward: it communicates the quality, price, maker and even desirability of a product. In this way, it serves consumers by advertising what they can expect, and whether the good's price is acceptable. Brands allow for conspicuous consumption. They also serve manufacturers through ensuring customer loyalty and recognition. As Bryan Murray points out, another reason brands have become important in the digital age is that formerly tactile, in-person sales have moved online, where consumers cannot judge products based on look and feel as effectively (Murray, 2004). Since companies spend millions yearly on expanding, bolstering and advertising their brands, they naturally oppose any misuse, whether in smearing the company or in riding the brand's coat-tails to sell knock-offs.

Adrian Johns (2009) tells how a counterfeit ring making copies of Tokyo electronics manufacturer NEC's products not only used the NEC brand, but also had so fully assimilated the company's operations that customers could not tell the

difference. Even the size of the two companies, the real NEC and the impostor, had eerie likenesses. Johns writes that 'operations often remained blissfully unaware that they were dealing with impostors. After all, the outlaws helped themselves to the very devices – affidavits, bills, forms, contracts – that are supposed to guarantee legitimacy in modern capitalism' (Johns, 2009: 3).

The irony of brand hijacking is that the closer bootleggers get to a respected or popular brand, the more threat they pose to that company's profits, but the less consumers know or perhaps even care about the difference. It is laughable to think that what *Crime Inc.*'s show 'Counterfeit Goods' used as an example of brand hijacking – an energy drink called 'Gold Cow' – posed any threat to the popular drink Red Bull, despite similar labels. But with NEC, customers could see no difference. Naim posits that companies with low-priced products suffer most from hijacking. When he spoke to an employee of a luxury timepiece manufacturer, the man said: 'The person that buys a pirated copy of one of our five-thousand-dollar watches for less than one hundred dollars is not a client we are losing' (Naim, 2005: 9).

Such knock-offs often come through the same channels as the legitimate products: sea-borne containers from Asia. This puts the onus of detection on border and port security, so it has become the responsibility of governments to enforce brand legitimacy. And yet, who upholds brand legitimacy for consumers? Surely it is not just businesses that have the right to know when they are dealing with impostors. But this is precisely what happens when a company buys another just to exploit brand recognition to push their own service or product, often to the detriment of consumers. Consider what one could fittingly call post-fall Napster. When Shawn Fanning created Napster, it grew into a recognizable brand, even if for a no-cost product (other people's songs). The name and the still-famous image of a cat wearing headphones remained recognizable to consumers. When courts shut down the file-sharing Napster in 2001, Roxio, Inc. bought the brand and logos and used this to market what was formerly Pressplay music service as Napster 2.0. So for less streetwise consumers only vaguely aware of Napster's fate, the brand meant free and open music. Of course, this is not what Roxio sold. Instead, they put out a shoddy line of Napster-brand mp3 players that needed a Napster account and online access just to add music. Napster 2.0 became just another mediocre 'music service' that turned monthly subscription fees into a few, DRM-riddled mp3s. So a brand built up on

copyright infringement then deceived consumers into buying products and services that had nothing to do with the file-sharing platform.

Similarly, the site mp3.com offered free, legal downloads mostly from smaller or independent artists. After they launched Mymp3.com, which allowed users to upload their CD collection for time-shifting the music, the RIAA pounced. Though time-shifting falls under fair use, the watershed case *UMG v MP3.com* found the defendants guilty, and UMG sued them into bankruptcy. Later, Vivendi Universal bought the site, suspended its time-shifting service, and made it yet another mediocre online music service. When it was later bought by CNET Networks, it became a site purely for advertisements and music news, though the banner has a tab for 'Free Music'. This clearly uses the brand mp3.com had built to sucker consumers into entirely different services.

No corporation uses branding against consumers like US-based retail monolith Wal-Mart. It is no secret that since the death of founder Sam Walton, Wal-Mart's values have plummeted with their prices. Wal-Mart's magic bullet for undercutting any mom and pop shop is off-shoring. With thousands of stores all over the US, Wal-Mart offers brands a strong incentive to do as they suggest, and what Wal-Mart suggests is off-shoring. The purpose is clear: to sell known brands at rock-bottom prices, with no concern for the inherent and unavoidable decline in quality that off-shoring begets. Two US cutlery companies offer great examples. Both Buck and Gerber created their high-quality, long-lasting cutlery in US-based factories. But when Wal-Mart demanded the ability to sell their knives at lower prices or they simply would not carry them, Buck and Gerber closed down their US-based factories to open factories in China. This dropped the price dramatically, but consumers still believed that the Buck and Gerber names spelled quality. They found out differently. Now, both companies have US-made and China-made blades. Some loyal customers simply know to look for the 'Made in the USA' stamp (and the higher price tag). Others abandon Buck and Gerber after discovering that their China-made blades selling at Wal-Mart do not live up to the historical standard of either brand.

A *New York Times* piece covers how even when some manufacturers can straddle the price-quality fence, selling cheaper models through big retailers, others cannot (Mitchell, 2005). Mower makers Toro found success selling lower-end models through Wal-Mart and Home Depot after some bad quarterly losses, but even this

meant begrudgingly moving 15 per cent of manufacturing to Mexico. Other times, formerly respected brands such as Rubbermaid are acquired and have their factories moved overseas, and then cheaper products bearing their brand hit the shelves with consumers none the wiser. Wal-Mart President and CEO Lee Scott, in a speech to stockholders, admitted the company 'has generated fear if not envy in some circles' (Greenwald, 2005). As long as brands mean a little less to consumers than price, this trend will continue.

Despite all of this, companies pretend that branding is everything and that fighting fakes is tantamount to defending the only edge a company has: its reputation. Author Bryan Murray symbolizes brand defence right on the cover of his book *Defending the Brand* with a not-so-subtle image of a snarling German Shepherd. 'Aside from outright fraud and theft,' Murray writes 'there are scores of other abuses that threaten brands in the twenty-first century. Propagation of false rumours, the online sale of counterfeit products, privacy violations, unauthorized claims of affiliation, and misrepresentation by partners are just a few examples. Left unchecked, all these activities undermine the customer experience and destroy brand equity' (Murray, 2004: 2). Murray leaves out brand self-mutilation and brands picked up by other companies solely to trick consumers into buying sub-par products based on name alone.

So who does the real brand hijacking? The supposedly egregious outcome of counterfeit brands is cheap and ineffective products. Media and industry rhetoric asks consumers to ignore the low prices and demand authentic goods. But then, cheap and ineffective also fits the outcome of companies who drive their own or others' brands into the ground through off-shoring, cutting parts quality and selling through big retailers known for low wages and predatory business practices. Perhaps the most noteworthy difference in counterfeit brands and brands whored out by desperate companies or acquiring corporations is that bootleggers avoid paying taxes. And perhaps this fact alone justifies government intervention to try to stop bogus imports and ensure brand integrity. But doing so under the guise of looking out for consumers seems rather dubious.

The USTR watch list

I think that sometimes we Americans think that we are chosen by God to lead the world. There are a lot of religions, there are a lot of languages, there are a lot of cultures in this world that are different from ours.

- Jack Valenti, former president of the Motion Picture Association of America (A Debate on 'Creativity, Commerce and Culture', 2001)

Jamaica had no intellectual property law, but they wrote one (with our help). Similarly the Dominican Republic. I sat down with their lawyer and together we wrote their copyright law.

- Former US trade lobbyist (Drahos, 2003: 87)

It should be no mystery that culture affects piracy, no matter what blanket legislation IP-producing nations try to create and enforce. Universal policies governing anything from politics to religion can never meet with simultaneous approval in every nation because of cultural, ethical and even economic differences. So it is myopic for multinational media corporations to believe that what works in one country will do so in another. Or – with the Office of the United States Trade Representative Special 301 Report – that fear tactics and lobbyist-perpetuated legislation, mainstays of the UK and US anti-piracy arsenal, will work in nations with dissimilar mores.

Each year, the 301 Report authors consider the endorsements and advice of trade organizations such as the RIAA and PhRMA (Pharmaceutical Research and Manufacturers of America). Among other items are the dreaded 'watch list' (orange) and 'priority watch list' (red). The purpose is 'to protect American inventiveness and creativity with all the tools of trade policy' (Kirk, 2010: 5). In the report are lists of where each country falls, and a report card explaining why each country fell into its respective bucket.

Already, South Korea no longer has films from the UK or the US on its shelves because of rampant film piracy, and a supposedly soured market where movie

studios could no longer profit. Now, the same may happen in Spain, which also has high internet film piracy (Tremlett, 2010). It is a mistake to assume the Spanish people care nothing for creative endeavours or artists, or have an inflated sense of entitlement. The reasons Spain is moving closer to mainstream media's blacklist should neither come as a surprise nor bear undue moralizing.

Foremost, the government simply does not have the hand in fighting piracy that they do in the UK or the USA. Unlike in France, citizens suffer no immediate threats of cutting off their internet. And yet, one cannot expect internet piracy to decrease in Spain without legal alternatives. If the Spanish people refuse to buy DVDs or rent movies from stores, then marketing a streaming service or setting up Redbox rental stations seems more sensible than pulling all DVDs in the hope that this incites change. In the US – despite news stories bemoaning Blockbusters and Hollywood video store closures – the alternatives Redbox and Netflix enjoy enormous success.

For the USA, one recent priority watch list member hits close to home. Canada recently became a 'red nation' on the 301 Report. This is not a nation where thousands of years of history have shaped an entirely different set of values. So how did the USA's neighbours to the north make the bad-boy list? According to some, instead of reflecting a pirate haven or soured market, this situation arose from greater concern for personal privacy.

A tiered and timed release of culture on the world may once have represented a successful business model, but no longer. Today, mass communication and digital media means that withholding creative content is akin to putting out a forest fire by spitting on it. In short, creating information bottlenecks will only ensure a flourishing bootleg and file-sharing market takes the place of legitimate IP sales. Citizens of blacklisted countries will not ask their government to play nice so they can buy DVDs. They will simply hop online to download their media, or go to a market selling bootlegs.

The real power of the 301 Report may be in allowing US industry groups to influence drafting new copyright laws for other countries. Allowing a copyright-rich nation to dictate those laws borders on imperialistic. Several Wikileaks cables out of Spain show just this grim picture. As Cory Doctorow writes: 'It's an open secret that [Spanish] law was essentially drafted by American industry groups working with the US trade representative'. Doctorow claims that the Wikileaks 'confirm the widespread

146 Digital Piracy in Asia

suspicion: the Spanish government and the opposition party were led around by the nose by the US representatives who are the real legislative authority in Spain' (Doctorow, 2010).

In this way, the 301 Report's blacklist preserves an ideological and economic barrier, and sends a message of superiority and exclusion. Trying to play at information keep-away in a time when data flies across the globe in seconds becomes a risky endeavour with little promise of reward. What the 301 Report has shown, however, is that piracy is systemic. People cannot believe it is a problem relegated to Southeast Asia or Eastern Europe. But there is real danger when the nations acting as judge also happen to own the courtroom.

The Idea-Expression Dichotomy



ust as any set of laws needs balance, IP courts must measure often the benefits of enforcing copyright against unavoidable drawbacks such as freezing future creation. This balance birthed what is called the idea-expression dichotomy. This means that content creators enjoy copyright of the expression but not the idea of their work. A picture of an Arizona sunset does not prevent other photographers from photographing those sunsets, commercially or not. It only protects that expression – the photo – from unauthorized copying. People can take their own photo and sell it to a gallery, but they may not copy someone else's photo for the same purpose.

As with many other facets of IP law, the idea-expression dichotomy grows more complex in the digital age. With a low barrier to entry and multiple platforms, it becomes as important for content creators to understand how copyright does not protect them (in their ideas) as it does protect them (in their expressions).

More disturbing is the movement from protecting expressions to owning ideas.

The benefactors of this greater protection are few: lawyers and corporate rights-holders. Little evidence suggests that IP's umbrella extended towards ideas has any benefit for culture, society or new content creators, though its drawbacks remain clear. In literature, the 'stolen idea' cases, with exceptions such as sue-happy author Henry Ellison, often end quickly and add no disincentive for future creation. In film, where once moviemakers considered any film a unique expression, legal action against too-similar releases has been gradual. For music, however, the line between idea and expression thins as musical and lyrical likenesses become easier to detect. Whole musical traditions that borrowed heavily decades ago now want protection from today's musicians.

The dichotomy evaporates entirely with software and game patents, where the smallest, simplest or – worse – broadest process gains protection and veto power. Though each media type heads in its own direction, they all move toward greater control. Yesterday's content creators have forgotten their own influences and borrowing, and they now team up with lawyers and legislators in locking down culture for no one's benefit but their own. And yet, no matter what degree of control exists, content relies on a finite number of ideas to create an infinite number of expressions. Nothing is so creative as to have come from thin air.

Imitation and intimidation in literature

It takes a thousand men to invent a telegraph, or a steam engine, or a phonograph, or a photograph, or a telephone, or any other important thing – and the last man gets the credit and we forget the others.

- Mark Twain, in a letter about Helen Keller being indicted for plagiarism (Macy, 1933: 162)

Frankly, [Alice Randall] would never have written her book if Margaret Mitchell hadn't out of thin air conjured up this extraordinary book.

- Jack Valenti, on *Gone With the Wind* retold as *The Wind Done Gone* (A Debate on 'Creativity, Commerce and Culture', 2001)

There is no shortage of 'idea' lawsuits, where authors who have found success suffer a barrage of unfounded claims of stolen ideas. For *Harry Potter* author JK Rowling, these claims are legion. One claimed that Rowling had borrowed significantly from Willy the Wizard for her fourth Potter book *Harry Potter and the Goblet of Fire*. Despite Rowling claiming she had never heard of or read the little-known series by deceased author Adrian Jacobs, the Jacobs estate's lawyer Max Markson says: 'I estimate it's a billion-dollar case' (CBS News, 2010). Another suit involved the screenplay for the film *Troll*, which features a character named Harry Potter who uses magic to smite the troll (*The Guardian*, 2007). Yet another claimed that Rowling stole the idea for wizard school Hogwarts from preceding novel *Wizard's Hall* by Jane Yolen (Springen, 2005).

Twilight saga author Stephanie Meyer endures similar claims, such as one from Jordan Scott. Supposedly Scott wrote a book in her teens from which Meyer borrows extensively (TMZ, 2009). It seems all lesser-known authors need do is have a copyrighted work in the same genre written before literary powerhouses such as *Potter* and *Twilight* to file suit and expect a piece of the fortune.

Unfortunately, such suits often do prove profitable, if not with legal settlements then with exposure. When the media paint such claims as valid before they have even gone to court, they provide a powerful publicity incentive. After all, story titles such as CBS News's 'Lawsuit: "Harry Potter" Author Stole Ideas' or TMZ's "Twilight" Author Sued for Vampire Rip-Off' leave little doubt that both the media outlet and the plaintiffs want exposure above all. The titles suggest fault or even a favourable judgment long before the suits actually reach court. The media fails in considering the idea-expression dichotomy: ideas, borrowed or not, hold no copyright to begin with.

Over many decades, vampire lore has become a favourite topic in literature. With a more human and romantic element that other classic monsters fail to capture, vampire fiction has abounded since Hollywood created iconic images of Nosferatu and Dracula, with Bram Stoker's classic tale laying the foundation. The idea of love between humankind and vampire runs as long and as deep. It represents the mother of all romantic tales: unrequited love, a literary idea stretching to the beginning of the written word. So 10, 20 or 30 years ago, readers could find books about a male vampire falling in love with a human woman. Such books were largely retellings of the same unrequited love in Stoker's *Dracula*, but did not enjoy popularity to a degree

that shops stayed open waiting for the next book to launch. Nor did they spawn derivative movies topping the box office. At least until 2005, when Edward Cullen and Bella Swan came together in the fictional town of Forks, Washington.

Stephanie Meyer's *Twilight* saga has risen to unprecedented heights retelling the vampire-loves-human story. The books fly off the shelves. The films sell out. The merchanise adorns tweens worldwide. The films' cast enjoys instant stardom. All this for a story that countless authors have told before.

Now, the shelves overflow with seemingly identical tales. Vampire teens in hoodies have to endure the torture of high school and a thirst for human blood. Teen girls no longer suffer the drudgery and disappointment of loving clumsy, shallow, inarticulate boys, but have ancient, cultured, romantic vampires longing to sweep them off their feet. Despite the implications of a pension-aged vampire falling in love with a high school girl, such books fill prime real estate in chain bookshops worldwide.

Meyer's series still falls well under US and international copyright laws, so how can all of these other authors write and sell books with the same idea? Simply put, no matter how large the *Twilight* empire grows, Meyer owns no copyright on the idea of a vampire boy falling in love with a human girl. Her protection lay in expressing that idea. The expression means the names, places, dialogue and – to a degree – the plot of that idea. It means no other writer may change a few words, or change Bella's name to Zelda, and publish it as their own.

This seems logical enough, but the concept still creates confusion among some writers. Glorianna Arias, under the pen name Lady Sybilla, took fan fiction of the Twilight saga told from proverbial 'other man' Jacob's viewpoint and tried to publish it for monetary gain in a novel called *Russet Noon*. The book tapped too deeply into Meyer's expression of the vampire loves girl idea. Fiction based on another story's characters remains a common and respected style of writing called 'fan fiction'. However, Sybilla drew ire from the fan fiction community, since a principle of fan writing is that it remains non-commercial. Sybilla then tried a rewrite of *Russet Noon*, claiming that she would turn it into a parody protected by US fair use statutes, saying: 'I know my rights' in a video response. Eventually, *Twilight*'s publisher, Hachette Book Group, stepped in. They ordered a cease and desist on Russet Noon's cover art, which 'intentionally copied the *Twilight* Series trade dress in order to trade off the success of

Stephanie Meyer' (Ramami, 2010). Sybilla has since published *Russet Noon* free on her website, rejoining the more accepted tributes of other fan fiction authors.

Teetering on the edge of copyright infringement, the 'parallel novel' *The Wind Done Gone* by Alice Randall tells the story of famed book *Gone With the Wind* from the slave's perspective. Despite being 65 years removed from Margaret Mitchell's classic, her estate wanted *The Wind Done Gone* not only stopped, but also burned (A Debate on 'Creativity, Commerce and Culture', 2001). The case made it to the Eleventh Circuit Court of Appeals, where – after enormous legal fees – courts said Randall could publish the book as a parody. Indeed, the story does not use the names and places from its predecessor, but alludes to them in fitting African-American vernacular.

More often, imitation and reuse of ideas is subtler. Stephen King's recent short fiction collection *Just After Sunset* contains a story entitled 'N.'. The story dabbles in ancient evils, long-forgotten rituals and other dimensions. While able to stand on its own, fans of H.P. Lovecraft would immediately draw parallels. 'N.' is so obviously a tribute to H.P. Lovecraft that it reads as if King had found a forgotten manuscript of a Lovecraft story and published 'N.' as his own. And yet, in the back of Just After Sunset, King credits not Lovecraft but Arthur Machen's story *The Great God Pan* as his inspiration. Of course, even a cursory look at Lovecraft's life and literary influences will surface Machen as a favourite.

Machen's estate no sooner sought settlements from Lovecraft than the Lovecraft estate has from King. Clearly each author offered readers unique expressions of the same idea. Authors would find it difficult to present unique ideas for each work. Even if ignorant of precedent, any ideas seep with influences stretching back through writers' lives, from books they have read to news events and the culture of where they live. Imagine a creative environment where ideas fell under copyright protection as well, where Cormac McArthy's *The Road* never sees publication because *Threads* or *The Day After* or any number of stories of post-apocalyptic journeys owns the idea. After all, most nations' copyright laws do not distinguish between short or long works, or judge whether a work has artistic merit. Any broader interpretation of the idea-expression dichotomy would allow people to copyright ideas, not to contribute to the artistic canon, but to set up future lawsuits for gathering settlements from subsequent creators.

Such broadening may seem far-fetched, but consider what the first film-makers

must have thought about derivative works: films made from books. The United States' 1909 Copyright Act spelled out for the first time an author's right to restrict derivative works. As Amy B. Cohen summarizes: 'The copyright owner now could recover not only against one who used the particular words or visual characteristics used in the copyrighted work, but also against one who took some elements of the copyrighted work and created a work that transformed those elements in some way, whether by changes in medium, format or otherwise' (Cohen, 1990: 205). For film-makers, though, it surely seemed absurd to claim that a book was the same expression as a film. Films must communicate differently from books or music. Film-makers must account for every visual and audible detail. Though inevitably containing fewer words than a book, movies often demand tighter messages, with only so many minutes to play with. Where a book may vary from 100 to 2,000 pages, a film has a couple of hours of viewers' attention, if that, to convey the same amount of information. Books take hours of face-time with readers; movies must use every minute.

While it is taken for granted today that a film adaptation of a book must receive permission and pay hefty royalties, recent history saw such cases in court. And while there is little doubt that today's big movie studios would create a movie adaptation of any wildly popular book such as *Twilight*, paying Meyer and Hachette Book Group is likely not a pivotal decision. For the small, independent film-maker, however, clearing rights is a full-time job, whether from other films, television or print media. So while we take for granted the current state of the idea-expression dichotomy and all that it covers, perhaps following generations will think it commonplace to clear rights before blogging, giving a speech or creating an in-game superhero. They may consider a tax on content an inescapable part of creation.

Tributes and disputes in film

For a town built on the power of imagination, Hollywood appears to be terribly short of new ideas.

- The Independent, 'Hollywood ate my childhood' (2010)

In film, as quality, budget, effects, sound and even technique continue to evolve, so too will the ability of film-makers to tell a visually compelling story. Classics such as *Rear Window* have acting blunders and effects that today's viewers might consider cheesy, and such blemishes would not make it into today's blockbusters. Even modern films rife with trite plots and clunky writing have become technically superior to films made even a decade earlier.

