The common pathways of samizdat and piracy

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PirateBrowser - No More Censorship!

On the 10th of August, for its 10th anniversary, The Pirate Bay (TPB) released a piece of software called the Piratebrowser, tagged with the headline: "No more censorship!" (Anon 2013b). It enables users who live in countries where access to TPB is blocked[1] to circumvent national internet filters. It is a simplified version of a TOR network-based web-br owser[2], which is used by many who want to stay anonymous and avoid the blocking and the surveillance of their online activities. The TOR network is used by: dissenters in oppressive countries with pervasive internet censorship; privacy-conscious users who wish to stay hidden from the surveillance machinery of spy agencies; leakers and whistleblowers; and users who wish to engage in various illegal activities from watching child pornography to buying drugs.

There are many reasons why governments and private interests wish to survey or censor certain online content and services. Copyright enforcement is one of them. The methods and technologies used for blocking access to TPB in the Netherlands and to Twitter in Iran are the same. But as the Piratebrowser warns us, the tools to circumvent these blocks are also the same. Copyright piracy and anti-censorship actions are crossing paths again, for the umpteenth time in the history of copyright (and censorship). But the question remains: is the latest effort of online pirates to cross-dress as free-speech warriors a simple opportunistic move to gain legitimacy, or there is something more to their claims?

The co-evolution of copyright and free-speech policies

It is not just piracy and *samizdat*[3] that are so closely intertwined. Censorship and copyright also have common origins, dating back to the early years of printing. The celebratory decades following the introduction of the press in Europe during the late 16th and early 17th centuries soon gave way to a nauseating hangover prompted by a flood of texts deemed heterodox and seditious. To regain control over the production and distribution of texts

1. Government-mandated or voluntary filters are in place now in Ireland, the Netherlands, Belgium, Finland, Denmark and Italy. See: http://en.wikipedia.org/wiki/Countries_blocking_access_to_The_Pirate_Bay

2. TOR- The Onion Router is a network of computers through which the internet traffic is passed, rendering the identity of the users more or less anonymous. It also enables users to circumvent locally implemented internet filters as it routes internet traffic through end-points outside of those filters.

3. Though it has a well established historical meaning that refers to the self-published, dissident texts in the Soviet Union, in this article I use the term *samizdat* to denote any effort that aims to distribute texts against the will of authorities. In return, the term censorship denotes efforts both by governments and by private interests to control the distribution of texts. For more on the definition of censorship see the concluding section of this lecture. Coincidentally, the self-published nature and decentralized distribution of historical *samizdat* fits well into the current web2.0 logic of content production.

in England, Queen Mary issued a royal charter in 1557 incorporating the Stationer's Company, a guild of printers in London, entrusting them with the task of policing the print market. In exchange the Company received a complete monopoly over everything that was printed (Pollard 1916). This offered enormous benefits for both sides: the Crown finally had an instrument of effective political control over the press, while the Company members could exercise complete economic control. The Company's register, which first recorded the fact that a given book was deemed publishable, soon turned out to be the ideal tool to establish ownership rights over the texts (copies) entered into it. By the early 1560's, copyright was born out of this simple but powerful arrangement (Feather 1994).

Centralization of both political and economic power, especially on such a scale, always produces its malcontents. The concentration of the copyrights of some of the most profitable texts (Bibles, almanacs, sermons, law books, alphabets) in the hands of a few wealthy printers prompted several waves of piracy in England during the 17th century. From time to time, disenfranchised printers found ways to set up massive clandestine printing operations, and the very same presses that catered for readers who could not pay monopoly prices could also serve those who wanted to read censored materials (Judge 1934).

For some, piracy was just a profitable enterprise. For others, especially for some pirate printers around the borders of the *Ancien Régime* in France, smuggling banned texts of the Enlightenment to France was also a matter of principle (Darnton 1982, 2003; Wittmann 2004). Selling Voltaire and copies the *Encyclopédie* in places where it was on the index of censors was both an excellent business opportunity *and* a powerful force of social and political change, advancing the interests of the nascent *bourgeoisie* against the entrenched feudal classes. Again, the same equipment and the same channels that were used to circumvent economic monopolies were used to circumvent censorship as well.

In late 17th century England, the arbitrary nature of both the print monopoly and the censorship of the press prompted intense debates over both the freedom of the press and the ownership of texts (Rose 1993, 2003). Members of the emerging *intelligencija* fought simultaneously for economic and political emancipation. The role of copyright reform was to secure control over the revenues generated by texts, while the abolishment of prior censorship could promote political emancipation. Just as the old, publisher-based, perpetual copyright and the crown's attempts at censorship could not be successful without each other, the new, author-based copyright could hardly be imagined without radically reforms to the way the press and free speech were regulated. Out of these debates a new arrangement was born.

