Who Are You Calling A Pirate?

Shaping Public Discourse in the Intellectual Property Debates

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To describe an activity as "piracy" is to code it as violent, avaricious, and unjustified. The word's etymology in the Hellenistic Greek *peirân,* "to assault," emphasizes the physical force involved. Later usage added the connotation of theft. Today, the term is applied to two groups that could hardly be more dissimilar. One group takes hostages at sea and sometimes harms them; the other, on a home computer, downloads songs and software without paying for them.

This paper argues that the use of the word "piracy" by members of the content industry, such as recording companies, betrays an effort to naturalize a notion of intellectual property that has historically been rejected by courts in the English-speaking world. This notion holds that intellectual property is analogous to any material good and that, as a consequence, acquiring it without the permission of its creator is theft. We contend, in contrast, that this analogy between physical property and intellectual property is troubled for a number of reasons. Moreover, referring to violations of copyright law as "piracy" in public and legal discourse can, by rhetorically invoking the bloody anomie of maritime piracy, promote the unsupported notion that intellectual property protections are as natural as prohibitions of violent theft. This rhetorical legerdemain obscures intellectual property laws' constructedness and papers over any gaps that exist between the letter of the law and the values of the citizens to whom it applies.

I.

The term "piracy" was first applied to copiers of literary works in the seventeenth century. John Donne referred to plagiarists as "wit-pyrats" in 1611, and Samuel Butler once used the phrase "wit-caper" — invoking Dutch privateers — in the same manner.[1] These and other accusations of literary piracy predated what we would now recognize as modern copyright protection — a legal right of authors to control who can copy their literary or artistic works.[2] According to historian Adrian Johns, in the seventeenth century, a pirate was "someone who indulged in the unauthorized reprinting of a title [which was] recognized to belong to someone else by the formal conventions of the printing and bookselling community."[3] In other words, literary piracy originally concerned breaking custom more than breaking the law.

A law that granted copyright protection for a fixed period of time was enacted in England in 1709, but as that first fixed period drew to a close, publishers and booksellers argued that copyright should last in perpetuity. Opponents of protection had the rhetorical advantage at the time. They argued that a copyright conferred a monopoly — and the Whig politics popular at the time despised monopolies.[4] Their claim needed strong rhetoric to counter — and publishers found that rhetoric in the idea of private property. Immanuel Kant was among the first to give them their hook, in his now little-read piece, "On the Wrongfulness of the Unauthorized Printing of Books." Kant argued that the author's work was an extension of his self. This link between author and work was crucial because it

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[1] ADRIAN JOHNS, PIRACY 23 (2010).
[2] Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1005 (2006).
[3] ADRIAN JOHNS, THE NATURE OF THE BOOK 32 (1998) (cited in Hughes, *supra* note 2, at 1009).
[4] JOHNS, PIRACY, *supra* note 1, at 42.

provided a mechanism for book publishers to argue that the exclusive ability to control what happened to one's written work was a matter of right, not just a creature of the law, malleable to the dictates of circumstance and changing preference. The book publishers ultimately lost their battle in court, and copyright remained a protection granted by the government for a fixed period of time.

Until the 1970s, piracy was generally conceived of as a commercial activity. Although purchasers of replicated material were individuals, so-called pirates were generally professionals seeking commercial gain from their actions. But by the late 1970s, the taping of radio and television programs on audio and video cassette recorders had caused a panic in the music and television industry — and sparked a change in the definition of "pirate." Noncommercial copying — on a small scale, in one's own home — became the recording industry's new *bête noire*.[5]

Campaigns were launched to vilify copying; warnings of the harm of filesharing aired on commercial television and frequently appeared before films in movie theaters. British campaigns tried to link the purchase of copied films to terrorism and illegal arms trading.[6] The Recording Industry Association of America launched a legal attack as well, this time on individuals who downloaded music for personal use. Unlike maritime pirates, those captured rarely put up a fight, and often agreed to settle for the entirety of their life savings — which, in the case of teenagers and college students, was usually only a few thousand dollars.

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[5] JESSICA LITMAN, DIGITAL COPYRIGHT 85 (2001) ("Then there's the remarkable expansion of what we call piracy. Piracy used to be about folks who made and sold large numbers of counterfeit copies. Today, the term 'piracy' tends to describe any unlicensed activity — especially if the person engaging in it is a teenager.").

[6] *See* Fifteen Years of Anti-Piracy Warnings, http://www.guardian.co.uk/media/pda/2009/apr/08/piracy-piracy (Apr. 8, 2009).

II.