Driving this ever-evolving mark of technical film-making is writing, which undulates in quality and popularity. Expecting superior film-making to imply superior scriptwriting is a mistake. Having a Hollywood blockbuster with a \$100 million budget do badly at the box office because of poor writing creates wary investors. So recycling older stories has become a staple in film worldwide. There are remakes: films bearing the same name and the same characters, but with modernized actors and effects, and then there are different expressions of the same ideas. When Hollywood began, film-makers 'wanted to have the law work both ways for them: low protection of original printed works that they could exploit for dramatic adaptation, and high protection for their own finished products' (Levy-Hinte, 2004: 98). This comes down to tweaking judgement of the idea-expression dichotomy. It means finding a balance that supports content creation, freeing creators from fears of litigation as well as fears of unjust use of their work. It means protecting original works from exploitation, but not so much as to allow them to lock down further expression. And it means finding the minimum protection needed to encourage investment in film projects.

In this way, copyright coverage differs from patent coverage, which gives the patent holder the right to forbid use of something. Copyright supposedly incentivizes content creation through monopoly, but requires the protected work to exist, again unlike patent law. Film-makers cannot forbid others from using the same concepts and ideas in their own expression, and rightly so.

That does not mean that original content bears no advantage, however. Sometimes moviegoers consider films too close to other films rip-offs. If a movie borrows too heavily or adds nothing to an already overused idea, the film will likely suffer from poor sales. Conversely, say a film uses the same idea as another – such as the idea of a woman who has an affair with a man who turns out to be her new brother-in-law – but it has a unique and inventive expression. It could prove more

successful than the first film. Compare this with academia. Consider a scholar who also uses the same idea as earlier works (the argument that Shakespeare was a noble's secret identity, for example). His expression might earn him greater notoriety than the idea's originator or any other expressions of that idea so far. Jonathan Bate was not the first scholar to examine ritual and mimesis in Shakespeare's *Titus Andronicus*. Yet his 106-page introduction to a reprinting of Titus not only made Bate well known in academia, but also revitalized *Titus* as an important early play.

Just as in writing, a too-strict interpretation of what counts as expression does little more than stop innovation and creativity. Copying and building on existing ideas is the nature of creation. And there are so many ways that an expression is unique, especially in film, that punishing a likened expression is tantamount to claiming copyright on the idea. Legislation that blurs the lines between expression and idea only results in stopping further expression. As Siva Vaidhyanathan writes: 'Fear of infringing can be as effective a censor as an injunction' (Vaidhyanathan, 2003: 114).

Consider an example – a solid idea that could form myriad unique expressions. War Games, starring Matthew Broderick, is the story of a computer linked into the US defence network that becomes self-aware and makes life-threatening decisions on its own. Later, Eagle Eye, starring Shia LeBouf, is the story of a computer linked into the US defence network that becomes self-aware and makes life-threatening decisions on its own. Later still comes Echelon Conspiracy about... well, you understand. These are three different expressions of the same idea. The idea is not that unique, since stories about the effects of computers becoming self-aware are as old as computers. But is this copyright infringement? With the almost overlapping release dates of Echelon Conspiracy and Eagle Eye, it sounds like someone working on the former overheard a lunch meeting about the latter. Echelon even uses a female-voiced computer and employs the same 'surveillance camera' shots. The protagonist is a white, male underachiever out of his element who teams with a woman he falls for by the film's end. So why are the producers of Eagle Eye not suing Echelon Conspiracy's producers?

Luckily, despite the similarities, these are two independent expressions with similar foundations. When two films look to the same idea, use the same technology, debut within months of each other, and seek to appeal to the same audience, striking similarities become unavoidable. This may bring up the question of who is in the right, if anyone.

An already functioning system actually deals with this potential problem without involving the law: the consumer market. The market will dictate how unique and appealing an idea's expression is to the public. Forces such as advertising, budget and the quality of the production can affect market success. But eventually a film's quality and value to viewers will decide its success. One might believe that, because <code>Eagle Eye</code> came first, it would trump <code>Echelon Conspiracy</code>. But then consider <code>The Last Broadcast</code> compared to <code>The Blair Witch Project</code>. Both are of supposedly found footage of mysterious murders that occur in the woods when a small team goes out to shoot a documentary about a local ghost legend. They have the same style (arguably made popular by the show <code>Cops</code>), and similar budgets. <code>Broadcast</code> came out before <code>Blair Witch</code>; it should be obvious which made more money. <code>Blair Witch</code> simply had better advertising and marketing, and a more popular expression of the same idea, and the market reflected this in the money the film grossed. This resulted in a sequel, merchandising and several later movies of the same premise and style (<code>Quarantine</code> and <code>Cloverfield</code> to name two).

Now imagine if the producers of *The Last Broadcast* had legal precedent to force injunctions on *The Blair Witch Project* to stop production. This not only would have meant that a genre-defining film went unmade, but would doubtless have spelled lower profits for *Broadcast* (which benefited from the later release of *Blair Witch*).

Similarly, the low-budget runaway success *Paranormal Activity* uses the idea that a poltergeist manifests in psychokinetic movement of objects and possesses people (both effects cheap to produce on film). If this idea (or even the style of camera work or special effects used to express the idea) gained protection, then *Paranormal Activity* may never have existed; a film that made more than \$100 million out of \$10,000. A decade earlier, little-known film *909 Experiment* looks, feels and progresses the same way, with strikingly similar effects. So much so that *909* writer and director Wayne Smith said: 'I believe my concept or premise was used in the current hit film *Paranormal Activity*. There is nothing I can do about that, but I can say mine was officially the first' (Jokeroo, 2010). Yet while Smith recognizes that taking an idea is not the same as cloning an expression, this does not keep others from consistently pushing the idea-expression dichotomy further and further toward copyrighting ideas, where expressions somehow cross over into copyright infringement.

Rewinding to 1977, a watershed case that first blurred these lines involved Sid and Marty Krofft (creators of the children's television show *HR Pufnstuf*) and McDonald's. McDonald's had approached the Kroffts about the rights to the *Pufnstuf* 'magical land' where speaking trees and other anthropomorphized wonders abounded. The deal fell through, but McDonald's still produced several one-minute commercials set in a 'magical land' with similar figures, likely to appeal to kids who watched *Pufnstuf*. However, the Ninth Circuit considered this more than just another expression of the same 'magical land' idea, and ordered that McDonald's pay reparations for violating the Kroftts' copyright. Yet the Kroftts were no sooner the first to imagine talking trees and flying witches than McDonald's were the first to imagine French fries.

The victory for the Kroffts came in the minutiae of the case. The plaintiffs successfully argued that while McDonald's had formed their own expression, it shared the 'look and feel' of *Pufnstuf*. Since the Kroffts, cases where copyright holders seek to stymie any expressions stemming from the same idea have made the weight of the Kroftts' case obvious. Particularly for Hollywood, the ironies are legion. As Vaidhyanathan notes: 'Although the film industry has pushed for thicker copyright protection to protect its dominant place in the global cultural marketplace, it should be clear that thin copyright protection, a rich public domain, and a strong legal distinction between ideas and expression made the American film industry powerful in the first place. Bending all decisions on the legality of derivations in favour of original authors violates the spirit of American copyright' (Vaidhyanathan, 2003: 115).

Many films teeter on the brink of non-existence because of claims involving more imitation than infringement. And imitation in the loosest sense of the word – hearing an idea and turning it into your own expression. Imitation is how authors such as Shakespeare created. And what was the Medieval revival of Victorian England but a mass retelling of Arthurian legend? Yet the works of Shakespeare, Tennyson and Waterhouse are supremely important to our culture.

Just as there are some benefits to UK and US common law, it holds undeniable drawbacks. Common law has softened the oppressive Digital Millennium Copyright Act (DMCA), but has opened a Pandora's Box for cases against likened expressions of the same idea. Cases where two expressions share a 'look and feel' loom unavoidable

when considering the nature of the expression. For instance, in India, Bollywood often bases movies closely on US films. Sparse lawsuits have come about because of this, and even then courts ruled the supposed infringement as falling on the idea side of the idea-expression dichotomy. While it remains debatable whether Indian remakes take away from US films' market share, the chances of market interference drop dramatically with remakes of older films.

Sure, there is still a small market for classic films such as *Casablanca* or *The Bridge on the River Kwai*, but not only are these exceptions because of their popularity, their primary delivery vehicle is the DVD as well. So how much market competition is a Bollywood remake bound for the cinema presenting? In his article about purportedly illegal Indian remakes, lawyer and author Rachana Desai mentions several Indian productions that copied US films. Yet he puts the 2002 release *Kaante* (a copy of the 1992 Tarantino film *Reservoir Dogs*) on a par with the 1992 Indian release *Dil Hain Ke Manta Nahim* (a copy of the 1934 US film *It Happened One Night*) (Desai, 2005). Even though *It Happened One Night* might enjoy moderate DVD success, ignoring the vast gap between its release and that of the Bollywood remake is absurd. Almost as absurd as claiming the Indian market for a 1992 remake of a 1934 US film lessens the latter's market. If anything, remakes promote interest in the original.

While Hollywood or anyone else files few suits against Bollywood, lengthy and unrealistic copyright terms always leave room for the possibility of litigation. Yet, as Desai points out, there is a cultural divide between what Indian and US courts would consider infringement (Desai, 2005). The Indian film industry holds a much more liberal view of how the idea-expression dichotomy works. Who is to say who is right?

The strictness of Hollywood's creative interpretation is not without its critics. The introspective film *Be Kind, Rewind* starring Jack Black and Mos Def reveals the problematic nature of 'thick' copyright. When Jack Black's character, Jerry Gerber, accidentally demagnetizes all the VHS tapes in an already-failing video store, he leaves the business without a product. To avoid foreclosure, they begin 'sweding' films: re-enacting famous films with cheesy effects and amateur actors around the neighbourhood. The effect is a warm cohesion that begins to emerge in a neighbourhood dilapidated by poverty. This proves financially successful for the video store, and uplifts a sad community sliding into entropy.

Alas, film executive Ms Lawson, beautifully played as over-the-top and heartless

by Sigourney Weaver, visits the store to enforce a cease and desist order. She tells the video store employees that they owe the film industry more than \$3 billion, to which Gerber replies 'I'll write you a cheque'. Also, as penalty, they are told they must serve 63,000 years in federal prison, 'which of course would have to be served before you could reopen the store'. Especially telling is when Lawson says: 'The entire industry is crumbling because of pirates and bootleggers, and we intend to stop it right now, right here'. As if a poor, rundown part of New Jersey could impact the mammoth revenues of big media or crumble a multibillion-dollar industry.

So despite rampant, flourishing creativity in a dying corner of the US, perceived lost revenue and the arbitrary heavy-handedness of copyright law stops any more films from being 'sweded' – at least in the movie. In reality, small cinemas now host Sweded film festivals, where they encourage independent film-makers to follow in the creative footsteps of $Be\ Kind$, Rewind's lovable characters – the cheesier the better. The film's director, French film-maker Michel Gondry, tells GQ: 'Eventually, at the end of $Be\ Kind$... they make their own movie. That's really what it's about. To make your own what you want to watch. For yourself. Not to be part of a commercial system' (Friedman and Finke, 2008: 94). This conveys the idea that while fledgling creations know only imitation and mimesis, creativity with more autonomy often follows. There is proof of this in music, film, writing and invention.

This echoes in other fledgling film-making. In the documentary film *Welcome* to *Nollywood*, Nigerian director Mildred Okwo says that when Nollywood began 'it basically was just a group of people just making films for people around the neighbourhood to enjoy. They never envisioned that it would grow across the Niger' (Meltzer, 2007).

Perhaps Hollywood has simply chosen to forget its piratical roots, where according to today's standards its films would suffer under countless lawsuits. They have forgotten violating the patents protecting Thomas Edison's movie projector, and let the unlicensed creation of derivative films from popular books still under copyright slip their memory. But the industry needs an environment where it is okay for Channing Tatum's *Fighting* to appear almost a retelling of Jean-Claude Van Damme's *Lionheart*. Where Chuck Norris's *Hitman* debuted with so many likenesses to Steven Seagal's *Hard to Kill*, it seemed impossible they could have evolved as independent, parallel expressions of the same 'nearly murdered cop gets revenge'

story.

It should matter little that a few studios might benefit from tighter protection on ideas. Of greater importance becomes possible harm to fledgling film-making both in the West and in developing nations, where film remains in its earliest stages. Law did not keep Hollywood from developing into the modern powerhouse of content creation. Now law needs to step aside and give the next generation its shot, even if Hollywood rights-holders believe otherwise.

Inspirations and borrowing in music

If the United States adhered strongly to the principle of authorial reward as the sole function of copyright law, every rock-and-roll musician would owe money to Mississippi Delta blues musicians.

- Siva Vaidhyanathan, Copyrights and Copywrongs (2003)

To do is to be.

- Socrates

To be is to do.

- Plato

Do be do be do.

- Frank Sinatra

Another pillar of anti-piracy rhetoric is that piracy harms from the bottom up, making it difficult for smaller artists to eke a living, and only mildly affecting larger artists. What this assumes, however, is that a small band will make most of their revenue from CD sales instead of touring – an assumption that is completely untrue. A smaller band's songs are probably not even on a file-sharing network unless the band themselves placed them there as a free means of upping their exposure. This is akin to posting videos or songs on YouTube or MySpace. More established artists, however, could lose more money from file-sharing, as could their label and trade group. While

an average artist makes around \$1 per CD, much of the rhetoric about file-sharing comes from the entities taking home the rest of that profit.

This rhetoric also ignores the nature of thick copyright. The blues artists of the early to mid-20th century consistently borrowed from one another because the originality was in expressing a song, not the song itself. Blues artists had no issue with making money from singing their own versions of someone else's songs. Later pop and rock artists had no problems making millions adapting old blues songs to their style and expression either.

And yet today, with copyright laws stretching further and wider, an upcoming band cannot dip into a rich and current public domain to create and market their own expressions. Now, an upstart band using any part of an existing, copyrighted song must first get permission from the rights-holder. This is costly and time-consuming, and largely unrealistic for upstart artists. Depending on the nature of the borrowed song, they might fail to get permission at any price, as well. So, like most rhetoric, the true case is the opposite of what the industry claims: thick copyright hurts upstart artists by restricting expression, and file-sharing hurts only larger artists and can help smaller ones.

Many would argue for implicit protection on all music, which forbids other expressions without compensation. But consider for a moment what that means. One popular example of the injustice of working off another's creation is Elvis's hit song 'Hound Dog'. This is clearly a retelling of black blues singer Mama Thornton's song of the same name. Thornton and Presley were even contemporaries, though appealing to different audiences. They were both popular, though Elvis more so, mostly because he appealed to a larger audience. Siva Vaidhyanathan writes: 'Presley's appeal transcended racial and regional lines and opened up several generations of young people from around the globe to the power of African-American music' (Vaidhyanathan, 2003: 119).

While some would see this as a landmark case for thick copyright, they ignore the potential effects of such protection. Copyright can restrict expression when monetary settlements precede creativity. We are looking back at 'Hound Dog' and saying that Elvis should have paid tribute – and money – to Mama Thornton for taking her music and making it his own. But we cannot assume that, were Elvis to have followed the process under today's thick copyright protection, that 'Hound Dog' would have found

the success it did. Perhaps it would not have existed at all. Indeed, applying today's protection back then, Thornton could have simply forbidden Elvis to use the song, and the world would be poorer for it. Despite Thornton's version growing popular in blues circles, it did nothing to benefit the millions of people not listening to blues. Vaidhyanathan goes on to write that: 'Whether in good faith or bad, white performers almost always reaped larger rewards than their black influences and songwriters' (Vaidhyanathan, 2003: 119). With those larger rewards, however, came larger exposure for those songs, which – under current copyright – may never have existed.

The legendary musician and songwriter Bob Dylan also has a history of sampling from several others for his work. Just as with Presley, this borrowing did not mean that Dylan offered monetary compensation or even acknowledgements to these influences, but likely saw nothing of his final product as anyone else's at all.

In a New York Times piece about Dylan's sampling habits, a DJ shrugs off Dylan's borrowing, saying: 'I think that's the way Bob Dylan has always written songs. It's part of the folk process, even if you look from his first album until now' (Rich, 2006). A biographer of obscure southern writer Henry Timrod shows similar acceptance of Dylan's obvious line-lifting from Timrod's work from the Civil War era. 'I'm glad Timrod is getting some recognition,' he says (Rich, 2006).

Today's rights-holders show far less generosity or forgiveness. In the offices of licensing organizations such as BPI and ASCAP (American Society of Composers, Authors and Publishers) are whole floors of employees scouring the internet, searching for similarities to their clients' music. They have no concern about whether borrowing is 'part of the folk process' but meet even the minutiae of copyright violation with legal action. In fact, Dylan's similarities to the largely unknown Timrod were uncovered by simple Google searches.

But modern indictments of both Dylan's songs based on Timrod and Elvis's 'Hound Dog' miss a key point: that it was Elvis who was able to bring that song to legendary heights, not Thornton. That Timrod was unable to make those words echo in millions of ears as Dylan was. 'Hound Dog' topped country, pop and R & B charts at the same time, and has found use dozens of times in other creations, from movies to art to satire. So while Elvis clearly took Thornton's work and made money from his spin on it, he still did what it took to make that money, to add that spin, to make the song the immortal tune that it is today. Whether it is right for Thornton to have

received no money from the millions Elvis's 'Hound Dog' made does not supersede the fact that Elvis made something creative, transcendent and clearly marketable from her creation.

The weight of following expressions cannot be ignored, nor should it teeter between existence and non-existence based on the outcome of a legal dispute. Lawyers and courtrooms do not create, and never will. Expressions may share as little as antecedents or as much as every note with another expression; it does not quash their creative value. All creation is inspired by ideas that already exist. We bind those expressions with law and process at our own peril.

Patent coverage of computer code

\$612 million is a big number, but when you look at overall life of patent, this ends up being a relatively normal size settlement.

- Steve Maebius of Foley & Lardner, regarding NTP's suit against Blackberry maker Research in Motion (Kelly, 2006)

I don't understand how someone can argue that high value patents inhibit innovation.

- Russ Krajec, Patent Attorney (2011)

We have seen how the breadth of copyright has increased with its terms. Often this reflects changes in media technology, such as extending copyright to photographs after the invention of the camera. Occasionally, this new breadth results in far more protection than is needed to secure works and incentivize creators. It then has the reverse effect, where protection meant to encourage content creation freezes it by granting too much control over content to the rights-holders. Not just those first to market, but first to fix legal controls.

Such was the case when computer code became eligible for patent protection. Copyright coverage of computer code makes more sense. It ensures that, say, code

released under the GPL does not end up cut and pasted into a commercial product with a closed source code. Patent coverage works differently, allowing patent holders to forbid other coders from using the outcome of the code, regardless of whether they used the actual code. After all, businesses usually close their source codes. Microsoft would no sooner offer the source code for Office than Adobe would for Photoshop. That there are programs similar to Office and Photoshop reflects similar code outcomes, not necessarily plagiarized code. In fact, someone can easily create a program similar to a mainstream application writing in a different computer language entirely. So the writing – the part covered by copyright – has little to nothing in common.

'Ask 20 people to write a program and give them the same specifications,' writes Jeremy Bowers, 'and you'll get 20 very different programs... If a patent was granted only on the specific code written by the patent applicant, then software patents would not pose a threat of any kind to anybody; the odds of exactly replicating somebody else's code are astronomical. Unfortunately, software patents are being granted on effects of code, and not the code itself' (Bowers, 2006).

The result of this protection is devastating to software development. At the most base level, as revealed in the documentary *Patent Absurdity*, software patents put a lock on mathematics. Such patents take an algorithmic means of solving for X, assign variable names, and use mathematics to match up compatible people, perform transactions or filter data. But Ben Clemens, author of *Math You Can't Use* explains: 'What we're giving out is basically exclusive rights to use mathematics' (Lucarini, 2010).

In 1953, the original terms in the US for patent coverage of a 'product' expanded to include a 'process'. This covers modern software, or more accurately and absurdly, the 'machine' of users' hard drives, which become 'new machines' once users install software on them.

What this means in practice is that software companies began to file patents in ever-increasing volume, not so much to protect output, but to prevent other companies from forbidding the process for which they created software. Every process patented was a process that new developers could not use without permission. And every new process led to a debilitating fear of losing rights, and so the creator sought a patent.

That software remains confusing in its process begets ambiguity in the patent verbiage, widening the legal noose for the patent holder. 'In the world of computer software,' says Eben Moglen of the Software Freedom Law Center, 'there was no way of defining what the unit was. I don't claim a program, I claim a technique that any number of programs doing any number of things could possibly use. The consequence of which is that very rapidly we begin to build up as real estate that somebody owned and could exclude other people from a whole lot of basic techniques in computer program' (Lucarini, 2010).

The patent grab did not even begin with the large corporations. Instead, it was smaller patent holders suing these corporations that created a patent frenzy. As James Bessen, co-author of *Patent Failure*, notes in the documentary *Patent Absurdity* (Lucarini, 2010), after suits against large companies in the 1990s 'industry attitudes started changing' and the feverish grab for patenting even the smallest process began. By the end of the 1990s, about 25 per cent of patents filed were for software, and the numbers have only increased from there.

Members of the exploding field of patent law, such as patent lawyer J. Michael Jakes representing Bilski in the watershed case *In re Bilski*, harbour clear incentives for this misuse to continue. Jakes offers as reasoning for software retaining patent protection that it is 'one of the greatest sources of technical innovation in this country' (Lucarini, 2010). But he skirts the important question: is it a great source of innovation because of or despite software patents? People must not confuse growing IP law with growing innovation. There is simply too much proof that software needed no such protection to claim that today's heavy-handed coverage has promoted any further growth in development. As Ciaran o' Riordan, director of lobbying group End Software Patents, notes: 'There was never a need to have patents in this field in order for the activity to happen' (Lucarini, 2010).

