

# **HIGH PLAINS DRIFTERS: INTELLECTUAL PROPERTY, FREEDOM OF SPEECH AND BIG BUSINESS – THE BATTLE FOR CONTROL OF THE WORLD WIDE WEB.**

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## **Abstract:**

This is a discussion and definition of Intellectual Property Rights, Intangibility, File Sharing, Freedom of Information, Drift Theory and the Social construction of the Cyber Criminal. In this work I intend to outline measures which have been taken to curb Intellectual Property Crime by the media industry and consider how such measures have been effective in designing out crime. Also an examination of the threat allegedly posed by file sharing to the media industry and if that threat is as great as the bodies and statistics claim? There is an exploration of Foucauldian notions of power and how they are stratified across the internet rather than being centred within one particular body or institution. Attempts are made to find strategies for resolving problems created by files sharing activities and an examination of claims made by those involved in the debate. This is linked to a discussion of file sharing as an indicator of social change in which we could come to see digital downloads are a normative behaviour and a move away from the 'physical' realm regarding intellectual property. Is the current business model based on 'physical' sales outdated and requiring a new approach to deal with the problems of protecting Intellectual Property that are presented in a digital age. Finally we examine ways in which modern criminology would require a paradigm shift in order to deal with changes in culture and technology.

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## **Chapter One: Sound and Fury.**

*'Once a new technology is out in the world anyone can use it. At that point it becomes a weapon in human conflicts and an embodiment of human dreams. We are not masters of the tools we have invented. They affect our lives in ways we cannot control – and often understand. The world today is a vast, unsupervised laboratory, in which a multitude of experiments are simultaneously under way.'*

(Gray, 2004 pg.21)

Intellectual Property Crime (IPC) is the central issue at the heart of the controversy surrounding P2P file sharing. The overriding quality of Intellectual property is that it is intangible as opposed to tangible property which we can 'physically' possess. So for example when we buy a book we own the paper it's made from, the ink on the page, the glue used to bind it but we do not own the substance of the book, this remains the property of the author. When we buy a book we are buying a right to access the author's work, as Bainbridge (2002, pg.10) puts it 'Intellectual property is property in a legal sense: it is something that can be owned and dealt with'. Property is protected by copyright law and allows the owner to control the way in which property is used. So should such property be subject to 'copy, broadcasting or giving a public performance', the owner may take legal action (Ibid 2002 pg.5).

When a person 'file shares' they make intellectual property available to others free of charge by uploading this content to the internet via a host website. Other users of such websites acquire (download) this property (effectively copying the material) from the uploader's computer, with the website acting as a conduit for activity (CIPPIC 2009). This an owner of copyright would contest is theft as they are not being paid for their labours by individuals who take their property, or to put it another way, the tangible expression of an idea (Bainbridge 2002 pg.5).

The law that deals with infringements in the United Kingdom is The Copyright Act 1956, which was later updated in 1988 with the Copyright, Designs and Patents Act to deal with the new technologies of audio and video cassettes (Robertson & Nicol 2002 pg.342), and protect intellectual property in these news formats. In fact the law states unequivocally that:

*'Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.'*

(Copyright, Designs & Patents Act 1988, Chapter Two, Section 16)

And further goes on to state:

*'The copyright in a work is infringed by a person who, without the licence of the copyright owner, imports into the United Kingdom, otherwise than for his private and domestic use, an article which is, and which he knows or has reason to believe is, an infringing copy of the work.'*

(Copyright, Designs & Patents Act 1988, Chapter Two, Section 22)

The former refers more to distribution of copyright material and the latter to what is called Secondary Infringement of Copyright which applies to the illegal acquisition of copyrighted material (Bainbridge 2002 pp 137-138, 239).

The music industry promotes the idea that this problem of unauthorised distribution amounts to little more than theft, with campaigns denouncing piracy with slogans such as ‘You wouldn’t steal a movie’ as in the physical act of stealing a DVD. It then goes onto reinforce the association by stating ‘Downloading pirated films is stealing. Piracy it’s a crime’ (Rohrer 2009). Further attempts by the industry watchdog, The Federation Against Copyright Theft (FACT) to associate P2P file sharing with such deviant criminal acts as terrorism and making claims that ‘piracy... will destroy our society’, were met with complaints (ASA 2004). It is difficult to see why a terrorist organisation would incorporate media piracy into its activities, unless it had a specific ideological reason for doing so (i.e. an anti-capitalist sentiment). This notion can be encapsulated by the phrase ‘Capitalism is killing music’ (Bragg, Quoted in Yar, 2007 pg.96-97).

The problem of researching the link between piracy and terrorist activities is that there is simply very little evidence to go on and no recognised framework in which to work. As Pollinger (2007) of Harvard University, writing in *The Michigan Journal of Business*, has stated:

*‘Ultimately, very little is certain in assessing the magnitude of the counterfeiting industry and the proposed connection between the industry and international terrorism. To create a stronger model with which to analyse the effect of any policy changes, obtaining more accurate, in-depth data is obviously of the greatest importance.’*

Sentiments such as these had already been had clear by the secretary general of Interpol, Ronald Noble (quoted in Campbell 2004) when he said that funding for terrorist organisations ‘is of an indirect nature’, making it ‘difficult to attribute direct links between an individual involved in IPC and funds remitted to a terrorist organisation’. However Noble does give us a link between IPC and counterfeit goods in the form of material objects. As Pollinger (2007) notes money from counterfeit goods such as cigarettes and brake pads are helping to fund terrorist organisations such as Hezbollah.



1. Poster from the £1.5m 2004 UK Anti-Piracy campaign.

From the rhetoric used by industry watch dogs, police and other law enforcement agencies there is clearly the intention to place in consumers minds an immediate association of the action as a criminal act. Even the term 'piracy' is an emotive one, as some have observed, it conjures up images of cut throats brigands, eager to steal and plunder (Yar 2006 pg.73 & Drahos and Braithwaite 2002: 24-5 cited in Yar 2007)). So by making a link with what maybe termed 'social ills' such as organised crime, job loses and terrorism, we can plant the theft of intellectual property firmly in the criminal realm as a deviant, anti-social act. This is a point re-enforced by Pollinger (2007) when he suggests that IPC is not a victimless crime, for example he states that the Madrid train bombing which resulted in the deaths of 191 people was financed by sale of pirated CDs.

But what of the 'pirate', so called. Are they merely thieves profiteering or is this sign of a significant cultural change? Labelled as the 'Generation Y-Pay' (Sweney, 2009), it targets 16 to 34 year olds as the worse offenders (Survey carried out by The Industry Trust for IP Awareness (Itipa) (Ibid 2009). Another survey conducted by Business Software Alliance in 2004 (quoted in Yar 2007 pg.99) shows that the number of people involved in file sharing decreases exponentially as the age of the survey sample increases. In other words the older they were the less likely they were to be involved, in fact it identifies the 18-29 age group as the worse offenders. Yar provides us with further evidence of an emerging cultural practice with a Canadian survey from 2004 which puts the age range even younger at 12 – 21 year olds (2007 pg.100).

