

**Bodó Balázs**

**Necessity knows no laws**

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**the role of copyright pirates in the cultural ecosystem from printing to file sharing  
networks**

Theses

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## I. The goal of the research

In the last few years there has been a growing academic interest in illegal, peer-to-peer file-sharing. This interest is due to the intensity of the copyright wars (Patry, 2009), the accelerating transformation of cultural markets, and the sheer ubiquity of the phenomenon. The bulk of this research is anchored in *economic* and *business* literature (see a comprehensive bibliography at: (Dejean, 2008; Oberholzer-Gee & Strumpf, 2009; Peitz & Waelbroeck, 2006)) and tries to understand the impact of illegal peer-to-peer file-sharing on various markets and industries. The other discipline that has extensively discussed file-sharing is *legal studies*. In the era of the Napster and Grokster cases, especially, when the legal status of file-sharing technologies was in question, file-sharing became closely linked to discussions of IP policy and copyright reform. Only a few studies, - predominantly from developing countries - tried to read copyright *piracy as a social practice* (Alford, 1995; Coombe, 1998; Grassmuck, 2008; Larkin, 2004; Liang, 2003, 2005; Sundaram, 2001; Wang, 2003) and explore the unauthorized uses of intellectual properties in a wider socio-cultural context. In these accounts the unauthorized reproduction and dissemination of copyright protected cultural goods is situated within the everyday practices of various social groups and the questions it raises are related to the issues of development, mobility, modernization, participation, social cohesion, cooperation, etc. Similar studies that examine the non-legal, non-economic aspects of participating in file-sharing networks are yet to emerge in a Western context.

This gap in literature was the primary factor in choosing the topic for my doctoral research. In this dissertation my aim was to look beyond the legal and economic readings of contemporary western copyright piracy and understand it as a unique social practice that merits attention not only because of its dubious legality, ubiquity, or the havoc it has played with copyright-based business models, but first and foremost because it shapes the ideas and attitudes of millions of netizens about what intellectual property is and could be; what sharing and online cooperation means in a p2p setting; what privacy is and how it can be protected; how to form and negotiate online identities in an anonymous environment, just to name a few issues. *Piracy is not just a drain on the cultural economy, but a powerful productive force whose legacy in social relations will stay with us long after the economic conditions that called it into being – and the power vacuum that enabled it – have passed.*

The notion that piracy is more than just a legally contested shadow economy is further supported by the body of research that documents historical examples of copyright piracy either from a social/media history, literary studies perspective (Bender & Sampliner, 1996-1997; Darnton, 2003; Feather, 1987; Heylin, 1995; Judge, 1934; Kaser, 1969; Pollard, 1916, 1920; Rose, 1993; Wittmann, 2004, Johns 2010) or from a legal history standpoint (Khan, 2002; Khan & Sokoloff, 2001; May & Sell, 2006;

Redmond, 1990; Scott, 1998). *These historical accounts of copyright piracy describe the internal norms of information markets both before and after the establishment of national and international layers of regulation.* The faces, motivations, and fates of the copyright pirates are many, but there is one thing that is common to all of them: they all exist in the extra-legal domain at the edges of state authority. In this semi-autonomous space, “Honor Amongst Thieves,” “synthetic copyright”, entries in the Registry of the Stationer’s Company, server-enforced share ratios, and other non-legal structures organize pirate activity. In each and every case we find norms that -- while competing with the legal -- act to encourage the production of a common pool resource, offer methods to settle disputes and limit free-riding. In other words these bottom up norms sometimes substitute, sometimes replicate state sanctioned layers of regulation that are missing or being denied.