Because software patents represent a large percentage of the 3,500 patents issued weekly in the US, patent trolling – patenting a process in the hope of suing content creators who use the process – has itself become a business. Now hedge funds buy, sell and trade patents for the sole purpose of suing content creators who violate those patents. These are companies that have no dealings with content creation, innovation or the public good. They merely manoeuvre a current legal folly to make money.

That this began to spiral out of control in the US does not remove any other

nation from its possible harm. As IP laws encompass more and more countries, the forced respect of these patents will go along with signing any IP trade or enforcement agreements. Then patented software processes will act as nothing more than a tax on software development, and the US will have more than a 200,000 patent head start on other nations.

This outlandish protection affects more than programs. It has now infected the booming video game market as well. In the same way, the effect of the code gains protection, not just the code itself. Most people remember the game Memory from childhood, where players turn over cards with matching pictures and try to remember where they saw them as the game progresses. This same game pops up as a time killer while loading hit PC title *The Sims 2*. Little do players know that this intuitive idea – playing a mini-game while the main game loads – meant that Sims creator Maxis had to pay for the right to use it. The owners of Memory? Hardly. The holders of the patent on load-time mini-games, Namco.

For EA – the umbrella game giant over Maxis's *Sims* – throwing compliance money Namco's way presents no problem. It will not hamper Sims development, and the more trivial any claim against EA becomes, the higher the odds that EA's own array of lawyers will shoot down claims of patent infringement. But for the small business, obeying the letter of patent law can mean scrapping projects, compromising game design, or worse – creating in ignorance of patent infringement, which almost always begets greater losses than pre-emptive licensing.

There are even patents on how game characters evolve, gain experience and grow stronger. Sound familiar? This is a premise found in almost all role-playing games, as well as many action/adventure games in both the first and third person. Using this as a benchmark, it seems logical that a company could patent the colour blue used in video games to simulate the sky.

As lawsuits go, it is common for patent holders to wait until a project makes money before claiming patent violation. This was the case with *The Simpsons: Road Rage* using a pointing arrow over the car to tell players where to go next. Sega owned the patent for that game device. They then sued Fox, EA and Radical Games.

Now, developers either pay a 'tax' once they have inevitably infringed on patents, or they avoid patented game concepts altogether. The only developers who can

afford to pay the patent holders for use of controlled concepts are the largest, not necessarily the best. So a legal device meant to prevent piracy and encourage content creation, the patent, now hurts small game developers.

This goes against the original purpose of patents. We believe that patents exist so innovations reward the creator. So that what businesses make and market will not immediately have to compete with reverse-engineered replicas or copycats. However, with patenting game ideas, it seems the rewards are going not to the creator, but to the person sitting back and waiting for others to create. No wonder so many file patents. Some patent for defence while others intend to profit when another company infringes.

And yet, no matter what the size of the developer, it has become in their best interest to patent anything they can. No matter how minute, it has become a race to the patent office, to avoid injunctions or infringement suits. As authors of one article in the *Intellectual Property and Technology Journal* put it: 'Even if a company is philosophically opposed to patents, it is prudent to adopt at least a defensive patent strategy. Unfortunately, it is often the case that companies do not deal with patent issues unless they have to (i.e., when a patent is asserted against them). At that point, it is too late' (Gatto et al., 2009: 9).

In the article, the authors argue that game developers should patent not because they plan to sue others, but to form a defensive strategy. But a company that files a patent and then sees another company using the same game concept would not refuse to file suit. In fact, the patent grab, no matter what the original purpose, only feeds the problem. These patents do not further incentivize creation, nor would their absence prevent coders from innovating. Gamers care more for worthwhile, immersive and intuitive gaming experiences than clever features. The facets of gaming that companies are patenting represent a symptom of game evolution, not the other way around.

Imagine this same coverage in other media. Let's say that a film studio patented the high-speed car chase. Any film after that would have to pay for the right to have a car chase scene. This would alter plots, stories and production to avoid lawsuits or save money rather than to please cinemagoers. Just as with software, the mad grab for film patents would have nothing to do with protecting talent, creation and innovation, only with a sue or be sued culture.

167 The Idea-Expression Dichotomy

How about the same rules for books? If you can patent a game concept, why not a literary one? If so, Christopher Paolini's hit series *The Inheritance Saga* beginning with dragon rider Eragon would have received hefty payment from every boy-ridesdragon clone to hit the market after that, or else would have just forbidden such stories altogether to prevent competition. Such an act would neither aid creativity nor please Paolini fans.

The fact remains that patents for code came after software and games already enjoyed widespread use and a strong economic presence. Such patents remain unnecessary to incentivize software and game creation while still exacting a hefty price on present and future development. The only people benefiting from such patents are the lawyers and the patent trolls, neither of which contribute anything to culture or technology. The longer the mad grab of patents continues, the more processes will become tied up in courts instead of contributing to content creation. Patents' role in digital media bodes ill indeed if the debacle of the software and gaming industry's patents spills over into other media.

Creative Piracy





Modern media boils over with repetitive themes, characters, settings and circumstances. Some receive little or no public ridicule while others suffer harsh judgement based on their lack of originality. And yet, so much of what passes for new media each year builds on previous work. Many book titles, films and songs are licensed remakes of previous works, whether from five years or fifty years ago. The difference in remake and remix, however, is that money changes hands for the former, and often does not for the latter. Remakes take money and make money, while remixes need only shoestring budgets and see scant returns.

So the small budgets and individual effort of remix culture lose some people. Perhaps they remain entranced by mainstream media and advertising, which says that nothing without a cost holds any value. But what ties remix types together is an almost universal disregard for copyright, and an equally universal respect for the original media. Nearly all levels of copyright enforcement, from international

to local, have created harsh penalties for file-sharing and counterfeiting. Yet these same entities are unsure of what to do with remix culture. Rights-holders can sue for any infringement, but legal action remains a delicate balance between dissuading competing products and preserving the good graces of customers. The most forward-thinking companies cultivate remix for guerrilla marketing.

Regardless of industry reception, creative piracy blossoms in the digital age. But though a shaky truce keeps some creative infringement out of the courts, the balance remains precarious. A time will come when the copyright rich tire of losing consumers to user-generated media. By then, perhaps piratical creativity will have too large a stronghold to be stamped out. Otherwise, everyone loses when corporate rights-holders tell a whole generation of content creators to cease and desist.

Fan fiction blurs the pirate line

The final dishonesty of the plagiarism fundamentalists is to encourage us to pretend that these chains of influence and evolution do not exist, and that a writer's words have a virgin birth and an eternal life.

- Malcolm Gladwell, 'Something Borrowed' (2004)

About the most originality that any writer can hope to achieve honestly is to steal with good judgment.

- Josh Billings (Henry Wheeler Shaw), US humorist

When the sixth book in the *Harry Potter* series, *Harry Potter and the Half-Blood Prince*, hit the shelves, Harry popped up everywhere. In the UK, the trains looked like an advertisement for the book, with more passengers engrossed in Harry's new adventures than newspapers or any other publication. In the US, bookstores held launch parties complete with cosplay contests and served Bertie Bott's Every Flavour Beans.

Since file-sharing sites' content reflects pop culture, Harry became popular on

Limewire as well. Most e-books on the Guetella network come in either PDF or Word format. The e-pub and LIT (Microsoft's proprietary e-book format) have grown in popularity, and a few also come in TXT with no formatting at all. This makes discerning an e-book's authenticity difficult, since pagination and cover art may change.

What many Limewire users found alongside illegal copies of *Half-Blood Prince* were books of equal length with the same title and loosely the same storyline that JK Rowling had no hand in writing. One such e-book begins with Harry back at Number 4 Privet Drive, as usual, but he has finally settled his differences with his overbearing cousin Dudley. Harry and Dudley – new pals – are talking about the magic world. Harry wins a soda-drinking contest with Dudley by downing 47 sodas. At the end of Harry's adventures at Hogwarts is the message: 'I hope you liked my version of *Harry Potter and the Half-Blood Prince*. Feel free to distribute it.' This is on page 500 or so.

Someone had written a full-length novel of the same storyline and put it on a p2p site for general download, all under the guise of the original book. The implications of this are staggering: someone spending all of that time (even if amateur writing, 500 pages is a magnificent feat of willpower and dedication) without any wish or request for payment. The author had even adopted some of Rowling's more trademark writing techniques, such as the generous use of adverbs.

That someone took the time to compose this novel, and within a relatively short period of time, speaks volumes about the person. Not among such volumes is that the author is a pirate or plagiarist for taking on such a thankless and interesting project. One could call them a dedicated, relentless fan of *Harry Potter* and JK Rowling.

This creative piracy is called fan fiction or 'fanfic'. Amazingly, several full-length fanfic versions of Half-Blood Prince appeared on Limewire. But full-length *Harry Potter* fanfic stretches beyond p2p sites. A site by web designer George Norman Lippert bore yet another full-length *Harry Potter* fan novel entitled *James Potter and the Hall of Elder's Crossing*, which received many responses from Potter fans worldwide. Indeed, the book became so popular and fans felt it did the *Harry Potter* world such credit that JK Rowling eventually came forth to ensure fans that she did not secretly write it under a pseudonym (PR Web, 2008).

But is this unique? Does Harry Potter hold such (magical) charm that he alone

makes people violate copyright to write and share fanfic? Hardly.

Fan fiction has grown rapidly with widespread internet. Now die-hard fans of everything from *Star Trek* to the more obscure *Vampire Hunter D* can share their own written adventures involving these characters or settings. It is by its nature a piratical act. When another *Star Wars* book appears in the shops, it has cleared all rights from George Lucas and other copyright holders responsible for this beloved galaxy far, far away.

And yet, fanfic is innately creative. If Tolkien Enterprises stopped people from writing their own adventures in Middle Earth because of copyright, it would stymie creativity, not protect it. Especially since fan fiction most often holds no commercial purpose. The rewards are in peer review and, arguably, it helps perpetuate commercial interest in the copyrighted material. Thus, how the industry reacts to fan fiction is important for claiming that copyright is a tool for ensuring artistic creativity. After all, fanfic is undoubtedly a 'derivative work' making use of copyrighted characters, themes and settings. Even claiming fair use were the work used for education would likely hold little water. Of course, parody is another means of fair use, such as with slapstick film *Meet the Spartans*, which comically portrays scores of copyrighted concepts and characters.

Fortunately, neither the MPAA nor publishing houses have turned to widespread lawsuits to stop fan fiction, but it remains a shaky truce. It can depend on how the author uses the copyrighted material (not in a sexually explicit manner, for instance). This is even more precarious for the sub-genre called 'slash', where the author pairs often-male characters in homoerotic situations. For instance, a piece of fanfic for the book-turned-film *Jumper* series portrays protagonists David and Griffin discovering homosexual feelings for each other. Thus, 'David/Griffin' is the title.

Possibly Steven Gould does not like seeing characters he created portrayed in such a way publicly, even if non-commercial and ostensibly not affecting *Jumper's* market. Yet authors have little say in how a fair use parody might portray their creations; should we treat fanfic any differently? After all, when an artist, writer, musician or film-maker creates art and works hard to increase its exposure and consumption, it becomes an entity with indisputable ties to society. Even before copyright expires, works ingrained in our culture must – to a degree – surrender to offshoot interpretations. *Star Wars* represents a prime example. Luke, Yoda and

Darth Vader have become icons embedded in our cultural literacy. Commercial or not, parody or not, people can make their voices gruff and low, and say: 'Wise you have become,' and almost everyone will get the reference.

Over time, Lucas has taken an almost hands-off approach to all fan fiction. This leniency extended only to fan films at first, then later to fanfic. In one instance a *Star Wars* fan novel went commercial, but LucasArts saw it removed from Amazon.com post-haste. The novel's author then drew ire from the fanfic community for trying to make money with her work (Goldberg, 2006).

JK Rowling even encourages fan fiction. Warner Bros – the production company of the *Harry Potter* films – even posted fanfic guidelines on their website.

So far, fan fiction writers comply with any author or creator wishes to keep fanfic off the internet. Perhaps because of this, the worst legal action most fanfic writers receive is a takedown notice. For example, despite the popularity of the show, there are few online works of fan fiction for sci-fi show *Babylon 5* because of requests from the creator.

Movements within the fan fiction world, notably by the Organization for Transformative Works (OTW), have argued that fanfic should fall under fair use. Fair use would not put fanfic writers completely in the clear, since fair use arguments have meagre success as a defence in copyright cases. But it would at least firm the shapeless legality fanfic now has. Indeed, fan fiction seems a normal and expected tactic for fledgling writers. In arguing for fan writers, avid fanfic author Carol Pinchefsky writes: '...So many people have independently created fan fiction without knowing it already exists that I've begun to believe science fiction and fantasy are a crucible for ideas – that there is a natural extension between fandom and creation' (Pinchefsky, 2006).

Is writing a story based on another's characters or settings any different from emulation in other arts? Throughout history, movements in art, literature, theatre and film have meant artists mimicking and building on one another's work. There are many examples of Shakespeare's use of previous, even contemporary stories in his plays. In fact, a Shakespearean play that modern copyright would not consider a derivative work would prove the exception, not the rule.

While fanfic authors cannot sell works using copyrighted characters without

permission, they still hold a copyright on their work. This may seem unfair, given that they play off protected works, but fanfic authors' rights warrant some recognition. For instance, when 12-year-old French writer Marie-Pier Côté landed a deal for her 2007 book *Laura l'immortelle* (Laura the Immortal), the media could not get enough of this young prodigy. However, it quickly came out that the story bore a likeness to the popular *Highlander* series. Afterward, people found out that Côté had pilfered 99 per cent of her work from *Highlander* fan-fiction writer Frédéric Jeorge, who had put his fanfic novel *Des cendres et du vent* (Ash and Wind) on the internet for free in 2001 (Morissette, 2007). In the end, despite Jeorge having no legal right to publish his fanfic novel, he had legal grounds to stop Côté from claiming it as her own. Jeorge received a small settlement from the publisher, and the book – while still lingering on Amazon as 'unavailable' – discontinued after its first 5,000-copy printing.

Unlike other forms of copyright infringement, fan fiction does not pretend to represent a new product. But while the authors are capable of creating their own worlds and characters, they expand on works they love, despite copyright protection. It represents creativity as much as the work from which it draws. Perhaps because fanfic writers avoid commercializing their works and respect requests to leave other works alone, big media has adopted a hands-off approach, despite infringement. However, it seems ominous that both the fanfic authors and rights-holders tacitly carry on. Because, come a day of reckoning, the law would favour the rights-holders. If current fair use arguments consistently fail in court, what hope does a creative form unprotected by fair use have?

Disparity in the modern hacker image

Sure it's crooked, but it's the only game in town.

- Mr Wednesday, American Gods

The term 'hacker' still conjures negative reactions in people. The computer industry has loaded this moniker with all manner of unauthorized actions. But just as the term 'pirate' should now seem an overused misnomer, the hacker title bears

several dubious assumptions. Any assumption about a hacker's guilt or harm must consider the nature of whatever they hacked, disassembled or just scrutinized. That hacking automatically transforms the target object or system into a victim remains a popular misconception.

For example, Apple's monopoly with mobile phone company AT&T has become a money machine worth more than the combined wails of Apple customers. After the DRM-laden iTunes tethered users' bought music to Mac devices and met with unending opposition, many thought Apple would avoid another user bottleneck that runs opposite to consumer wishes. But their stubborn dedication to the AT&T monopoly on the iPhone's several editions and the new iPad have spawned hacks called 'jailbreaking', for installing third-party applications, and 'unlocking', which frees iPhone users from going to AT&T for phone service. While reasons vary, most people want to stay with their current service provider, and simply switch the SIM card from their old phone into the iPhone.

Plainly resisting collective customer will, Apple finally declared jailbreaking and unlocking as copyright infringement and threatened legal action. But despite the occasional article or blog on how 'the law is the law' and how Apple has every right to prosecute any violation of their IP, few consumers look down on jailbreaking. The reason lies in how unpopular the AT&T monopoly has become. But the ubiquitous hacks allowing even the least savvy iPhone owners to loosen Apple's imposed shackles presents a quagmire. In most people's minds, the hackers working to counter any protective measure Apple creates look nothing like the generic 'bad guy' hacker from industry rhetoric. Since Apple's firmware upgrades have had more to do with reinstituting DRM and other controls than with fixing bugs, the hackers have become heroes.

Similarly, the hacker group Operation Payback has mirrored industry-funded Distributed Denial of Service (DDoS) attacks on the RIAA, the MPAA and even the US Copyright Office, leaving their websites inoperable for a short time. Payback is open about its purposes and represents strong opposition to the current copyright climate and inherent 'necessary evils' such as taking down websites or stifling free speech. When Amazon, MasterCard, Visa and others pulled their support of whistle-blower site Wikileaks late in 2010, Payback took down their websites, resulting in press coverage and public awareness. When the RIAA finally received a favourable

judgment resulting in the p2p file-sharing platform Limewire shutting down, Payback shut down the RIAA's website multiple times for several hours.

Other hackers boast no political or ideological objectives, such as with projects to reverse engineer technology. Though often transparent to consumers, rights-holders see nothing innocuous about reverse engineering their IP. This seems deeply ironic, since such hacks often entail making programs work on platforms on which they do not already work. A program or piece of hardware must have a digital bridge between it and users' operating systems. Linux users either accept that having a rock-solid and open source operating system means that many mainstream software applications cannot run on it, or they pick the program apart to make it work. But the irony is that reverse engineering an application to run on another platform is in effect stretching and working to consume that product. Only in digital media would rights-holders incite legal penalty against those so eager to become customers. They not only break the law, but also put in their own time and effort to make the programs work. Rights-holders would normally have to pay to for such specialty work.

A prime example is the industry battle over DeCSS. Content-Scrambling System (CSS) was a technical protection measure to control what devices could play DVD movies. It prevented disks from playing on computers running the Linux operating system (because they lacked the authentication protocol approved by the DVD consortium). A group of Linux users 'hacked' the mediocre encryption of CSS, so DVDs could play on their computers. The resulting program, which began on message boards, was called DeCSS, and quickly went viral. But as Lawrence Lessig remarks: 'DeCSS didn't make it any easier to copy DVDs than before. There's no reason you can't simply copy a CSS-protected movie and ship it to your friends. All that CSS did was ensure that you played the movie on a properly licensed machine. Thus, DeCSS didn't increase the likelihood of piracy. All that DeCSS did was (1) reveal how bad an existing encryption system was; and (2) enable disks presumptively legally purchased to be played on Linux (and other) computers' (Lessig, 2001: 189–190). Bypassing CSS violated the newly formed Digital Millennium Copyright Act (DMCA) and so met with swift legal retribution, regardless of DeCSS's function or its creators' motivation. So this group of hackers wanted nothing more than the ability to consume licensed media, and the industry reacted with legal action that put one of them in jail.

Arguably the most feared and hated of hackers are those who penetrate and

expose security flaws. Industry rhetoric would have consumers believe that such hackers act as a continuous threat to their online safety, personal privacy and financial security. So successful is this rhetoric that an entire industry of security software has met market demand for protection against these manufactured threats. Again, media work to pass all liability and blame to the hackers penetrating popular platforms such as Internet Explorer, AOL and Adobe Reader. This ignores the message such hackers are communicating: that companies releasing software riddled with security flaws should be responsible for fixing it. Doubtless, there are myriad hackers out for credit card information, identity theft and even government and trade secrets. But the hair-thin line between hackers who mean harm (often called black hats) and those who expose the same security vulnerabilities to strengthen existing infrastructure (white hats) remains pivotal. Alas, it has become the least understood and so the most feared brand of hacking, despite its obvious importance in hardening online security.

To pretend that all unauthorized access represents a threat, and to demonize publicly all such hacks, is to harbour a dangerous ignorance, both for consumers and businesses. The outcome for both means avoiding all but well-known, oft-used programs for access and security. The drawbacks to this should be obvious, as they are to the hacker. Security services or programs have a vested interest in arousing fear of hackers: money. If contributing to the veil of mystery and anxiety around hacking fattens their bottom line, why argue otherwise? And yet when users relegate themselves to mainstream access points and programs, for office suites, internet browsers or email clients, they only guarantee that this remains the largest target for hackers. Any malicious code, scam or other attack will ignore lesser known programs or operating systems. So when fear huddles all users into the same corner, this will invariably become the primary target for hackers. Users must remain wary of any advice coming from companies creating profit from compliance.

After all, exposing security flaws can further public exposure to important social issues. For instance, in the HBO documentary *Hacking Democracy*, hackers exposed a clear and disturbing backdoor in the popular Diebold brand electronic voting machines. The hackers could alter votes at the voting machines themselves, or – more importantly – using only the scorecards from each voting station. Bev Harris, founder of voter advocacy group Black Box Voting, brought these vulnerabilities to Ion Sancho, Leon County Florida's Supervisor of Elections in what they called the 'Hursti Hack'.

177 Creative Piracy

This, at the least, prods Diebold to revise and upgrade their security, and could mean lost voting machine contracts because of these egregious shortfalls.

Despite any possible good they may do, in many ways hackers suffer from IP law more than any other group. They contend not only with copyright, but also with technical protection measures (TPMs) and patent restrictions. While copyright infringement often meets with only civil penalties, hacking can mean criminal penalties. Indeed, hackers have few legal choices, and yet their value becomes clear when the same companies willing to criminalize these tech savvy pirates turn around and hire them. Hired hackers test security and copy protection, and work to form an environment to defend against other hackers. That some businesses benefit from hacker tactics fails to alter public opinion, however.

