

Virtual Piracy vs. Licensed Fraud

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Will file sharing be the death of copyright? Will the internet be the graveyard of Intellectual Property? Will the "leaks" of whistleblowers become a flood, ending forever the monopoly of information held by governments and industry? Software designers, legal scholars, musicians and writers have joined with political activists to make these questions vitally relevant in the 21st Century. This is due not only to the technological innovations involved, but to the crisis of legitimacy facing capitalism and the growing opposition to its depredations. The absurdity of children being accused of "piracy" while bankers loot the public treasury undermines any reasonable hope that government will ensure justice. Claims that peer-to-peer would kill music have not only proven to be utterly false but have exposed the motives of those making them. Why else would a moral panic be sewn if not to divert attention from the fraud being carried out by the industries controlling Intellectual Property? From record companies to pharmaceutical firms, the threat posed by the internet is not "piracy", but an aroused citizenry no longer willing to be coerced or cajoled by multibillionaires who produce no music or medicine and yet extort their booty through ownership of copyrights and patents. If it were not obvious 12 years ago when the Napster case made headlines it is abundantly so today. The profits of all the major players in the music business have steadily increased even as the world was thrown into the "Great Recession". That these corporations can no longer be called "record companies" is part of a larger process that began before the internet. Monopolistic concentration is a function of capitalism, and, contrary to Schumpeterian claims of "creative destruction" have everything to do with accumulation of wealth and little or nothing to do with "innovation", as such. The myth of the "inventor-entrepreneur"-a la Thomas Edison-has been widely promoted to disguise the much more pertinent fact that scientific and artistic knowledge is developed through the open exchange made necessary by language, community, common interest and mutual benefit-not solely or even mainly by self-interest. More to the point, the specific history of copyright as it developed in the United States, reveals the deception necessary to get legislation passed in the first place.¹ The method is being employed again and the reason is that

¹Suisman, David *Selling Sounds*, Harvard University Press (2009), also, Isaac Goldberg & George Gershwin, *Tin Pan Alley: a Chronicle of the American Music Racket*, John Day Co. (1930)

for the first time in a hundred years large numbers of people are questioning the premises of laws that are oppressing them.

From its inception, the concept of Intellectual Property was advanced under the cloak of "the public interest". The booksellers and music publishers who clamored for copyright could indeed enlist some authors and composers in their cause but it was nevertheless apparent to all that only an appeal to society's general welfare would convince enough people to support legislation whose ulterior motive was to enrich a few businessmen. Indeed, there was opposition from many quarters, especially among those who immediately saw the contradiction between freedoms being demanded in the name of humanity and the limits that would inevitably be placed on those freedoms by copyright. If the printing press promised the widest possible dissemination of knowledge, how could restrictions be placed on this potential merely to benefit the owners of capital?² Piracy was invoked, then as now, to sow confusion and stigmatize well-founded opposition. This could not be completely successful, then as now, and for similar reasons. One country's pirate was another country's privateer. Plunder was the rule and conquest by force or fraud the objective of all parties concerned.³

While space permits only the briefest outline, it is necessary to present a small portion of the evidence that has been accumulating over the last two decades. But, above all, it is crucial that the framing of debate be done in the broadest historical, scientific and political terms, and not narrowly confined to those deemed "relevant" by defenders of the status quo. There are many perspectives from which to more accurately assess the current state of affairs but I have chosen five I find most useful. First, is the idea of moral panic which helps explain how the whole subject of piracy was introduced

² Thomas Jefferson is only one famous opponent of copyright. In his letter to James Madison, July 22 1788, Jefferson wrote:

"...it is better to establish trials by jury, the right of Habeas corpus, freedom of the press and freedom of religion in all cases, and to abolish standing armies in time of peace, and monopolies, in all cases, than not to do it in any... The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression."

