

The Pirate's Life is the Life For Me

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Introduction

In the past, new technologies have been catalysts of great social evolution. Our intrinsic desire for wealth drives us to seek profit using the tools available before us, even when that calls for adaptation. At a macro level, entire societies can evolve around the effects of a single invention. This process is happening again with the increasing availability and use of the internet. But, in addition to propelling us into the future, the internet has helped create a generation of individuals guilty of copyright infringement. The moral values of today's young adults are not in harmony with today's law. Many know that violating copyright is illegal, but they don't agree that it is immoral.¹ I argue that this tension will be resolved not by criminalizing our young adults, but by changing our business practices and our laws to reflect emerging social values and immutable properties of new technologies.

Literature Review

In his book, *Remix*, Lawrence Lessig asserts that copyright law needs to evolve to become suitable for the society that is emerging today. As a result of recent technological advancements, including digitization and computing, it has become easier than ever for individuals to be producers of culture. Proliferation of recording technology has also played a role. Unfortunately, our legal environment and common business practices haven't kept up. So there is a discrepancy creating both social and economic consequences. Fans and customers are sometimes alienated by a business' response to their goodwill gesture. The copyright system is too complex and inaccessible for the general public, who are now creators. He proposes ways to reform current copyright law so that it more effectively accomplishes its original goal, "To promote the Progress of Science and useful Arts", in light of modern technological developments.

1. Julie L Ross, "Generation of Racketeers-Eliminating Civil RICO Liability for Copyright Infringement, A," *Vand. J. Ent. & Tech. L.* 13 (2010): 55; Geraldine Szott Moohr, "Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws," *Am. UL Rev.* 54 (2004): 783.

His first suggestion is what we change how we deal with amateur production of transformative works. Lessig argues that we must distinguish amateur from professional work and create an exception that permits amateur, noncommercial remixes to be exempt from the distribution policies of copyrighted work. Furthermore, if an amateur remix is then later used for commercial profit, the original copyright holder should be compensated.

Resistance to this model, Lessig continues, won't be on the basis that amateur remixes will be competition. Rather, the issue is that copyright owners are obligated to restrict the use and application of their copyrighted works since they are held accountable for their use. That is, since it is within their power to prevent distribution of their work, then, if their work is misused, they are held socially responsible because they could have done something to prevent it. Lessig explains this concept in an example involving racial discrimination in the United States. It used to be the case, he writes, that some store owners did not want to deny African Americans from entering their shops. But, if they allowed it, they would lose more business from the white community than they would gain. To solve this, a law had to be created to prevent business owners from being able to deny service to individuals on the basis of their heritage. That way, store owners couldn't be blamed for allowing African Americans into their stores; they're just following the law. Similarly, in the context of copyright, if copyright holders aren't held accountable for amateur misuse of their work, they will not feel compelled to so tightly regulate it. Therefore, granting individuals the joy of participating in amateur creativity with the effect of drawing attention to the original content for the benefit of the copyright holder.

In his second point, Lessig argues against the overhead of copyright law. In current copyright law, all created works are automatically copyrighted. However, what has happened is that sometimes, increasingly more often, we come across some unit of culture—which we presume is under copyright, as that is the default—that lacks an indication of who the author or copyright holder actually is. The tendency, in those cases, is to stay on the safe side and not use the artefact in question, since the consequences of being found guilty of copyright

violation can be quite expensive.

Lessig's solution here is to revert copyright to an opt-in system. After a period of automatic protection, individuals will need to take steps to place their work under copyright. Being explicit about their copyright will improve efficiency of the overall system by reducing the amount of work required to check for the existence of copyright and enforce it. In Lessig's proposal, copyright expires after fourteen years. Requiring renewal ensures that copyright holders value their copyright by being required to put in some degree of effort to maintain it. He states, "[i]f it's not worth it for a copyright owner, after fourteen years, to take some minimal step to register her works, then it shouldn't be worth it for the United States government to threaten criminal prosecution protecting the same property." This will only become more important, as the means for producing culture are becoming more and more accessible to the common man. This leads into Lessig's next point.