To the hacker, it matters little what manner of legal protection IP holds. With the growing number of software patents, hackers become even more likely to violate IP protections. However, violating patents should bear no more moral weight than jailbreaking the iPhone. Patents create monopolies and artificial scarcity just as copyright does. Reverse engineering a patented product or process becomes a matter of calculated risk, not morals or ethics. Any attempt to profit from patented IP without permission is an algorithmic decision weighing risk against gain, as with counterfeit goods. For the hacker, however, protected products or processes present a challenge, a puzzle. Hackers indeed harbour ideological motivation, but their incentives may lie in the hacking itself – the prestige that unveiling that hack brings.

These are facts that rights-holders have difficulty understanding and, more importantly, adapting their business models around. When a company's only incentives are sales, that any group would risk legal prosecution with no aim of financial reward seems foreign. But hacking – whether opposing copyright or cracking a video game – should not be misunderstood as the malicious acts of ne'er-do-wells. It is as much a part of the digital age as portable media, online business and expanding culture.

User-generated film

The US produces more than 600 films per year. India, 900, Nigeria 1200, and Nigeria has no copyright law.

 Ronaldo Lemos, Brazilian Law Professor (Johnsen et al., Good Copy, Bad Copy, 2007)

Give me the second and third *Matrix* movies, a pair of scissors, and some duct tape, and I'll put together 90 minutes that will flatten your balls.

- Anonymous fan edit remixer

Consumers' love of cinema remains as solid in the digital age as it was before the internet was a sketch on a napkin. In some countries, cinema is developing at pace with the country's economy. In other post-industrial nations such as the US and the UK, the film industry has enjoyed more than a century to hone the craft. But if the rise of user-generated media proves anything, it is that film does not have to be cost-prohibitive either to inspire creative content or please viewers.

While micro cinema abounds today, the low financial barrier to film-making has also spawned a new collection of remixes. That the content falls under copyright protection holds no concern to the remixers – only the creative process and outcome. That does not mean that movie remixers believe all content should come at no cost; only that copyright meant to encourage creative expression should not stand in the way of their expressions either.

One such remix movement in film is the fan edit. These edits can mean blending multiple movies (often sequels) together for a tighter product. Other times, the editors will take extra sections or deleted scenes from the consumer DVD and integrate them into the film. Rarer but equally respected are releases that weave in lost footage not commercially available. Often the remixers also develop and post alternate DVD cover art for their edits.

A prominent fan edit remixer goes by the handle ADigitalMan or ADM. Obviously a huge fan of film, ADM makes his position on piracy clear in the DVD credits of his releases: 'This DVD should be traded freely among legitimate owners of the official

DVDs,' he writes. 'It is important that we not steal from film-makers as we enjoy their products in exciting new ways.'

ADM entitled one of his edits *Superman Redeemed*. In the DVD's 'about' section, he explains blending 'elements from all four movies (including some esoteric deleted stuff)'. He describes *Superman III* and *IV* as 'mostly painful to watch' calling part three 'a bad concept produced well' and part four 'a good concept produced horribly'. *Superman Redeemed* takes Lex Luther and his 'Nuclear Man' from part four, but uses the warm and amiable chemistry between Clark Kent and hometown crush Lana Lang from part three. ADM says he hopes 'it redeems the legacy of Christopher Reeve for you, as it has for me.'

A similar ADM edit focuses on another comic book-based film. After the mammoth success of *Spiderman 2*, fans felt underwhelmed and let down by the cheesy, overacted scenes in part three. ADM felt that part three, when Spiderman discovers the black symbiote suit that eventually creates his arch-enemy Venom, 'was supposed to be the darkest chapter of our favourite webslinger's life' but 'followed so many genre predecessors' third outings by going campy'. So ADM removed just ten minutes from the 140-minute movie to rid the film of its cheesier, more light-hearted scenes. 'This movie,' says ADM about his version 'feels like it belongs with the other two now' (FanEdit, 2007).

Fan edits need not work with full films. Anyone lured into seeing a mediocre film at the cinema knows the power of movie trailers. A good trailer makes the shoddiest of films seem Oscar-worthy. Despite this, trailers command massive audiences as an appreciated and beloved facet of film. Trailer mashups or 'retrailers' remix film segments to present an alternative preview, often for a non-existent film. They employ snippets from several films as well as sampling all manner of copyrighted songs and scores. To put it lightly, mashups use so much copyrighted material that their creators could never have cleared rights before presenting them to the world. In fact, if videorich websites such as YouTube needed proof that uploaders had cleared all rights, most mashups would never go public at all.

YouTube and other video sites offer fans an anonymous platform to share their remixes with the world. But more than anonymity, they allow mashups to continue accruing views despite infringement. Staying non-commercial keeps media trade groups and rights-holders from pouncing with takedown notices or lawsuits. Sure,

some YouTubers can monetize their videos in tandem with Google, using ads that pop up during the video, but this is a far cry from charging viewers to see the retrailers.

Mashups are the epitome of mimetic creativity, since most are mere remixes of what someone else has created – from the original trailer, the 'previewed' film, or from other films. Seldom is anything made from scratch, save for on-screen text, voice-overs or transitions. And yet, the mashup reflects a great tribute to the trailer. Mashups use the same effects viewers have come to expect from real trailers, either for the same response, or as a satirical jab at cliché.

The epic scope, grand digital set and instantly classic lines of the trailer for Frank Miller's film *300* spawned several mashups. These depicted farcical ideas using the score and voice-over from the original trailer. 'Cat 300' featured woven together viral videos to depict cats as the brave Spartans resisting the 'thousand nations of the Persian empire' as hordes of puppies.

Other mashups twist the original genre of a film and recreate it as something different. Mashup artists blend in such a fashion that, were viewers ignorant of the original, they would believe the mashup represented the real film. In a remix of Stephen King's *The Shining*, the mashup artist re-cut the trailer using bits of the film to portray it, not as a haunting horror classic, but as a heart-warming, inspirational film. Instead of the Overlook Hotel driving Jack to murder his family, Danny finds a loving father figure in Jack, and helps end his writer's block. In an opposite twist, the mashup entitled 'Scary Mary' combines the visually capricious parts of *Mary Poppins* to make them appear disturbing. The film comes across as a horror movie where Mary flies into town to steal the children instead of care for them.

Much as independent cinemas support remixed or remade films, mashups have also received patronage and support from organizations such as the Association of Independent Creative Editors. However, mashups are not without criticism. Writing in *GLQ: A Journal of Lesbian and Gay Studies*, Corey Creekmur finds the slew of *Brokeback Mountain* mashups 'snicker-inducing mutilations' that 'undercut the film's sombre trailer' (Creekmur, 2007: 106). Creekmur cannot deny, however, that rampant interest in the mashups spells an inevitably greater interest in the film, no matter what the origin or assumptions of this interest. After all, mashups – no matter how comical or degrading to the film's message – do not undermine the film itself.

So why do musical remixes receive negative attention from media trade groups when trailer mashups are left relatively unscathed? For starters, the RIAA already laid a foundation of suing fans and consumers that the MPAA has resisted. Possibly, mashups could pass for fair use as parodies. Unless the work is Weird Al Yonkovic, who still must jump through legions of legal hoops to create his music, mashups and remixes are simply perceived differently, even if their creators and their intended audiences are fundamentally the same. Or perhaps trade groups consider mashups inherently dependent on the original film, whereas music remixes seem more autonomous and thus greater competition to their commercial counterparts.

Film remix will only increase as hardware and software continue to drop in price and as more user-generated platforms blossom. Both emerging and established film industries have only to gain from this creative content. Lawsuits and even takedown notices will neither stem the flow nor create consumer favour. Sites such as YouTube, bearing all manner of view stats, offer rights-holders millions of dollars in free marketing research. For emerging film industries, this is an opportunity to learn from both high-end, budgeted film and shoestring tricks as well. Nowhere in this bright future does arbitrary copyright enforcement add incentive, content or market share.

Remixing the music industry

Perhaps it's a little easier to take a piece of music than it is learn how to play a guitar or something. True. Just like it's probably easier to snap a picture with that camera than it is to actually paint a picture. But what the photographer is to the painter, is what the modern producer and DJ and computer musician is to the instrumentalist.

- Shock G, Digital Underground, Copyright Criminals (Franzen, 2009)

They took the credit for your second symphony / Rewritten by machine and new technology / And now I understand the problems you can see

- The Buggles, 'Video Killed the Radio Star' (1979)

The hit television show *Glee* follows a high school glee club through the dramacomedy of teen life. Each episode finds the students expressing themselves, dealing with their problems, and competing using modern, copyrighted songs. They add their own spin, mashup multiple songs, and remix classic songs. Season one saw them performing everything from Britney Spears to Madonna. Season two incorporates hip-hop and classic rock. What happens on the show represents a healthy, harmless means of expressing adolescent creativity, emotion and teamwork. The only problem is, it does not exist. Nor could it exist in real life.

While no one on the show even mentions the word 'copyright', what audiences do not see are the mountains of legal paperwork, performance contracts and hefty rights payments that make such a show possible. What appears an inspired, colourful group of kids singing songs and performing off-the-cuff is the result of calculated, licensed and sanctioned music; of legal negotiation and costs that no real high school could swing, only the fictional William McKinley High School of *Glee* producers at Fox. So while it may seem a spontaneous burst of musical inspiration, glee club members will not feel inspired to belt out any Bryan Adams or Guns N' Roses, since neither allow their songs to be performed on the show.

Of course, when the characters sing their hearts out on the show, they also create a marketable product. But it seems the price for students of McKinley High ignoring performance rights is that they also ignore any royalties. Despite selling more than 5 million albums worldwide and having 25 hit singles, label Sony Music has cut the cast of *Glee* out of the profits. One of the stars, Corey Montieth, told radio show host Toby Knapp: 'I got 400 bucks from it going number one. But you know what, that's okay, because if I'm patient, and if this thing does really well, maybe I'll see another 400 bucks' (New York Post, 2010).

Consumers misunderstand music's creative process when taking industry rhetoric as gospel. Think about this legally. When record labels sue others for infringement and then fiercely defend against infringement the message is: music is creative and unique so long as we own it. Any other music lacks creativity and uniqueness. More accurately, labels only care about creativity and uniqueness so far as it fixes copyright controls while avoiding any other labels' controls.

Historically, this legal tango bears no likeness to creating music. People falsely assume that modern music abounds with piracy and plagiarism, as if the last

generation of music presents nothing but unique expression. But let's be clear: the music industry only became rife with copyright criminals the moment 'inspiration' became 'theft'. Modern music is no more mimetic than it was 10, 20 or 200 years ago. It has always built on old ideas. But rights-holders and courts do not stand for unauthorized use. Labels show no hesitation in defending their IP regardless of whether the violation could lead to lost profits. Most record labels feel the same way about every song in their archives. When pirate DJs play their remixes in a club, they step on the toes of hundreds of songs, dozens of labels and a bevy of artists. But step on their profits? Probably not.

'Everyone we're remixing – including Britney Spears – we like,' says remix DJ Eclectic Method. 'When we play Britney Spears in a bangin' techno club, we're playing her in a place where she never gets played' (Albert et al., 2010). Some remix DJs do intend for their mashups to conjure some recognition of the music they cut up. This might mean something as small as a few notes or as subtle as a baseline subdued in the background. Other times, their product bears so little likeness to the original works, the infringement remains undetected. But DJs use remix to create fresh expressions, not to avoid paying rights by masking the original tracks.

When courts stand by 'if you sample, you license', what they fail to weigh is whether the remix poses any financial threat to the original. Whether the remix acts as a disincentive for future artistic creation. Under those guidelines – far closer to the stated purpose of most nations' copyright laws – few if any remixes would qualify as infringement. 'Just because there's leakage and not every use of your music can be controlled,' says expert witness and law professor E. Michael Harrington, 'that's just something we have to deal with' (Albert et al., 2010).

If you consider that courts and lawyers and legislators are dictating what is creative, it seems absurd. Lawyers do not create. Courts do not create. Congress does not create. So when industry trade groups dictate law to Congress and then enjoy the backing of law enforcement, what goes unconsidered is what represents creation. In other words, creation absolutely takes place outside the law. The law is arbitrary to the remix artist, and only exists to preserve a consumer model that currently makes money.

It is impossible to examine music copyright without butting against remix. But another example of infringement needs no great creativity, but diligent work. Moving

traditional sheet music for pop songs to tabular form has grown exponentially since the internet. Now amateur musicians can use tabs to play any song imaginable or at least any song where someone willing to violate copyright has transformed the sheet music into tabs. Most would agree that while tabular has not made sheet music obsolete, it is much easier to learn. So even though it does not suggest pace and rhythm, for popular tunes, the only real question is how to play it, not what it sounds like when played.

When considering how egregiously tabular conversion infringes on sheet music, again, the only reasonable question is whether tabs interfere with sheet music sales. Any other indictment of tabular conversion is arbitrary, and therefore risks bad publicity while gaining nothing. Despite this, the Music Publishers' Association of the United States and the National Music Publishers' Association have threatened to shut down sites posting tabular music (Lyons, 2006). But is tabular transformative, much like a translation? This would not free tabular sites from infringement, but it makes a strong case for tabular music offering no market competition to sheet music. If the companies selling sheet music sold tabular music as well, opposition would gain some logical ground. So if tabular music represents a lost market, why do sheet music companies refuse to sell tabular tunes?

With music especially, big media has adopted a clear attitude of 'do as I say, not as I do'. Consumers see thousands of messages daily that encourage creating art, the versatility of media, and the beauty and freedom of spontaneous expression. But the same companies spending millions convincing consumers that the world exists for creating and sharing art, music and information are first to fall back on their legal haunches when detecting infringement. Even non-commercial, harmless infringement that could promote the infringed material. In this identity crisis, remix artists create with a sword dangling above their heads, unsure of when or if it will come down. Most create despite such danger, but the more visible the sword, and the thinner its cord becomes, the more tomorrow's creators may just resign themselves to consume instead.

User-generated modifications in the video game market

If you fail to remove all infringing material immediately, then we will have no choice but to turn this matter over to our litigation counsel.

- Square Enix cease and desist letter sent to the makers of *Chrono Trigger:*Crimson Echoes (Square Enix Legal Department, 2009)

It is the responsibility of leadership to provide opportunity, and the responsibility of individuals to contribute.

- William Pollard, Quaker

The argument that fighting piracy ensures creativity loses steam further when considering game modification. Game 'mods' (short for modifications) can take the form of something as simple as a new map or character or encompass all the complexity of a stand-alone game.

One Real-Time Strategy (RTS) game that has formed an enormous following over a long career is the *Command and Conquer* series game, *Command and Conquer: Generals*. With a user-friendly graphical editor, thousands of mods, maps and extras surfaced. Some were so complete and elaborate that the developers claimed to have spent several hundred collective hours on them and the mods reached hundreds of megabytes in size. With new soldiers, equipment, missions and maps, the replayability of the game continued to grow. Even later *Command and Conquer* releases and the game's age (it was initially released in 2001) could not deter hoards of fans from developing more mods.

Alas, it appears that this rampant creativity could only reach as far as copyright laws would allow. A team of coders called Slipsteam Productions was developing a total conversion mod for *Generals* called *Halogen*, which used characters, concepts and lore from the hit X-Box game *Halo*. Close to launch, however, Microsoft Studios and Bungie (the manufacturers of *Halo*) ordered them to cease and desist (Miller, 2006). For three years, these eight coders had spent innumerable hours creating the mod. Of course, the universal online opinion of this move raged against Microsoft

and the *Halo* series. Nowhere could one find a voice sympathetic to their reasons for stopping the project, despite their legal rights. Microsoft and Bungie wanted to prevent *Halogen* from diminishing their upcoming game *Halo Wars*, also an RTS game. Despite *Halo Wars*' release date being years away, Slipstream Productions heeded the threat, and abandoned the project.

This remains a clear example of copyright holders having no capacity for thinking outside the legal box. Imagine if they had let the project continue; would there have been more buzz about *Halo* or less? Imagine if someone played *Halogen* and loved it: loved the game play, the storyline and the characters. Would they be more or less likely to buy *Halo Wars*? And imagine if, instead of throwing snowballs from behind the walls of copyright law, Microsoft and Bungie had embraced the project. They might have gone so far as to include a copy of *Halogen* with the PC version of *Halo Wars*. This would have spelled two developments. Gamers with no exposure to *Halogen* would feel inclined to buy *Generals*. Those who did know of *Halogen* would have bought and played *Halo Wars* out of respect and admiration for a monolith game developer supporting a few hard-working coders putting out a free mod.

Instead, Bungie simply stopped creativity. Slipstream Productions moved on to another project. Nothing would stop them from creating. But the gaming world is that much poorer for the countless hours wasted in the name of copyright. An idea – supporters of copyright law would have people believe – that exists to make sure creativity always has a place.

A similar case occurred with a mod a full five years in development. Based on Square Enix's *Chrono Trigger* game for the Super Nintendo, *Chrono Trigger: Crimson Echoes* was days away from launch when the cease and desist letter came from Square Enix. The group, Chrono Compendium – arguably the greatest fans the *Chrono Trigger* saga ever had – got shut down just before delivering a mod that would have undoubtedly rekindled gamer interest in the series. Stopping a five-year project days before launch is more than law enforcement: it appears backbiting and vindictive to the fans who have made Square Enix a successful company.

Square Enix learned little from the bad press fighting *Crimson Echoes*. More recently, they ordered a one-person coding project called *OpenC1*, which used some graphics from Square Enix title *Carmeggedon*, to cease and desist releasing his version for free. 1am Studios, under which game creator Jeffrey Harris works on his open

source and no-cost projects, posted part of the letter on his blog. Square Enix told him that his 'actions have already caused and will if they continue cause substantial damage to the value of Square Enix's copyrights and you will understand that Square Enix cannot allow this clear infringement to continue' (Denby, 2010). All this for a game that at the time was 13 years old and that no one could buy. Harris removed all *Carmeggedon*-related images and other references in *OpenC1*, and released it shortly after.

1am Studios also created a free-to-play game with all original coding but that 'uses the original *Need for Speed* data (textures, models, tracks)' (Harris, 2010). *Need for Speed* is 15 years old, not currently for sale, and cannot run on modern versions of Windows. 1am Studios' version, called *Need For Speed: XNA*, plays on current Windows operating systems. Obviously, *Need for Speed* rights-holders Electronic Arts (EA) acted more practically than Square Enix. Perhaps EA realized that a no-cost, updated release paying tribute to one of their older titles could spawn interest in the series and mean more sales for newer titles.

Fortunately, some game developers show no interest in stopping modders, and others even encourage them. After gamers made a slew of mods for *The Elder Scrolls* III: Morrowind, respected gaming company Bethesda made modding especially easy for their later release The Elder Scrolls IV: Oblivion. Gamers regarded Oblivion as easier for the lay gamer to play, and with this broader audience, so too was the ability to make and use mods proportionally easier. Gamers could find and activate mods using a simple graphic interface built right into the main menu. Overnight, scores of mods sprang up, many for magical items that made the game easier, but others that clearly improved on the game's design. Mods for everything from graphically rendering water to making faces more human or spells more realistic made playing Oblivion a customizable experience, not just a game. Players' in-game homes could feature portraits of their real-world family, imported through use of a mod. By applying another mod, they inherit a fortress to store the plethora of items picked up in the game and the ability to teleport to any town in the land. Yet another mod made sparse lock picks available from multiple (yet still decidedly shady) merchants instead of only select towns or people.

The ability to mod *Oblivion* created sales, fostered creativity and gave Bethesda a ready and discernible pulse on how to improve on their designs to meet fan wishes.

It also rekindled the mod market for the former *Elder Scrolls* games, and with it their sales. It is little wonder that Bethesda remains such a potent force in gaming, having embraced the wishes and creativity of fans instead of punishing them with copyright infringement claims and cease and desist orders.

While there are several more examples on both sides, the seemingly precarious balance between modding and piracy still evokes apprehension among game developers. Many remain wary of lost sales or too hard-lined on thick copyright to realize that modders are just game developers working for free. They spend endless hours for love of the game and the art. What this dedication and effort has to do with piracy remains little indeed. Almost as little as it has to do with decreased game sales.

Almost.

Reinventing cinema through video games

Suddenly, in this new digital millennium, it has become possible to commit serious, punishable offenses with what was once viewed as an innocuous, personal, and pleasurable experience with various forms of published media. Should this trend continue and spill over into other aspects of our rights of personal expression and freedom, it is likely we will lose more of both.

- John Gantz and Jack Rochester, Pirates of the Digital Millennium (2005)

A video game isn't any more 'speech' than a gun is. Both are devices.

- Jack Thompson, disbarred anti-video game activist

Critics have long tagged video games as soul-sucking time vacuums destroying youth in record numbers. This smacks of how those critics' parents felt about television, and their parents felt about radio. However, games offer many creative outlets for anyone interested enough to explore and experiment. Many titles allow coding mods, developing environments, boards and even entire levels. Games also offer a medium of expression for those with no interest or competence in coding. For

them, a creative form of video production called 'machinima' (a mix of machine and cinema) presents more than a way to pass the time between new games. It gives them a way of expressing their passion for the game and their own creativity. Machinima is when someone fuses images and characters from game scenes with tons of imagination and wit to tell a story through film.

A popular and mainstream example of machinima is a series called *Red vs Blue* by Rooster Teeth Productions. It features characters from the hit game *Halo*. The show portrays *Halo* characters (mostly multiple 'Master Chiefs') in situation comedy. It became so popular that major retailers carried DVDs with the various seasons of the show, though the *Red vs Blue* website also hosted the videos free.

The most obvious advantage to machinima as a creative form is that game developers have already done much of the work. Creators can focus on the writing, shots, situations and other details instead of creating graphics. Plenty of challenges remain, however. In machinima, shot blocking, voice acting, cut scenes and tight editing are just as necessary as in traditional film. For one, game developers created characters with the game in mind, not acting. In the first seasons of *Red vs Blue*, which used the first *Halo* game, the film-makers managed with limited movements and positions for the master chief actors. Character movement, after all, depends on what developers need to create quality game play. Halo is a first-person shooter, where the player is the game's protagonist. This means that Bungie, the game's developers, focused more on what Master Chief sees, since players only see the character in cut scenes or multiplayer mode.