³ For an in-depth account of this tortuous history, see: Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, Representations, 30, Spring 1990, 109-137

following the Napster case. Second, I examine the legal definition of piracy for both its specific content and how it is being used, not to curtail theft *per se*, but to criminalize sharing of any kind and to saturate the public sphere with private ownership, enforced by the police. Third, a brief look at the black market or underground economy which, oddly enough, is rarely considered in discussions of online activity. The significance of this "omission" is explored as well, reminding us that how discussion is framed can be decisive. Fourth, I touch upon piracy and popular resistance. There is a vast literature, especially the work of historian Eric Hobsbawm which examines outlaws of all kinds from bandits to pirates. But here we will look at the significance of popular movements, asserting freedoms ostensibly guaranteed by liberal democracy, being branded criminals. Not only is this evidence of what is really at stake in the present conflict, but it points toward revolutionary solutions. Finally, I raise fundamental questions of freedom, creativity and the commons. As with the rest of this essay, these are necessarily brief and introductory. My hope is that by at least broaching these subjects a more illuminating discussion can take place.

Moral Panic

Sociologists have, since 1973,⁴ used the term "moral panic" to describe a phenomenon wherein "moral entrepreneurs" spread fear among the populace that a grave threat to society is posed by those identified as "folk devils". Witch hunts are the classic example but so are present day campaigns that transform genuine concerns into mass hysteria. Moral panic perfectly describes use of the term "piracy" as applied to cultural products. Moral entrepreneurs-such as the RIAA or IFPI⁵-whipped up an irrational and groundless frenzy directed against the folk devils, in this case young people "stealing" music. The fact that they were successful is explained in part by their control of the media necessary to manipulate public opinion. They succeeded, therefore, not only in sewing moral panic but hiding their motive for doing so. This motive has, however, emerged over time. From the outset, the goal was to divert attention from a campaign underway since the late 1990's,⁶ i.e.: the defense and expansion of Intellectual Property regimes,

⁴ Cohen, S. (1973). *Folk Devils and Moral Panics*. St Albans: Paladin

⁵ The Recording Industry Association of America and the International Federation of the Phonographic Industry

⁶ Winseck, D. R. (2011) *Political Economies of the Media and the Transformation of the Global Media Industries: An Introductory Essay* Bloomsbury Academic

the Enclosure of the internet Commons, and suppression of any challenge to corporate rule.

Now, a decade after Napster, the facts confirm that this was the strategy. Contrary to wild assertions made daily, the music and film industries have profited handsomely at the very moment they have convinced many people that they are an endangered species. Simultaneously, these industries have mobilized sections of public opinion to support acts such as SOPA, PIPA and ACTA⁷ which move to criminalize activities that hitherto were subject to civil litigation. Nowhere in this affair is it reported that several countries, notably Peru and South Africa,⁸ as well as Indigenous People in many parts of the world, have accused major pharmaceutical and agribusiness interests of Bio-piracy, i.e., the misappropriation of traditional knowledge and genetic resources originating among particular populations mainly in the Global South. We are asked to support the prosecution of teenagers sharing files while ignoring the claims of Indigenous communities that their methods of cultivation and the resulting medicinal and nourishing plants are being taken and patented by Syngenta, Monsanto, Bayer and other giant corporations without the prior informed consent of these communities. We are further asked to ignore the persecution of Julian Assange and Bradley Manning who are not, incidentally, accused of piracy but of espionage and treason! Disseminating information via Wikileaks is evidently too much democracy for certain parties to allow.

Using data compiled in their own business and financial reports, the "Big Ten Network, Media, Entertainment and Internet Industries"⁹ have not only increased their profits in the so-called "age of free", they have consolidated into fewer and fewer separate entities thereby concentrating their control even further. Companies such as Apple, Google and Microsoft may enjoy an aura of refreshing novelty associated with the "knowledge" economy as opposed to the tainted image of the oil industry or the old telecommunications giants, AT&T, British Telecom, etc. But their products and practices-not to mention stockholders and, in some cases, boards of directors-are in no way distinct. The apparent conflicts between the Big

⁷ The Stop Online Piracy Act, The Protect Intellectual Property Act, the Anti-Counterfeiting Trade Agreement

⁸ The literature on this unfolding drama is extensive, but Wikipedia is a start. I am drawing on personal observations made attending WIPO meetings for four years on behalf of my NGO *Music In Common*. See also: The Copy South Research Group, <http://copysouth.org/portal/about>

⁹ Winseck, D. R. (2011) *ibid.*, p.8

Three music companies (Sony, Universal, Warners) and iTunes or other digital distributors are in fact negotiating positions, not conflicts in principle. The question is how profits are to be distributed and control of the markets monopolized.