Current copyright law was designed for a society in which copyrighted works were produced by corporations, and, since corporations had lawyers, copyright was something that pretty much only lawyers had to deal with. But this is no longer the case. Now, the copyright system must be accessible to support even teenagers. Lessig describes the doctrine of "fair use" as an example of an area of copyright law that has, historically, been a problematic area. It is acceptable for individuals to copy part of a copyrighted work for a purpose that falls under fair use. However, if the application of a work is called into question, even if it is protected under fair use, the cost and complexity for the individual can be overwhelming and not worth the bother. Copyright law needs to be simplified in way that allows individuals to be engaged with it in a way that is useful to them without the aid of the "company lawyer".

Lessig's final remark of the legal side of copyright is the assertion that Congress should decriminalize file sharing. The fact is that people have tried to prevent file sharing but they have never succeeded because they're trying to do something that is simply unnatural within the medium they're operating in. We could keep trying to come up with new ways to enforce existing copyright policy, but they will just keep being circumvented, and we will not be any

closer to ensuring that artists are compensated for their efforts. In addition, the file sharing community is arguably given too much credit for the decrease in music sales.² In fact, it is not unheard of for file sharing to increase sales by generating publicity.³ Lessig summarizes that the proper way to deal with file sharing is to design legal and economic models around what we are already doing instead of against it.

In addition to legal reform, Lessig argues that the social values of consumers and producers must change to become in agreement with each other and with the technology that everybody is now using. Law should exist to serve society and should be modeled on its values. But even our current social habits are still in need of some evolution in order for us to catch up with current technology. So Lessig lays out some norms for us to adopt.

He mentions two different ways that corporations respond to use of their intellectual property. More traditional institutions will seek to limit it. This practice has been reinforced by the design of current law. Yet in spite of our current tendencies, economic success need not be contingent on controlling every use of a copyrighted work. The more progressive companies of today will seek to capitalize on the effort of their fans to obtain free publicity.⁴ While the law may not facilitate this just quite yet, as social adoption of this practice increases, pressure on the law to follow will increase. Eventually, this methodology can become standard.

In conjunction with the act of licensing explicitly, people need to actively try to produce correct and accurate licenses. Individuals should be interested in employing licenses to properly reflect their intended restrictions or freedoms for the use of their work. Lessig points out that facilitating this is the goal of the Creative Commons project. The Creative Commons serves to abstract the process of producing internationally valid licenses, so that licensing is accessible to the general public. But, just having these tools is not enough. We

2. Felix Oberholzer-Gee and Koleman Strumpf, "The effect of file sharing on record sales: An empirical analysis," *Journal of Political Economy* 115, no. 1 (2007): 1–42.

3. RLSLOG, "Piracy isn't THAT bad and they know it," December 2007, <http://www.rlslog.net/piracy-isnt-that-bad-and-they-know-it/>.

4. Chris Anderson, *Free: The future of a radical price* (Century, 2009).

need to feel that using them is important. Making use of the existing copyright system to articulate the desire for how creative works should be used is a good step toward producing an entire social attitude that permits copying and remixing for noncommercial use.

Analysis

Lessig states that our legal system is in need of reform. I agree with this, and feel that actions of organizations, such as the Recording Industry Association of America (RIAA), in the past couple decades serve as evidence. The RIAA seek to deter copyright violation by enforcing existing laws. Apparently, this is done in order to protect the ability for copyright holders to capitalize on their creative works. But, as Reynolds explains, the methodology employed by the RIAA reflects a different motivation.

The general approach taken by the RIAA is to detect instances of copyright infringement and sue those suspected of being responsible for sharing copyrighted works without the consent of the copyright holder. Their process is to record the Internet Protocol addresses (IP addresses) of those who share copyrighted material, obtain the name and physical address of the individual associated with the IP address from the Internet Service Provider (ISP) who owns the IP address, and submit a lawsuit against that individual.⁵ However, for all the justice they apparently uphold, the RIAA has been subject to a great deal of criticisms regarding their tactics and are not a very popular group.