In short, "piracy," a word that could once describe stealing *anything* — as long as the stealing was violent — came in time to mean the comparatively mild-mannered reproduction of printed matter and, later, any authored work, whatever its embodiment. The end result is a term most commonly applied to a very particular, and a rather bookish, activity but still redolent of massacres on the high seas. It may be that, for many, this evolution has cognitively linked *all* the meanings of "piracy" — yielding a rough equation of intellectual property infringement and maritime piracy, and naturalizing the former as a wrong just as universal and self-evident as the latter.

This equation, whether fair or not, was not of course the result of any single person's will or intention. Instead, the evolution of "piracy" falls somewhere on a continuum, from an accident of careless usage to a deliberate act of political spin. While the micro-histories of this evolution are long since lost, it is still possible to draw some macroscopic conclusions about it – conclusions that will lead us to question the fairness of the term and, in turn, the ethical status of "pirating" intellectual property.

The history of the term "piracy" transparently shows it to be, in semiotic terms, an unstable signifier. The old conversation about whether *all* signifiers are erratically and semi-arbitrarily related to their signifieds is irrelevant for our discussion; the instability of signifiers is an historical fact at least as much as it's an abstraction, and the changing relationship of meaning to meant is clearly enough in evidence here. It is more important to note the source of this instability (or at least *a* source). The linguistic anthropologist Michael Silverstein argues that the evolution of signification over time can be molded by a word's context of "interested human use." Words, that is, retain an ability to change to mean what speakers of

a language *want* them to mean. For example, the Arabic word *jahada,* from which comes the word *jihad,* is a verb meaning both "to wage physical war" and "to struggle toward perfection." However, it has been reframed since the 1970s by extremists as a chimera of the two, one that refers specifically to waging *holy* war. This, of course, has come to be the dominant understanding of the word, especially among Western audiences. What this suggests about the evolution of "piracy" is clear. The equation between stealing words and stealing ships is not an accident. The term would never have taken on the entire range of its referents if the comparison resonated with no one.

Claiming that the evolution of "piracy" reflects some deliberation and even approval is not, however, the same as arguing that the equation it implies is justified. In contrast, it may not be possible to justify it at all. The word's range of meanings closely resembles the result of an act of Nietzschean genealogy. This is a practice that refuses to accept the sanctity of an original form, neglecting even the possibility of an *Ursprung*, or an essence of things that inheres in their terms. Every interpretation, in this view, is a "usurpation" of rules from the past; to call it "right" or "wrong" is meaningless, since there is no pure, originary form with which to comply or from which to depart. (Foucault's addition to the idea – that genealogy is conducted by situated selves with *un savoir perspectif,* perspectival wisdom – is isomorphic to Silverstein's notion of "interested human use.") In this case, the current denotations of piracy revealed through a survey of recent news articles suggest a "usurpation" of the definition — in the news media, "piracy" now more commonly refers to copyright infringement than to maritime theft.[7] In the Nietzschean view, this usage is as impossible to condemn as to accept.

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[7] *See* Hughes, *supra* note 2, at 1070-71.

III.

However, while we can find no *a priori* reason either to dismiss or to accept this evolution — or usurpation — we should question whether this usage is wise in practice. The evolution of the term "piracy" has been molded not by some general "interested human use," but rather by the interests of what *particular* people want the term to mean — specifically people who benefit from powerful intellectual property laws such as the Motion Picture Association of American and the Recording Industry Association of America. By using the term piracy to describe copying, these parties suggest equivalence between physical property and intellectual property where none exists historically, legally, or economically. Where there might otherwise have been a debate about the merits of intellectual property on the one hand and "free culture" on the other, these industry groups project ideas such as violence and theft onto copyists, demonizing them and delegitimizing their position and motivations. As Judge Richard Posner of the Seventh Circuit has argued, "The use of the word 'piracy' . . . to describe unauthorized copying . . . is objectionable because it obscures the difference between theft of tangibles, including that involved in old-fashioned maritime piracy, and the copying of intellectual property."[8]

The principle difference between physical property and intellectual property is that while physical property is "rivalrous," intellectual property is a "non-rivalrous" good. Consider the difference between a piece of jewelry and the prose of a book. The jewelry is rivalrous. If it is taken, the original owner can no longer wear it. In contrast, a book's prose is non-rivalrous. If a book is photocopied or an e-book is copied to a flashdrive, no one is

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[8] Richard Posner, *Misappropriation: A Dirge*, 40 HOUST. L. REV. 621, 622 (2003).

deprived of the use or enjoyment of the book. What an author or rights-holder may have lost is *income* from the book's sale, but not the prose itself.