For those who have been observing this situation unfold since the mid-1990's what is striking is how few of the promises made by gurus of the "information age" or "digital revolution" have materialized. As one report summarizes: "it was the techno-enthusiasts who seemed to crow loudest, predicting the imminent demise of television (Gilder, 1994), the music business (Barfe, 2003), the press (Negroponte, 1995), radio, and, in short, the 'old media regime' entirely due to the rapid growth of the internet (Thierry & Ekselsen, 2008, p. 31)."¹⁰ It must now be admitted that all these claims have proven false and were at best wishful thinking, at worst blatant hucksterism. Since music was used as the stalking horse (Napster) and continues to be the most common charge regarding piracy's nefarious effects, let's look at these figures: "Global 'music' industry revenues rose from \$51.2 billion to \$71.1 billion between 1998-2010"¹¹ While CD sales have fallen, all other uses of music-especially live performance and other media such as films, advertisements and video games-have garnered large increases in profits even during the Great Recession of 2008!¹²

But why was the term "piracy" chosen as opposed to "banditry" or "bootlegging" or some other designation for the unauthorized use of property?

Piracy

Piracy is defined by dictionaries and by international law as robbery at sea. More specifically, it must involve at least two vessels. According to the Max Planck Encyclopedia of Law¹³:

"Piracy by the law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas,

¹⁰ Winseck, D. R. (2011) , *ibid.* p10.

¹¹ Winseck, D.R- (2011) (drawing upon Price, Waterhouse, Coopers, 2010, 2009, 2003; IDATE, 2009)

¹² Rogers, Jim-(2013) *The Death and Life of the Music Industry in the Digital Age* Bloomsbury Academic

¹³ http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1206&recno=1&

which it is not the right or the duty of any nation to police, he is denied the protection of the flag he may carry, and is treated as an outlaw, as the enemy of mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish."

Lest there be any ambiguity, this article explicitly states: "The notion of 'pirate radio stations', reflected in Art. 109 UN Convention on the Law of the Sea whereby jurisdiction is given to States to suppress these on the high seas, is not a true example of piracy (→ Pirate Broadcasting). Still less is the notion of 'piracy' justified as applied to the unlawful sale and use of copyrighted material such as music, films, and books."

Even though the term "piratical" was applied to literary practices as early as 1564¹⁴ its statutory expression is: *copyright infringement* or *counterfeiting*. This differed from actual piracy in two crucial ways: universality and criminality. The Law of the Sea is by definition, universal. Copyright law has until this very day differed from country to country and in some cases did not exist at all (Cuba, China, the Soviet Union being, until recently, notable examples). Furthermore, application is necessarily debatable. In other words, what constitutes copyright infringement is settled on a case by case basis in civil court. In the vast majority of cases this involves litigation, not criminal charges, and is settled by financial awards. (Apple vs. Samsung, for example) The application of the term "piracy" today seeks to make sharers of music or other cultural products "hostis humani generis", that is, enemies of mankind. It is to close the gap between two uses of the same word, making the different actions they name equivalent and those engaged in either "whom any nation may in the interest of all capture and punish."

This still leaves a troubling question regarding what are obviously rampant and international practices. Could it be that "piracy" is just another name for black market or underground economy?