Their process is unreliable due technical reasons. There is no one-to-one correspondence between an IP address and an individual using the internet. IP addresses can be a starting point in an investigation into who did what online, but it does not make for conclusive and reliable evidence in and of itself. The RIAA, unfortunately, have a tendency to look over this technicality.⁶ One contributing factor to the unreliability of their method is the fact that,

5. Daniel Reynolds, "RIAA Litigation War On File Sharing and Alternatives More Compatible with Public Morality, The," *Minn. JL Sci. & Tech.* 9 (2008): 977.

6. Chadwick Schnee, "Sound Policy: The RIAA and the Copyright Act, A," *Pitt. J. Tech. L. & Pol'y* 9 (2009): p. 13.

as time passes, IP addresses may be rotated and assigned to different customers by the ISP that controls the addresses.⁷

Furthermore, there have been challenges against the RIAA's taste for lawsuit targets. "The RIAA has taken criticism for pursuing a U.S. serviceman (and threatening to expose sexually explicit files on his computer)."⁸ In addition to servicemen, the RIAA have a tendency to take action against the innocent, due to the technical failures of their methodology.⁹ Although the RIAA tends to belittle these errors, those who object to the practices of the RIAA feel that this is a more serious issue.

The RIAA have received also been accused of habitually exaggerating claims regarding the damages, and therefore the reparations, of an individual's copyright infringement.¹⁰ The consequences of exorbitant demands for money is that individuals must often settle out of court. The RIAA gives those they have accused the option of handing over a lump sum in exchange for having the charges dropped. This amount is significantly lower than the cost for individuals to defend themselves in court. So they will often choose to handle things this way in order to avoid legal fees. However, in combination with their spray and pray approach to suing potential targets, the effect is that innocent people fall victim to this form of extortion.

Finally, they have even been criticized for calling the act of illicit copying "piracy" or "theft". It is argued that this is a form of name-calling and a misrepresentation of the reality of the situation. In fact, a majority of those who take part in illicit copying and file-sharing do so for non-commercial reasons. Yet the RIAA fail to recognize the distinction.¹¹

The tactics used by the RIAA have been criticized as operating on extortion and defamation. And there is not a general consensus that what the RIAA are doing is effective or even

7. Schnee, "Sound Policy: The RIAA and the Copyright Act, A," p. 4.

8. Reynolds, "RIAA Litigation War On File Sharing and Alternatives More Compatible with Public Morality, The," p. 984.

9. John Swanson, "Don't Fight the Crime if You're Going to Sling Grime," *Fresh Voices: Composition at Cal Poly 2*, no. 1 (2010): p. 77.

10. Reynolds, "RIAA Litigation War On File Sharing and Alternatives More Compatible with Public Morality, The," p. 983.

11. *Ibid.*, p. 985.

morally right.¹²

One reason, I believe, for why the RIAA faces so much resistance is that there simply isn't a large or powerful enough majority of individuals who hold the norms that they do. Recently, we have seen the growth of a population that, in spite of copyright law, takes advantage of the internet's ability to facilitate copyright violation. There now exists a conflict between social values and legal ones for many teenagers and adults. The RIAA seek to accomplish reform by enforcing tradition. Their goal is for everyone to hold the social values that are derived from current copyright law. But the RIAA is not only fighting those who have been conditioned otherwise, they are fighting the invention that has done the conditioning.

The idea that technologies can have massive influences on social values is not especially new. The Amish are well aware of it. They are very careful about what technology they associate themselves with and introduce into their lives. They recognize that technology has latent effects, and use discretion in order to prevent unsatisfactory changes to their social values as consequences of the use of a particular invention.¹³ Another example of this is in the hypothesis that contraception produced the sexual revolution in the 60's.¹⁴

There is currently a conflict between the internet's influences of our social values toward abundant copying and the legal restrictions on copying. And, on the basis that the internet isn't going anywhere, the legal restrictions must change for the conflict to be resolved. Lessig agrees with this, saying that both the social and legal landscape ought to adjust to accommodate the nature of the internet. However, in the past, business models were based on the fact that copying and sharing culture was difficult and expensive. With the digitization of culture and the proliferation of the internet, this is no longer the case.¹⁵ Consequently, we see this business model struggling.