A more recent study published in 2006 by the MPAA (Motion Picture Association of America) makes further attempts to profile the 'pirate'. According to their study "the average copyright thief is male, between the ages of 16-24 and lives in an urban area" and of the 22 countries surveyed it was the college students of the US, Korea and Hungary that where the worst offenders. They also highlight that the older the population that was surveyed, the less likely they are too indulged in pirating activities. This could be an indication of a population that has matured and come to see the moral implications of IP theft and their consciences won't allow it. The more likely explanation is that the older population have not grown up with computer technology in the same way that the younger survey sample have.

Strong evidence indeed of a cultural practice which has occurred in tandem with a generation which has grown up with digital technology as part of their everyday lives and file sharing as a normative behaviour. This has lead to epithets such as the 'Y-pay' (Sweney, 2009), 'the lost' and 'the lazy generation' (Simpson 2009) from media commentators, politicians and media moguls. It can even be argued that the explosion of internet piracy is just a reflection of the internet expanding (Yar 2006 pg.67)

But now a word of caution. Whilst this profile of the internet offender may sound plausible, we must acknowledge that the research of Cybercrime is hampered by a lack of statistical information which is either impartial or standardised (Wall 2002 pp.7-8). Reports have been produced, usually by industry bodies, to support claims made about the injury of cyber activities upon business. At the very least they could be accused of exaggeration if not fabrication by those willing to defend the kinds of actions they seek to vilify. As the Australian Institute of Criminology (Greene, 2006 cited in Wall 2008 pg.98) argues music industry studies are incapable of 'explaining statistics for staggering losses through piracy'.

What has given many, such as Kovacs (2001 Duke Law Journal Vol.51:753) for example, cause for concern is the metaphysical quality of the internet with its anonymity and freedom from constraint of both moral restriction and stigma. The

obvious benefit from this would be an unprecedented freedom of expression and self-realisation, as in the Isaiah Berlin's notion of 'Two Concepts of Liberty' (1959) (cited in Blackburn 2008 pp41-42 & 141). 'Positive freedom' with its component part 'negative freedom' are a means of reaching our full potential using freedom within the structure of an ordered society, whilst 'negative freedom' is associated with whim and caprice. Put simply the arbitrary and whimsical nature of mankind (negative freedom) is held in check by social and cultural forces.

The impeding of self-realisation appears to have been used by those involved in illicit activities as an argument attacking the capitalist commodification of the internet content, and attempts by such forces to instigate legal sanctions. The message of the 'pirates' appears to be an anarchistic one, freedom of information with all electronic forms of artistic expression freely available. Battle lines are drawn up by the infringers of copyright along control and human rights grounds, championing freedom of information and of expression. The argument is further reduced to a struggle of good against evil with governments and corporations painted as the 'villains'.

Whilst it maybe true that some corporations and/or governments maybe corrupt in the ways that the pirates outline, they fail to acknowledge their own moral culpability when committing illegal acts. As Albert Kovacs puts it:

*'Through its decentralised architecture, which promises free communication, the Internet has modified concepts of property and information, seducing an entire generation into associating copyright infringement and theft of intellectual property with "discourse" and "sharing".'*

(Ibid, Duke Law Journal Vol.51:753 2001)

In other words they seek to absolve themselves from any blame by explaining it away as an act of protest, almost like a crusader with a moral duty to battle oppression.

In the instances in which P-2-P file sharers have been successfully prosecuted the defendants have argued that their activities come under the banner of 'fair use'. When Harvard Law School Professor Charles R. Nesson argued for the defence of Boston University graduate Joel Tenenbaum it was using this very scenario (Jiang 2009).

Fair use is normally the province of academic and journalistic institutions when there is a need to reference material for critical review or academic scholarship.

*'If certain conditions are met, academic (non-commercial) research, libraries and archives are exempted from IP protection in the sense that they may quote and copy without the author having a right to claim royalties.'*

(Nentwich 2003 pg.431)

It is this claim to 'fair use' which seems particularly problematic for a legal system bound by precedent. In the United States they have the 'four factor test' (section 107 of the Copyright Act of 1976) when determining fair use. As Lohmann points out, fair use acts as a 'safety valve' preventing copyright owners from complete and total control. Some infringement, he says, is needed for innovation and everyday common uses (such as whistling in the street, or photocopying a newspaper article).

In Great Britain 'Fair Dealing' defence as it is known makes copyright right exempt for similar circumstances as those we have already outlined. It also makes copyright exempt from enforcement if it is in the public interest or contrary to the policy of law (Robertson & Nicol 2002 pg.291). The Human Rights Act has gone some way to strengthen the exemption of copyright for public interest matters (Ibid).

In the Tenenbaum case it was also argued that the fine of \$675,000 is an exemplary punishment and entirely unjustified “for something that everyone in the generation did” (Tenenbaum quoted in Rolbein 2009).

Here he clearly implies that there is a cultural element to P2P file sharing with this last statement. He is making an appeal to neutralise his responsibility by claiming it is part of some form of sub-culture, in fact a claim to normality. In essence he does not see anything wrong with his activity but has merely ‘drifted’ into it (Matza cited in Burke 2006 pg.113). Tenenbaum’s ‘drift’ into criminal activity could be a result not of any particular deliberate criminal intent, rather due to the unique opportunities enjoyed by a highly computer literate generation in which the means and opportunity to commit such offences are commonplace. Added to this, that until recently there has been little or no chance of being caught.

An argument against excessive exemplary punishment can be found in the case of Jammie Thomas-Rasset who received wide spread press coverage after she received a fine of \$2 million for illegally downloading 24 songs (Sky News 19<sup>th</sup> June 2009). In this case the defence was less sophisticated when she claimed it was her children or ex-husband who were responsible. It is difficult to see how such a fine can possibly be paid by a 32 year old single mother of four children; indeed it would seem to imply a gravitas to the crime which seems totally disproportionate. It may even create more social harm to the defendant, her family and any form of financial support she may receive from the state. It would certainly be the case in Britain where any financial state aid comes directly from taxation, in effect society would be indirectly paying the fine, not the criminal.

Cases such as these are hardly going to win much sympathy for the media companies from the public who are after all the target of such actions. Much talked of harm to the media industries does not sit well with announcements of record profits and would appear to be at odds with the ‘official’ discourse upon the subject. In recent commentary, Senior Intellectual Property Attorney Fred von Lohmann of the Electronic Frontier Foundation (EFF) (31<sup>st</sup> December 2009) pointed out that the most pirated film of 2009 was set to make a cool \$100 million profit. He goes on to question Hollywood claims that internet piracy is as severe a threat to film production when in 2009 record box office takings were announced and that more films and music had been released than ever before. All this he further goes onto state is against the backdrop of a global recession.