Why is the study of piracy especially interesting today? For several reasons. First, even though on paper we have seen a steady strengthening of the protection of Intellectual Property, the inability to enforce them resulted in a significantly weaker copyright protection than any time during the last hundred years. That vacuum is partly caused, partly filled by the competing, bottom up norms of file-sharing communities. The weakened property rights, along with the emergence of file-sharing networks created a *de facto* common pool of resources from the musical, audiovisual, textual works circulating in the digital underground. This commons has proved to be quite resilient to attacks from the outside as well as to those internal issues that can lead to a tragedy of commons. *Many file-sharing communities seem to have successfully solved the problems of managing a common pool resource as well as protecting it from – in this case (re) - enclosure.* There is, however, little to no research on the actual mechanisms of how these commons are maintained, protected and replenished. Only a few unconfirmed accounts describe the internal workings of online cultural black markets (b-bstf, Summer 2004; Howe, January 2005).

Second, even from these shallow accounts it is evident that non-monetary incentives and complex social motivations play a crucial role in the existence and successful survival of file-sharing communities and of those resource pools around which these communities gather. To illustrate this point it is worth examining the ways community norms manifest themselves in the technological restraints and defaults (Strahilevitz, 2003). Employed at the level of both *software clients* (like the design principle of bittorrent) and servers (minimum shared library size or upload/download ratio) technology is fine-tuned to reflect the characteristics of content flows, the relative popularity of different titles, the aesthetic judgments, and the thematic preferences of file-sharers. Global, open, mainstream bittorrent trackers for example set no minimum level of contribution - they rely on the sheer number of users and the loyalty of some to provide the necessary level of resources for all. On the other hand, while many national level trackers prohibit the exchange of current local goods, they highly reward the making available of local back catalogs and out

of print works. Some allow only a trusted circle of releasers to provide them with digital copies of new titles. Others allow, even encourage each and every user to upload and seed whatever they see fit. From this latter group some set and enforce highly detailed technical specifications regarding video encoding, sound quality, etc. Others provide the community collaborative filtering tools to assess the quality of contributions. Beyond the technologically enforced compulsory rules, informal community norms encourage voluntary cooperation. The exclusivity, notoriety of some communities guarantees a loyal and enthusiastic user base. Their fame inspires others into competition, trying to replicate their success. Many fail, a few prefer to stay small and secluded, but some develop into big, extraordinarily powerful underground marketplaces.

Third, none of these subtle differences between different pirate communities is described with the current economic and legal language used to discuss copyright piracy, despite the fact that they have profound economic and legal consequences on legal markets and on general copynorms (Schultz, 2006) alike. Current discourse on copyright piracy tends to homogenize a wide variety of fundamentally different practices with reductionist legal /economic arguments.

Following the footsteps of Lessig (2004) I hope that the time is now ripe to step beyond the monolithic understanding of p2p file-sharing by enriching the currently fragmented research landscape with a social-sciences based piracy research that

*- describes the role copyright pirates played throughout the history of printing,*

*-describes the international flow of intellectual property to explain piratical states such as China,*

*- based on these findings situates current file-sharing and assesses its impact on legal markets.*

## **II. Research questions and methods**

I have posed several different questions in the dissertation:

- who were branded as pirates in the history of print capitalism?
- what common characteristics they share across different times and places?
- what was their role in local markets?
- what factors caused their appearance?
- what factors sustained their existence?
- what factors led to their extinctions, if any?

These questions were answered by reviewing primary and secondary sources that addressed the phenomena of print piracy. By assembling a general framework that describes the emergence, existence and disappearance of pirate publishers, I could start explaining the role digital, file-sharing piracy plays in current cultural flows. I used quantitative methods to measure the level of interaction between digital black markets and legal movie markets in Hungary during 2008. I also found several factors that explain the persistence of piracy beyond pure market failures.

### III. Short summary of the findings

Digital technologies have brought a sharp drop in the costs of reproduction of many cultural goods and, consequently, in the degree of control that culture industries exercise over how and where those goods circulate. The breakdown of this model has been so rapid, and the reaction of industry stakeholders so decisive in framing it, that it is hardly surprising that many see it as a unique development—indeed, as a unique catastrophe.

But a longer historical lens suggests that the current crisis of copyright, piracy, and enforcement has much in common with earlier periods of technological change and conflict among cultural producers. From the early days of the book trade in the 16<sup>th</sup> century, cultural markets were shaped by deals between publishers and the state over who could print, and on what terms. Copyright law was originally a simple formalization of these deals, which provided a small group of London publishers with monopoly rights over the printing of specific texts.