12. Reynolds, "RIAA Litigation War On File Sharing and Alternatives More Compatible with Public Morality, The."

13. Jameson M Wetmore, "Amish technology: Reinforcing values and building community," *Technology and Society Magazine, IEEE* 26, no. 2 (2007): 10-21.

14. Merritt Roe Smith and Leo Marx, *Does technology drive history?: The dilemma of technological determinism* (MIT Press, 1994).

15. Neil Netanel, "Impose a noncommercial use levy to allow free peer-to-peer file sharing," *As published in Harvard Journal of Law & Technology* 17 (2003).

The solution that people have been trying is, to force the existence of the market they need by artificially making copying difficult. But we have seen that this is a flawed approach both in its logical premise and in the practicality of its implementation. In conjunction with Lessig's argument, that copyright law and social practices need to change, we must also evolve our business practices such that their income models do not depend on the act of copying and sharing culture being difficult. Exactly how, is a matter of debate.

On the one hand, artists need to be able to profit from their work—this is what the RIAA is supposed to be fighting for. On the other hand, the use of the internet and the ability for culture to be made digital make copying and sharing technically trivial and virtually free. The desired solution is one in which both of these features exist. Lessig briefly describes two ideas that aim for this ideal. Both involve unrestricted permission for the sharing and distribution of copyrighted works for noncommercial use. The idea being that the general public wouldn't change how they already obtain copyrighted material, instead it would just become legal. And both involve some sort of way to collect wealth from consumers of culture as well as a way of measuring the popularity of creative works, in order to determine which producers of the consumed culture would receive the wealth. But the two ideas differ on their methods for collecting income from consumers.

The first idea involves collecting wealth from a levy imposed on certain products that are vaguely related to file sharing, such as computer hardware and CDs.¹⁶ This has been done before. As personal recording first became accessible, the Audio Home Recording Act was established in the United States to permit the use of recording devices at the cost of imposing a levy on recording equipment. However, this idea is criticized for being too abstracted from the issue. It's difficult to impose a levy that accurately taxes only those who are actually meant to be taxed. A levy is too general.¹⁷

The second idea, put forward by the Electronic Frontier Foundation (EFF), is to allow

16. Netanel, "Impose a noncommercial use levy to allow free peer-to-peer file sharing."

17. Reynolds, "RIAA Litigation War On File Sharing and Alternatives More Compatible with Public Morality, The."

users to pay a reasonably small, monthly fee for a license that would give them legal permission to share copyrighted content. In this scenario, giving fiscal support for artists would be a voluntary and intentional action. The author of the EFF article clearly states his belief that those who participate in copyright infringement through file sharing are not completely void of morals. It is argued that the population in general will pay the fee, even though there would be no technical factors forcing them to pay in order to obtain music. The paper by the EFF explains that similar things already exist, such as the service known as Last.fm.¹⁸

Each of these have their advantages, but they are not without faults. As previously stated, the levy is very abstract. That method would impose a tax on the wrong people. Another issue, which exists in both of the mentioned approaches, is the reliability of their metrics. In order to compensate content creators, we must measure the popularity of their content. But implementing a system that does that securely and reliably is non-trivial. If the system is poorly designed, it may become the case that content creators could provide fabricated statistics or otherwise distort the apparent popularity of their content in order to secure a greater portion of the earnings.¹⁹

I argue that both of these solutions move in the wrong direction. We should not be trying to fund the creation of products as if they were services. In order to determine what the ideal economic model would look like, we need to understand the fundamental economic principles.

Our economy of ownership exists as a necessary evil. We would love to feed everyone for free. Unfortunately, there is a cost to give someone a loaf of bread. There is the cost of growing and maintaining the raw materials, the cost of building bread from the raw materials, the cost of distribution, and the cost of labour and human time. We accept that prices are placed on these products in order to make up that cost.