The Black Market

Research in this field was established long before the advent of the internet and the scope and influence of such economies are well documented. For example, it is reported that the black market or "informal economy" accounts for 1.8 billion jobs¹⁵ and 1.8 trillion dollars in revenue worldwide¹⁶. Under the heading "black market" are drug trafficking, arms

¹⁴ Oxford English Dictionary

¹⁵ Neuwirth, Robert in Scientific American (August 18, 2011)

¹⁶ Havocscope Global Black Market Information - <http://www.havocscope.com/>

trafficking, prostitution, tobacco and alcohol smuggling as well as the sale of "counterfeit" goods from drugs to electronics (both hardware and software). The "piracy effect", to which the present book calls attention, seems to be referring to something else. But is it, really? At least since the 1970's, with the advent of cassette tapes, music was "pirated" throughout countries of the Global South. From Jamaica to India, most music (and later film) was sold through vast networks of street vendors and home production facilities. To a large extent this continues today, albeit in forms modified by digital technology, the use of cellular phones and internet. The point here is not to make an exhaustive study of all manifestations of such black market or informal economies but to draw attention to one aspect of the division between the Global North and South, on the one hand, and to pin down the elusive term "piracy" in its multiple and contradictory uses, on the other. It need hardly be mentioned that all the criminal activities normally associated with the black market are punishable by long established laws making no reference to piracy. Furthermore, these activities continue to thrive, in some cases comprising not just the underground economy but the *only* functioning economy. (Nigeria is a prime example)¹⁷

Piracy and Popular Resistance

One other way the "piracy effect" could be interpreted is that the name, "pirate", has been adopted to express defiance of authority. For example, the Pirate Bay and the Pirate Party. Clearly, these are uses of an image-not an advocacy of criminality-and one, moreover, that puts the stigma on government and corporate attempts to limit freedoms that take precedence over mere business. Freedom of speech, assembly and the press along with free access to information are the cornerstone of liberal democracies, or so we are told. That these freedoms have long stood in contradiction with government secrecy, copyright and patent law is not surprising but in the age of the internet the threat of more democracy than ruling elites can allow has suddenly reared its head. The case of Pussy Riot is a prime example but is only the tip of the iceberg. As reported on the website, Chtodelat News, "The exhibition *Revolution in the Net* deals with social and political conditions in contemporary Russia, focusing on the political events surrounding the presidential election in spring 2012. It includes works by Russian artists and artist collectives: Olga Zhitlina; Factory of Found Clothes (FFC) represented

¹⁷ Larkin, Bruce, (2011) *Degraded Images, Distorted Sounds: Nigerian Video and the Infrastructure of Piracy*, Project Muse

by Natalya Pershina Yakimanskaya (Gluklya); and the collective Gentle Women (Nezhnue Babu, Evgenia Lapteva and Alexandra Artamonova). The exhibition is curated by St Petersburg-based curator Anna Bitkina." This report goes on to make a point people the world over will find applicable to their own situations: "The most immediate reactions to the current political situation continue to take place on the Internet, which is still a semi-free space where freedom of speech is less curtailed. This online revolt has created a network of people who care about the future of Russia, and has divided the country into those who are for and those who are against the Putin regime."¹⁸

Revolution is precisely what is at stake, in the net and in the world at large. What is most troubling, from the point of view of governmental and corporate authorities, is that popular resistance moves from the internet to the public square. From Cairo to Athens, from Madrid to New York, 2011 was a stunning reminder that virtual change is not acceptable. No matter what problems or promise there might be in cyberspace, confronting tyranny means taking to the streets. What is equally apparent is that suppressing the aspirations of the great majority of people-the 99%-is what unites all the corporations from Apple and Google to Exxon and Goldman-Sachs. This perspective enables us to cut through the confusing morass of claims and counterclaims, single issues and narrow constituencies, that have so long dominated debate. It makes possible the invention of means by which political struggle can be developed to serve the interests of the great majority of people.

Who's Pirating Who?

What ever happened to Freedom? If any idea was identified with the personal computer and the internet, it was Freedom. The potential for education, creative expression and effective citizenship inspired millions of ordinary people to seize the opportunities presented by these new technologies. To this day, a large constituency in many parts of the world oppose any attempts by government or industry to limit or repress Freedom on the internet. But what does "piracy" have to do with Freedom? If serious inquiry were made into the fabled Pirate Republic of Libertia, it would lead to the discovery of the political principles shared by many pirates in the so-called Golden Age of Piracy. Historians have described these as

¹⁸ Chtodelat News - <http://chtodelat.wordpress.com/2012/11/07/revolution-in-the-net-helsinki/>

"libertarian, democratic, federal, egalitarian, fraternal and communal."¹⁹ Intellectual Property has as little to do with such principles as Columbus' "discovery" of the New World had to do with saving the souls of Native Americans. Yet, ubiquitous as the term "piracy" is, it rarely elicits such inquiry. It is rare, even, that the obvious parallels between "digital piracy" and present day maritime piracy are drawn.