The free speech that the pirates claim to be defending could be the very thing which suffers the most as a consequence of their actions. In a bid to stem the tide of online piracy the governments evoke ever more stringent measures to seek out and punish offenders. It is under these conditions that legal uses of internet freedom will suffer. There will be greater surveillance of internet traffic possibly leading to greater detection of illegal activity but also to possible cases in which detection is mistaken. As Simon Halberstam a specialist in internet law points out in Business Week (Quoted by Scott Feb 22<sup>nd</sup> 2009) “At the moment ISPs (Internet Service Providers) can’t distinguish between legal and illegal content on their networks”. In the UK ISPs are protected under the ‘common carrier’ principles which does not make them responsible for the content of the traffic on their networks (Scott 2009). In the same way that ‘Royal Mail’ is not responsible for the content of a letter they deliver so the ISPs are bound by the same principle. This means that ISPs cannot be charged with a secondary form of infringement as part of a chain of distribution of pirated material (Robertson & Nicol 2002 pg.291).

Attempts to instil a sense of surveillance amongst internet users is a modern manifestation of the 'Panoptic discipline' in the Foucauldian sense in which one can never know if one is being observed, so you must act as though you are (Wall 2008 pg.192 & 213). This 'self-policing' is instrumental in the strategy used by media corporations and government initiatives to quell cyber crime and create a 'Carceral society' (Foucault cited in Rock 2007 pg.22). But it is not that simple, how are you to monitor something as busy and vast as internet communication? Also the innovation which appears to be a characteristic of the internet 'pirate' will surely just be employed to circumvent any restrictions or attempts at detection. Moreover who is to perform such an onerous task? Neither the ISPs nor government want responsibility because of the sheer scale of cost and administration involved.

In another Foucauldian sense cyber crime has given rise to the power of the 'cyber' expert, forensic computing has become a discipline in its own right with companies and university courses set up specialising in expert witnesses ready to give evidence in criminal proceedings. A whole industry has been created around cyber crime from investigating and collating evidence, monitoring surveillance and with the law and prosecution.

The power of cyber technologies however is not simply confined to the few. Because of the relative simplicity of modern computer technology it can be exercised by anyone willing to learn, in fact tools can be used that require only the barest minimum of skill to operate. This presents us with possibility that 'power' (again in the Foucauldian sense) is dispersed amongst all users of the internet to varying degrees dependent upon skill, resources application etc.

Power is diffused even further through the creators of technology (i.e. Microsoft) and those that host the means by which we access the internet (ISPs). In this sense power is systemic as in an exchange between the means and those that use them, a relationship akin to buyer and seller but one in which the seller has power over the buyer.

This is essentially freedom of the press in its broadest sense; it is the bedrock of free speech and one which would be eroded by blanket censorship of content of ISP traffic by law. Perhaps this more than intellectual property rights is the bigger threat to personal liberty and freedom of expression.

## **Chapter Two: Bread and Circuses.**

The central topic at the moment is how copyright law is enforced and what laws are there to facilitate IP protection? After all as David Wall (2002 pg.5) points out "monetary values are attached to ideas rather than to objects", leading to a battle for control over 'intellectual real estate' (ibid).

As we have seen piracy has been linked to organised criminal and more importantly terrorist activities. Terrorist activities are significant because it places this form of Cybercrime under the remit of specialist anti-terror legislation such as the Regulation of Investigatory Powers Act (RIPA) (OPSI 2000). RIPA and the Interception of Communications Regulations (HMSO 2000) enable the interception of communication traffic which leaves the United Kingdom and returns to it from any foreign country. When we consider that the vast majority of internet traffic must leave the country at some point, either directly or indirectly, this opens up a massive potential for covert monitoring.

Governments have come under pressure to act by powerful media lobbies to do something to curb the proliferation of downloading which they see as a pernicious blight upon their industry. They in turn seek to place pressure upon the Internet Service Providers (ISPs) making them responsible for what users choose to access. This is clearly shifting the responsibility and cost which governments would rather not spend, as was stated before the resources involved in policing the internet would be vast.

The emphasis upon monitoring and surveillance has serious implications for issues such as privacy and free speech. As we have observed in chapter one, ISPs are mere conduits through which the traffic of communication can flow, they are there simply to facilitate and exchange of information/data between users. When they seek to censure content they act as both moral guardian and instructor telling you what you should and shouldn't say or think. The question that concerns us is whose morals and values are being enforced?

The proposed 'three strikes' system for file sharers would be counter productive for the ISPs whose business is directly affected by the amount of customers they have. If they start to cut them off they are effectively losing business. In some cases the mere threat may be enough to prompt some users to change to providers that do not monitor their customers. Chairman of Consumer Focus, Larry Whitty and director of Privacy International, Simon Davies (both quoted in Wray 2009) make the point that internet users could be falsely accused of Intellectual Property Crime. Also by cutting off internet access without first establishing the correct facts denies "consumers the right to challenge the evidence against them" (ibid). The onus of proof is placed upon the accused and not the accuser essentially "undermine(ing) fundamental rights to a fair trial" (ibid).

This tougher approach to internet piracy by the British government has been lead by Lord Mandelson whose dubious past exploits (Allen & Bingham 2008 & Oliver & Glover 2000) may leave some critics wondering about the ethics of his judgments<sup>1</sup>. In fact it is curious to note that his position on internet piracy changed significantly following his meeting with media mogul David Geffen "at a private dinner with members of the Rothschild banking dynasty at the family's holiday villa on Corfu" (Wray 25<sup>th</sup> August 2009 & Drury 27<sup>th</sup> August 2009).

Such revelations do not engender the cause of IP protection to the public, it smacks of corruption and manipulation fuelling anti IP sentiments amongst activists. It allows for the condemnation of the condemners ala Matza (cited in Hopkins Burke 2005 pg.113). The holders of copyright are reduced to the status of money grabbing capitalists, philistines and barbarians. They claim the media corporations are guilty of placing money above culture with the commodification of artistic license sacrificed on the altar of business and the endless repetition of dross designed to make a profit rather than enrich the soul. People such as Peter Sunde of the 'Pirate Bay Four' convicted of breaking copyright law in Sweden have made such views as these clear (Simpson 2009). In April 2009 a Swedish court ordered Frederik Neij, Gottfrid Svartholm Warg, Carl Lundstrom and Peter Sunde to pay the International Federation of the Phonographic Industry (IFPI) £3 Million in damages and ordered to spend a year in prison in a landmark case for IP litigation. Reactions from both sides following this court action are atypical of the arguments we have thus far examined. The victors (IFPI) where disappointed with the amount of damages awarded despite the landmark decision, although they claimed it sent out a clear message about the damage that file sharing does to the industry. The convicted defendants however

steadfastly maintained that they had done nothing wrong, claiming that they were merely hosting a website and not hosting files. This essentially is a 'common carrier' argument (as we have previously seen in chapter one) which under British law does not make ISPs responsible for traffic over their networks (Scott 2009). It does seem thought to the casual observer that this argument may smack a little of sophistry, as it looks to be more like an excuse for the practice known as 'fencing', (distribution) of stolen goods (IP property).