But this is the simplest case. Things are more complicated when dealing with creative

18. Fred von Lohmann, "A Better Way Forward: Voluntary Collective Licensing of Music File Sharing," April 2008, <https://www.eff.org/files/eff-a-better-way-forward.pdf>.

19. Reynolds, "RIAA Litigation War On File Sharing and Alternatives More Compatible with Public Morality, The," p. 1000.

works. For these kinds of products, the cost of the first instance is greater than the cost of each subsequent instance, which we call a copy. A book is an example of one of these goods. The cost to produce a book includes, like the bread, the raw materials and the cost of distribution. But a certain amount of work is put into creating the ideas and the knowledge that the book conveys; the creative attributes. So, in addition to the fundamental cost of producing a material object, there is the cost of creative effort. But the creative cost only applies to the first copy. Once an author composes a book with a story, copies of the book can be made, such that the story is reproduced, but without the creative cost that went into the first copy.²⁰

Now, recuperating the cost of a loaf of bread was as simple as charging for the raw materials. But for a book, there was an initial investment of creative energy. In order to accommodate this, we have established the notion of intellectual property within the context of an economy of ownership. And we place a markup on the marginal cost of the book. In that, we include a fraction of the amount required to recuperate the cost of our first creative effort. Suppose we write a book or paint a picture or compose a song, we might feel entitled to a compensation of \$500 for the creative effort we put into its creation. If we expect to sell 100 copies, then we should supplement \$5 onto the price of each copy.

There is, however, a fundamental difference between the price that covers the cost of production and distribution and the price that covers the cost of the creative effort. The first is accepted as natural. Whereas the second is artificial. It is artificial in the sense that it is invented by the owner of the intellectual property. It is not a reflection of the cost to produce each copy. It serves a purpose that we feel is good, to provide a living for the producer. But it is a distortion of the cost to produce each copy for the goal of covering the cost of the first copy.

20. Some of the content here and in the following few paragraphs is roughly based on lectures and articles by Eben Moglen. See:

Eben Moglen, *Eben Moglen Lecture Edinburgh June 2007*, Lecture, Edinburgh, June 2007, accessed April 5, 2013, archive.org/details/EbenMoglenLectureEdinburghJune2007text

Eben Moglen, *The dotCommunist Manifesto*

And just as we would love to feed everyone for free, we would also love to be able to share knowledge with everyone for free. This is the ideal of the public library. A library eliminates the marginal cost of a book by sharing. It is a way of making the information in the book available for free. And it is not unethical. It's an okay thing because the book was, in the beginning, paid for.

The issue that has the RIAA in a fuss is that the idea of making up for the cost of the initial creative effort by placing a markup on the marginal cost does not work anymore. Capitalizing on the production of copies was achievable when it was expensive and could be controlled. But when there is no marginal cost and the ability to make a copy is so available, then you get what we have now. Everyone has a printing press, and now everyone is a pirate for using it.

But the issue should not be that we can turn art into a bitstream and share it. We should not be trying to stop sharing. To prevent copying for the sake of preventing copying is empty. The reason that copying was prevented was because to protect the author's ability to acquire compensation for their effort. And, because due to the marginal cost, it was not easily possible to make copies for the entire planet. We had libraries where we could. But we never really had the chance to cure cultural and intellectual scarcity. Until now.

The problem we face is not rampant sharing. It's that we can no longer make up the cost of the initial creative effort by inflating the price of a copy. But inflating the price of the copy is not the only way to generate compensation for artists.

The solution I propose is sponsorship through crowdsourcing. There are different ways to do crowdsourcing. InnoCentive delegates the work of problem solving to the masses. Bounties are placed on relatively complicated challenges, and the first to provide an acceptable solution will get the bounty.²¹ Amazon Mechanical Turk (MTurk) allows people to create tasks that can be done quickly and trivially by humans. The tasks are then carried out by groups of individuals who are each compensated by a very small amount of money. MTurk

21. Jeff Howe, "The rise of crowdsourcing," *Wired magazine* 14, no. 6 (2006): 1-4.

is good for problems for which the task of solving through computer automation is considerably more expensive.²² But crowdsourcing can also be applied to the development of public works. We have created, from from the work of volunteers and the offerings of donors, a comprehensive database of information called Wikipedia. It is freely and publicly available. And it is competing with those created by paid experts, such as Encyclopedia Britannica. These are variants of crowdsourcing that use crowds to acquire labour or research.

