CHAPTER 2

The Six Faces of Piracy: Global Media Distribution from Below

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The VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.

—Former Motion Picture Association of America president Jack Valenti

Rip, mix, burn.

—Apple iTunes marketing slogan

The public profile of debate around intellectual property (IP) issues has never seemed higher than in the last decade. Newspapers regularly feature coverage of piracy prosecutions, columnists debate the pros and cons of copyright extensions, studio-funded antitragleg promos appear on DVDs and in cinemas, and Hollywood trade papers overflow with updates on changes in copyright law, international trade regulation, and studio IP policy. A familiar cast of characters appears again and again—the teenage downloader, the corporate bigwig, the struggling independent artist, the “foreign” pirate-cum-terrorist.

In most public discourse, piracy either looms large as scourge and scandal or is talked up as the way of the future, but rarely is it analyzed systematically or contextualized historically. Rarely is the focus shifted away from the ethics of piracy and toward its broader contexts—its legal history, its economic functions, and its implications for knowledge and information distribution on a global scale. Through a series of six critical readings of piracy, I argue that we should understand it as, among other things, an alternative
**DEFINING PIRACY**

Piracy networks can be considered part of the informal sector, that subterranean zone of the economy that is largely untaxed, unregulated, and unmeasured. However, piracy is distinct from other areas of the informal economy, such as the drug trade, because pirate goods are not technically illegal in their own right. Rather, the illegality of pirate products is usually a function of their reproduction and sale.

The U.S. film industry’s flagship lobbying body, the Motion Picture Association of America (MPAA), defines piracy as “the unauthorized taking, copying or use of copyrighted materials without permission,” and is keen to remind us of its economic and social cost by invoking dramatic statistics such as these:

- The major U.S. studios lose $6.1 billion globally each year as a result of piracy.
- Losses to audiovisual industries worldwide are estimated at $18.2 billion annually.
- More than 34 million illegal discs and 3,362 burners were seized in anti-piracy operations in 2005.
- 80% of global piracy originates from outside the United States, with especially high levels of pirate audiovisual consumption occurring in China (90%), Russia (79%), and Thailand (79%).
- Piracy operations have links to terrorist outfits, prostitution rings, drug smugglers, and other organized crime syndicates.

Other industry bodies such as the Cable and Satellite Broadcasting Association of Asia (CASBAA) define piracy more broadly, as “any form of revenue leakage from any point in the value chain”—a definition that perhaps highlights the way in which piracy often functions as a scapegoat for the industry’s own structural problems.

It is important to note that piracy is as old as cinema itself. Every new distributive technology has given rise to its own boogeyman. In the early years of the medium, U.S. distributors were plagued by “bicycling” and “jackrabit ing,” whereby film prints were screened in unapproved venues or extra screenings were put on without the distributors’ permission. The market for “bicycled prints” developed in the postwar period also irritated the studios. And with the invention of the VCR, home-based illegal dubbing became the biggest nightmare yet for the movie industry, which feared that its entire existence was under threat. As ludicrous as this sounds today, it tells us something interesting about both the history and the future of the “war on piracy.” While the studios strategically play up their purported financial woes when it is useful to do so, global theatrical revenues in fact rose 20 percent in 2006, which suggests that despite all the hype piracy is having little impact on the industry’s bottom line. A recent study by the criminologist Majid Yar supports this conclusion, arguing that the piracy “epidemics” decried by industry moguls are often a product of PR campaigns by the studios combined with legislative changes that declare more and more everyday audiovisual activity illegal.

I shall have more to say later about the extent to which piracy threatens or bolsters the existing power structures within the entertainment industry. However, to fully appreciate the implications of piracy, we must first examine the legal framework against which it is defined.

**A BRIEF INTRODUCTION TO COPYRIGHT**

Copyright law is conventionally understood as a common-sense way of protecting the rights of cultural producers, rewarding them for their efforts and fostering future innovation. The extent to which copyright in its present form does these things is open to some debate; however, what I would like to suggest here is that, as well as being a legal framework, copyright is also a historically and culturally specific ideology, one founded upon modernist notions of innovation and deeply embedded in capitalist thought and practice. For this reason, it is important not to take its normative claims as gospel.

The history of copyright is a long and convoluted one and has been the subject of numerous scholarly works from across the disciplines. Interestingly, one of the earliest forms of copyright was a de facto form of state censorship—in sixteenth-century England, a group of publishers known as the Stationers Guild were granted the right to publish commercially on the condition that they steer clear of anything critical of the Crown. Other precedents can be found in ancient Greece, Italy, and The Netherlands. However, most scholars trace the origins of modern copyright to early eighteenth-century England—and specifically to the passing of the Act of Queen Anne in 1710. The Act of Anne provided authors and publishers with the first enforceable period of monopoly control over their intellectual labor (for a period of 14 years, extendable once only), after which a work would enter into what would become known as the public domain. This was considered to be a fair trade-off between the competing demands of individual authors and civil society, which was presumed to benefit from a freely accessible archive of cultural production.
The globalization of copyright law has been underway since the late nineteenth century. In 1886, the Berne Convention for the Protection of Literary and Artistic Works was signed by a number of European nations and would go on to become the key template for global copyright regimes of the twentieth century. An Anglo-American agreement was also signed in 1891, harmonizing some of the discrepant traditions in both nations. This process was consolidated and extended with the 1948 Brussels Convention (which granted copyright protection to cinema) and the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which formed part of the final Uruguay round of the General Agreement on Tariffs and Trade (GATT). The GATT's successor, the World Trade Organization (WTO), has been a prime disseminator of the "new world order in knowledge" ever since, supporting policies that tend to favor established players in the agribusiness, information technology, entertainment, and other IP-based industries. Those few recalcitrant states that have attempted to water down their copyright protections—a group that has included, at various times, Hong Kong, China, and Brazil—have generally either been bought off with trade incentives or disciplined with restrictions and embargoes.