In the United States of America, a report by the Strategic Advisory Board on Intellectual Property has cited research done by criminologists who have attempted to use established theories to help explain the behaviour patterns of some offenders. Both Sameer Hinduja and Jason Ingram (cited in Rohrer 2009) have drawn conclusions based upon David Matza's 'techniques of neutralisation' (cited in Burke 2005 pp.112-114). As we have observed previously in this work, the theories of Matza probably present the best hope we have of understanding the motivations of the P2P file sharer and help us avoid reductionist arguments explaining the criminal act.

Arguments around Intellectual Property Crime have become politically radicalised by the leader of The Pirate Party (the political wing of The Pirate Bay web site) Rickard Falkvinge who claimed that in Sweden file sharing constituted a culturally normative behaviour. He then implied that the judgment violated human rights when he stated that he intended to take it to the European Parliament. If we then apply Matza's theory to this we could perhaps say that we have a claim to normality, a condemnation of the condemners and an appeal to higher loyalties (cited in Burke 2005 pp.112-114).

The stated intention of The Pirate Party is the reform of laws concerning copyright and patent in the digital age (Pirate Party 2009 & BBC 17<sup>th</sup> April 2009). By implication we can interpret this as a call for civil disobedience in the face of the law, although it would be interesting to wonder which came first; the file sharing or the drive to change the law. One is merely a sophisticated argument for breaking the law whilst the other is an attempt (possibly misguided) to change what they see as unjust law. Their intention therefore seems to be resistance to what Virilio (2000: 110 cited in Cere 2007 pg.10) 'digital capitalism' and the various laws enacted to prevent electronic civil disobedience.

In its rhetoric The Pirate Party warns against the powers of state and big business to manipulate and invade people's lives, culture, privacy and economic wellbeing. Instead of the current control of copyrighted material it seeks an end to the "Privatised monopolies (which) are one of society's worst enemies" (Pirate Party 2009). They espouse the gradual abolishment of patents and a reduction of commercial copyright protection replaced with cultural commons. As Jewkes (2007 pg.107) has noted this we can say is an 'idealistic view' in which 'new technologies are democratising and the fact that control over content rests not with one powerful interest group but potentially with each and every user', which 'makes the cyber-environment a great social leveller'. David Wall (2008 pg.98) has observed that technological advances and 'illicit MP3 downloads are in fact helping to promote music culture and also expand the capacity of the market' as 'individual musicians now obtain immediate exposure to a much broader section of the public', without relying on record company distribution networks.

AN IMPORTANT MESSAGE FROM THE GLOBAL ENTERTAINMENT INDUSTRY...

**REMEMBER WHEN...**

RADIO WAS GOING TO DESTROY THE RECORD INDUSTRY?



TELEVISION WAS GOING TO BE THE END OF CINEMA?



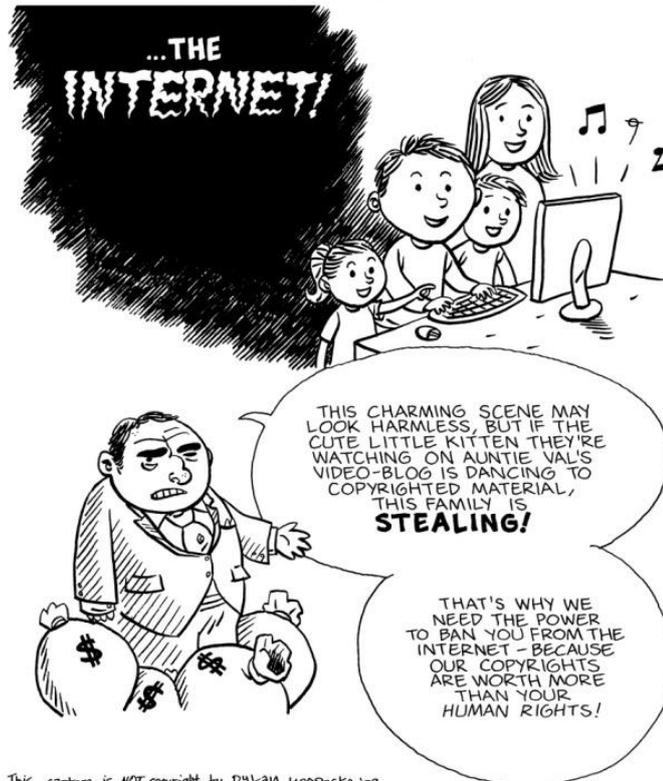
HOME TAPING WAS KILLING MUSIC?



VIDEO WOULD BE THE DEATH OF HOLLYWOOD?



WELL, NOW A NEW SPECTRE HAUNTS THE CORPORATE BOARDROOMS OF THE ENTERTAINMENT INDUSTRY...



This cartoon is NOT copyright by DYLAN HORROCKS '09

2. This cartoon by artist Dylan Horrocks demonstrates the political position of file sharers and those who dispute Intellectual Property Law. It eposes the free culture ethos and demonises global capitalism and corporate control of performing arts.

When we read these utopian ideals and look at the activities of The Pirate Party you could be forgiven for thinking that there is something of the ‘Monster Raving Looney Party’ about them, which may detract from any genuinely held sentiments. Also their agenda is far too limited for a genuine political movement; indeed further to this the name and imagery associated with them could make some believe they are more worthy of a ‘fringe’ party appellation. Even Pirate Party luminary Christian Engstrom (MEP) (Schmundt 2009) freely admits “The name ‘Pirate Party’ sounds silly at first”. Recent success in the European Elections and with new Pirate Parties popping up all around the globe, giving it the status of ‘transnational social movement’ (Cere 2003 pg.147) it would appear that more and more people are turning to them as an alternative the mainstream political parties. In Sweden they secured 7.1% of the votes cast putting them into fifth place behind the Social Democrats, Greens, Liberals and Moderate Parties (BBC News 6<sup>th</sup> Aug 2009).

Some, such as anti-piracy campaigner Henrik Ponten (Ibid), have put this phenomenon down to a protest vote by ‘angry young men’. The implication from this

statement being that they would have voted for any party that would have let them do whatever activity they want (i.e. file share). He then went on to state that “The right wing extremists did very poorly in this election, many angry young men voted for the Pirates instead” (Ibid).