Unlike microcinema, machinima creators also benefit from the game's character recognition. Their creations hold instant appeal for whatever fan base the game created. A game like *Halo* will have its own draw of millions of people who love the game.

Film-makers who want to capture the majesty of the Alps or the bustle of New York City can build a set, shoot on location or use CGI. A machinima film-maker suffers no such burdens. Sure, this means limiting locations to those either portrayed in games or that users can create. But video games look more realistic and grow more expansive with each platform.

The time involved, while possibly substantial, is less than the extensive time

needed for animation and CGI. What the game avatar sees, the film-maker records: the game developers have already rendered the graphics. Compare this with the latest *Harry Potter* or *Toy Story* film, where rendering a single frame can take half a day on multiple linked computers (Lehrer, 2010).

Quickly, machinima spread beyond stories about the game. The games became the platform for any topic, even activism and social commentary historically reserved for those with the means of funding film projects. Allen Varney wrote about how the short machinima film *The French Democracy* allowed no-budget industrial designer Alex Chan the opportunity to offer another view of the 2005 riots in France. '[The film's] widespread recognition proves you don't need high-powered graphics cards and a team of hundreds to join the world's ongoing conversation,' writes Varney. 'Ideas are not only cheap; they run on low-end hardware' (Varney, 2007).

Game companies have even used the popularity of machinima in advertising campaigns. The hit series *Syphon Filter* used machinima in an advertisement to promote their newest sequel. This quick, comical commercial not only showed off the game's graphics, but integrated the innovative weapon selection feature into the action. The mere act of breaking the frame of conventional advertisements by stopping game action to allow dialogue and other facets that had no place in the game resulted in eye-catching marketing for an otherwise mediocre game.

As with other innovative art forms that occurred organically outside mainstream media, other commercial attempts to capitalize on machinima have proved less effective, such as an underwhelming Geico commercial that uses machinima. Just as capitalizing on viral videos often meets with tepid audiences, machinima in advertising needs a tender balance between faithfulness to the nature of machinima and the sales pitch. Thus, game manufacturers will often sponsor machinima contests, offering prizes for the best 'movie' that they then use as an advert for the game (Ford, 2008).

But independent machinima creation represents a clear violation of copyright. It uses copyrighted graphic creations that developers spent countless hours perfecting without permission. These clips can then go on to have thousands or even millions of views online or – as with *Red vs Blue* – even make money through direct sales, often without the original developers receiving anything. Employing some in-game scenes or sequences could mean using the copyrighted musical score as well.

However, the gaming industry has upheld a far more lax and realistic approach to this copyright infringement than the film or music industry ever has. Bungie Studios (and by extension, Microsoft Games) gave permission to Rooster Teeth Productions to use the 3D world of *Halo*, even creating a special mode in *Halo 3* that offers more freedom when making machinima. Other studios have even released digital environments that creators can use expressly for making machinima.

Even with unauthorized machinima, game companies rarely demand creators take down the content because of copyright infringement. This is rarer than takedown notices because of film or music use, by far. The law allows rights-holders to forbid machinima of their games, but few developers want to put a stop to it. After all, it would take some creative analysis to finger machinima as direct competition for video game sales. Developers have to consider whether higher exposure, even through unauthorized and technically illegal use, still acts as guerrilla marketing for their product. While the answer is probably yes, the question remains, why have the film and music industry been so slow to embrace remixes and mashups?

After all, a film-maker creating a documentary that samples from many other works to weave an argument could spend years clearing rights, only to have copyright holders renege. Others demand excessive sums, and still others refuse use of the work at any cost. Sometimes film-makers cannot even reach the rights-holders. Most film still under copyright is doing nothing but rotting in cans in sporadic archives (called 'orphan works'). Obviously a rights-holder that film-makers cannot identify cannot grant permission for use.

Licensing is time and cost-prohibitive, but it is the paltry nature of the public domain of Western media that becomes the real barrier. Instead of film-makers using myriad clips from the past – clips no longer making any money and that have no real market demand – they are forced to use clips for which they can afford licensing. Or they use footage with no clear copyright holder and hope no one sues them in the aftermath. Instead, machinima film-makers may use any footage they can create within any number of games. This relegates them to a purely machinima project, but when cost, access and legal issues abound, and a less-restrictive platform comes along, the choice may be creating in an imperfect medium or not creating at all.

Machinima possibilities continue to grow with newer games. Inventing elaborate and creative shots one might expect in a Quentin Tarantino or Yimou Zhang film

in machinima would have seemed impossible only five years earlier. But French film-maker Mathieu Weschler spent two years working solely with the *Grand Theft Auto 4* engine to create a full-length machinima film. Ringing in at 88 minutes, *The Trashmaster* holds all the action, story and camera work of a modern blockbuster. This half-*Dexter*, half-*Taxi Driver* tale of murder in New York City breathes creativity, innovation and hard work. *Grand Theft Auto* series developers Rockstar Games called it 'a pretty stunning accomplishment' (Rockstar Newswire, 2011) and even hosted the film on their website.

Ironically, while one arm of companies such as Microsoft can see user-generated, copyright-infringing material like machinima as a boon for their products, the company aggressively combats other infringement. Microsoft spends more than \$10 million annually on gathering intelligence on counterfeiting and about \$200 million a year on researching better anti-piracy tactics (Vance, 2010). Members of the BSA, notorious for scouring p2p sites for copies of their software, and often seen globally as corporate bullies pushing for local raids on counterfeiting rings, Microsoft takes no lax stance on software piracy.

This is the problem with lumping all manner of infringement together: gamers and film-makers producing creative, not-for-profit videos become grouped (legally and socially) with bootleg rings in developing countries. Both have their reasons for infringing on copyright, but they have little in common. Their incentives are entirely disparate, as are their rewards for infringing and their products. But so long as fair use defences gain so little legal ground, and copyright laws offer scant wiggle room and an ever-shrinking public domain, infringement remains certain.

New Models for Skirting Piracy



Fighting piracy – the War on Piracy – must end somewhere. Fighting digital piracy means making criminals of customers and bleeding as much money in the fight as is supposedly lost to piracy. So some businesses have begrudgingly accepted that file-sharing, hacking, modding and remixing will happen. That media once kings of the market now compete with piracy as much as with other media. And so ideas begin to form and come into practice – some good, some very bad.

Rights-holders and content creators have begun to realize that file-sharing can create exposure, birthing an online presence that would cost valuable money in traditional marketing. Others try more innovative marketing, both to embrace digital media and to try to pull customers back to physical media through repackaging.

An unseen casualty of the digital age, the pornographic industry, has become a model for effective advertising and establishing a presence among internet pirates. Other industries have learned that adapting the platform to the customers beats

trying to adapt the customers to the platform. Lastly, a model of pirate-proofing that risks the future of our food supply to ensure production equals profit.

Ideally, the best models would remain as the poorer, unrealistic ideas fell away. But this is not the case. Money as well as legal and political clout give weight to new models that leverage them, whether good or bad for everyone else. The fulcrum for all ideas is consumer spending, whether through money, time, attention or proliferation. The digital age has introduced many paths for where IP may head, no matter where it has been. Eventually, what paths information and technology take rests with consumer decisions, not businesses. Perhaps this is another reason piracy has garnered such fear: if people realize they have more in common with copyright violators than with many rights-holders, their attention and attitudes might begin to align with the pirates.

Using piracy to grow business

The worst thing that can happen to a label or artist is not that your music is pirated, but that no one hears it. And that's much more common than... piracy.

- John Buckman, CEO, Magnatune (Good Copy, Bad Copy, Johnsen et al., 2007)

I really feel like my problem isn't piracy. It's obscurity.

- Cory Doctorow, author/blogger (Rich, 2009)

Copyright infringement violates the law, but it only hurts business when consumption matters more than exposure. Like when rights-holders invest so heavily in advertising that gross profits trail far behind net profits. Big media continues to rely on traditional methods of advertising, so when their content debuts, it works to pay off a handsome deficit. Smaller content creators have much less to lose, having spent little or nothing on advertising. And the more obscure the content, the more valuable the exposure, even if that exposure comes from illegal file-sharing. Lesser-known content holds just as much potential value as mainstream media, but far fewer

advertising costs, operating expenses and outstretched hands awaiting payment.

In software development, programs or services that offer free versions to market premium packages are called 'freemiums'. For such companies, file-sharing their free versions proves easier and cheaper than hosting the downloads elsewhere. When file-sharers download and continue to share such programs, it means scores of potential customers for the premium versions. Much file-sharing and copyright infringement is about sampling, not simply avoiding payment. In this way, freemiums have only to gain through their products peppering p2p platforms.

Other small developers profit from piracy, solving problems inherent in internet file-sharing and pirate applications. One such program, called Little Snitch, keeps pirated versions of software from 'phoning home' and deactivating. Another program called cFosSpeed arranges data packets so bandwidth hogs such as torrents fall behind packets for, say, VoIP phone calls or e-mail. So users can run torrents without slowing down the connection speed for other online jobs.

Though becoming popular serving pirates means the program will endure its own illegal copying, often well-made helper programs find success. Seeders and release groups will still host such files on bit torrent trackers. They often suggest that downloaders buy the program to support the developers, treating the developers more as allies than software companies who use heavy-handed authentication.

File sharing and copyright infringement also have a unique effect on the written word. Text is small enough to share repeatedly, but as covered earlier, people consume literature differently from other media. Writing has a clear sampling effect, where readers want a satisfactory taste of a book or magazine before deciding to buy. And yet even smaller pieces mean valuable face-time. This is why blogs that pay contributors handsomely still allow unfettered visitor access. The advertising pulls in the money, not pay-for content.

Alas, writers' conferences and online forums abound with horror stories of stolen material. But few authors enjoy enough exposure to have their work pirated. Copyright lawyers encourage authors to register and protect their work (mostly to proliferate lawsuits). They cannot see how the struggling writer competing for exposure amid millions of other writers could benefit from illegal copying. So much online copying preserves attribution, however. The internet is not about plagiarism,

but sharing information, regardless of authorship. This is the idea behind the blogosphere. Trying to control every word and prevent any unauthorized copying runs a distant second to getting exposure and a steady readership. This means that link-backs are fine, but so are discussion boards where users cut and paste entire articles without permission.

Some new publishing houses even offer a no-cost PDF of their titles, protected under the Creative Commons license. For Onyx Neon Press, customers can easily buy their books through Amazon, or they can download a DRM-free PDF for no cost or by donation. The site explains this rationale, stating: 'We believe we'll reach more [people] by encouraging everyone to share this book than by trying to maximize our profits' (Onyx Neon Press, 2010).

Most in the music industry fervently disagree. RIAA President Cary Sherman said during an interview for the short film What Do You Think? 'That's what the whole copyright system is about; it's a property right that's intended to encourage investment' (Richmond School of Law, 2007). But Sherman and many others have sold the public a different version, one of starving artists, out-of-work labourers and a fizzling will to create. So instead of blazing the path for new consumers, rights-holders innovate with control in mind. To combat piracy and simultaneously wow customers, companies have met changing technology with greater controls and a turntable of new products. These ventures draw in some early interest from price insensitive consumers, but often die out. Individuals or small, new businesses cannot afford to reproduce such models. For them, a higher degree of freedom from control can indeed mean more illegal sharing. But sharing always means more exposure, and setting up a brand in a competitive marketplace remains more important than enforcing copyright law.

For music labels who have used p2p networks to create a fan base, their savings pass on to the artists. Despite every musician dreaming of the record deal where they go platinum, and even 10 per cent of sales puts them in huge homes, driving fancy cars, and throwing mad parties, this represents a pie in the sky. The more rooted, practical record deal may come with an independent label. Such labels, saving money on advertising and paying off radio stations for playtime, give as much as 50 per cent of all sales to the artists (Nelson, 2003). For the independent label, slowly pulling together a fan base from file-sharing falls in line with their business model, where

they are 'developing artists' careers over the long-haul rather than the pursuit of immediate hits' (Nelson, 2003). Compared with the hype-driven, flash-in-the-pan methods of mainstream music promotion, indie labels harbour a stick-to-it attitude that copyright infringement can make pay off. Chris Blackwell, indie label Palm Pictures' chief executive, said in a *New York Times* piece: 'In artist development, file sharing – it's not really hurting you' (Nelson, 2003). If music labels begin to question measurable harm, it will prove better than assuming file-sharing kills music.

Even game creation is changing. Not a decade ago, large game companies such as EA Games gobbled up smaller upstarts. Now, on widespread, popular platforms such as Facebook, little-known games can find overnight attention. Facebookers did not spread the now-ubiquitous 'social game' *Mafia Wars* because it proved worth the money – it is a no-cost game. They spread it because, for no cost, it offered enough entertainment to justify learning the rules and enlisting friends. *Mafia Wars* creators Zynga essentially took a natural human tendency – sharing – and moved it from a crime to the backbone of their growth. Sharing spelled more power and greater success in the game, not legal threats or internet disconnections. For independent game developers, lacing games with DRM and suing file-sharers have become less important than getting known and getting played. Now scores of games on Facebook and elsewhere have followed suit, realizing that sharing does not have to hurt business; that tied to growth it can mean greater success than trying to exercise control. Sure, sharing *Mafia Wars* with friends is not copyright violation or piracy, but that is the point. For such games to succeed, they decriminalized what other game makers still view as a cardinal sin. This is a lesson that veteran game companies are beginning to understand. In a 2010 conference with Nintendo CEO Satoru Iwata, he noted: 'If one software can attract many people and can become a social topic, that software can sell regardless of piracy' (Nintendo IR Information, 2010). Nintendo still hard codes piracy countermeasures into compulsory and automatic updates, but an attitude that piracy will not bankrupt the company is a start.

Heavy-handed controls eventually loosen because of court cases, poor consumer reception or realized profits, but control remains the copyright-rich reaction to changing times. Meanwhile, younger, more agile and accepting companies are sidestepping old business models, and trying to compete with or even use piracy instead of fighting it. Today, trade groups should have more work than ever – finding

ways to deal with and avail their clients of new technologies. Instead, they have largely resorted to litigating their problems away.

As Fred Von Lohmann from the Electronic Frontier Foundation astutely notes: 'No one thinks that suing music fans one at a time is the business model of the future' (Clough and Upchurch, 2010). Such simple reactions make trade groups appear little more than one-trick ponies, not only to consumers, but also to their clients. Self-publishing is growing rapidly, as are independent films, music under the creator's own label, and software creators concerned more with getting the word out about their niche programs than punishing potential pirates. So while it is doubtless that piracy indeed affects media, the results are less polemic than industry rhetoric would have consumers or lawmakers believe. The crowning irony is that file-sharing already proves a powerful tool in marketing and distribution. And as media grow ever more digital, file-sharing's power will grow, whether fettered or free.

Edge marketing meets with mixed success

I'm always struck by how successful we have been at hitting the bull's-eye of the wrong target.

- Joel Salatin, Polyface Farms, Food Inc. (Kenner, 2008)

Ever tried. Ever failed. No matter. Try again. Fail again. Fail better.

- Samuel Beckett

The copyright rich often try to compete with piracy using the same old tools: repackaging their products instead of re-imagining them. Such tactics still cling to the notion that beating piracy means lowering prices and increasing convenience, but introducing new limits as well. That piracy needs to be beaten at all, as reflected in such models, shows a gap in understanding.

Beginning in 2003, petrol stations, airports and other transitional places began selling EZ D disks of popular films. They performed as any other DVD, but with a

catch. After 48 hours of inexorable exposure to oxygen on opening, the disk changed colour and became unreadable by the DVD laser. In effect, Flexplay Technologies, Inc had created a self-destructing DVD, so they could sell popular films anywhere without the concern of returning the DVDs, therefore allowing much lower prices. Plus, since the disk was little more than a shiny object after 48 hours, the viewer would have to rent or buy the film again to re-watch it.

There are several issues with this innovation that should be glaring to any consumer concerned about the monumental amount of waste the Western world produces daily. Creating waste arbitrarily – taking a disk that could otherwise work for decades and ensuring it works for hours – is shameful. It uses technology opposite to how one might expect: taking a relatively efficient medium and making it inefficient. From the Boston Globe travel desk, however, Paul Makishima lauds the idea, calling it 'convenient and "Mission Impossible" cool'. He writes: 'Once the DVD is kicked, you recycle' (Makishima, 2008), as if not only is the wasteful nature of such disks a consumer responsibility, but also that all consumers recycle (while travelling, no less). This conveniently sidesteps the hidden environmental externalities inherent in the creation, packaging and distribution of the DVD. Toxic chemicals go into producing electronics, as well as the plastic packaging. It takes fuel to transport them to their sale point, and electricity to power the kiosks. Also, as Annie Leonard points out in *The Story of Stuff*, recycling should be our last resort, not a default when considering how best to conserve resources: 'Recycling is the last thing we should do with our stuff, not the first' (Leonard, 2010: 232).

The same argument applies to other one-off efforts as well. Delta Entertainment released older films and television shows, many of which reside in the public domain, with two disks: one for the DVD player and the other from which users could drag and drop the video files onto their iPods. That copy protection should exist at all on such DVDs is asinine, since they are in the public domain and have little demand; the move also implicitly gives iPod space shifting the okay, meaning the extra disk is so much superfluous material. A likened strategy by Disney tries to lull consumers back to the physical disk, and the amount of material quickly becomes obscene. One 'collection' contains four disks: BluRay 3-D, BluRay, DVD, and 'data disk' for space shifting without format shifting.

Perhaps a better way to bridge the gap between the value attribution consumers

attach to hard goods and the unavoidable evolution of digital media is to blend the two. Popular rapper Mos Def released his 2009 album The Ecstatic as a t-shirt bundled with a code for downloading the songs (Saba, 2009). While CDs still hold appeal in disk collection purposes and cover art, a CD is little more than an archaic and superfluous shell for consumers who know the versatility and cross-platform ability of the digital track. But there is no digital counterpart for clothing, and little devalues fan tees, especially for conspicuous fans.

In the UK and the US, amid industry wails of declining CD sales, vinyl records have enjoyed an upsurge. In fact, more LP records sell now than in decades before, with 2009 seeing the most sold since sales tracking began (Mearian, 2010). While reasons for increasing sales vary from nostalgia to sound quality, many record companies add a modern kick. They include a code with the album allowing buyers to download the songs at no extra cost.

Indeed, with so little from CD sales going to the artists, and private collections going digital, fans seek out one-off ways to support artists. Doubtless this is why, despite the rise of file-sharing, live shows have flourished worldwide. Artists can sell more than t-shirts, of course. Merchandising has become an enormous boon for artists as well.

No matter if exposure comes from piracy or payment, fame still holds great value. Celebrity product endorsements gain as much weight from pirate fans as any others. Some celebrities such as Madonna, Gene Simmons and Lars Ulrich may believe that ridiculing file-sharing fans only cuts off non-paying customers. But a willingness to buy bootlegs or share copyrighted files does nothing to keep pirates from spending money on all manner of other consumer goods, including media. Consider the actions of sci-fi author Cory Doctorow, who released his e-book *Little Brother* free online the day the print book hit the shelves. Not only is Little Brother no cost to download, Doctorow released it under the Creative Commons license, meaning that anyone can rip, remix and mashup *Little Brother* for non-commercial purposes. This has made Doctorow a household name among remix artists and pirates alike, and respect gleans sales. Fearful or excessively litigious authors such as Harlan Ellison or Mark Helprin cannot boast such progressive ideas, and their fan-base reflects this.

Turning business exchange on its head, still others have begun a 'pay what you want' model. Just as it sounds, this means that customers choose what they want to

pay for products or services (often with recommended price guidelines in place). In the analogue world, this has met with some success. Recently, a Panera Bread restaurant in St Louis began this model, which other independent restaurants have done since as early as 2003 (Strom and Gay, 2010). The *Associated Press* followed up on Panera Bread's trial and found that while most paid the suggested price, an equal percentage paid more as paid less. The 1,400-store strong restaurant business expects to open stores with the same model in Portland, Oregon. Of course, for scarce goods, clientele matters. Businesses using these models typically choose upscale neighbourhoods. One restaurant, for instance, had limited success because of the high concentration of teens in the area (Strom and Gay, 2010).

For digital goods, however, this model makes even more sense. Because despite industry rhetoric, digital media are not scarce. Anyone can reproduce them any number of times. But then the point of the 'pay what you want' model is twofold. First, to draw in customers who might not have become customers. Second, to create exposure for the product. The springboard for this model was the 2007 release of English rockers Radiohead's album *In Rainbows*, which launched first for digital download and then on CD. Even though many fans downloaded the album free, and the average payment for each download was only £4, the digital sales alone made more money than the previous album *Hail to the Thief*. This is a fact not mentioned in loaded coverage indicting the model in *The Times* article 'How much is Radiohead's online album worth? Nothing at all, say a third of all fans'. Again, the point of the model is not to persuade consumers to pay the retail price, but to create more customers and gain more exposure.

This is the case with independent game company Wolfire Games. Wolfire bundled five games selling at \$80 and allowed customers to pay what they wanted. Wolfire co-founder Jeffrey Rosen said sales of the so-called Humble Indie Bundle were 'far better than we expected' (Brom, 2010). It spawned a second Humble Bundle, which made even more than the first, ringing in at nearly \$2 million. Game developer Robert Fearon and his co-workers followed suit with the Bundle of Wrong, not only giving 'pay what you want' customers access to several titles, but also promising to add titles to the bundle for later download (Meer, 2010). Arguments that such models devalue the 'worth' of media seem especially doubtful with video games. Indeed, while many will pay less than retail, a \$60 game is not by its mere existence worth \$60. It only

bears this premium for so long. Then, it drops down to \$40 and then \$20, particularly if it has a strong resale market for used copies. This devaluation is faster in short-life media than it is with longer life media, such as movies. Value holds longer still in many corporeal goods, such as books. Books several years old still sell for cover price in bookstores, but no game store would think of selling a title from a few years ago at the premium price. This depreciation reflects not only the mayfly existence of ever-evolving media, but also the turnover the industry itself forces. Sports games offer a great example. When a new *Madden* debuts each year, the value of the previous editions drops to near nothing, let alone the premium price.