The application of crowdsourcing that is interesting here is fundraising, called crowdfunding. Organizations such as Kickstarter, IndieGoGo, GoFundMe, and RocketHub provide a way for producers to acquire sponsors to fund their activities. A target monetary goal is set. Individuals can then pledge money toward the activity. And, depending on the model, the money may placed in an escrow, so that the producer is compensated once they complete their objectives, or the producer may get all the donations regardless of if either the fundraising goal is met or if he fulfills his end of the deal.²³ Crowdfunding like this is already happening. It raised nearly 1.5 billion dollars in 2011. And has been growing since then.²⁴ It is similar to the idea as going door-to-door and begging people to give you a couple bucks, which will go to fund research for your favourite disease, in exchange for the promise that you will accomplish a particular feat, such as biking 40 kilometres or fasting for 30 hours.

But the key difference now is the scale at which this can happen. We are no longer limited by how far we can get before it gets dark. We can post our idea on a church door and the world can see it. We can tell our friends and our fans and they will tell theirs. That is what the internet gives us.

This principle of sponsorship from the crowd has a number of advantages that I argue makes it something that could work well in the context of funding the creation of cultural

22. Howe, “The rise of crowdsourcing.”

23. Johan Oomen and Lora Aroyo, “Crowdsourcing in the cultural heritage domain: opportunities and challenges,” in *Proceedings of the 5th International Conference on Communities and Technologies* (ACM, 2011), 138–149; Claudia Parvanta, Yannig Roth, and Heidi Keller, “Crowdsourcing 101 A Few Basics to Make You the Leader of the Pack,” *Health promotion practice* 14, no. 2 (2013): 163–167.

24. Devashis Mitra, “The role of crowdfunding in entrepreneurial finance,” *Delhi Business Review* 13, no. 2 (2012): 67–72.

and intellectual works. First, it addresses the issue in a very direct way. Imposing a general levy is an abstraction that costs accuracy and elegance. It separates the producers from their consumers. Even applying markup to the marginal cost is not ideal. The cost is in the first copy. What you want is compensation once the first copy has been made. This is exactly what sponsorship through crowdfunding accomplishes. Second, crowdfunding operates in harmony with sharing rather than in competition with it. The sharing of art will facilitate its discovery and the discovery of its artist. And greater discovery will benefit the crowdfunding income model. As artists begin using crowdfunding as a way to cover the costs of the creative effort of producing the first copy of their work, they can give their creations away for free. They no longer need to control the act of copying, because preventing the creation of copies is no longer necessary to acquire profit. In fact, the creation of copies will serve to promote the artist by increasing their exposure, thereby adding to those who would participate in crowdfunding. So the act we today call piracy will become sharing again. And it will be doing a nice thing for the artist as sharing ought to be.

Conclusion

A prominent theme in Lessig's book is that everyone, from kids to grandmothers, can now be a publisher. In the past, copying was difficult; only people with special resources could do it. Now, computers and the internet have reduced the cost of copying to a very small amount. And, especially in developed nations, having access to a computer is incredibly easy. One no longer needs an army of scribes, a gigantic stamp, a bureaucracy, or a sack of money to make a copy. It can be done with a click. Everybody is becoming a publisher. Everyone is becoming a vendor. And people are now vending for free; sharing. The next step is not to criminalize people who share. It is to evolve our legal doctrines, social norms, and income models to work with technology instead of against it. We can no longer inflate the marginal cost of a copy because there is no marginal cost. But, through crowdsourcing,

we can reshape how artists are funded and produce an economy that benefits from sharing.

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