The figure of the economically independent author, taking *ex-post* responsibility for his printed words, while having the chance to live by his pen, has served well for the best part of the last three hundred years.

With time, important legal instruments were developed to ensure that the economic controls imposed on the ownership and circulation of texts do not limit free speech. The protection of expression (rather than of the ideas behind it), the limited term of protection, the doctrines of exhaustion or first-sale and the development of a series of exceptions or limitations where no right-holder permission is needed[4] are the main instruments for ensuring harmony between freedom of expression and copyright (Nimmer 1969). Due to the fact that copyright provides financial incentives to produce texts, it is regarded by many as the "engine of free expression"[5].

Post-modern copyright and the freedom in cyberspace

The growing economic and political power of copyright-based industries and the emergence of the internet (among other reasons) gave rise to what Pamela Samuelson labels "post-modern copyright", which has some disturbing parallels with the old, publisher-based ways of ordering the information markets (Samuelson 2002). The structural changes both within the copyright industries and the context of copyright regulation[6] have revived the debates over the relationship between free speech and copyright (Balkin 2004; Kaplan 1967; Netanel 2008; Samuelson 2002; Tushnet 2004).

One of the key issues raised by the last decade of scholarship is the integration of the internet into the regulatory frameworks of copyright and free speech. Despite the early, utopian approaches which considered cyberspace as a sovereign space (Barlow 1996; Turner 2006), it swiftly became clear that this medium is subject to the same pressures of control as any other (Lessig 2006; Palfrey 2010). Governments around the world routinely censor texts from digital circulation (Deibert et al. 2008; Morozov 2012). In the UK this concerns pornography and other content deemed harmful to minors, which, as it turned out recently, seems to include all "esoteric material" (Anon 2013a). In other parts of the world, such as China or Iran, it concerns political or religious dissent.

Big corporations are also trying to exert control over the popular use of their intellectual property online. Appropriation (Coombe 1998), remix (McLeod 2007) or other transformative ways to use protected works without permission are subject to routine copyright enforcement efforts by various rights holders.

4. I refer to cases such as parody, pastiche, commentary, criticism or certain educational settings. In continental law such cases are usually spelled out, while in the common law countries the general framework of fair use makes such uses permissible.

5. The term was used by the US Supreme court in Harper *&* Row Publishers, Inc. v. Nation Enterprises (SCotUS Case No. 83-1632).

6. Samuelson offers the following trends which she identifies as a step-back from the arrangement reached after the first modern copyright statute in 1710: the concentration in the copyright industries, the primacy of profit maximization, rather than of the promotion of learning, excessive pricing, the increasing length of copyright terms towards perpetuity, the subsidence of the author and the rise of the work, the expansion of exclusive rights and the erosion of fair use and other copyright limitations, the decline of originality as a meaningful constraint on publisher rights, the unclear origin of rights, the rise of private ordering and enforcement, the rise of the rhetoric of "piracy" and "burglary", and the ever-enhanced criminal sanctions.

Modern-day government censorship and private copyright enforcement seem to be fundamentally different both from each other and from their historical precedents. But, as it turns out, due to the similarities in their execution, as well as the potential synergies between the two, they have much more in common than we might at first like to think.

The legal scholarship of the last decade has focused mainly on the chilling effects of copyright, where creative production by amateurs as well as by professionals is hindered by the legal hindrances to building upon pre-existing works. While such a practice is in theory legitimate and justified, in reality it is routinely contested by rights holders on copyright grounds. The toxic combination of overzealous rights holders and the extreme costs of protecting fair use privileges do pose a problem, especially for digital *samizdat* writers: the amateur or semi-pro bloggers, music producers, fan fiction writers, videographers and remixers of the internet. This situation is further aggravated by the way in which copyright enforcement in the digital environment is set up. On the internet everyone has the chance to issue their own *samizdat* publication, but distribution is facilitated by various intermediaries, such as search engines, ISPs, and other online service providers like file hosting services, blogging platforms, etc. The limited liability and safe harbour provisions (including notice and takedown mechanisms) which shield such intermediaries from legal liability arising from their users' copyright infringement are conditional upon the removal of content identified as infringing by rights holders, which creates the perfect setup for collateral censorship (Meyerson 1995; Mulligan 2013). This happens because intermediaries have an incentive to remove perfectly legitimate content when the alternative is to individually review the legality of the rights holders' claims. Couple that incentive with the high incidence of content falsely identified as infringing by algorithmic agents operating without direct human control, and with the wilful abuse of the system by some to silence critical voices, opposition, competition and commentary (Electronic Frontier Foundation 2013; Von Lohmann 2010; Seltzer 2010), and you get a perfect storm, where beyond the problems of chilling effects on free speech (self-censorship), we also have to face extensive and aggressive ex-post (corporate) censorship as well.