Three key points can be extracted from this potted history of copyright. First, copyright regimes—particularly in their current "hard" incarnation—function to convert knowledge into capital. Copyright is thus inextricably linked to the development of free-market capitalism and what is sometimes dubbed information capitalism. Furthermore, we should be aware that copyright's reach extends beyond the realms of the economic and the legal and into the cultural: it designates forms of cultural production as either legitimate or illegitimate based upon a set of values that privilege "progress" and "innovation." In contrast, the public domain is always defined negatively—as that which is "left over after all other rights have been defined and distributed." Second, copyright terms have been steadily increasing, meaning that knowledge and cultural production are kept out of the public domain for longer and longer periods. Copyright terms now extend up to 70 years after the death of the creator in many territories. Term extensions have been a key feature of recent U.S. trade deals, such as the 2005 U.S.–Australia Free Trade Agreement, which required that Australia fall in line with the restrictive IP framework outlined in the U.S. 1998 "Sonny Bono" Copyright Term Extension Act. (As one would expect, this Act was the result of intensive lobbying on the part of American software and media corporations. Disney led the charge, motivated by the fact that its copyright on the infinitely profitable Mickey Mouse was set to expire. For this reason the Extension Act is commonly referred to as the "Mickey Mouse Protection Act.") Similar agreements have recently been signed with many other nations. The U.S.–Korea FTA is expected to have a particularly harsh effect on the Korean film industry, which has been booming over the last decade, as it mandates the partial dismantling of one of the key drivers of the industry's success: a domestic screen quota. Finally, wherever IP industries have political clout, constant pressure for further extensions exists. For example, an alliance of British record companies, with the help of aging rock stars such as The Who's Roger Daltrey, mounted a high-profile campaign in 2007 to lobby for legal changes in the European Union (EU) with the aim of instituting a new music copyright term of 90 years. This proposal was eventually rejected by the British government—however, it is only a matter of time before it is put back on the agenda.

Third, it is important to note that art and business are not always diametrically opposed in IP debates. The history of copyright is full of examples of cultural producers who, understandably, have been more interested in their incomes than in the future of the public domain. Wordsworth, Twain, and Dickens were all champions of copyright, as are the band Metallica and the director George Lucas contemporarily. Even Spike Lee, a radical filmmaker acclaimed for his unflinching analyses of contemporary racial politics, has been a vociferous defender of his own IP rights. We should also note that copyright law has on many occasions been used as a legal tool to protect the rights of individual artists against corporate interests. For example, the "moral rights" (droit d'auteur) provision of European copyright law (to which the United States has long objected) was the basis for John Huston's court victory over MGM in relation to the colorization of the 1950 film The Asphalt Jungle.

This complication duly noted, the implications of current copyright regimes for many types of cultural production are quite alarming. One frequently cited example concerns an independent filmmaker whose documentary on opera stagehands unintentionally included four seconds of The Simpsons. (During one take, the program had been playing on a TV set in the background.) Despite obtaining the personal blessing of Simpsons creator Matt Groening, the filmmaker was threatened with a lawsuit by the copyright holder, Fox, which demanded a whopping $10,000 clearance fee. The filmmaker's legal advice suggested that even though the sequence would probably be covered by "Fair Use" provisions in U.S. copyright law, which allow the use of copyrighted material in certain circumstances, the potential court battle would most likely be decided by the size of each side's legal team—and given the resources of Fox's parent News Corporation, the filmmaker had little chance of success.

As this episode suggests, copyright has strayed a long way from its original purpose, and Fair Use provisions cannot always be relied upon to protect the rights of cultural producers. So where does this leave piracy? Violations of an ethical/legal system can only be considered inappropriate if we believe in the principles and the efficacy of that system to begin with. Thus, if we accept that copyright is a flawed system built around a specific political and
economic worldview, does this not occasion a reappraisal of pirate reproduction? Given the high visibility of current debates around file-sharing and digital IP law, is it not time to complicate the common-sense assumptions that inform our understanding of copyright and, in so doing, to open up a series of vantage points on its opposite number—piracy—which do not necessarily involve its reflex condemnation?

With this aim in mind, what follows is a series of critical readings of piracy from six different perspectives.