Unfortunately, this model has not spread to independent films very quickly. Many documentaries, especially those released under the Creative Commons license, use 'pay what you want' with success. Other film-makers load their movies onto video sites such as YouTube, increasing viewership and ostensibly an interest in retail copies, but have yet to embrace 'pay what you want'. More authors are selling e-books in this fashion, with hardcopies upholding a static price. For many, this is superior to free-to-read e-books using heavy-handed controls over how, when and where potential customers can read them.

Of course, any attempts to compete with or even use piracy and file-sharing meet better reception than criminalizing potential customers. Some industries are faring better than others, but so long as rights-holders show a willingness to coexist with systemic piracy, successful schemes will float to the surface and continue to succeed.

Pornographic industry turns piracy into profits

My circulation went from three million to about 500,000, and that was all attributed to the Internet.

- Larry Flynt, founder of *Hustler* magazine (*Porndemic*, Benger, 2009)

The basic business models, the how to transact, the per click, the per impression, the upsell concept: that all came from the adult business.

- Jason Tucker, Falconfoto (Porndemic, Benger, 2009)

Many assume that file-sharing only affects movies, music and games, ignoring media that users can share just as easily, and consume just as much. Despite pornography's tacit place in Western society, where leftover puritanical beliefs keep porn behind the curtain of propriety, there are few industries that piracy has affected more than adult entertainment. Just 15 years ago, people went to a XXX store and bought pornographic videos at a high premium, often approaching \$100 for a full-length film. The movies were largely VHS, making duplication, sharing and editing difficult for the mainstream. Unlike sharing other types of media, pornography occupies a private space in consumers' lives. So while sharing entailed human interaction, it remained limited.

Compare that with today, where anyone with an internet connection and a little patience can find endless collections of pornography. And unlike a conventional movie, pornography in the digital age comes cropped, mashed and blended – an act that would make a conventional film worthless. Print pornography has long enjoyed a solid market. With analogue photography, creators easily controlled their work. The nature of printed media limits consumers' capacity for sharing. Even if people sought to copy analogue photography, they would have only glossy copies without the photographer's negatives. With digital pornographic pictures, however, a perfect copy of a photo can circulate indefinitely without losing its quality. Unlike other photographers, who have several photos that few people will enjoy, pornographic photographers have few photos that several people will enjoy. Their incentives are clearly different. They have more to lose if their pictures end up on a p2p site.

Yet the adult industry gleans little public sympathy over pirates sharing their media. No commercials condemn porn piracy, and likely none will. The porn industry indeed funds lobbyists, such as the Free Speech Coalition in the US. However, unlike their media counterparts in the RIAA and MPAA, they argue for the right to keep producing porn. They do not demand the government pay for their anti-piracy efforts, or consistently tighten free speech controls to try to stymie piracy. Nor have they 'declared war' on piracy, or made Luddite statements like Sony CEO, Michael Lynton, who told the world that he 'doesn't see anything good having come from the Internet' (Salisbury, 2009). Their lobbyists make no mention of lost jobs, economic hardship or the loss of will to create pornography because of piracy. No letters flood colleges ordering them to ensure that their students are not sharing adult films or

pornographic pictures over the network. ISPs do not send cease and desist letters to their customers for detected pornographic piracy.

So what has the pornographic industry done against such overwhelming obstacles? What could they do to ensure the survival of their business when it has changed so drastically since the digital age? Simply stated: they compete with piracy. Even porn producers made rich off the old models knew they had to evolve or dissolve. After suffering an enormous decline in *Hustler* subscriptions because of internet porn, the CBC special *Porndemic* calls founder Larry Flynt 'just another huckster' (Benger, 2009). But Flynt did not act like so many other industry leaders turned topsy-turvy by the web. He quickly benefited from digital pornography, setting up a strong online presence that remains profitable.

The strategy is simple enough. FalconFoto CEO Gail Harris says: 'We're willing to give away a few images, and then if you're interested in more, we have a whole archive of hundreds of thousands of images that you can subscribe to see' (Friess, 2003). How effective is this approach? Consider the potential number of files on a p2p network. They can grow indefinitely, but the way in which users access the files limits distribution and availability. If users wanted photos of a particular subject – say, 'Jenna Jameson' – then they could search using various methods. The query results could number in the thousands, but always with superfluous files unrelated to Jenna's pictures. Also, there is no guarantee that all or any of Jenna's pictures will be on the network, since p2p networks have no central server but rely on 'nodes' – shared folders on users' computers.

If those few pictures of Jenna displayed a website address, however, users who wanted many more images of her could go to the site and subscribe to the service. Then they would have fast, navigable and relevant pictures to choose from, probably video as well, and likely far more than available on the p2p network.

For videos, p2p platforms work largely the same way. They hold scores of videos under 10 minutes. But downloading them implies some buy-in from users, since they remain unsure what the file contains, how long it will take to download and whether it will prove complete. Some files are snippets from full-length films while others make up a two-minute highlight reel. Realizing that potential customers are legion, pornography providers litter p2p networks with free snippets. They display their website name and address in part or all of a video sample. Others, notably the videos

in QuickTime format, jump online toward the end of the video. The adult industry has embraced these tools instead of constantly seeking legal punishment for those downloading the videos.

Harris goes on to say: 'What we have is a captive audience of people we know are interested in our product because they went out seeking it themselves. Many of them are willing to pay for it, too' (Friess, 2003). These are the tactics that groups such as the RIAA and MPAA refuse to employ, and to their own harm. Their refusal is understandable to a degree. To flood p2p networks with, say, music videos that jump to the band's website or a place to buy the CD sounds viable, but what would it mean for them? It would be tantamount to admitting that their current anti-piracy model – suing those infringing on their copyrights – is ineffective. It would also be admitting that file-sharing has a market application, a stance that RIAA representatives in particular have long fervently opposed. This stubbornness in refusing to alter their strategy may seem pointless and counterproductive, but as long as they continue litigation and claiming the cataclysmic harm that piracy is doing, the music and movie industries cannot profit by the adult industry's model.

The digital age has also broadened the potential client base for pornography. Renting or buying adult films holds negative stigma, as does buying pornographic magazines. Now, however, those social barriers are gone. Anyone with an internet connection can have access to all manner of adult videos and photos. What some have called a rise in sexual addiction is likely the product of more people consuming pornography due to the anonymity and ease of digital technology. And yet again, we see the music and movie industry shying away from this reality. Instead of embracing streaming movie services that have benefited the adult industry, they enforce arbitrary red tape and use verification, chilling convenience, and with it marketability.

So while pornography remains in the shadows socially, its industry leaders are innovating, adapting and learning how to compete with piracy. The media industry that piracy could have hit hardest is among the only innovators showing acceptance instead of aggression, and no doubt it is working for them.

Moving from static to streaming media

The only question is whether we're going to get the celestial jukebox the way that the biggest copyright holders would prefer: by paying for it.

- Douglas Wolk, Wired magazine (2009)

Convincing rights-holders to allow streaming media, where consumers enjoy media through the internet or mobile phone networks rather than physical products or client-side files, should be easy. Big media has long sought the Celestial Jukebox, where licensed media flow through approved, controlled channels and devices. But today's emerging streams buck conventional predictions on how it should work, for how much, and how best to control it.

For music, streaming songs had a rocky start. Early music services offered only pay accounts that met with mixed reviews and had no clear industry leader. In the US, the still reigning streaming service is Pandora, which debuted in 2005. Pandora considers user tastes and then plays music to match those preferences. It streams through nearly any device, from computers to iPods to Playstations.

In the UK, Spotify was the brainchild of confessed pirate Daniel Ek, who teamed up with the creator of famed bit torrent application uTorrent, Martin Lorentzon. Two young entrepreneurs unafraid of technology and with the wherewithal to tap into their piratical roots to make a better media model. Spotify's free account allows for unlimited streaming music, formation of playlists, sharing songs with friends, and accessing personal collections from multiple devices. It makes money from advertising and its premium service, which allows users to space shift songs onto an iPod or phone. Alas, both Pandora and Spotify contend with licensing issues that keep them from crossing the pond into each other's country.

US-based DVD distributor Netflix brought automation to the DVD rental industry. Shipping DVDs direct to customer homes quickly began to beat the price, commitment and unforgiving fees of conventional rental. When Netflix added a streaming movie service, it pulled customers away from premium monthly cable channels, rentals and movie on-demand services, all of which bore higher prices. Netflix planned to expand to the UK, but for now operates only in the US and Canada.

Also in the US, Hulu has done for television shows what Netflix's streaming service has done for movies. Hulu offers five episodes of many current shows without an account. It is a joint-venture by NBC, Fox and ABC, and makes its money from ad revenue. Ironically, it usually has only 90 seconds of advertising for every 20 minutes of programming. Comparing this with the 10 minutes of advertising for each 20-minute show on cable programmes, a clear disparity surfaces. In short, how can cable companies charge for cable and still need one-third of viewer time to focus on adverts when Hulu is no-cost with minimal advertising? Hulu's corporate owners get the irony. In their own adverts for Hulu, they call it 'an evil plot to destroy the world' (Vodpod, 2009), and if the media triumvirate did not own it, this description would probably sum up their feelings. Hulu had planned on debuting in Europe, but licensing issues have prevented them so far.

In gaming, server-side game platforms such as Valve's Steam join social games like *Mafia Wars* in engaging a greater number of players and allowing them to create and connect in communities. Just as with other media, Valve has to balance an antipiracy stance with pleasing customers. Steam mandated internet connectivity even to play Valve titles, beginning with hit release *Half Life 2* in 2004. While widespread broadband was well underway by then, that Steam appeared chiefly a DRM scheme angered many customers who felt guilty until proven innocent. Steam now offers ingame chat features and automatic updates, and provides a noteworthy platform for small-developer games to gain widespread exposure. Yet their DRM controls forever hum in the background.

Cloud-based literature seems a technological breeze. Files are tiny in size but offer valuable content. Despite no provable threat to the print industry, publishing houses have remained reluctant to surrender any control of books to users. The result is a collection of disparate, second-rate reading platforms mandating that users be online, often with time-outs and other annoying controls. Some publishers such as the University of Chicago Press have tried giveaways, where they make monthly titles free-to-read, but again with a plethora of annoying controls. Some libraries have created tolerable lending practices for customers' phones, e-book readers or computers. While still bogged down in details of format (to avoid copying), the logistics remain simple.

The legal misgivings of streaming or cloud-based media remain just as

complicated for film. Cinema tickets and many first-run DVDs bear no price discrimination. If a film cost \$50,000 to create, cinema tickets cost the same as for a film that needed a \$100 million budget to hit the big screen. When films debut on DVD or BluRay, studios and retailers want to cash in on price insensitive consumers, and so the same universal pricing occurs. Later, however, price discrimination creeps in, not based on the film's production costs, but on consumer demand. For rental stores a universal price also made sense, because at first they paid a high premium for copies of the VHS tapes. Later, even though DVD prices declined, stores often paid a standard price themselves.

However, when considering a movie streaming service, the idea of universal pricing seems silly. While Netflix's streaming choices appear arbitrary or random to consumers, it reflects costs. Licensing one film for streaming may cost much more than another. When, not if, films become as commonly streamed as music, an auspicious and realistic beginning considers this price disparity. A new film streaming service with low-premium memberships would start out with an archive of films that cost little to license. In time, this collection would grow. Even later, as such a service began to act as a notable revenue stream for Hollywood and other nations' film studios, streaming service providers could negotiate lower and lower licensing fees.

Right now, Netflix already allows streaming films on portable devices so long as users have an internet connection. In the future, this must mimic Spotify, where users become free from internet tethering and can stream any manner of media from portable players for the price of an affordable, sensible membership. After all, having all sorts of media at users' disposal is still miles away from sharing illegal copies with millions of people. Instead, offering each person a wide range of fast, flexible media on several platforms and sharing through that same platform makes illegal file-sharing nearly obsolete.

Mention the Celestial Jukebox to most pirates, and expect a huff. Historically, this spells control, pay-per-use and inflexibility. But younger entrepreneurs, themselves versed in copyright violation, happily turn the Celestial Jukebox on its head. The idea is the same: a conduit through which media pass, indeed controlling the flow of content, but then it's hands-off. Instead of pay-per-use, consumers pay nothing until using specific features (such as space or format shifting). Instead of inflexibility, users have access to their collection, even with free memberships, from almost anywhere.

Some pirates will always want complete control and even possession of their media, but when commercial services begin to offer advantages over file-sharing and ownership, they will pull consumers away from piracy. Fretting over the small percentage of pirates who demand ownership only echoes old and tired business models that are dying off. Eventually, ownership of media could become the tether, and cloud-based collections, sharing and media consumption could become freer than ownership. As long as streaming service providers understand what Spotify, Facebook, DropBox, Evernote and many others already know: consumers need to see no-cost services work properly before they will gladly pay for premium.

Critics claim that as media change from selling in physical stores to streaming or cloud-based services, consumers have no authority to turn to for advice. Anyone who has been to a bookshop, spoken with a true bibliophile, and left with an armful of must-read books knows that gurus can enhance a buying experience. Alas, for every guru in a rundown record store who could tell you – hands down – the best version of 'Sympathy for the Devil,' there are droves of minimum wage Virgin Records employees who are simply making a living. For every bookworm happy to talk about Neil Gaiman for an hour, there are ten whose knowledge of literature starts and stops at the computer in front of them. The same for movies, for games, for any media.

Yet to presume that without brick-and-mortar stores customers now wander about the internet buying whatever pop-up ads direct them to is a fallacy. Media gurus still exist, arguably in even higher numbers, but now anyone can tap into their wisdom via the net. The difference is that they are sharing their wisdom for love of the media, not for minimum wage. And instead of sharing it with a few hundred customers in their brick-and-mortar store, they speak to tens of thousands online. They debate with other gurus, and – to be fair – with many who only claim to be gurus.

As expected, another unparalleled advantage to using the internet to cater to one's tastes is in the code. Computations and algorithms beyond human capacity can tell what someone will probably enjoy based on indicators such as likes, dislikes, buying habits or even price sensitivity. And while code notably aids commercial enterprises such as Amazon and eBay, it has non-commercial applications as well. The website Library Thing, for instance, gets users to build a virtual library, and then matches that library to other users based on congruent titles, authors, genres and other

indicators. Then, users can sift through the libraries of other, like-minded readers on the site to discover new reads that someone like them has found interesting. Such sites encourage community and communication as well, while being only passively commercial via premium accounts that allow for larger collections or other, exclusive features.

One chink in the streaming armour remains: user-generated remix and mashup. Without high-quality files to work with, remix culture suffers. With physical media comes file-sharing sites offering near-perfect copies for whatever purpose. But could ubiquitous streaming cause such sharing to fall from favour, both by becoming a more isolated target for rights-holder lawsuits and by losing sharers and thus speed and variety? Users will forever continue to create and share, but if streaming media takes over, getting copyrighted content for client-side remix could become both high-profile and difficult.

There is no doubt that the internet's popularity and use will continue to climb. With it, streaming media will increase as well. It remains up to rights-holders to ensure streaming happens through legal channels. If they fail to meet market demand for streaming media, pirates will.

Food patents paint a bleak picture of IP control

The centuries old practice of farmer-saved seed is really a gross disadvantage to Third World farmers who inadvertently become locked into obsolete varieties because of their taking the 'easy road' and not planting newer, more productive varieties.

- Harry Collins, vice president of Delta & Pine Land Company, creators of terminator technology (Warwick, 2000)

And I looked, and behold, a pale horse: and his name that sat on him was Death, and hell followed with him. And power was given to them over the fourth part of the earth, to kill with sword, and with hunger, and with death, and with the beasts of the earth.

- Webster's Bible Translation

IP has been called the oil of the 21st century, yet much of it contains no corporeal form. One of the greatest struggles rights-holders take on, needed or not, is how to pirate-proof their IP. In many ways, this protection has seen more failures than successes. Schemes such as CSS and other technical protective measures have proved so ineffective as to need scads of lawsuits to enforce them, when originally designed to prevent piracy independently.

Just as the RIAA fights and sues over the piracy of music, the agricultural industry fights real and perceived piracy of genetically modified (GM) crops through food patents. GM crops come in many forms, whether changed to increase yield, prevent crop loss due to pests, or even make a crop more resilient to a particular herbicide. Companies such as Monsanto have created a model in which farmers must pay for their seeds and their herbicide in tandem to achieve the best results. Monsanto – known for DDT and Agent Orange – makes RoundUp, the most successful herbicide on the market, so it is financially sound for Monsanto to create seeds that falter without their particular brand of herbicide, no matter what this means for the crop itself. It is easy to argue that nations should want as high a yield as possible. That using RoundUp to deal with weeds, and Monsanto's GM seeds to ward off pests and improve yield, would mean more food. But increasing crop exports from developed nations is not – in and of itself – mutually exclusive to arguments against GM crops, just as Monsanto's innovative means of protecting their IP is not necessarily one that others should copy.

Consider what Monsanto's patents are protecting. Nature harbours plants that are annuals, which need replanting each year, and perennials, which usually come back each year (self-seeding). In both cases, the plants produce some manner of seed or clipping that farmers can harvest and use for another plant. This is how non-indigenous crops (such as cherries and soybeans in the UK, and apples and bananas in the US) have come to prosper in non-native lands.

However, this natural cycle is not a part of Monsanto's plans. No one may patent nature, and so natural ingredients are an ineffective money-maker. And yet, in the 1980s, through hefty lobbying and an ever-increasing presence of former Monsanto executives peppering governmental agricultural groups, the United States allowed for patenting of genetically modified seeds (Kenner, 2008). By using bacteria to alter

the DNA of the crop cells, Monsanto can modify seeds to an extent and with a process that allows them to gain patent protection. Of course, while greater yield sounds like a sensible advancement of science, it is also in Monsanto's best interests to ensure that they sell as many seeds as often as possible.

Monsanto began selling GM seeds that conveniently develop best using RoundUp. But this is where the perversion started. Since Monsanto owned the patent on the GM seed, they effectively owned the seed. Therefore it became patent infringement for farmers to use seed for a second year. These second generation seeds are the product of nature, but since they spawned from a GM seed, farmers could not use them. While this may sound like an on-paper rule that no one follows, a team of more than 75 investigators works for Monsanto to expose any farmers reusing their seeds (Kenner, 2008). Seed reuse leads to many one-sided lawsuits, given Monsanto's battery of lawyers. Most end in hefty settlements, since fighting Monsanto proves too costly for many farmers.

Other legal targets of Monsanto include farmers whose fields have unintentionally cross-pollinated with their GM-using neighbours. Such farmers become doubly damned, as they must try to prove themselves innocent of patent infringement by costly legal means, and they also have crops that will produce illegal seeds, and seeds that only respond to RoundUp.

Moe Parr made a living cleaning farmers' seeds so they could replant the following year; now a dinosaur profession. Monsanto sued him for 'inducing farmers to break the patent law' (Kenner, 2008). And yet, this is precisely the same scenario, only analogue instead of digital, as when companies simplified bypassing technical protection measures (TPMs) so consumers could practise fair use. The same with companies such as DropBox, where despite the possibility of customers infringing on copyright by using DropBox to file-share, copyright violation was not the primary purpose of the service. In the same way, Parr's service may have led to patent infringement, but that was not its primary function, especially since his machine's design pre-dates patents. Alas, there is no fair use for patents, and patent protection offers rights-holders tighter reigns over their IP than copyright.

However, even the GM patents were not pirate-proof enough for Monsanto. They still lacked any physical barriers to stop reuse of their IP. So Monsanto looked to the ultimate pirate-proof seed, one that no farmer would be able to reuse. These seeds

have what are euphemistically called Genetic Use Restriction Technology (GURT). More fittingly, the term 'suicide seeds' came to mean the use of so-called terminator technology that ensured a seed would produce a sterile crop. Any further seeds coming from plants using this technology could not grow crops the following years. Arguments for terminator technology include less cross-pollination, though as Hugh Warwick notes, this is tantamount to admitting that GM crops do indeed cross-pollinate and fertilize neighbouring fields (Warwick, 2000). This is a fact that would prove damaging to Monsanto's constant litigation for patent infringement against cross-pollinated farms accused of using RoundUp Ready seeds illegally.

In 1999, Monsanto agreed not to commercialize suicide seeds, responding to fervent opposition from farmers and governments. Still, vice president of Delta & Pine Land Company Harry Collins asserted that they would continue to work towards commercialization (Warwick, 2000). Monsanto bought Delta & Pine Land Company five years later.

If anything represents hope of reversing such dire controls, it is consumer preferences. Monsanto also manufacturers Recombinant Bovine Growth Hormone (rBGH), which stimulates milk production in dairy cows at some considerable cost to the quality of the milk and the life of the cows (Robin, 2005). However, rBGH has not rooted into milk production as GM seeds have in crop production. This is only because of consumer pressure on governments and regulatory bodies to forbid the sale of rBGH milk, or at least ensure labelling of such milk as coming from cows given the hormone. Every nation but the US has forbidden milk from cows treated with rBGH. Even in the States, Wal-Mart stopped carrying such products 'based on customer preference' (Kenner, 2008).

Yet, for many, the future of IP controls echoes Monsanto's tactics. Control not only of knowledge or the right to create, but also the right to use what comes naturally, whether corn seed or guitar riffs or slogans. But Monsanto owns nothing worth stealing. No developing country will reverse-engineer GM seeds or terminator technology. While a competing company may mirror such monopolistic designs, no pirate would choose something as unwieldy and unnatural as a seed that cannot reproduce, or that needs a specific brand of fertilizer and herbicide. And so Monsanto offers a fine example of how to pirate-proof intellectual property: make something no one wants to copy, even at the peril of everything but profit.