A great deal of digital ink has been devoted to the chilling effects of copyright regarding new cultural production. On the other hand, the second class of copyright infringement, which consists of non-transformative uses, has received little attention in the free speech debate. The function of the 18th century pirates in the context of censorship is well understood, and their role in circumventing oppressive economic and political structures has received due recognition (Johns 2010). Few studies have tried to understand the same issues in the case of the online, unauthorized, non-transformative

reproduction, the downloading and the sharing of copyrighted works (Bodó 2011; Karaganis 2011; Liang 2005). The legal consensus finds little or no value in plain p2p file-sharing, despite the fact that copyright may act as a significant barrier, not only to the production of derivative texts, but to the circulation of the original works as well.

Copyright as a tool for censorship

There are quite a few known instances where copyrights are used for clear, political censorship. The Bavarian state, which is the post-war copyright holder of Hitler's *Mein Kampf*, has used its exclusive rights to keep the book off the market during the last half-century. The Dutch state, which owns the rights of the Dutch translation, uses the same means to block publication in the Netherlands. Publishers who wished to circumvent this instance of censorship had to resort to piracy.

The censorship and copyright policies of less democratic governments also offer instructive tales. In the Soviet era, *samizdat* was not, of course, subject to copyright considerations. Both original texts as well as the *samizdat* publications of Western literature were usually reproduced and distributed with only the implied (rarely explicit) consent of the authors. It was understood that any copyright restrictions would hinder the dissemination of valuable information.

Somewhat surprisingly, this latter view was also shared by the Soviet authorities. For much of its existence, the Soviet Union exempted translations from any protection whatsoever, in order to facilitate the import and dissemination of literary works in a populous and multi-lingual country. While the USSR used copyright piracy to obtain and disseminate knowledge, it was also feared that it would use copyrights to suppress the circulation of *samizdat*. In 1973, when the Soviets signed the Universal Copyright Convention, and introduced new domestic copyright legislation which enabled the Soviet state to nationalize intellectual property, many, most prominently the *samizdat* writer Aleksandr Solženicyn, feared that this provision would be used to block the publication of *samizdat* works abroad, in the West (Jinnett 1974; Levin 1983; Newcity 1980).

On the evidence available now [...] the Soviet Government seems to count on using the world copyright law to turn its tight domestic censorship into effective international censorship. [...] Ironically the preface to the UCC declares that "A universal copyright system will facilitate wider dissemination of works of the mind and increase international understanding". The apparent Soviet scheme now is an instrument to hinder such "wider dissemination"[7].

7. Solženicyn, quoted in Levin 1983.

Although there is no evidence of such actions within the publishing domain (as Levin noted, the Soviet state had far more effective means to block *samizdat* than copyright laws), yet, the fact that the fear spread in Western publishing circles suggests that they understood quite well that the same mechanisms that grant market control can also be used to exercise political control.

What remained an unfulfilled prophecy in the Soviet case became a reality a few decades later, when China started to use copyrights and other trade rules to enforce censorship. There are several official complaints to the dispute-resolution body of the World Trade Organization (WTO) to document how China tried to enlist copyright protection to support her censorship machinery. The first one[8] was concerned with the fact that until 2010, the Chinese statute on copyright did not provide protection to censored works. The results of the US complaint on the issue are instructive. China removed this provision from its laws, as it was found to be in conflict with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) which China had signed in 2001. The same agreement, however, gives China the sovereign right to control or prohibit the circulation of any work, a claim that the WTO panel acting on the issue also had to admit (Yu 2010). In the end, censored works were granted copyright protection, but that did not affect either their status as censored, or the machinery of censorship itself.

8. WTO DISPUTE DS362: China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights

The second US complaint[9] (filed on the very same day as the first) was concerned with limits imposed by China on market access. In that dispute the US complained that China only allows two state-owned companies to import audiovisual works. Again, China had to revise its legislation, but the panel decision again confirmed China's right to censor the cultural domain, adding only that it had to do it in a less trade-restrictive manner. As one commentator put it: "[This] may be a legal win for the US Government, it is not a win for freedom of speech. It may facilitate importation and distribution of material that passes Chinese censorship, but it leaves China's substantive content review intact and may even make it worse" (Pauwelyn 2010).