RETHINKING PIRACY: SIX CONCEPTUAL MODELS

Piracy as Theft

Let us begin with the most common understanding of piracy. As I have outlined so far, IP regimes understand creativity to be a form of capital. Copyright is the regulatory mechanism that oversees this property system, ensuring that markets remain healthy and that levels of protection for IP rights-holders are on a par with those extended to other property owners, such as land owners or car owners. From this perspective, it is suggested, copyright is something that should be not only defended but also legislatively boosted and pedagogically entrenched. Piracy, on the other hand, is imagined as a parasitic act of social and economic deviance.

Writers such as Pat Choate and Paul Paradise are representative of this conventional reading of piracy, which is in line with mainstream political and legal thought throughout the West. In the arena of film, this approach to piracy is best exemplified by the aforementioned Motion Picture Association of America. The MPAA’s antipiracy activities have been the envy of other sectors of the IP industries because they resulted, at least until the emergence of peer-to-peer (P2P) technologies, in the virtual eradication of large-scale commercial movie piracy in the United States, Australia, Canada, and most of Western Europe. No one has been more vocal in their denunciations of piracy, nor more florid in their rhetoric, than the MPAA’s former president Jack Valenti. A former aide to Lyndon Johnson, this powerful lobbyist ran the MPAA from 1966 until 2004. He contributed significantly to several landmark legal offensives, including the failed 1984 Sony Corp vs. Universal City Studios (“the Betamax case”), which sought to stamp out the booming home video industry, and the much-maligned Digital Millennium Copyright Act in 1998.

Now deceased, Valenti was a legendary orator in his day. During Congressional hearings for the Betamax case, he famously quipped that “the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.” He regularly referred to piracy as “a pandemic” that robs IP industries of what is rightfully theirs, and he was also fond of making (frequently unsubstantiated) connections between piracy operations and terrorist groups including Hezbollah, Hamas, the IRA, Al Qaeda, and Lashkar-e-Taiba.20

The MPAA’s war on piracy has sought to embed an ethics of copyright in the global mindset. In the past, MPAA ad campaigns have attempted to counter the widely held belief that piracy only harms the stock options of studio moguls by presenting the audience with stories from Hollywood technicians and tradespeople regarding the threat posed to their livelihoods by illegal copying. MPAA competitions such as the “Xcellent Xtreme Challenge” offer DVDs and Hollywood studio trips to children who submit anti-piracy essays. The organization’s Web site even promotes a cheerful “Copyright Kids” game (www.copyrightkids.org) where children can familiarize themselves with the virtues of IP by registering their own poems, paintings, and drawings for protection.21

However, much of the MPAA’s rhetoric unravels upon closer inspection. Statistics from the MPAA on piracy losses tend to defy the most basic tenets of economics because they are often based on calculations that presume that for each movie accessed illegally a legitimate version of the same film is unsold. This logic is fundamentally flawed, for it ignores the influence of pricing levels and distribution in media consumption. For example, legal VHS/VCD hire in Korea has traditionally been very cheap and accessible thanks to an extensive network of local family-run stores.22 As a result, piracy levels have been very low for much of the last few decades. In China, however, where cinema admission and legal movie purchasing is much more expensive in comparison to average wage levels, piracy is rampant.23

Furthermore, reports of industry “losses” are usually based on gross rather than net figures and are necessarily suspect given that piracy’s subterranean and disreputable nature means attempts to quantify it are speculative at best.24 And even if such figures were reliable, the purported piracy boom of recent years has as much to do with increasing amounts of everyday activity being criminalized as with verifiable increases in illegal activities. As Majid Yar argues, piracy statistics tend to function as self-fulfilling prophecies:

[11] High figures put pressure on legislators to criminalize, and on enforcement agencies to police more rigorously; the tightening of copyright laws produces more “copyright theft” as previously legal or tolerated uses are prohibited, and the more intensive policing of “piracy” results in more seizures; these in turn produce new estimates suggesting that the ‘epidemic’ continues to grow unabated, which then legitimizes industry calls for even more vigorous action.25

Like the music industry’s campaigns against illegal downloading, the film industry’s war on piracy is in many senses a public relations exercise aimed
at reinforcing a delerential relationship to copyright at the level of everyday consumption and showing the "vulnerable" side of a profitable and quasi-oligopolistic industry. However, this rhetoric is somewhat disingenuous, for piracy is still above all a form of film consumption, and this consumption can often be made profitable for the studios in other ways. As Toby Miller has argued, piracy breeds a "Hollywood habit," familiarizing global audiences with American product and softening up markets for future exploitation. It also adds value to prenegotiated product placement deals, increasing revenue streams via the back door. Finally, it is worth recalling that digital piracy is actually Hollywood’s own digital Frankenstein: Not only is it a side-effect of technology developed by the major studios, but it is also made possible in many cases by DVD preview discs secretly copied by U.S. technicians during postproduction—and even, in one memorable case, by an Academy of Motion Picture Arts and Sciences member.

Let us move now to another perspective on piracy, one that sees copying as a potential business model rather than a form of deviant behavior.