Conclusion

t can prove discouraging, looking back on what we have covered of copyright and piracy, to realize that the façade of IP law as a well-oiled machine crumbles under the lightest scrutiny. Conversely, knowing that culture and creativity will flower under both the tightest and loosest of copyright controls should bring hopeful certainty. At the least, armed with a greater understanding of incentives, you may evaluate the prevalent mantras about the evils of piracy with fitting scepticism.

Just as it is important to consider the hidden costs of laws that invade privacy for the sake of security, we must assess what thick copyright laws cost tomorrow's content creators. We should understand that any greater controls to protect current media will have an equal and opposite chilling effect on tomorrow's creations. This applies to longer and broader terms, technical measures, lawsuits, expanding patent coverage – all inflict a hefty cost on future creation, costs that surface in debates alongside dreary loss statements, doomsday prophecies and us-versus-them finger-pointing. After all, most creative piracy only became illegal when the laws expanded around it.

Rest assured, the pirates are no sooner 'out to get you' than corporate copyright is destroying creative content. Healthy cynicism reveals that anti-piracy measures and propaganda have more to do with preserving current moneymaking models than with incentivizing creation, protecting consumers or preventing job losses.

Even recent history arms us with a likely road map for where copyright-poor countries are heading. They follow the same path that currently copyright-rich nations traversed not long ago. To criminalize such countries for ignoring other nations' IP laws, or even for counterfeiting with the very processes and machinery that more developed nations gave them, is absurd. A nation's bootlegging prevalence neatly matches the demand for its cheap labour, as its medical and agricultural advances often match its disregard for drug and food patents.

History also reveals that all creation draws from what came before. Authorized remakes

or repackaged ideas hold no superiority over unauthorized remixes; not in novelty or utility. The only difference is legal, and lawyers, legislators and courts make poor judges of creativity.

That IP laws as monopolies still fail continuously to prevent piracy or secure markets should beget doubt, but not discourage. We have come a long way both in trying to give creative piracy a safe harbour and, alas, in ensuring that it remains piratical. Accepting that user-generated content (UGC) that violates copyright holds no threat to monetized copyrighted content is a good first step. Equally important is understanding that it represents artistic creation despite, not because of, current copyright laws. Eventually, mainstream media will butt against unauthorized content, based on the number of people enjoying it, or how much money is 'lost' because exposure to pay-per-use media loses to free content. We must resist demonizing this creative piracy the way that we have allowed slandering of so many other derivative works.

File-sharing and derivative works will never stop. But we can vilify such acts to an extent that we see violating copyright as always criminal and never creative. So much content we enjoy and expect from the internet sits on the edge of a razor. Neither the law nor consumer preference could stop rights-holders from excising it if they chose. But enforcement is calculated, not random. Big media considers what UGC does for them compared with how such content acts against them. Supremely, while UGC helps mainstream media sales, makes money through advertising, or presents only limited threats to industry profits, it will remain unmolested. Eventually, people might rather watch a machinima movie free online than pay \$20 to go to the cinema. No-cost music remixes might grace more iPods than pay-for content. Independent 'pay what you want' games or mods for existing titles might draw more face-time than the premium-priced releases. Fanfic might glean more favour than the novel or movie that it emulates. That day, rights-holders will bring down the legal axe, and we will all suffer the outcomes.

To be fair, just as it seems convenient for rights-holders to condemn piracy and laud copyright, this pendulum swings the other way. It is convenient for pirates to claim that they share media because information wants to be free or because they are protesting against DRM. But this act of dissent also saves them money. A better means of dissent would be to pay for only those games or books or films that forgo DRM, allow mods, encourage remix or offer an agreeable price model. A more telling act of rebellion would be to violate copyright only in creating something else. This both bolsters public opinion of the creativity of remix

216 Conclusion

culture and user-generated content, and makes people question any set of laws that forbids such creativity.

Finally, we must resist crediting our current creative culture and access to media to the effects of thick copyright. Suing Girl Scouts is a result of copyright. Bad sequels are a result of copyright. The art and culture we enjoy would be here with or without a state-enforced monopoly; whether we called content creators pirates or employees. Even a cursory glance on the internet reveals legions of content creators incentivized by creativity alone. But making money from media is as sound a model as ever. It just means adapting to how people consume, and moving on from models the digital age has made ineffective. Greater control is only a model, and arguably one much less effective than seeing how people use, share and create information and going with it.

Create what the market wants. Ignore unauthorized use. Monetize without alienating. And consumers will gladly abide.



ACTA: Anti-Counterfeiting Trade Agreement. A proposed multinational piece of legislation to standardize intellectual property protection policy and rights enforcement.

ASCAP: American Society of Composers, Authors & Publishers. A non-profit organization for licensing performance rights for copyrighted works in the US.

BASCAP: Business Action to Stop Counterfeiting and Piracy. The activist arm of the International Chamber of Commerce (ICC), persuading governments of the economic harms done by digital piracy.

Berne Convention: An agreement among several nations governing international copyright terms.

Bit torrent: A file-sharing protocol that allows simultaneously uploading to and downloading from multiple peers.

BPI: British Phonographic Industry. A trade organization for the British recording industry.

BSA: Business Software Alliance. Third-party trade organization that represents software manufacturers in combating piracy of their intellectual property worldwide.

Celestial Jukebox: The copyright industry's long-held ideal of media distribution where all media comes through a single device as pay-per-use.

Cosplay: Costume Play. Where people dress as characters from popular media, such as video games, comic books, or films, often for fan conventions.

Creative Commons: A non-profit organization focused on supplanting automatic All Rights Reserved copyright with a series of licenses that encourage sharing and collaboration.

CRIA: Canadian Recording Industry Association. A non-profit trade organization that represents members within the Canadian music industry in legal matters and through political lobbying.

218 Glossary

CSS: Content Scramble System. A digital rights management protection scheme for controlling how and on what devices DVDs can function.

DDoS Attack: Distributed Denial of Service Attack. An attack of a server's resources by routing traffic from multiple, often-unwilling computers.

DeCSS: A program to decode the DVD protection scheme Content Scramble System (CSS) so that DVDs could play on machines running the Linux operating system.

Digital piracy: Unauthorized copying or distribution of intellectual property.

DMCA: Digital Millennium Copyright Act. A 1998 addendum to US copyright law criminalizing, among other things, the circumvention of Technological Protection Measures (TPMs) to enforce copy protection.

DRM: Digital Rights Management. Protection schemes to control how digital content is used.

EFF: Electronic Frontier Foundation. Non-profit organization advocating for consumer digital rights.

EULA: End User License Agreement. A written agreement between software rights holders and users governing how a program may be used.

Fanfic: Fan Fiction. Fictional written works based on copyrighted characters, settings, or concepts.

First-sale doctrine: copyright policy allowing the rights holder control over only the first sale, so that media owners may transfer ownership of used media without violating copyright.

GMO: Genetically Modified Organism. Patentable organisms that have been genetically modified by DNA-modification.

Google: An Internet search engine providing web links based on user queries.

GPL: General Public License. A software license that ensures that software code remains available when used in derivative works.

IP: Intellectual Property. Any creation protected by patent, copyright, trademark, or trade

secret.

iPod: Apple's proprietary portable music and media player.

ISP: Internet Service Provider. A company that provides access to and bandwidth for the Internet.

iTunes: Apple computer's proprietary, cross-platform media management software.

Jaywalking: When pedestrians cross the street either against the traffic light at a crosswalk or where there is no crosswalk present.

LEK Consultancy: A firm hired by the MPAA to conduct research into the economic impacts of film piracy.

Limewire: Now defunct popular p2p file-sharing platform using the Gnutella Network.

Machinima: Machine Animation. Animated film created through video games or other rendered digital environments.

MMORPG: Massive Multiplayer Online Role-Playing Game. Also called Massively Multiplayer Online (MMO). Video games housed on servers into which players worldwide play the same game simultaneously and cooperatively.

MMPS: Major Motion Picture Studios. A collective term for the largest film studios in Hollywood.

Moniker: A nickname or alternate name for someone or something.

MPAA: Motion Picture Association of America. A non-profit trade organization representing movie studios in legal matters and through political lobbying.

Napster: Now defunct music file-sharing platform created by college student Shawn Fanning.

p2p: Person to person. A file-sharing scheme where users share files with one another in lieu of downloading files from a central server.

PRS for Music: formerly Performance Rights Society. An organization for licensing performance rights for copyrighted audio works in the UK.

220 Glossary

RAM: Random-Access Memory. Temporary data storage for computers, allowing for faster performance and data retrieval.

RIAA: Recording Industry Association of America. A non-profit trade organization that represents members within the US music industry in legal matters and through political lobbying.

Terminator Technology: An as-yet-unused technology of making GMO crops produce sterile seeds.

The Pirate Bay: Sweden-based bit torrent tracker site, providing site visitors with the ability to search for torrent files.

The Pirate Party: A political party started in Sweden with a platform of copyright reformation or abolishment, information transparency, and personal privacy.

TPM: Technological Protection Measure. A means of copy protection governing intellectual property.

TRIPS: Set of standard intellectual property rules and regulations established by the World Trade Organization for all WTO member nations.

UMD: Universal Media Disc. Proprietary media format created by Sony for the Playstation Portable (PSP) hand-held gaming system.

USTR: United States Trade Representatives. Publishes the annual Special 301 Report watch list of countries' levels of digital piracy.

Wikileaks: A non-profit organization that publishes classified or otherwise controlled documents or other media made public through leaks or whistle-blowers.



- A Debate on 'Creativity, Commerce and Culture' with Larry Lessig and Jack Valenti (2001) The USC Annenberg Norman Lear Center, University of Southern California
- Albanesius, C (2008) [Accessed 19 December 2010] 'President Bush Approves "Copyright Czar", *PC Magazine* [Online] http://www.pcmag.com/article2/0,2817,2332432,00.asp
- Albert, J, Beauchamp, R and Schlagel, B (dirs.) (2010) Walking on Eggshells, motion picture, Yale Law & Technology
- Alfano, S (2006) [Accessed 28 November 2010] '50 Cent Sued For Copycatting', *CBS News* [Online] http://www.cbsnews.com/stories/2006/01/21/entertainment/main1227294.shtml
- Anderson, C (2009) Free: The Future of a Radical Price, Hyperion, New York
- Anderson, N (2008) [Accessed 22 October 2010] 'Oops: MPAA admits college piracy numbers grossly inflated', *Ars Technica* [Online] http://arstechnica.com/techpolicy/news/2008/01/oops-mpaa-admits-college-piracy-numbers-grossly-inflated.ars
- Apple, Inc (2010) [Accessed 16 August 2010] 'Terms and Conditions' [Online] http://www.apple.com/legal/itunes/us/terms.html#SERVICE
- Ardizzone, S and Michaels, R (dirs.) (2006) *Hacking Democracy*, motion picture, HBO Films
- Bannon, L (1996) [Accessed 15 December 2010] 'Birds Sing, but Campers Can't Unless They Pay Up', *Star Tribune* [Online] http://www.law.umkc.edu/faculty/projects/ftrials/communications/ASCAP.html
- Bate, R (2007) [Accessed 26 January 2011] 'India and the Drug Patent Wars', *AEI Outlook Series* [online] http://www.aei.org/outlook/25566
- BBC News (2009a) [Accessed 15 December 2010] 'MGMT to Sue Sarkozy for Music Use' [Online] http://news.bbc.co.uk/2/hi/7912423.stm

- BBC News (2009b) [Accessed 02 February 2011] 'Apology for Singing Shop Worker' [Online] http://news.bbc.co.uk/2/hi/uk_news/scotland/tayside_and_central/8317952.stm
- Benger, R (2009) 'Porndemic', television program, Cogent/Benger Productions, Inc.
- Bernstein, J (2006) 'Q + A: Jack Valenti', W, vol. 35, no. 9, pp.420–421
- Borland, J (2003a) [Accessed 21 November 2010] 'RIAA Settles With 12-year-old Girl', *CNET News* [Online] http://news.cnet.com/RIAA-settles-with-12-year-old-girl/2100-1027_3-5073717.html
- Borland, J (2003b) [Accessed 21 November 2010] 'P2P Group: We'll pay girl's RIAA bill', *CNET News* [Online] http://news.cnet.com/P2P-group-Well-pay-girls-RIAA-bill/2100-1027_3-5074227.html?tag=mncol
- Borland, J (2003c) [Accessed 22 November 2010] 'RIAA's Case of Mistaken Identity?', *CNET News* [Online] http://news.cnet.com/RIAAs-case-of-mistaken-identity/2100-1027_3-5081469.html?tag=mncol;1n
- Bowers, J (2006) [Accessed 30 November 2010] *Software and Software Patents* [Online] http://www.jerf.org/writings/communicationEthics/node6.html
- Boyle, J (2008) *The Public Domain: Enclosing the Commons of the Mind*, Yale University Press, New Haven
- Bradford, D (2006) [Accessed 12 October 2010] 'Bird Flu: Liability and Risk Management Update', *Advisen* [Online] http://www.kmrdpartners.com/documents/BirdFluPandemic-RiskManagementIssues.pdf
- Brandon, J (2008) [Accessed 19 November 2010] 'Tech Myths That Just Won't Die', *PC World* [Online] http://www.pcworld.com/article/151606/tech_myths_that_just_wont_die.html
- Brom (2010) [Accessed 23 December 2010] 'Pay-what-you-want Model Adopted by Indie Games Company, Lawsuit Imminent', *Tiny Mix Tapes* [Online] http://www.tinymixtapes.com/news/pay-what-you-want-model-adopted-indie-games-company-lawsuit-imminent
- Burns, C (2010) [Accessed 13 December 2010] 'UK Prime Minister Wants US-style Fair Use Industrial Policy to Spur Innovation', *Slash Gear* [Online] http://www.slashgear.com/uk-prime-minister-wants-us-style-fair-use-industrial-policy-to-spur-innovation-05112678/

- Business Action to Stop Counterfeiting and Piracy (2010) 'Report on mission, achievements, work plan, and membership', Business Action to Stop Counterfeiting and Piracy (BASCAP) and the International Chamber of Commerce (ICC)
- Business Software Alliance (2010) 'Seventh Annual BSA/IDC Global Software 09 Piracy Study', Business Software Alliance (BSA), Irving, TX
- Business Wire (1998) [Accessed 18 October 2010] 'RIAA Wins Restraining Order Against MP3 Recording Device', [Online] http://www.highbeam.com/doc/1G1-53092513.html
- Calandrillo, S and Davison, E (2008) 'The Dangers of the Digital Millennium Copyright Act: Much ado about nothing?', *William and Mary Law Review*, vol. 50, no. 2, pp.349–415
- CBS News (2010) [Accessed 11 September 2010] 'Lawsuit: "Harry Potter" Author Stole Ideas' [Online] http://www.cbsnews.com/stories/2010/02/18/entertainment/main6219192.shtml
- Clough, B and Upchurch, L (dirs.) (2010) When Copyright Goes Bad, motion picture, Access to Knowledge Project
- Cohen, A (1990) 'Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments', *Indiana Law Journal*, vol. 66, pp.175–232
- Committee on Governmental Affairs (2003) *Privacy and Piracy: The paradox of illegal file sharing on peer-to-peer networks and the impact of technology on the entertainment industry*, Washington
- Committee on the Judiciary House of Representatives (1982) *Home Recording of Copyrighted Works*, Washington
- Congressional Joint Committee on Patents (1906) *To Amend and Consolidate the Acts Respecting Copyright,* Washington
- Conti, A (2004) [Accessed 19 December 2010] 'Ebay Art Fraud: Copyright violations, plagiarism, forgery', *Big Crow*, blog posting [Online] http://www.bigcrow.com/anna/ebay_fraud/evidence.html
- Corliss, R (2007) [Accessed 06 December 2010] 'What Jack Valenti Did for Hollywood', *Time* [Online] http://www.time.com/time/arts/article/0,8599,1615388,00.html

- Coulter, C, Masayuki, N and Foskett, E (2010) 'UK Steps Toward "Digital Britain" with the Introduction of the Digital Economy Act 2010', *The Computer & Internet Lawyer*, vol. 27, no. 9, pp.25–31
- Craig, P (2005) Software Piracy Exposed, Syngress Publishing, Inc, Rockland, MA
- Creekmur, C (2007) 'Brokeback: The Parody', *GLQ: A Journal of Lesbian and Gay Studies*, vol. 13, no. 1, pp.105–107
- Denby, L (2010) [Accessed 19 December 2010] 'Square Enix Cease-And-Desists Amateur Dev For Carmageddon Spin-Off', *Beef Jack* [Online] http://beefjack.com/news/square-enix-cease-and-desists-amateur-dev-for-carmageddon-spin-off/
- Deng, S, Townsend, P, Robert, M and Quesnel, N (1996) 'A Guide to Intellectual Property Rights in Southeast Asia and China', *Business Horizons*, November–December, pp.43–51
- Desai, R (2005) 'Copyright Infringement in the Indian Film Industry', *Film & TV*, Spring, pp.259–278
- Diffley, K (ed.) (2002) *To Live and Die: Collected Stories of the Civil War, 1861–1876,* Duke University Press, Durham, NC
- Doctorow, C (2010) [Accessed 12 October 2010] 'Wikileaks Cables Reveal That the US Wrote Spain's Proposed Copyright Law', *BoingBoing* [Online] http://www.boingboing.net/2010/12/03/wikileaks-cables-rev.html
- Drahos, P (2003) Information Feudalism, The New Press, New York
- Efroni, Z (2007) [Accessed 15 September 2010] 'DRM by Mandate? Belgium Court Imposes a Filtering Duty on ISP', *Stanford Law School* [Online] http://cyberlaw.stanford.edu/node/5449
- Elinson, Z (2009) [Accessed 18 November 2010] 'ASCAP Sues Over Ringtone "Performance", *The Recorder* [Online] http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202432025253&slreturn=1&hbxlog in=1
- Espiner, T (2009) [Accessed 02 September 2010] 'U.K. Gets its Own Pirate Party', CNET News [Online] http://news.cnet.com/8301-1023_3-10309960-93.html
- FanEdit (2007) [Accessed 09 September 2010] 'Spiderman 3: The Darkness Within', [Online] http://fanedit.org/328/

- Federal Bureau of Investigation (2010) 'Justice Department Announces New Intellectual Property (IP) Task Force as Part of Broad IP Enforcement Initiative', Federal Bureau of Investigation (FBI) National Press Releases, Washington
- Firestone, D (2000) [Accessed 12 December 2010] 'King Estate and CBS Settle Suit Over Rights to Famous Speech', *The New York Times* [Online] http://www.nytimes.com/2000/07/14/us/king-estate-and-cbs-settle-suit-over-rights-to-famous-speech.html
- Ford, S (2008) [Accessed 21 October 2010] 'City of Heroes Launches Matrix Machinima Contest', *Warcry Network* [Online] http://www.warcry.com/news/view/84779-City-of-Heroes-Launches-Matrix-Machinima-Contest
- Franzen, B (dir.) (2009) *Copyright Criminals*, motion picture, Copyright Criminals, LLC, Changing Images, LLC, and ITVS
- Fricklas, M (2009) [Accessed 21 December 2010] 'Copyrights, Markets, and Free Speech: Should we be free not to be free?', Yale University presentation [Online] http://www.youtube.com/watch?v=vVvC7bj26aU
- Friedman, D and Finke, B (2008) 'The Big Bong Theory', *GQ Gentlemen's Quarterly*, vol. 78, no. 2, pp.90–95
- Friess, S (2003) [Accessed 19 December 2010] 'Porn Strategy: Share and Snare', *Wired* [Online] http://www.wired.com/techbiz/media/news/2003/01/57348
- Frisch, M (2010) [Accessed 07 December 2010] 'Digital Piracy Hits the E-book Industry', *CNN* [Online] http://articles.cnn.com/2010-01-01/tech/ebook.piracy_1_e-books-digital-piracy-publishing-industry?_s=PM:TECH
- Gantz, J and Rochester, J (2005) *Pirates of the Digital Millennium*, Prentice Hall, New York
- Gatto, J, Blaise, B and Esplin, D (2009) 'Worlds.com Saber-rattling Portends a Trend in Virtual World and Video Game Patents', *Intellectual Property & Technology Law Journal*, vol. 21, no. 5, pp.8–13
- Gaylor, B (dir.) (2008) *RiP!: A Remix Manifesto*, motion picture, National Film Board of Canada and EyeSteelFilm
- Geist, M (2008) 'Transparency Needed on ACTA', *The Toronto Star* [Online] http://www.thestar.com/sciencetech/article/439551