So does this mean that P2P file sharing is an activity indulged in and supported by ‘right wing extremists’ as a way of protesting against the established political order as Ponten would suggest? This would seem at odds with liberal policies of the pirate party and seem particularly odd for a right wing ideology that historically seemed more intent on burning books than making them freely available to all at no cost.

In some respects the link forged by anti-piracy campaigners between intellectual property theft and terrorism finds a resonance here and it is one which the Pirate Party is in all probability unaware of. It is that, similar to terrorist organisations, they have created a limited agenda for changing an issue, have become active in this field with illegal activity and have then set up a political wing to give them legitimacy and political power. If we make a comparison to terrorist groups such as the IRA (Irish Republican Army) we can see that they also have a political wing Sinn Fein and (as has happened in the European Parliament) they have gained political acceptance and joined mainstream politics.

Ultimately ‘piracy’ is theft, it is illegal and a breach of copyright a point which Rick Falkvinge tacitly concedes when he says “File sharing has its pros and cons, the copyright infringement is a drawback” (Johnsen, Christensen & Moltke 2007); and one wonders if other areas of human endeavour could be treated in a similar way. For example, should an individual enjoy driving their car on a pedestrian walkway would they then go on to form a political party campaigning for the right to drive on the pavement? This would be a nonsense and could lead to other beliefs finding currency in mainstream political thought, such as Holocaust denial for example although it could be argued that file sharing is a lot less injurious to society than Holocaust denial.

Clearly the implication in all the arguments from file sharing activists is that cultural capital should be valued above monetary gain and a right to privacy and freedom of information for all, a worthy and noble ideal. But without getting into a protracted and subjective debate about what constitutes ‘cultural value’, we must take it to mean a blanket term applied to all forms of creative media. It is interesting to note that in the cases of Tenenbaum and Thomas-Rasset no such appeal to higher ideals was made, instead they concentrated on the proportion of damages to the harm of the criminal act. In fact if the intention was one of civil disobedience then such a defence would be legitimate, providing the offence was committed openly with the intention of accepting the punishment. To use a defence based on ‘rights’ for activities of this nature done clandestinely, would amount to little more than sophistry. As Yar (2008 pg.74) draws our attention to the Lockean notion of ‘property rights’ as an inalienable right of ‘honest labour’ he also draws a comparison to other cultures whose values surrounding property are different from those of western capitalists. This prompts the question of whose values are right? Are they both and never the twain shall meet?

Intellectual Property Rights and cultural capital find their home in the digital age in what is called ‘Cultural’ or ‘Creative Commons’.

*‘Commons are resources that all in a specified community may use, but none can own. They contrast with commodities, exchanged for profit on the basis of privatised possession.’*

(Coleman and Dyer-Witthford 2007 pp.934-935)

The idea of commons harks back to the days when 'common land' was used by the peasantry of Europe between the 16<sup>th</sup> and 18<sup>th</sup> centuries as a form of subsistence. This land was effectively 'privatised' by landowners marking a change from a rural feudal agrarian society to an industrial capitalist one. Therefore if we transpose this to a digital realm in which a free flow of information of ideas is being commodified by capitalist concerns, piracy some have said can be 'justified as assertion of customary right' (ibid).

Confusion arises when jurisdiction is not well defined, an aspect which may lead some to commit a breach of copyright without actually realising. For example in America there is a website called 'Project Gutenberg', on which an internet user can legitimately download classic works of literature free of charge. How is this possible? Because of the copyright laws in that country that make artistic works available in the public domain following the death of the author and after the appropriate period of copyright has elapsed. However if you should access such data from a country under which the works in question is still subject to copyright control then technically the law has been broken.

On their website the administrators of the Project Gutenberg make clear their stance on copyright:

*'When we distribute in the United States, U.S. law applies. When we distribute to other countries, their law applies. That is why Peter Pan is marked for US distribution only. It is public domain in the U.S. but not in the U.K.'*

(Project Gutenberg 2010)

Here we can see that the Project Gutenberg is a sophisticated lending library that takes advantage of local copyright laws in order to make books freely available as a part of the 'public domain'.

Problems making items of intellectual property freely available in the public domain can be seen when the British Broadcasting Corporation unveiled its iPlayer service on the internet in 2008. It allows for an internet user to watch streaming video and to download television programmes which had been shown on its TV and radio channels. Internet 'hackers' had breached anti-piracy measures which the BBC had put in place allowing them to download programmes and keep them beyond their one week limit (Johnson 13<sup>th</sup> March 2008).

Because of the way that the BBC is funded leads us to another potential contentious issue, who has the right to watch their output? Is it right that someone in the UK; who has bought a T.V. license in order to watch and own a T.V. set should have the same access as an internet user who may not own a T.V. license? Similarly one could argue that it would be unfair for the BBC to sell the programmes that they have made to commercial television networks or to sell their output on DVD as it essentially negates the public service element of their broadcasting. In other words why should you have to pay twice for the same service?

As industry officials seek legal action to close down sites such as The Pirate Bay they are faced with new problems with internet users finding new sources from which to download intellectual property. As Kovacs (2001) points out, closing down The Pirate Bay or similar web sites would not stop the 'misconception of 'free information' and the culture of entitlement that accompanies it completely'. What we are seeing is the

rise of a subculture which in time may come to dominate our thinking and practice with regard to the dissemination of intellectual property.

Those in favour of file sharing argue that industry attempts to clampdown on file sharers does nothing more than penalise fans and create animosity towards recording artists and record companies. Some have also argued that resources would be better spent on improving systems of digital download in order provide an effective, low cost alternative to P2P networks.

In an interview with Dr. Aleks Krotoski, conducted for the BBC (2010) TV series *'The Virtual Revolution'*, London based rap artist 'Master Shortie' makes his work freely available to download. He believes that there are other ways to make money besides the sale of CDs, such as live performances. He utilises the internet not only to 'share' content with fans of his music but other artists in the same spirit of the 'cultural commons' we examined earlier. The trend toward digital downloads rather than the 'physical' sales of CDs are, he says, a reflection of the modern culture which has grown up with this sort of technology, "It is part of the generation in which they've grown up where it's the norm to go online and quickly download music" (ibid). Cracking down on internet piracy he claims would "damage relationships between artists and fans" (ibid).

These are sentiments which have also been expressed by the journalist Stuart Maconie (2010) in a recent article he interprets the media corporations' attempts 'to demonise its core customers' as 'baffling'. He further goes onto state that in his view file sharing is not 'inherently evil'; a view which appears to have found a consensus amongst today's computer savvy generation.

Perhaps what we are in fact seeing is history repeating itself, as with former technological innovations which are now obsolete, the new technologies of the internet have heralded social change. Perhaps in the future we will look back on this period with some amusement at our 'outdated' thinking and as Maconie (2010) says: 'we may have to acknowledge that far from being venal pirates and thieves, as the Who said, the kids are all right'.