Piracy as Free Enterprise

While several of the alternative approaches to piracy that I outline here involve a critique of capitalism, one does not. This perspective—what we might call the extreme laissez-faire model—reads piracy as the purest form of free enterprise. Unimpeded by restrictive legislation and monopolistic market structures, piracy from this vantage point can be appreciated as a flourishing of commercial activity catering directly to market needs. For example, certain economists have argued that greater economic efficiency can be achieved in a liberalized regulatory environment where the reduced returns to copyright holders would be offset by the productivity gains arising from lower prices and wider availability of cultural goods. A recent editorial in The Economist (July 2, 2005)—which is hardly a bastion of anticapitalist sentiment—even suggested that copyright terms should be stripped back to 14–28 years in order to boost innovation. In other words, a persuasive argument can be made on economic grounds alone that strong copyright is undesirable. Indeed, if we push this argument to its logical limit, it becomes possible to read piracy as the quintessential form of free enterprise. This view suggests that the two competing objectives that copyright seeks to balance—collective progress and individual profit—are in fact collapsible into a brave new world of unbounded capital and information exchange.

Contemporary China provides an excellent example of these contradictions. The nation’s thriving pirate economy is often represented as the Mr. Hyde to global capitalism’s Dr. Jekyll, but it is more than this. In many ways, piracy is a side-effect of the boom in “legitimate” enterprise that has followed China’s accession to the WTO, as it is based upon factors such as increased consumer activity, the rise of digital technology, new levels of commercial autonomy for Chinese businesses, and the technologization of mass production practices. In fact, Warner Bros. Chinese operation chose as its first home video licensee a well-known piracy outfit (the Xianke company), which makes a mockery of the MPAA’s moralistic IP rhetoric. My point here is that piracy is still a lucrative form of business, that wealth is still created and exchanged—it’s just that the distribution of this wealth takes a different form.

The recent history of DVD technology offers another example. Consumers shopping for new DVD players are often faced with an interesting choice. One can buy an expensive brandname unit loaded with all the irritating anti-copying mechanisms that make life difficult (region coding, Macrovision, copy protection, and so on). Or, for half the price, one can choose a generic brand that will allow you to play what you want, where you want, when you want—it, in many cases, the manufacturers of these units are not part of vertically integrated audiovisual empires and have little to gain from the extra time and expense that is required to install copy-prevention technology in their players.

Here we have two competing models of capitalism: on the one hand, an oligopolistic, vertically integrated, top-heavy capitalism that perpetuates itself through collusion with the state via technical standards, trade deals, copyright regimes, and so on; and, on the other, a less formal, often extra-legal variety of enterprise that operates between the cracks in existing economic structures and frequently outstrips its legally sanctioned counterpart in efficiency, speed, and flexibility. This second model resembles what film theorists Chuck Kleinhans and Darrel Davis refer to as “cockroach capitalism.” This is an apt metaphor: cockroaches, like pirates, tend to live in cracks and dark spaces; they move fast and multiply quickly; they feast on whatever scraps are available; and they are extremely difficult to squash.

Over the years Sony has evolved from cockroach status to pest-killer. During the aforementioned Betamax case, the Japanese electronics giant was still largely a hardware manufacturer and was thus on the receiving end of the MPAA’s anti-home video offensive. It was portrayed by the studios as a rogue company trying to erode copyright protection and destabilize the industry. Two decades later, Sony is now in the opposite position. Its recent attempt to shore up IP protection in the face of cockroach competition involved concealing spyware and data-collection utilities in the copy-protection software on Sony RMG CDs—a sneaky strategy that became a public relations disaster.

The laissez-faire approach to piracy is gaining traction as the P2P revolution forces the culture industries to develop business models based around revenue sources other than box office admission and record sales. It has precedents in other informal economies. One example is the adult industry—a grey zone that remains one of the more profitable sectors of the entertainment market even though piracy levels may run at up to 85 percent. However,
rather than bemoaning the loss of their customers astute porn distributors accept piracy as a given and build this into their business models. As the CEO of adult distributor Nectar Entertainment has commented, “If someone’s stealing my stuff, I see it as great PR and great marketing.”

Whereas Valenti sought to damn piracy through discursive connections to porn and the criminal underworld, the laissez-faire brigade might notice something more productive in this connection. Such is the logic of the shadow economies. However, this fact reminds us that piracy is always more than an ethical issue—it is at the same time economic, social, and, as we shall now see, political.

**Piracy as Free Speech**

Arguably the most effective critiques of current copyright regimes have been coming from a group of vocal, tech-savvy American liberals. Often affiliated with the open-source movement and such bastions of “technoliberalism” as Wired magazine and the Electronic Frontier Foundation, writers including Lawrence Lessig, Siva Vaidhyanathan, Michael Strangelove, and J.D. Lasica have published popular critiques of copyright culture over the last few years, helping to give the issue a degree of public visibility. They argue that copyright’s intended balance between free speech and the free market is increasingly favoring the latter over the former: Consumer rights are being compromised, and the future of innovation is under threat. Furthermore, these writers—and many others—feel that the piracy issue is inextricably linked to the right of free speech.