A German court recently convicted 10 Somali men of kidnapping and conducting an attack on maritime traffic. What came to light in this trial is that illegal fishing and dumping of toxic wastes in the waters of Somalia had ruined the local economy. Since the 1980s the Italian mafia, under contract to various European states, has been dumping nuclear and other toxic waste off the coast of Somalia. "European companies found it to be very cheap to get rid of the waste, costing as little as \$2.50 a tonne, where waste disposal costs in Europe are closer to \$1000 per tonne."²⁰ Simultaneously, illegal fishing was expanding out of control. According to various reports, this led to the acts considered piracy by the German court. "Through interception with speedboats, Somali fishermen tried to either dissuade the dumpers and trawlers or levy a "tax" on them as compensation" wrote Wikipedia.²¹ "It's almost like a resource swap, Somalis collect up to \$100 million a year from pirate ransoms off their coasts and the Europeans and Asians poach around \$300 million a year in fish from Somali waters.", wrote piracy expert Peter Lehr.²² Even mainstream news outlets asked, "Off the lawless coast of Somalia, questions of who is pirating who" (Chicago Tribune)²³

Who is pirating who? applies with equal force to the domains of copyright and patent. The enormous wealth of a few celebrities cannot justify the impoverishment of most artists or the expropriation of the cultural legacies of oppressed peoples.²⁴ The profits of pharmaceutical companies cannot justify the plunder of traditional knowledge and genetic resources developed by societies over thousands of years. Attempts to reform the

¹⁹http://en.wikipedia.org/wiki/Governance_in_18th_century_piracy#The_Dream_of_Liberalism

²⁰ Abdullahi, Najad (11 October 2008). "[Toxic waste' behind Somali piracy](#)". English.aljazeera.net.

²¹ http://en.wikipedia.org/wiki/Piracy_in_Somalia#Waste_dumping

²² [The Independent](#) (London). January 5, 2009. "[You are being lied to about pirates](#)"

²³ "[Off the lawless coast of Somalia, questions of who is pirating who.](#)" *Chicago Tribune*, 10 October 2008

²⁴ The glaring example of the musical heritage of African-Americans is typical and well-documented. See, for example, Suisman, David *Selling Sounds*, Harvard University Press (2009)

system have failed. Even such well intentioned efforts as Creative Commons only highlight the problem. Their virtue lies in popularizing concepts such as creativity and the commons. But because they fail to question the presumption at the root of Intellectual Property law they end up perpetuating an irreconcilable conflict. The very idea that ideas can be owned was contested the moment it was proposed.²⁵ The “balance” sought between mutually exclusive positions was then enshrined in law following the American and French revolutions. The result is anything but balanced. The divine right of kings to grant “privileges” to authors and publishers was overthrown, only to be replaced by the divine right of corporations to colonize the human mind. Now, however, the day of reckoning is at hand.

To free creativity from the shackles of ownership requires the liberation of the commons and its occupation by ordinary people. Therein lies the great potential of sharing. Trivialized and demonized by defenders of privilege, sharing holds a key for unlocking the doors of a prison. Not only is there great utility in the free exchange of knowledge but there is a far wider horizon in sharing effort and ideas than in hoarding great piles of lifeless objects. Long ago, the Greek philosopher Pythagoras, made *friendship*-defined as mutuality and equality-equivalent to *justice*. Individual acquisitiveness, especially the private appropriation of wealth, is anathema to social harmony. Or, as John Chrysostom, wrote, "The rich man is a thief".

²⁵The debate between Diderot and Condorcet is documented in: Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, Representations, 30, Spring 1990, 109-137