### **Chapter Three: All's Share in Love and War.**

The issue which appears to be at the heart of the conflict between global media and internet users would seem to be one of control and power. The global corporations attempts to assert their powers by legal means and political lobbying contrast with the P2P file sharers who, whilst seeming to have lost the legal battle appear to be more prolific in the political arena. All this conflict can lead us to one basic assumption, there is a lack of order in what amounts to a vast non-physical 'wilderness' leading to what is essentially a fight for control.

One of the challenges of future criminological thought is the issue of intangibility which pervades the modern 'cyber' world. New technology creates new customs and practises making it necessary to change with the times in order to avoid stagnation and encourage progress. Criminologists must adapt their thinking accordingly in order to meet new challenges and provide a better understanding of the emerging global society we are all a part of.

Clearly the future is becoming more intangible with an emerging generation that prefer to download Intellectual Property (i.e. music), rather than buy physical goods. In order to meet the challenges posed by this change in cultural habits it would perhaps be advisable for criminologists to adapt their way of thinking. Rather than

inventing new categories of criminal activity and finding ways to punish them we should expand our criminological imagination. We should seek to neutralise deviant behaviour by a fundamental change in social practise, acknowledging new forms and adapting to them. If there is an easier, legitimate option which would be in keeping with social norms and practises then this would have a dramatic effect on what is seen as 'criminal'.

The change from the 'physical' (CDs for example) to the 'intangible' (MP3 Downloads) poses a problem for the current business model employed by the major corporations involved in media production. In order for these companies to survive they must adapt their business model to meet these new challenges now that the substance has been divorced from the physical means. Put bluntly their business model is outdated; it seeks to control new innovative forms of communication in the same way that it did with older, now obsolete ones. It must recognise changes in communications technology and distribution at a fundamental level in order to survive.

Figures recently released by the British Phonographic Industry (BPI) show that in 2009 that album sales dropped by 3.5% overall, but there was a rise in album downloads of 56.1% (BBC 7<sup>th</sup> January 2010). This is a significant indicator of cultural trends when it comes to buying intellectual property and could be the shape of things to come. In fact it was also announced that there was a record 152 million singles sold in 2009 with digital downloads accounting for a massive 98% share of the total (Ibid). These statistics certainly support claims

A sea change is without doubt required to usher in new thinking around the problem of intellectual property. How do you control the intellectual property of intangible goods? Previous initiatives such as macro vision and DRM (Digital Rights Management) have proved to be problematic attempts in designing out crime using technology (ala Bourdieu's Dichotomy) (Cited in Wall 2002 pg.170). In the case of DRM it caused such problems for people who had legitimate copies of copyrighted material that it prompted massive public opposition. It eventually lead RIAA (Record Industry Association of America) spokesman Jonathan Lamy to the admission that "DRM is dead" (quoted in Mick 20th July 2009).

One industry attempt to secure payment for downloaded material that is currently under development is highlighted by Tang (1997 cited in Jewkes 2003 pg.24) as a system based method to verify that a royalty has been paid. If not then an electronic method of payment must be forthcoming or access is denied. The obvious flaw is that the rapidly innovating cyber criminal would in all probability circumvent such restrictions; many would see it as an intellectual challenge rather than a profit making exercise.

With every new safeguard there exists a parallel innovation which renders it obsolete. The concern here is that such technology is dependent on innovation from both providers and users leading to an oddly symbiotic relationship between hackers and those who provide security. What is the old adage, 'It takes a thief to catch a thief'?

The differences between cyber-crime and 'real-world' crime are stark and demand that we take new approaches to crime control, as Benner points out 'Cybercrime is unbounded crime' (2007 pg.16). This is to say that the constraints of the physical world do not apply, in cyber space barriers can be easily removed which would normally regulate our behaviour. For such an imaginative realm as cyber-space imaginative solutions must be sought.

As we have already observed in chapter one when we purchase a book/CD etc we purchase a right to access the substance of the book. If we take this to its next logical

step then why not make the 'physical' aspect separate from the 'substance'. Technology has allowed us to purchase the 'substance' without its 'physical' component so perhaps a better way of controlling the sale and distribution of intellectual property in an 'intangible' cyber world is to levy taxation on the gateways, in other words; what if internet users paid a small fee as part of the internet subscription which entitles them to freely download material governed by intellectual property laws. If a user had to pay a set fee to download IP material before they could even access the internet then it would have the potential to make the bulk of file sharing redundant over night.

An IP licence could be introduced (similar to the Television Licence enforced in the UK) that would require everyone with an internet connection to purchase such a licence. Details of the internet user could be passed onto the licensing authority in the same way that TV licensing details are passed on from the retailer to the TV licensing authority. The licence would allow the internet user to legitimately download media (i.e. Music) to the hard drive of their computer or other electronic device. The user could go to a legitimate downloading website that could guarantee safer and faster downloads which could be paid for by advertising and promotion of other goods (i.e. T-Shirts and other merchandise).

Non-payment of the IP licence fee could be treated in the same way as the TV licence defaulters, in the criminal courts. There is no reason why such an infra-structure could not work despite the vast number of people that subscribe to the internet. Massive organisations for the collection of TV licensing fees, Car Tax and driving licenses already exist and there is nothing to suggest that an IP licence would be radically different. Following this notion we could gain internet access in the same way that a driver gains access to the roads, with economic constraints dictating whether someone drove a Rolls Royce or a Robin Reliant, as is in keeping the capitalist ethos of western society.

The Licence could be administered by a quasi autonomous body which would oversee the distribution of royalty style payments based on the amount of downloads on a weekly/monthly/yearly basis. It would have to be independent but with powers under the law to not only pursue licence offenders but to regulate the price of intellectual property. A fixed fee could be established to avoid criticism of over pricing and allowing for fairness and regulation. The owner of IP would simply submit an invoice to the regulatory body of details regarding the amount of downloads over a period of time and then be paid from a central fund collection from the IP licence fund.

Such an approach would have the effect of not only breaking the monopoly that file sharing websites have over the activity of downloading, but also it makes the artist (to a certain extent), independent of large media corporations. An artist could upload their own works to the internet and be paid directly for each download from the licensing fund. Such freedom to publish already occurs with web pages such as 'My Space' on which an individual uploads their own creative works to a host website, to be paid for purchase of this material would simply be the next logical step. The artist would no longer be dependent on surrendering IP 'rights' in return for distribution.

It would be naive to think that this or any other approach would completely safeguard intellectual property rights. There will always be some who, for whatever reason, will seek to avoid payment. But until our thinking changes the problem of IP theft will remain endemic. While such a move cannot stop file sharing it can offer an alternative which would not only be more reliable, but one which you had already paid for. Why would you need to file share when you can download directly from the source a cleaner, safer copy? A survey conducted by the International Federation of the

Phonographic Industry (IFPI 2005) demonstrates that there exists a strong demand for digital downloads when it states that legal downloads exceeded illegal file sharing in both Great Britain and Germany (NPD Group Inc 2005). This was partly prompted by concerns about 'spyware, adware and viruses found on P2P networks' (Ibid).