The sympathies of Lessig and his contemporaries tend to lie with consumers and “creatives.” They are concerned, on the one hand, with the harsh penalties that P2P downloading attracts, with our inability to legally transfer data between different pieces of hardware, with the bugs and spyware that jam up our computers, with the monopolistic practices of Microsoft, and with other user-related issues. At the same time, they seek a way through the copyright minefield for directors, writers, musicians, DJs, animators, and, above all, software developers, via legal recognition of appropriative cut ‘n paste techniques as legitimate forms of expression.

In his book *Copyrights and Copywrongs*, Vaidhyanathan analyzes the history of copyright as it has applied to literature, film, music, and software, arguing that the current hard-lockdown phase of IP regulation is stifling creativity. He proposes a system of “thin protection” as the best way to ensure the fair compensation of creatives while still fostering a culture of innovation and freedom of information. Strangelove takes a more anarchic approach in his study *The Empire of Mind*, lamenting the Internet’s devolution from a space of culture-jamming and activism into a commercialized sphere ruled by IP autocrats. For Strangelove, piracy is a progressive act designed to take back what should rightfully belong to us all—the liberating potential of digital technology.

However, it is Lessig, a former Young Republican turned Stanford law professor and free-speech activist, who is the most prominent figure in this group. Lessig is the man behind Creative Commons, an easy-to-use alternative to copyright that has been attracting considerable attention within creative industries circles. Creative Commons operates on a “some rights reserved” principle. Artists who license a work under the Creative Commons system may still benefit financially from copyright protection, but they also give permission for the work to be used creatively by others (as samples, as source code, and so on) or for nonprofit purposes.

Lessig’s influential books *The Future of Ideas* and *Free Culture* have become bibles for the online libertarian movement. The latter is grounded in the information-wants-to-be-free rhetoric of cyberpunk. It argues that important forms of cultural production are under threat from the “copyright warriors” whose restrictive IP laws are in fact harming free enterprise. In Lessig’s words, Overregulation stifles creativity. It smothers innovation. It gives dinosaurs a veto over the future. It wastes the extraordinary opportunity for a democratic creativity that digital technology enables.

The sentiment expressed here is libertarian in that, like the laissez-faire extremists referred to earlier, Lessig sees state regulation as a threat. His argument valorizes innovation for its own sake; it is a reformist position that seeks a softening of certain aspects of the existing IP regime rather than the wholesale overthrow of the political and economic systems of which it is a component. Lessig is very clear about this, insisting at one point that his “message is absolutely not antimarket.”

Although Lessig notes that piracy has been a constitutive feature of the content industries since the invention of mass communication technologies, he shies away from celebrating piracy per se. In fact, he declares on many occasions his opposition to “theft,” drawing a line in the sand between acceptable piracy (cut ‘n paste cultural production, culture jamming, remix culture) and stealing. But as Kativa Philip correctly notes, there is something a little U.S./Euro-centric about this argument, given that many of the “bad” pirates Lessig has in mind are “foreign” in origin, or at least are constructed as such. This is a point to which we will return shortly. But in the meantime, let us consider a fourth reading of piracy, this time from the vantage point of cultural theory.

**Piracy as Authorship**

While the readings of piracy offered so far have revolved around material issues of access and economy, it is possible to approach the phenomenon from
other perspectives as well. Postmodern theory, for instance, has critiqued IP law by attacking a concept at the very heart of the discourse: authorship. Jacques Derrida, Michel Foucault, and Roland Barthes, among others, have all offered trenchant critiques of such concepts as originality, innovation, and expression, revealing the ways in which these common-sense notions are in fact saddled with all kinds of historical and ideological baggage. By pushing some of these ideas to their logical limit, it may even be possible to appreciate piracy as a form of cultural production in its own right.

However, before examining the postmodern critique of copyright let us consider how the legal frameworks around IP define originality. Copyright law makes a distinction between an idea and its expression. While ideas cannot be copyrighted, their expressions, in the form of films, books, poems, songs, and so forth, can be. This distinction presents several problems. First, the line between an idea and an expression is often a rather arbitrary one. Second, it has also been argued that the definition of authorship that is codified in copyright law is tipped in favor of those types of cultural production that are commodifiable (and thus marketable and saleable) and that are “fixed” in certain types of recognized sign systems, such as written language or musical notation. Many other forms of cultural production are excluded from copyright’s scope—for example, oral texts and traditions, physical forms of dance and theatre, and community-based knowledge and information. So, in effect, the kind of authorship privileged by copyright and IP discourse frequently functions as a gate that tends disproportionately to favor the developed countries’ contribution to world science and culture. Curare, batik, myths, and the dance “lambada” flow out of developing countries, unprotected by IP rights, while Prozac, Levis, Grisham and the movie Lambada! flow in.

As a result, copyright tends to privilege those forms of cultural production in which Western cultural industries specialize. This is no accident; on the contrary, it accurately reflects the historical, social, and cultural specificities that have shaped the Euro-American legal traditions upon which copyright law is founded.