9. WTO DISPUTE DS363: China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products

These examples indicate that copyright is a rather redundant as a tool to enforce any serious censorship regime. The WTO cases also leave the question open as to whether in the long run strict censorship rules can coexist with market rules that conform to global standards.

Economic censorship – some unintended consequences of copyright

The introduction of the global copyright standards to a censorship-happy country may or may not reduce the effectiveness of political censorship, but in any case it introduces a new source of power into the local cultural domains. Well-enforced copyright protection paves the way for both wilful and involuntary economic censorship by those who hold the copyrights.

The classic definition of economic censorship covers cases when media companies or news organizations are pressured by their advertisers to drop certain topics. Economic censorship in the copyright domain also has the effect of certain texts disappearing from the marketplace of ideas, but the reasons for this may just as well be due to circumstances as to deliberate intervention.

The economic powers that copyrights grant can be, and routinely are, converted into political power. The negotiations around the TRIPS Agreement highlighted the fact that the stronger intellectual property protection frameworks not only diminish developing countries' ability to modernize through "piracy" (as the US has, or the USSR did, for the better part of their histories), but also subject them to the inequalities inherent in the global knowledge markets. If the newly protected rights holders do not wish to sell at prices developing countries are willing or able to pay (Karaganis 2011), then intellectual property protection becomes a tool for maintaining global political and economic inequalities (Bettig 1996; Deere 2008; May and Sell 2006; May 2006; Richards 2004; Scotchmer 2004). The fact that the US is the worst offender when it comes to updating its copyright laws to comply with unfavourable TRIPS decisions (Lee 2011) suggests that at least in some cases the preservation of this global order is more important than adherence to international institutional frameworks that were designed to strengthen that order. As we have already noted, at local levels copyright grants significant power to rights holders over the interpretations of their texts (Coombe 1998), rendering the production and circulation of critical, heterodox messages a legally adventurous enterprise.

Besides this aforementioned, wilful (ab)use of economic power, there is another logic that makes texts disappear from the marketplace (of ideas). The current catalogue of publicly sold copyrighted works is shaped by a number of factors: the (expected) demand, the production and distribution costs, the resources available to the rights holders, and the (geographic) density of the distribution network, among others. Any of these factors can render a work commercially unavailable, creating gaps of varying size between supply and demand on the market. Unmet market demand creates

the perfect conditions for the emergence of grey and black markets, which illegally provide what the legal alternatives cannot or will not offer (Bodó and Lakatos 2012). There is ample evidence that the copyright system in its current form creates an immense number of orphan works (whose rights holders are unknown) (Covey 2005; Mousner 2007; O'Reilly 2005), and an even larger group of out-of-print works (Heald 2007, 2013). While legislators are trying to catch up, the unfortunate effects of this type of economic censorship are promptly remedied through the emergence of extensive pirate markets, both online and offline.

Towards a redefinition of copyright infringement

Does this mean that pirates are free-speech warriors? Can we decide by answering the question of whether copyright is censorship? If the task were so simple, we would not need to go too far. Court cases both in the US and in the EU acknowledge the fact that copyright protection may hinder free speech, and we need to constantly re-balance the two. Are they in balance, then? If we ask the courts again, the answer is affirmative. The US Supreme Court, in *Golan v Holder*[10], was asked to give an opinion on the question of whether the retroactive extension of the term of copyright protection, and the removal of works from the public domain, would breach first amendment rights. At the European Court of Human Rights (ECHR), the administrators of the Pirate Bay, who were convicted in the Swedish courts on copyright infringement grounds, sought free speech protection for sharing copyrighted works[11]. Both decisions re-visited the balance of free speech and copyright protection, but brought no substantive shifts in the *status quo*. The rulings re-affirmed that copyrights may have adverse effects on free speech rights. The US Supreme Court found that as long as the free speech safeguards (the fair use exceptions and the idea/expression dichotomy) are not changed by Congress, the balance is satisfactory. The ECHR established that while operating a site which facilitates file sharing is covered by the right to "receive and impart information" under Article 10 of the European Convention on Human Rights, even if the files being shared are copyright-protected and the facilitation takes place for profit-making purposes, this right enjoys less protection than right holders' rights to the protection of their intellectual property. The conclusion that both Courts reached was that the current balance that legislators and the judiciary have struck between the two values does not justify intervention.

Should we stop here and rest our case? We certainly could, but then we would not be accounting for the fact that the Courts' interpretations are not universally shared, either by rights holders, who complain about the lack of enforcement tools, or by users, who complain about intolerable interference with the online practices they see as legitimate.