For the file sharing that persists then there is still a provision for IP holders to be paid, for example if a holder of IP could present evidence to suggest that IP had been downloaded from a illegitimate site (Piratebay for example) then they could make a claim for compensation from the licensing fund. This in a sense penalises those that pay their licence fee and download from authorised sites, but it would also foster a sense of social responsibility amongst legitimate users and stigmatise illegal users. Also it tackles the pragmatic claims of some file sharers that they only download material that is hard to find (Simpson 2009), that if it wasn't shared it would otherwise not be readily available to download.

A similar approach is highlighted by Oliver Chastan, Head of Marketing of VP Records (Johnsen, Christensen & Moltke 2007) with a business model based on the 'all you can eat' principle, in which you pay a subscription which allows unlimited consumption. Another approach he espouses is that "a percentage of revenue from the telecom operators and cell phone companies and ISPs and allocate a certain amount to the copyright owners as compensation" (Ibid). This we can see is another way to regulate the 'gateways' to the internet, making payment compulsory not optional.

A possible draw back to any form of economic licensing of internet access or indeed electronic 'data' is the marginalisation of the poorer members of society. Tang (1997 cited in Jewkes 2003 pg.24) fears that it would create 'a society of information rich and information poor'. Yar (2006 pg.67) draws our attention to the practise of 'activation codes' which allow a user to download a program which will have partial or limited capability until appropriate payment has been made and an activation code acquired. This method also has the potential to be 'cracked' by 'hacktivists' in the same way that macro-vision and DRM technologies were circumvented.

Because of the global nature of the internet, for action to be one hundred percent successful it would have to be agreed and enforced by all nations, ignoring partial concerns in favour of a global strategy. Global policing presents its own problems as it would suggest that each country would have to surrender 'sovereignty' over what they may see as their portion of 'cyber space' or at least the 'physical' component (i.e. servers, databases etc). Also there is the problem of how any strategy could possibly be enforced in countries which have little or no regulation over the internet and intellectual property?

Innovations in technology require a subsequent change in the legal system to address intellectual property matters, as Nentwich (2003 pg.428) succinctly puts it ; "as is often the case when old legal regimes meet new technologies, some of the solutions following from the present rules are not adequate or cannot accommodate all interests involved." Advances in technology, one could argue, are crucial to the development of a global economy, for without such advancements trade would not be possible. It is therefore commercial considerations that drive forward globalisation causing a legal change in its wake.

*'The main impetus for the new generation of intellectual property legislation worldwide comes from the commercial music and software sectors. They have high stakes as novel computer equipment (scanners, CD burners) and novel organisational, networked solutions (the "Napster" model) are endangering the traditional ways of doing business.'*

(Ibid pg.429)

From this statement we may read two meanings; perhaps the commercial agents of the digital age want to have their cake and eat it. In other words they want to sell you the means of copying intellectual property but do not want you to do it, and also they do not trust you not to do it, hence DRM. The other meaning we could extrapolate is the importance of globalisation for effective legislation to create what Nentwich calls a 'harmonised legal environment' (Ibid pg.429).

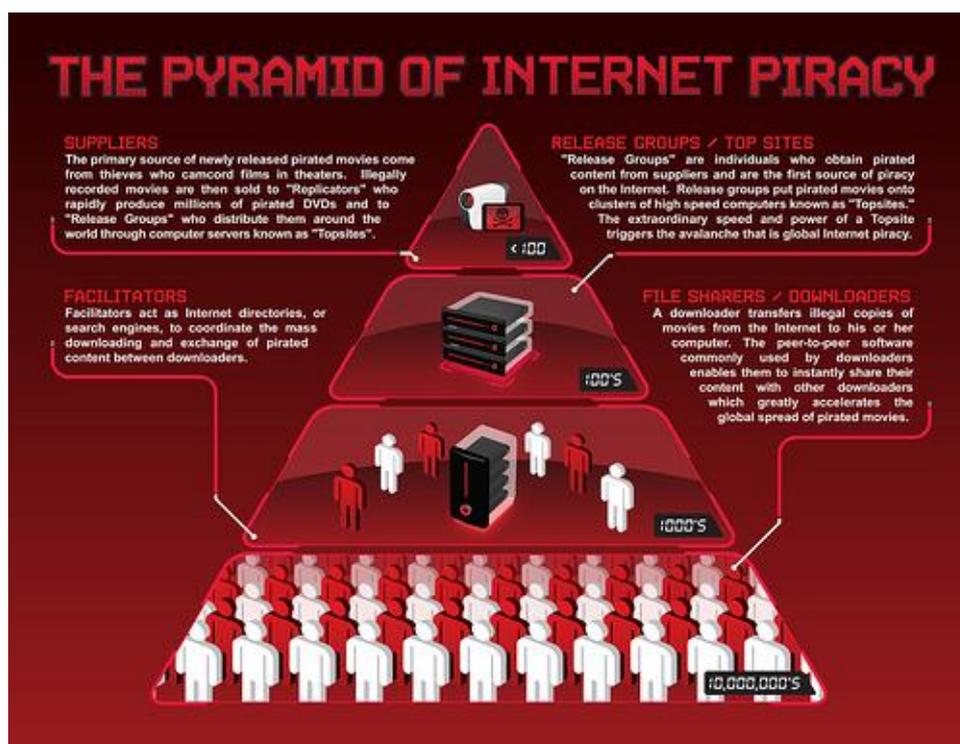
*'Properly understood, globalisation means nothing more than the increasing interconnection of world events, created by technologies that abolish or curtail time and distance. Because it is driven by new technologies, it is an inexorable process.'*  
(Gray 2004 pg.93)

It would be conceivable to say with some conviction that P2P file sharing is a manifestation of globalisation. After all, it is this breaking of barriers to world communication via technological progression, which have lead to the unprecedented freedom of movement and expression of the internet. As Wall (2008 pg37) argues it is information networks (such as those used in P2P file sharing) which have 'contributed to the acceleration of globalisation by collapsing traditional geographies of distance'. To this end it can be demonstrated that the biggest threat to the media industries would appear to originate in sources which are outside of Europe and North America. In their documentary film *Good Copy, Bad Copy*, Johnsen, Christensen and Moltke (2007) visit Gorbuska market in Moscow and visit a market stall which sells DVDs and CDs. From the proprietor of the stall they learn that of the two thousand shops in Gorbuska, around thirty of them sell original non-counterfeited goods. The remaining one thousand seven hundred shops sell counterfeit goods and are, he says, controlled by the police. "To us this is perfectly normal", the stall holder states presenting us with an idea of the endemic nature of this practise in Gorbuska, if not the whole of Russia itself.