Copyright also tends to erect boundaries between “legitimate” and “illegitimate” cultural activity. What passes for originality or appropriation, as opposed to theft or forgery, is in most cases determined by IP law rather than any universal standards of creative conduct. Some interesting examples of these tensions can be found in postmodern art of the 1980s. The American artist and provocateur Jeff Koons was famously sued for producing a sculpture (String of Puppies, 1988) based on a kitsch postcard image. His contemporary Sherrie Levine rephotographed the Depression-era images of Walker Evans and exhibited them under her own name, while the video artist Douglas Gordon screened a slowed-down version of Hitchcock’s Psycho (1960) and called it 24 Hour Psycho (1991). All these works were attempting to make important points about what constitutes an “original” art work and to highlight the blind spots of copyright law, which offers many artists little more in the way of protection than the easy publicity of a ready-made scandal.

A famous attack on conventional notions of authorship was mounted in the late 1960s by the French semioticist and cultural theorist Roland Barthes, whose canonical essay “The death of the author” is one of the key texts of postmodern theory. Arguing, among other things, that “it is language which speaks, not the author,” Barthes seeks to cut the text loose from the anchors provided by what we understand as authorship. Instead, Barthes sees creativity not as the unique expression of an artist’s subjectivity but as the selection and combination of fragments of already-existing discourse:

We know now that a text is not a line of words releasing a single “theoretical” meaning (the “message” of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from the innumerable centres of culture...

["The writer can only imitate a gesture that is always anterior, never original. His only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them.

This model of authorship has significant implications for the categories of originality, innovation, and authenticity upon which copyright law is founded. If, as the saying goes, there is nothing new under the sun, and the role of the artist or writer is simply to rearrange existing discourse in new combinations, then what makes a pirate any different from an artist? Only the fact that the pirate rests too long on one particular site, resisting copyright’s call to move along in a timely fashion.

Now, this argument may work at a theoretical level, but how useful is it when applied to today’s mediascape? Well, recall the famous Apple slogan “rip, mix, burn,” which explicitly situates creativity at the point of reproduction. Or consider the form of originality valued in DJ culture and how this differs from the modernist model of the self-contained, unified art work. From here we are only a small step away from the interpretation of piracy as a creative act in its own right.

This argument is especially pertinent to film, a profoundly collaborative medium which is subject to an array of value-adding processes in its voyage from studio to consumer—processes that have traditionally swallowed up the lion’s share of a film’s revenues (distributors retain upwards of 80% of home video takings, for example)—and that at the level of narrative and style frequently involve slight variations on a handful of well-worn themes anyway.
Taking all this into account, can we really claim that it is the copyright holder who is the sole “author” of a film?

Piracy as Resistance

While film industry lobbyists decry piracy, postmodernists read it as an intrinsic component of authorship, and the IT community sees it as either a necessary evil or a potential business model, others have read piracy as a form of subversion. Numerous studies by progressive cultural critics and Marxist political economists have drawn our attention to issues of ownership, power, and resistance within the media industries. Rather than being the creative expressions of their copyright holders, films are understood differently within this tradition—as “commodities whose value is derived from the labour that makes them.”45 Seen from this perspective, copyright is a legal institution that converts information and labor into capital for the benefit of a small coterie of multinational corporations. Thus, piracy—as a rejection of this economic order—has a certain political value.

Some of this may sound similar to the libertarian readings discussed earlier. Key differences exist, however. Unlike Lessig, many political economists are decidedly “antimarket.” They consider the media to be a system of control and exploitation that operates in the service of capitalism. Furthermore, they insist on the importance of class, whether in reference to the IP-rich capitalist barons or the workers whose surplus value they extract.

For example, Ronald Bettig’s authoritative 1996 study Copyrighting Culture argues that copyright represents a strategy of property regulation and market colonization. He provides a detailed history of copyright law, highlighting the “essential connection between the rise of capitalism, the extension of commodity relations into literary and artistic domains, and the emergence of the printing press.”46 He notes how the U.S. government, in close consultation with industry bodies like the MPAA, has institutionalized copyright culture globally through such means as trade sanctions against recalcitrant nations, FTAs with built-in IP boosters, multilateral initiatives such as GATT and the WTO, and increased infringement penalties and enforcement efforts.47 For Bettig, pirate circuits are spheres of commercial activity that have yet to be “recolonized” by transnational audiovisual empires. Bettig thus implicitly positions piracy as a practice that, in its obstruction of capitalist domination, represents a form of resistance.

A similar argument is posed by Toby Miller and others who, in their influential book Global Hollywood, opened up a new area of class analysis within media studies by exploring the political economy of film labor. Their interpretation considers not only the creative talent but also the “below-the-line” workers who paint the sets and drive the delivery vans. They argue that intellectual property laws are one of the key enablers of the major studios’ exploitative practices: “IP’s transformation of knowledge into property traditionally prioritizes ownership over use, creators over audiences and production over reception.”48 Global Hollywood lists numerous examples of heavy-handed IP “enforcement,” such as Disney’s lawsuit against a Florida school over the copyrighted cartoon characters painted on its buildings. They argue convincingly that the MPAA’s war on piracy is about markets rather than morals: In their eyes, IP law is a “strategic weapon” used to “license international exhibition and open up new areas of information management.”49 Here, as in the work of Bettig, piracy is implicitly valorized for its challenge to Hollywood’s hegemonic “new international division of cultural labor.”