One could argue that, in taking a copy of the work, the copier has effectively stolen the amount the copyright holder would have earned on the sale of the work. However, this interpretation is open to challenge. As Richard Stallman, the originator of the GNU General Public License, wrote, "The claim [that copying results in a loss] is begging the question because the idea of 'loss' is based on the assumption that the publisher 'should have' got paid. That is based on the assumption that copyright exists and prohibits individual copying. But that is just the issue at hand: what should copyright cover?"[9] If the law allowed a particular kind of copying, through the fair use doctrine or a home recording exception, for example, "then the publisher is not entitled to expect to be paid for each copy and so cannot claim there is a 'loss' when it is not. In other words, the 'loss' comes from the copyright system; it is not an inherent part of copying."[10] To cast copying as a "loss" to the publisher is, then, like claiming that a loss results when a person borrows a book from a friend or the library instead of purchasing it — in both cases, it is possible that one fewer book is sold. However, it is merely the legal expectation surrounding copyright law that creates the impression that the rights holder has "lost" a sale to the copier but not to the borrower.

The upshot is as Supreme Court Justice Benjamin Cardozo cautioned in 1926: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought,

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[9] Richard Stallman, *Reevaluating Copyright: The Public Must Prevail*, 75 OR. L. REV. 291, 294-95 (1996).
[10] *Id.*

they end often by enslaving it."[11] In other words, when "[h]ypnotized by a label which emphasizes identities, we may be led to ignore differences."[12]

The questions about when and to what degree intellectual property protections should be granted are vitally important ones, but the rhetorical invocation of pirates and piracy short-circuits that debate by casting those adverse to intellectual property protection as villains who must be thwarted instead of as philosophical or political opponents.

IV.

Recently, music pirates have benefited from cultural portrayals of maritime pirates. Although "piracy" could refer to music or maritime piracy, the single word meant that the public's understanding of one almost certainly influenced its understanding of the other. When maritime pirates were embraced as positive, jaunty cultural icons — think *Pirates of the Caribbean* — opponents of sweeping intellectual property laws, such as the successful Swedish Pirate Party, used the power of that imagery to popularize their own position with the public.

This co-opting of "piracy" did not go unnoticed by those who had used the term with a derogatory bent. At a March 17, 2010, press conference on illegal downloading, International Actors' Federation President Agnete Haaland admitted, "We should change the word piracy . . . . To me, piracy is something adventurous; it makes you think about Johnny Depp. We all want to be a bit like Johnny Depp."[13] Perhaps for similar reasons, the UK film

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[11] Hughes, *supra* note 2, at 1055 (quoting Benjamin Cardozo).
[12] *Id.* at 1055-56 (quoting Jerome Frank).
[13] Nate Anderson, *"Piracy" sounds too sexy, say rightsholders*, Ars Technica, http://arstechnica.com/tech-policy/news/2010/03/piracy-sounds-too-sexy-say-rightsholders.ars (Mar. 2010); Sangeeta Shastry, *Internet*

and television industry has abandoned their "piracy is a crime" advertizing campaign, which ran from 2004-2007, in favor of an anti-infringement campaign with a more positive spin, called "You Make the Movies," which spoofs old films.[14]

The resurgence and public awareness of piratical activity in Somalia throws a wrench in this process. As Americans remember that maritime piracy isn't all fun, games, and Jack Sparrow — a lesson Cartman learned in a recent South Park episode — antipathy to maritime pirates could cross over into a greater antipathy towards intellectual property pirates, sparking advocates of "free culture" to disclaim piratical associations instead of embracing them.

However, the renaissance of maritime piracy might well have a clarifying effect on the intellectual property debates as well. The instability and bloodshed off the coast of East Africa remind us, to paraphrase many holiday specials, of the true meaning of piracy — violence, avarice, and desperation. A Somali pirate — who acts outside the law of nations in a struggle to survive — could not stand in starker contrast to the suburban teenager who posts his own music videos set to a Top 40 single. Better than any argument cast in words, the reality of the maritime pirate highlights the absurdity inherent in intellectual property "piracy."

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piracy taking a big toll on jobs, Reuters (Mar. 17, 2010), *available at* http://www.reuters.com/article/idUSTRE62G3BU20100317.

[14] Mark Sweeney, *Anti-piracy ads target digital savvy youth over illegal downloads*, THE GUARDIAN (Mar. 4, 2010), *available at* http://www.guardian.co.uk/media/2010/mar/04/anti-piracy-ad-campaign.