- Gladwell, M (2004) [Accessed 13 November 2010] 'Something Borrowed',
- The New Yorker [Online] http://www.gladwell.com/2004/2004_11_25_a_borrowed. html
- Goldberg, L (2006) [Accessed 28 September 2010] 'No HOPE for this Fanficcer', *A Writer's Life* [Online] http://leegoldberg.typepad.com/a_writers_life/2006/04/no_hope_for_thi.html
- Graham, P (2004) Hackers and Painters, O'Reilly, Beijing
- Greenberg, A and Irwin, M (2008) [Accessed 19 December 2010] 'Spore's Piracy Problem', *Forbes* [Online] http://www.forbes.com/2008/09/12/spore-drm-piracy-tech-security-cx_ag_mji_0912spore.html
- Grice, C and Junnarkar, S (1998) [Accessed 25 October 2010] 'Gates, Buffett a Bit Bearish', *CNET News* [Online] http://news.cnet.com/2100-1023-212942.html
- Halliday, J (2010) [Accessed 11 September 2010] 'BT in Privacy Row After Sending Customer Data to ACS: Law', *The Guardian* [Online] http://www.guardian.co.uk/technology/2010/sep/29/bt-unencrypted-customer-data
- Hansen, E (2003) [Accessed 30 November 2010] 'eBay Mutes iTunes Song Auction', *CNET News* [Online] http://news.cnet.com/eBay-mutes-iTunes-song-auction/2100-1027_3-5071566.html
- Harris, J (2010) [Accessed 19 December 2010] 'Need For Speed: XNA', 1am Studios, blog posting [Online] http://www.1amstudios.com/games/NeedForSpeed/
- Harris, J, Stevens, P and Morris, J (2009) 'Keeping it Real: Combating the spread of fake drugs in poor countries', International Policy Network, UK
- Hartman, R (prod.) (2004) 'Pirates of the Internet', 60 Minutes, television program, CBS
- Helprin, M (2009) Digital Barbarism, HarperCollins, New York
- House Appropriations Committee (2002) *A Clear and Present Future Danger*, Ashburn, Virginia
- House Committee on the Judiciary, US Congress (1996) *The National Information Infrastructure: Copyright Protection Act of 1995* (H.R. 2441), Washington
- Hyde, L (2010) Common as Air, Farrar, Staus, and Giroux, New York
- If Symptoms Persist (2008) Television programme, mPedigree

- Ingram, M (2000) [Accessed 18 September 2010] 'Napster Offers Deal to Recording Industry', World socialist website [Online] http://www.wsws.org/articles/2000/oct2000/naps-o10.shtml
- Johns, A (2009) *Piracy: Intellectual Property Wars from Gutenberg to Gates*, University of Chicago Press, Chicago
- Johnsen, A, Christensen, R and Moltke, H (dirs.) (2007) *Good Copy, Bad Copy*, motion picture, Rosforth
- Johnson, S (2010) Where Good Ideas Come From: The natural history of innovation, Riverhead Hardcover, New York
- Jokeroo (2010) [Accessed 11 November 2010] 'Paranormal Activity 2 Review/909 Experiment', [Online] http://www.jokeroo.com/videos/yt/sdaf-paranormal-activity-2-review909-experiment.html
- Jones, B (2006) [Accessed 15 November 2010] 'The Swedish Pirate Party Presents their Election Manifesto', *Torrent Freak* [Online] http://torrentfreak.com/the-swedish-pirate-party-presents-their-election-manifesto/
- Keen, A (2007) *The Cult of the Amateur: How today's internet is killing our culture,* Doubleday, New York
- Kelly, R (2006) 'BlackBerry Maker, NTP Ink \$612 Million Settlement', CNN Money [Online] http://money.cnn.com/2006/03/03/technology/rimm_ntp/
- Kenner, R (dir.) (2008) Food, Inc., motion picture, Magnolia Pictures
- Khoo, N (2008) [Accessed 22 September 2010] 'Cutting off Someone's Internet Access for Illegal Downloading?', *Geekonomics*, blog posting [Online] http://asia.cnet.com/blogs/geekonomics/post.htm?id=63003196
- King, B (2001) [Accessed 02 September 2010] 'Fight Rages Over Digital Rights', *Wired* [Online] http://www.wired.com/politics/law/news/2001/01/41183?currentPa ge=2
- Kirk, R (2010) '2010 Special 301 Report', Office of the United States Trade Representative, Washington
- Krajec, R (2011) [Accessed 19 January 2011] 'Patent Litigation Encourages Innovation, Not Stifles It', [Online] http://www.krajec.com/blog/patent-litigation-encourages-innovation-not-stifles-it

- Kravets, D (2010) [Accessed 18 December 2010] 'Newspaper Chain's New Business Plan: Copyright suits', *Wired* [Online] http://www.wired.com/threatlevel/2010/07/copyright-trolling-for-dollars/#ixzz0yuUQDiZQ
- Lehrer, J (2010) [Accessed 17 September 2010] '1,084 Days: How Toy Story 3 was made', *Wired* [Online] http://www.wired.co.uk/magazine/archive/2010/07/features/how-toy-story-3-was-made?page=all
- LEK Consultancy (2005) 'The Cost of Movie Piracy', LEK Consultancy and the Motion Picture Association (MPA)
- Lemire, P (2007) [Accessed 07 December 2010] 'Three Chords and the Truth Part I', Leyendecker & Lemire, LLC [Online] http://www.coloradoiplaw.com/pdf/resources/Three-Chords-and-the-Truth-Part-1.pdf
- Leonard, A (2010) The Story of Stuff, Free Press, New York
- Lessig, L (2001) The Future of Ideas, Random House, New York
- Lessig, L (2004) Free Culture, The Penguin Press, New York
- Levy-Hinte, J (2004) 'The Digital Divide', Filmmaker, Summer, pp.72–92
- Love, C (2000) [Accessed 18 August 2010] 'Courtney Love Does the Math', *Salon.com* [Online] http://www.salon.com/technology/feature/2000/06/14/love/print. html
- Lucarini, L (2010) Patent Absurdity, motion picture, Free Software Foundation
- Lyons, K (2006) [Accessed 04 November 2010] 'Fretting Over Infringement', *Pittsburg Tribune-Review* [Online] http://www.pittsburghlive.com/x/pittsburghtrib/news/tribpm/s_465216.html
- Macy, A (1933) The Story Behind Helen Keller, Doubleday, New York
- Magee, C (2010) [Accessed 13 September 2010] 'Confessions of a Book Pirate', *The Millions* [Online] http://www.themillions.com/2010/01/confessions-of-a-book-pirate.html
- Makishima, P (2008) 'Rent a \$6 Self-destructing DVD at Airports', *The Boston Globe* [Online] http://www.boston.com/travel/blog/2008/10/rent_a_6_selfde.html
- Marco, M (2008) [Accessed 27 September 2010] 'EA Allows 3 "Activations" Of Mass Effect And That's It? Period?', *The Consumerist* [Online] http://consumerist. com/2008/06/ea-allows-3-activations-of-mass-effect-and-thats-it-period.html

- Marshall, A (2009) [Accessed 19 December 2010] 'The Fatal Consequences of Counterfeit Drugs', *Smithsonian magazine* [Online] http://www.smithsonianmag.com/people-places/Prescription-for-Murder.html?c=y&page=1
- Martell, D (2007) [Accessed 11 September 2010] 'Jobs Says Apple Customers Not into Renting Music', *Reuters* [Online] http://www.reuters.com/article/2007/04/26/us-apple-jobs-idUSN2546496120070426
- Mason, M (2008) The Pirate's Dilemma, Free Press, New York
- McArdle, J (dir.) (2007) On Piracy, motion picture, Celsius Studios
- McDermott Will & Emery (2007) [Accessed 18 September 2010] 'Defective Chinese Goods: Legal Risks and Protective Measures', [Online] http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/e6a6094d-ee63-486e-b8f1-c22c0a476e04.cfm
- McHugh, M (2010) [Accessed 10 December 2010] 'Woman Found Guilty (again) of Sharing 24 songs, Owes \$1.5 million', *Digital Trends* [Online] http://www.digitaltrends.com/computing/woman-found-guilty-again-of-sharing-24-songs-owes-1-5-million/
- McIllwain, J (2007) 'Intellectual Property Theft and Organized Crime: The case of film piracy', in: Albanese, J (ed.) *Combating Piracy*, Transaction Publishers, New Brunswick
- McNeil, D (2000) 'Selling Cheap "Generic" Drugs, India's Copycats Irk Industry', *The New York Times* [Online] http://www.nytimes.com/2000/12/01/world/selling-cheap-generic-drugs-india-s-copycats-irk-industry.html
- Mearian, L (2010) [Accessed 15 December 2010] 'Forget Digital Tunes: Analog music on the upswing', *Computer World* [Online] http://www.computerworld.com/s/article/9187001/Forget_digital_tunes_analog_music_on_the_upswing
- Meer, A (2010) [Accessed 18 December 2010] 'The Other Indie Philanthropy Bundle', *Rock, Paper, Shotgun* [Online] http://www.rockpapershotgun.com/2010/12/16/the-other-indie-philanthropy-bundle/
- Meltzer, J (dir.) (2007) Welcome to Nollywood, motion picture, Cinema Guild
- Meyer, S (2008) [Accessed 10 December 2010] 'Midnight Sun: Edward's Version of Twilight', blog posting [Online] http://www.stepheniemeyer.com/midnightsun. html

- Meza, E (2010) 'Pirate Party Fires Volley: Movement to limit intellectual property laws shows surprising strength', *Variety*, vol. 419, no. 5, pA4
- Miller, R (2006) [Accessed 18 December 2010] 'MS Shuts Down Halogen Mod... Why now?', *Joystiq* [Online] http://www.joystiq.com/2006/09/13/ms-shuts-down-halogen-mod-why-now/
- Mitchell, D (2005) [Accessed 22 December 2010] 'Manufacturers Try to Thrive on the Wal-Mart Workout', *The New York Times* [Online] http://www.nytimes.com/2005/02/20/business/yourmoney/20sell.html?pagewanted=all&position=
- Monblat, J (dir.) (2002) 'Attack of the Cyber Pirates', television program, BBC
- Morissette, N (2007) [Accessed 18 September 2010] 'Copier-coller aux Intouchables' ('Copy-paste the Untouchables') *La Presse* [Online] http://web.archive.org/web/20070328173853/http://www.cyberpresse.ca/article/20070321/CPARTS02/703210674/1017/CPARTS
- Murray, B (2004) Defending the Brand, Amacom, New York
- Naim, M (2005) Illicit, Doubleday, New York
- Nelson, C (2003) [Accessed 15 December 2010] 'Upstart Labels See File Sharing as Ally, Not Foe', *The New York Times* [Online] http://web.mit.edu/21w.784/www/BD%20Supplementals/Materials/Unit%20Two/Piracy/indy%20labels%20 like%20shar.html
- New York Post (2010) [Accessed 10 October 2010] 'No "Glee" Over No Royalties', [Online] http://www.nypost.com/p/pagesix/no_glee_over_no_royalties_ahwxPuTlo2YpVsWSOhAN2N
- Nintendo IR Information (2010) [Accessed 22 December 2010] 'Nintendo Conference Q & A Session', [Online] http://www.nintendo.co.jp/ir/en/library/events/100929qa/index.html
- Oberholzer-Gee, F and Strumpf, K (2007) 'The Effect of File Sharing on Record Sales: An empirical analysis', *Journal of Political Economy*, vol. 115, no. 1, pp.1–42
- Onyx Neon Press (2010) [Accessed 15 December 2010] 'Why Free?', [Online] http://www.onyxneon.com/books/modern_perl/index.html
- Parfitt, 0 (2009) 'Will Leak Help Wolverine?', *IGN UK* [Online] http://movies.ign.com/articles/972/972978p1.html

- Perone, T (2008) [Accessed 11 November 2010] 'Bon Jovi Sued for \$400 billion', New York Post [Online] http://www.nypost.com/p/news/national/item_ Yp8NtYfdj8Op8JMwxB7clN
- Philip, J (dir.) (2006) Yoga, Inc., motion picture, Bad Dog Tales, Inc.
- Pinchefsky, C (2006) [Accessed 13 November 2010] 'Fan Fiction, Part Two: City on the edge of copyright infringement', *Wizard Oil* [Online] http://www.intergalacticmedicineshow.com/cgi-bin/mag.cgi?do=columns&vol=carol_pinchefsky&article=009
- PR Web (2008) [Accessed 30 August 2010] 'On Eve of James Potter Sequel, Harry Potter Fan Fiction Heats up: Unlikely author poised to keep the story alive', [Online] http://www.prweb.com/releases/2008/07/prweb1080574.htm
- Ramani, R (2010) [Accessed 04 December 2010] 'Re: Russet Noon A Parody Sequel to Breaking Dawn by Lady Sybilla (the "Book")', Message to Ms. Glorianna Arias, letter [Online] http://fanlore.org/wiki/Image:Letter_re_Russet_Noon.pdf
- Ramsey, N (2005) [Accessed 06 November 2010] 'The Hidden Costs of Documentaries' *The New York Times* [Online] http://www.nytimes.com/2005/10/16/movies/16rams.html
- Refe (2009) [Accessed 19 December 2010] 'Lawmakers Praise Napster for File Sharing Innovation in 2000', *Creative Deconstruction* [Online] http://www.creativedeconstruction.com/2009/08/lawmakers-praise-napster-for-file-sharing-innovation-in-2000/
- Rich, M (2006) [Accessed 18 January 2011] 'Who's This Guy Dylan Who's Borrowing Lines From Henry Timrod?', *The New York Times* [Online] http://www.nytimes.com/2006/09/14/arts/music/14dyla.html?_r=2&th=&adxnnl=0&emc=th&adxnnlx=1158238978-cnkpSQFIU6EDbkL2zyeI5g&pagewanted=print
- Rich, M (2009) [Accessed 17 August 2010] 'Print Books Are Target of Pirates on the Web', *The New York Times* [Online] http://www.nytimes.com/2009/05/12/technology/internet/12digital.html?_r=1
- Richmond School of Law (2007) *What Do You Think?* Motion picture, Intellectual Property Institute
- Ringle, K (1996) [Accessed 15 December 2010] 'ASCAP Changes Its Tune; Never Intended to Collect Fees for Scouts' Campfire Songs, Group Says', *The*

- Washington Post [Online] http://www.law.umkc.edu/faculty/projects/ftrials/communications/ASCAP.html
- Robin, M (dir.) (2008) *The World According to Monsanto*, motion picture, Image et Compagnie
- Rockstar Newswire (2011) [Accessed 15 January 2010] 'Full Feature-Length Film Created with GTAIV: "The Trashmaster"', [Online] http://www.rockstargames. com/newswire/article/12771/full-featurelength-film-created-with-gtaiv-the-trashmaster.html
- Rodriquez, K (2005) 'Closing the Door on Open Source: Can the general public license save Linux and other open source software?', *The Journal of High Technology Law*, vol. 5, no. 2, pp.403–419
- Rojas, P (2004) [Accessed 07 December 2010] 'The Engadget Interview: Jack Valenti', Engadget [Online] http://www.engadget.com/2004/08/30/the-engadgetinterview-jack-valenti/
- Rotstein, R, Evitt, E and Williams, M (2010) 'The First Sale Doctrine in the Digital Age', *Intellectual Property & Technology Law Journal*, vol. 22, no.3, pp.23–28
- Saba, M (2009) [Accessed 13 November 2010] 'Mos Def's The Ecstatic: The T-Shirt', *Paste Magazine* [Online] http://www.pastemagazine.com/articles/2009/06/mos-defs-the-ecstatic-is-both-an-album-and-a-t-shi.html
- Salisbury, A (2009) [Accessed 19 August 2010] 'Sony Pictures CEO "Doesn't See Anything Good Having Come From The Internet", *Maximum PC* [Online] http://www.maximumpc.com/article/news/sony_pictures_ceo_doesnt_see_anything_good_having_come_internet
- Samuelson, P and Wheatland, T (2009) 'Statutory Damages in Copyright Law: A remedy in need of reform', *William & Mary Law Review*, vol. 51, pp.439–489
- Sanford, J (2010) [Accessed 15 January 2011] 'Why the Entire World Doesn't Steal from Harlan Ellison', Fiction, Thoughts, and Ramblings, blog posting [Online] http://www.jasonsanford.com/jason/2010/12/why-the-entire-world-doesnt-steal-from-harlan-ellison.html
- Schager, N (2006) 'Unfair Use: An Interview with Kirby Dick', *Slant Magazine* [Online] http://www.slantmagazine.com/film/feature/unfair-use-an-interview-with-kirby-dick/45

- Sciretta, P (2007) [Accessed 03 January 2011] 'Michael Moore's Sicko LEAKED Online', Film [Online] http://www.slashfilm.com/michael-moores-sicko-leaked-online/
- Smith, D (2007) [Accessed 05 December 2010] 'Dumbledore Was Gay, JK Tells Amazed Fans', *The Observer* [Online] http://www.guardian.co.uk/uk/2007/oct/21/film.books
- Springen, K (2005) [Accessed 19 August 2010] 'Writing Dynamo', *Newsweek* [Online] http://www.msnbc.msn.com/id/8917828/site/newsweek/
- Square Enix Legal Department (2009) [Accessed 12 November 2010] 'Re: Cease and desist: Chrono Compendium, Crimson Echoes', Message to Chrono Compedium, letter [Online] http://crimsonechoes.com/letter.pdf
- Strom, S and Gay, M (2010) [Accessed 19 October 2010] 'Pay-What-You-Want Has Patrons Perplexed', *The New York Times* [Online] http://www.nytimes.com/2010/05/21/us/21free.html
- Taylor, G (2009) [Accessed 29 October 2010] 'Napster 10 Years of Turmoil', *BBC News* [Online] http://news.bbc.co.uk/2/hi/technology/8120320.stm
- The Buggles (1979) 'Video Killed the Radio Star', audio recording, Island Records
- The Guardian (2007) [Accessed 13 December 2010] 'Second Coming for First Harry Potter', [Online] http://www.scenta.co.uk/home/search/cit/1706904/second-coming-for-first-harry-potter.htm
- The Independent (2010) [Accessed 11 December 2010] 'Hollywood Ate my Childhood: Why film remakes are desecrating our most precious memories', [Online] http://www.independent.co.uk/arts-entertainment/films/features/hollywood-ate-my-childhood-why-film-remakes-are-desecrating-our-most-precious-memories-2032073.html
- Three Boys Music v Michael Bolton (2000) [Accessed 13 December 2010] Ninth Circuit Court, [Online] http://cip.law.ucla.edu/cases/case_threeboysbolton.html
- *TMZ* (2009) [Accessed 28 September 2010] 'Twilight Author Sued for Vampire Rip-Off', [Online] http://www.tmz.com/2009/08/19/twilight-stephanie-meyer-jordon-scott-lawsuit/
- Todis, V (dir.) (2010) 'Counterfeit Goods', *Crime, Inc.*, television program, CNBC Tremlett, G (2010) [Accessed 17 September 2010] 'Spain Finds that Film Piracy

- is a Hard Habit to Break', *The Guardian* [Online] http://www.guardian.co.uk/world/2010/mar/31/spain-film-piracy-downloading-dvds
- United States Government Accountability Office (2010) 'Intellectual Property: Observations on efforts to quantify the economic effects of counterfeit and pirated goods', United States Government Accountability Office (GAO), Washington
- Vaidhyanathan, S (2003) Copyrights and Copywrongs, NYU Press, New York
- Vance, A (2010) [Accessed 15 January 2011] 'Chasing Pirates: Inside Microsoft's war', *The New York Times* [Online] http://www.nytimes.com/2010/11/07/technology/07piracy.html?pagewanted=all
- Varney, A (2007) [Accessed 19 October 2010] 'The French Democracy', *The Escapist magazine* [Online] http://www.escapistmagazine.com/articles/view/issues/issue_88/496-The-French-Democracy
- Vitale, K (2010) 'Video Game Piracy in the Philippines: A narrowly tailored analysis of the video game industry and subculture', *Pace International Law Review*, vol. 22, no. 1, pp.297–329
- Vodpod (2009) [Accessed 17 November 2010] 'Hulu Reveals Its Secret, An Evil Plot to Destroy The World', [Online] http://vodpod.com/watch/1328642-hulu-reveals-its-secret-an-evil-plot-to-destroy-the-world-enjoy-
- Warwick, H (2000) [Accessed 19 August 2010] 'Syngenta: Switching off farmers' rights?', *Genewatch* [Online] http://www.genewatch.org/Publications/Reports/Syngenta.pdf
- Washburn University (n.d.) [Accessed 03 December 2010] Copyright Glossary, [Online] http://www.washburn.edu/copyright/glossary/
- Watts, R and Chittenden, M (2009) [Accessed 11 January 2011] 'All Shook Up: Small traders hit by music snoops', *The Sunday Times* [Online] http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article5581353.ece
- Weiss, D (2010) [Accessed 28 November 2010] 'Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print', *ABA Journal* [Online] http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print/

235 References

Wolk, D (2009) [Accessed 22 December 2010] 'The Future of Music: The Celestial Jukebox', *Wired* [Online] http://www.wired.com/dualperspectives/article/news/2009/05/future_of_music_jukebox

Wu, T (2006) [Accessed 08 November 2010] 'Copycat: Can China create its own Hollywood?', *Slate* [Online] http://www.slate.com/id/2144789/



- Anderson, C (2008) *The Long Tail: Why the future of business is selling less of more,* Hyperion, New York
- Bocij, P (2006) The Dark Side of the Internet, Preager, Westport
- Kempema, J (2008) 'Imitation is the Sincerest Form of... Infringement?: Guitar tabs, fair use, and the Internet', *William and Mary Law Review*, vol. 49, no. 6, pp.2264–2307
- Koons, D (dir.) (2004) The Future of Food, motion picture, Lily Films
- Kuhlen, R (2007) 'Knowledge and Information Private Property or Common Good? A global perspective', in: Lenk, C, Hoppe, N and Andorno, R (eds.) *Ethics and the Law of Intellectual Property*, Ashgate, Hampshire, England
- Litman, J (2001) Digital Copyright, Prometheus Books, New York
- McLeod, K and Smith, J (dirs.) (2007) *Freedom of Expression*, motion picture, Media Education Foundation
- Patry, W (2009) *Moral Panics and the Copyright Wars*, Oxford University Press, Oxford, NY
- The Future of Intellectual Property on the Internet: A Debate (2000) Harvard University Law School's Berkman Center for Internet and Society, Harvard
- Tsai, T and Czarnecki, K (2008) 'Machinima Goes Mainstream: Digital filmmaking for the 21st century', *School Library Journal*, vol. 54, no. 2, pp.29–31
- Vaidhyanathan, S (2005) The Anarchist in the Library, Basic Books, New York
- Wolinsky, A (2003) *Safe Surfing on the Internet*, Enslow Publishers, Inc., Berkeley Heights, NJ

fin