The Hong Kong–based film theorist Laikwan Pang puts forward an extreme version of this argument in her recent book Cultural Control and Globalization in Asia. In what often amounts to a romanticization of piracy, Pang attempts to theorize pirate media “as a critical interrogation of today’s international cultural politics.”50 She argues that Hollywood pilfers content (styles, stars, and so on) from Asian cinemas while hypocritically waging rhetorical war against the East on the grounds of copyright infringement. For Pang, the only difference between the two forms of piracy is the technical issue of legality, which is itself defined according to legal structures that favor Hollywood.

However, Pang’s totalizing rhetoric—and the propiracy argument in general—can tend to obscure more than it reveals. There is little point excusing all pirates as subversive agents, just as there is little to be gained from blindly damning Hollywood and all it represents. We should not only be thinking of piracy in terms of theft and resistance, of right and wrong; we also need to start thinking about what it can do for communities across the globe by assessing its social, cultural, and economic effects as well as its moral implications.

We need to think in terms of access.

Piracy as Access

Recent work from postcolonial, legal, and development studies has offered a compelling, new interpretation of piracy, one that is concerned less with its ethics than with its potential. This approach is interested in the transformative aspects of piracy—in piracy’s capacity to disseminate culture, knowledge, and capital. It interrogates the relationship between technology and development, asking not “whose property?” but “whose future?”

Earlier on, I referred to the familiar cast of characters that populate the debates around piracy: the teenage file-sharer, the struggling cultural producer, the corporate bigwig, the pirate-terrorist syndicates, and so on. Missing from this picture are those forms of everyday piracy that take place in
the developing world. For instance, many communities aren't included in the kind of Marxist or libertarian critiques outlined previously because they may not belong to a working class per se, much less the creative class to whom Lessig addresses his arguments. Political economy's binary division between owners and workers has less to offer to those who exist beyond the boundaries of the latter category and who may indeed have something to gain from the technological modernity of pirate media.

In a compelling essay, the feminist/postcolonial theorist Kativa Philip unpacks some of these issues. Drawing on the work of Michel Foucault, Philip invites us to reconsider the familiar narrative of "technological authorship" from the perspective of "sites in the global south which are perceived, in the liberal democratic discourse of development stages, to be mired in the 'not yet.'"

What does it mean that, at the very historical moment that technological authorship seems to become widely accessible, the law marks off certain authorial spaces as transgressive? What difference does it make that a particular kind of ripping off happens on the margins of the industrialized world, among the "less developed" members of the WTO, at the apparent edges of the reach of western liberal democratic law, where the lines between authentic original and corrupted copy are being blurred by street vendors and high-tech entrepreneurs?

Philip thus suggests that the libertarian reading of piracy exemplified by Lessig uses the type of commercial piracy practiced in Asia as a kind of black sheep against which the free-software movement can define itself. In other words, she argues that the war on piracy is also about the struggle for authority and power on the global stage. In this geopolitical arm wrestle, "copying" has a double meaning: On the one hand, Asia is encouraged to imitate the West by replicating its political and economic systems and by promoting responsible digital citizenship; but on the other hand, alternative forms of "copying" (pirate reproduction) are strictly forbidden. Such an argument pushes debates around piracy into a whole new territory. By connecting everyday piracy to development and global politics, Philip makes a compelling case for taking piracy seriously as a route to social, economic, and political change.

One of the inspirations of Philip's critique is Lawrence Liang, a legal scholar based at Bangalore's Alternative Law Forum (www.alflawforum.org) whose work has also been influential in this debate. In the essay "Porous Legalities and Avenues of Participation," Liang develops this argument by emphasizing the fact that legality itself is a relative concept. He notes that millions of Indians live in a state of illegality every day of their lives, forced by socioeconomic circumstances to bribe officials for essential services or to steal electricity because no "official" sources exist. According to Liang, the "porous legalities" that characterize life in much of the developing world may be the only routes through which contact with the modernity that the West takes for granted may be realized. Piracy is therefore not solely about morality, freedom, or even resistance; it's also about "ways through which people ordinarilly left out of the imagination of modernity, technology and the global economy [find] ways of inserting themselves into these networks."

A third and final writer who has been able to give some experiential detail to these arguments is the Indian new media theorist Ravi Sundaram. In the absorbing essay "Recycling Modernity: Pirate Electronic Cultures in India," Sundaram defines "recycled pirate modernity" as an urbanized, everyday, nonlegal sphere characterized by speedy, small-scale practices of circulation (rather than production). This is a culture of cassette-based music trade, DIY computer networks, cheap mobile phone repairs, and pirate VHS/VCD movies, a "world of informal technological knowledge existing in most parts of India, where those excluded from the upper-caste, English-speaking bastions of the cyber-elite learn their tools." Sundaram's "recycled modernity" is a set of practices that conform neither to the boosterist hype of economists (India as a brave new world of service-sector innovation) nor to Marxist models of economic imperialism (India as a source of cheap labor and an object of exploitation). It is founded upon a variety of piracy that is not by definition oppositional or countercultural and has little in common with the kind of cut 'n paste postmodernity fetishized by Western academics. Instead, Sundaram presents recycled modernity as "a strategy of both survival and innovation on terms entirely outside the current debates on the structure and imagination of the net and techno-culture in general."