10. GOLAN v. HOLDER. 132 S.Ct. 873 (2012). United States Supreme Court, January 18, 2012.

11. Fredrik NEIJ and Peter SUNDE KOLMISOPPI against Sweden, application no. 40397/12, ECHR Decision of the ECtHR (5th section) of 19 February 2013

This lecture has tried to highlight some of the issues at the intersection of copyright and piracy. How should one connect these dots, and how should one interpret the resulting picture? The real debate is just starting. Just as courts do not share the view that these conflicts are anything more than glitches in an otherwise satisfactory system, there are many who do not share the view of the courts. Those half-million users who downloaded the Piratebrowser in the first twenty days of its existence may think that these glitches are evidence of copyright being systematically used to censor legitimate speech.

At this point it would seem rather difficult to bridge the gap between the two interpretations. But in any case, this latest move by copyright pirates to reframe their struggles in the context of censorship raises two important issues for us to consider.

First, as the Piratebrowser story suggests, different online dissenting / delinquent groups are in some sense rapidly merging. As noted earlier, there are many different groups that use technologies which provide extra privacy, from terrorist organisations to governments, revolutionaries, recreational drug users, privacy conscious citizens, whistleblowers, leakers etc. Some enjoy state support, others are targets of law enforcement agencies with multi-billion dollar budgets, some enjoy considerable public support, others never will, but they have at least two things in common. Efforts to control online communications, the surveillance of the internet, online blocks and filters constitute fundamental threats to their existence; thus their survival depends on the availability of reliable privacy technologies.

Copyright piracy is a form of social banditry[12] (Hobsbawm 1969; Lea 1999) which has so far been legitimized by the belief that such actions were simply not criminal. The popularity of such ideas as "sharing is caring" or "file-sharing is not a crime", and the success of pirate parties were signs of the legitimacy of different copyright-infringing social practices.

12. Social bandits are groups "whom the lord and state regard as criminals, but who remain within peasant society and are considered by their people as heroes, as champions, avengers, fighters for justice, perhaps even leaders of liberation and in any case as men to be admired, helped and supported."(Hobsbawm, 1969: 17).

In recent years copyright enforcement has started to enlist online intermediaries, and has tried to establish itself in more fundamental, architectural levels of internet technologies. This move made the pirates adapt and evolve: they turned to the tools of the censored to resist copyright enforcement. But pirates gained more than just an internet filtering circumvention technology. They also found a cause for their rebellion. They may have started as ignorant merry men happily sharing what was sold and all that wasn't, but they soon found themselves in the company of all the disenfranchised groups on the internet: victims of persecution, political censorship and economic deprivation. They share the tools as much as they share the strong desire for anonymous, private and undisturbed online communications.

This is the cause they will fight for from now on; this is the cause with which they can replace the ageing idea of the digital free-for-all; this is their way to gain new legitimacy, when the (mis)educational efforts of copyright holders slowly turns the tide against them.

This radical transformation from naïve infringer to self-conscious protester points to the second moral of this story. Scholars of copyright (and piracy) need to follow in the footsteps of censorship scholars, and take a second look at their subject. In recent years the studies on censorship have moved a long way from the simplistic understanding of the concept of censorship. To quote (Holquist 1994): "the [...] illusion, that censorship is a vice to be overcome through morally guided will, assumes that there either is censorship or not - that a complete absence of censorship is somehow possible. Despite Freud's stoic assertions that censorship is unforgoable, all too often it is still treated through a crude axiology, as an absolute choice between prohibition and freedom. This position denies the reality of interdiction and masks the necessity of choosing between the myriad specific conditions that embody censorship's fatedness. To be for or against censorship as such is to assume a freedom no one has. Censorship is. One can only discriminate among its more and less repressive effects." According to Foucault, censorship is not simply the "external silencing of a resistant subject's speech" (Freshwater 2003) or a "predefined set of institutions and their activities" (Kuhn 1988), but rather, as a form of power that shapes the discourse, it is a complex web of external pressures and internal(ized) values, individual and institutional practices, which reflect upon and respond to each other (Foucault 1978, 1979, 1981). Likewise, scholars interested in copyright enforcement and piracy need to overcome the binary understanding of piracy, according to which piracy either is, or isn't, and take steps to understand *how* copyright piracy is, and interacts with markets, laws, technologies, values, practices and social imagination.

Due to the shared technological foundations, copyright enforcement in the digital domain may be hard to separate from the larger struggles around security, privacy, surveillance, and from the overall war on general purpose computation (Doctorow 2012). As a result, that pirates now walk the same path as other dissenters, political and other, again, still fundamentally different, but hardly distinguishable any more.

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