Perhaps when copyright laws are effectively ignored by other countries this makes it obvious why the bulk of enforcement is centred upon America and the European countries. Put simply they cannot, nor ever have any hope of controlling file sharing websites that are outside US or European borders. As Peter Jenner of Sincere Management says;

*"If they close down all the peer-2-peer technologies in Europe, there will be one in China or in Russia... or in Kazakhstan and if you close all those down they'll be on Pacific Islands and if you close all those down they'll be on a boat".*

(Johnsen, Christensen and Moltke 2007)



**3. The Pyramid of Internet Piracy demonstrates how IP is cascaded to users via file sharing technologies.**

There is still a market for 'physical' goods as there will always be those who for whatever reason do not possess an internet connection. Merchandising and live performances also generate revenue for artists and can be quite a lucrative market and added source of income for industry players. Such strategies maybe in keeping with The Pirate Party's philosophy of 'cultural commons' and perhaps would be a step towards realising that goal. When an artist is performing live to an audience the fruits of their artistic endeavours, surely this is the quintessence of performing arts.

If criminology is to meet the challenges faced by the advances in technology and the social practises they spawn we must perhaps develop what Barton, Corteen, Scott and Whyte call our 'Criminological Imagination' (2007 pp.1-14). As Elizabeth Stanley (Ibid) makes clear (although in a different context the metaphor is none the less valid) 'the criminological imagination must disengage from restrictive individualistic models of criminal responsibility'.

Criminologists must not handicap themselves by adhering to strict paradigms (such as Marxism for example), but should allow their thinking to be as broad and diverse as the internet itself. Importantly this message is echoed in the works of Roger Sibeon and Tim Owen (Owen 2009) when they champion 'ontologically-flexible and anti-reductionism'. Although applied out of context in this instance, the model is essential in developing effective metatheoretical explanatory frameworks for 'multifactorial explanations' (Owen 2007 pg.10). By examining multiple variables, such as agency-structure, micro-macro and time-space can we create a synthesis which is distilled from methodological generalisations to develop non-reductionist theories and empirical studies (Owen 2006 Vol. 54(6): 899-900). Only by broadening the theoretical pallet will any significant understanding come about which would match the unrestricted 'free thinking' of the pirates themselves.

In some respects the technology that has driven globalisation as it exists (if it indeed *exists*) at the moment benefits the criminal more than the media corporations. The lack of uniformity in intellectual property law and royalty structures across the world make any form of pan-European or global licensing initiatives problematic and labour

intensive (IFPI 2010). It suggests that there exists a resistance to globalisation from countries which do not wish to share common cultural values but would rather be left to their own devices.

Technology has propelled free trade into what appears to be some sort of unstoppable force, capable of removing boundaries and steamrolling others into acquiescence in order to facilitate the free movement of capital and finances (Bauman 1998 pg.66). But this freedom of movement has not brought with it the co-operation that would be required to bring about any sort of global world order. As Bauman has stated:

*'One of the most seminal consequences of the new global freedom of movement is that it becomes increasingly difficult, perhaps altogether impossible, to re-forge social issues into effective collective action'.*

(Ibid pg.69)

Freedom of movement does not mean co-operation or shared values and norms on social issues such as crime and culture. As we have seen from the rhetoric of the Pirate Party, there is antagonism expressed towards what they perceive as an imposition of another's morality and cultural values upon them. Here we see the fundamental problem, a lack of consensus which makes any concerted, unified effort to stamp out Intellectual Property Crime a 'virtual' impossibility.

#### **Chapter Four: Conclusion**

Intellectual Property Crime is a many headed Hydra, no sooner has one head been cut off then there is another to replace it. In Chapter One we came to understand the basic objection to file sharing from industry officials and artists. We examined IP law and what steps had been taken to combat IP theft as well as industry claims of harms inflicted by piracy and possible links to terrorist and other social ills.

Chapter Two concerned itself mainly with the views of the pirates themselves, their ethos and practises and how file sharing is seen as a normative behaviour. It looked at the political ambitions of such people and how it is portrayed as a rebuttal of corporate capitalism and globalisation. We've seen how the aggressive stance taken by the media corporations has created an antipathy towards them which damages their relationship with the consumer.

In our final chapter we discuss the issue of changing popular culture and cultural practises, how file sharing may one day no longer be seen as a deviant form of behaviour. How business models need to be changed to meet the new challenges and the changing demands of consumers. We also examined how criminologists have to change their thinking if they are to play any significant part in the battle against P2P piracy.

Established theories have their parts to play but not to the detriment of limiting our efforts, we must expand our reasoning to new heights and avoid handicaps such as a limited teleology or reification. It is certain that those involved in Cybercrime in all its many varied forms are not hampered by such delusions, why therefore should we.

During our discussion we have come to see that the possibilities of cyber space not only expand our field of vision but also make us question what is it to be part of the natural world as well as a virtual one. Any discussion of Cybercrime or 'virtual' criminology ultimately has to be grounded in the physical world; this is the great

leveller as all users of the internet have this one fact in common. In this respect the appellation 'virtual criminologist' would appear to be a misnomer. The implication of cyber technology's ability to allow the user to re-invent the 'self' and commit morally and legally reprehensible deeds in a myriad forms may not only beg the question 'what is cyber criminal', but challenges the fundamental notion of 'what is a criminologist'?

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## Notes

### Chapter Two: Bread and Circuses

- 1 In their Daily Telegraph newspaper article Nick Allen and John Bingham (03/10/2008) recount the career of Peter Mandelson beginning with his first post as Trade and Industry Secretary, which he left after only five months in office after a scandal involving an interest-free loan from Geoffrey Robinson. Mr. Mandelson did not declare his loan of £373,000 to the Commons Register of Interests, the Britannia Building Society (to whom he applied for a mortgage) or the Permanent Secretary to the cabinet. After resigning he returned to government 10 months later as Northern Ireland Secretary and during this appointment another scandal caused him to resign his post. On this occasion he was implicated in a “cash for passports” scandal involving the Indian billionaire Srichand Hinduja and press allegations that he helped to get him a British passport after making a £1 Million donation to the Millennium Dome Faith Zone. A further account of the former scandal maybe found in the report of Mark Oliver and Julian Glover of The Guardian Newspaper (17/10/2000)

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### **List of Illustrations:**

1. A poster from the £1.5m 'Piracy is a Crime' campaign launched in July 2004. Available online at: <http://news.bbc.co.uk/1/hi/entertainment/3881587.stm>
2. Dylan Horrocks Cartoon: S92A Copyright Blackout. Available online at: <http://www.mohawkmedia.co.nz/node/184>
3. The Pyramid of Internet Piracy. Available online at: <http://www.michellehenry.fr/internetpiracy2.jpg>