Time and time again, however, these political agreements were undermined, thrown into crisis, and—ultimately—reconfigured by entrepreneurs who undercut the high price / low-volume business of state-protected book cartels. Already in the early 17<sup>th</sup> century, publishers with Crown privileges labelled such entrepreneurs pirates, evoking maritime theft and plunder.

Conflicts between pirate and Crown publishers were often strongly spatially marked: pirate producers emerged at the geographical peripheries of markets, and often across borders where Crown interests and the political influence of publishers could not be as easily asserted. Faltering control at the edges of geographical markets—often amplified by differences in local law—was a defining feature of the book market, and one that permitted the growth of a European sphere of letters, with major publishing businesses in Scotland (competing with London publishers), Holland and Switzerland (competing with Paris publishers).

Repeatedly in the book market, high-price / low volume publishing cartels gave way to low-price / high volume markets, characterized by many more actors, higher sensitivity to market demand, and often informal agreements among publishers for

managing competition. This process was almost always mediated by new entrants in the business who ignored the systems of local rights and privileges that protected the publishing cartels. It almost always ended with the reincorporation of some of those pirate groups into a wider circle of legitimate business, and a reconfiguration of copyright and related rights to recognize the new terms of business. Views of piracy were usually situational enough to accommodate these shifts: 1705's book pirates were 1710's avid enforcers of IP rights. As the history of the book market makes clear, local industry routinely piggybacks on the intellectual products of more-developed, geographically remote competitors. This is not a deviant or undesirable form of economic development—it is one of its basic features.

This story could be told in many industrial contexts—computer hardware, chemical engineering, pharmaceuticals, software. The early history of book publishing and piracy can be used to emphasize how these dynamics play out in cultural markets:

- Persistent gaps between supply and demand due to artificial constraints on price or supply *will be filled by pirate producers*.
- When faced with piracy, industry incumbents almost always turn to the state to defend their market positions, instead of trying to beat pirates by adjusting their business models;
- Conversely, pirate producers will tend to operate at the edges of those state jurisdictions, where differences in law create spaces of ambiguous or conflicted legality.
- Piracy, in this context, has a long-established role as a development strategy at the economic periphery, creating businesses that later go legit.
- Piracy, in this context, also acts as a counterweight to the centralized control of information—whether by states or private interests. The censorship of texts was continually undermined by pirate networks.

These findings are relevant in the context of peer-to-peer file-sharing as well. Debates on its negative impact on the cultural industry and the legal struggle over its criminalization continue into the next decade. Surprisingly, despite the attention devoted to the subject, research into p2p downloading – especially in Hungary - is still rudimentary, and the majority of empirical studies can only establish circumstantial evidences on the nature of relationship between the legal and pirate marketplaces. Also, data on the consumption of content are typically self-reported (i.e., questionnaire-based), rather than observed which may be appropriate for the offline and legal context but is inadequate (or at best highly inaccurate) in the case of

p2p piracy. In the dissertation I looked at the interconnections between the p2p and legal marketplaces in the case of the film industry using data collection methods that avoid the pitfalls of questionnaire-based surveys. Central to my analysis was the assessment of two piracy paradigms: substitution and shortage, that is whether pirated content is available through legal or only through illegal channels. Using transactional data (real time observation of p2p downloading activity by users of three major Hungarian torrent trackers) and movie distribution statistics I have found that shortage-driven downloaders (pirating old catalogues only) outnumber those downloading only current theatrical releases, while the majority pirates both categories. The analysis of causal relationships reveals nonetheless that demand for a film among online pirates is impacted by its theatrical distribution (number of copies) rather than its actual success at the box offices, the effect of which is insignificant. This leads to the conclusion that part of the marketing efforts directly contributes to propping up piracy. However, the high diversity of the movie genres downloaded by users suggests that p2p pirating is also an activity that is disembedded from the context of personal taste and is thus contributing to the evolution of cultural consumption beyond preexisting preferences and loyalties.

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