These three theorists alert us to the fact that there is a great deal at stake in debates around piracy, more than just the revenues of Hollywood studios and the leisure options of metropolitan elites. They help us to see that consumer rights issues, important though they are, tend to pale in comparison to piracy's potential as a productive force. As a form of information distribution, piracy has made a plethora of new social practices possible: grass-roots organization through pirated spreadsheet software, photocopied technical manuals, bootleg copies of banned novels, online activism facilitated by cheap IBM PC knock-offs, new forms of youth culture based around illegally procured CDs and tapes, and so on. In other words, piracy is a distributive technology—it enables ideas, knowledge, and cultural production to circulate in and through society—and should be recognized as such.

Film is particularly important in this regard. As the most prestigious of the culture industries (if no longer the most profitable), cinema is still an enormously influential educative technology. It teaches us how to think and feel; it offers pleasures of immeasurable power and value. This is why
the issue of film distribution is as important as access to software or books. Pirate circuits disseminate all kinds of media, from Hollywood blockbusters to more localized forms of cultural production. A prime example of this can be found in Nigeria’s enormously successful video-film industry. Sometimes dubbed “Nollywood,” this network of producers and distributors pumps out hundreds of films a year, none of which get shown in cinemas (most cinemas in Nigeria have shut down or been turned into churches). Instead, films are shot quickly on video or on digital and distributed cheaply on VHS and VCD. Operating completely outside conventional channels of film production, distribution, and exhibition, Nollywood has become the country’s most vibrant form of popular culture, not to mention a booming economic force in its own right. It has its own star system and a rising international profile. But the keys to its success have been low production overheads and efficient distribution networks that, as the anthropologist Brian Larkin has documented, evolved from pre-existing pirate circuits radiating out from the city of Kano, circuits that had previously moved bootleg Indian and American movies around the country and into neighboring nations.55

This is a powerful example of the productivity of piracy—of how illegal film distribution cannot only redistribute existing content according to market demand but also open up a space for whole new industries, new economies, new forms of cultural production, and new possibilities of change and survival.56

CONCLUSION

Bearing in mind the maxim that those who engage in crystal-ball gazing end up eating crushed glass, I would like to conclude by offering some tentative speculations as to the immediate future of the war on piracy. It seems likely that the protections offered to rights-holders by global IP law are unlikely to be diluted in any meaningful way in the short term, notwithstanding the odd reprieve for early-adopting Western consumers. IP debates will, however, become increasingly visible in public discourse and will continue to function as a crossover issue for development NGOs (nongovernment organizations), antiglobalization activists, technolibertarians and consumer groups. As broadband penetration and technological literacy levels rise, digital piracy will flourish despite the obstacles that studio-funded digital rights management (DRM) technology will place in its way. In the wake of iTunes, digital technology will present the entertainment industries with new distributive models, but it is likely that these will tend to favor the established players or to replace old corporate giants with new ones. In other words, the distribution bottleneck will continue to be the primary obstacle for both consumers and producers, even as our cultural industries become increasingly complex and interconnected.

In highlighting piracy’s productive potential, let me reiterate that I am not mounting a moral defense of piracy per se. Piracy does indeed hurt (some) filmmakers and artists, but given the extremely low rates of return offered to independent artists by most existing market structures, which privilege distributors over producers, it is worth taking all other alternatives seriously. In other words, we should be open to the possibility that pirate distribution often functions as an enabling energy rather than—as well as—a form of economic parasitism.

The open-source movement is helping to show that profit and ethical information management are not necessarily incompatible, but this alone is unlikely to lead to progressive forms of copyright law. Instead, what is required over the medium to long term is a deeper interrogation of the very foundations upon which our proprietary models of IP are constructed. This is by nature an interdisciplinary project, one in which academics, filmmakers, programmers, economists, lawyers, artists, consumers, and community groups may all find a voice. After all, there is more at stake here than entertainment. Skirmishes over DVD ripping and music downloading are linked in important ways to debates over affordable AIDS drugs, agribusiness patents, the “evergreening” of pharmaceuticals, and the future uses of the human genetic code.

As the most visible tip of this IP iceberg, the piracy debate may well influence outcomes in these related fields. For this reason, media scholars have both the opportunity and the obligation to become more involved with issues of distribution and to contribute in some small way to the debates taking place around one of the most pressing issues of our time.

NOTES

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Barthes, “The Death of the Author,” 143, 146.


Miller et al., *Global Hollywood* 2, 5 (emphasis added).


This argument is especially pertinent at the present moment given the U.S. government’s ongoing attempts to combat piracy in China and to bring the PRC into the global IP fold.

Miller et al., *Global Hollywood* 2, 226.

Ibid., 216.

Pang, *Cultural Control and Globalization in Asia*, 82.


Ibid., 96.


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