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Bodó, B.

Publication date

2014

Document Version

Submitted manuscript

Published in

Piracy: leakages from modernity

[Link to publication](#)

Citation for published version (APA):

Bodó, B. (2014). Set the fox to watch the geese: voluntary IP regimes in piratical file-sharing communities. In M. Fredriksson, & J. Arvanitakis (Eds.), *Piracy: leakages from modernity* (pp. 241-264). Litwin Books. <http://litwinbooks.com/piracy.php>

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Set the fox to watch the geese: voluntary IP regimes in piratical file-sharing communities

Bodó Balázs

Budapest University of Technology and Economics

Fellow @ Harvard University, Berkman Center for Internet and Society

bodo@mokk.bme.hu

There is a short story I need to tell, before I start this chapter. [W]¹ is a highly secretive, elitist music-sharing network. Born on the ruins of [O], it is rumored to have all the finest, most exquisite and most complete collection of music ever written, hummed or recorded. Entry is difficult. Hopeful candidates need to pass an interview to prove that they know the rules of music piracy. Detailed preparation materials discuss such notions as ‘lossy’ and ‘lossless’ compression techniques, bitrates, transcoding, and so on. The hopeful candidates need to be prepared on the community guidelines and as well as site-specific etiquette.²

The entry exams are conducted on an IRC³ channel. When I felt prepared, I tried to join the channel. Instead of a merciless examiner, however, the following message greeted me:

You were kicked from #[W]-invites by ZeroBot (Banned: Your entire country [Hungary] is banned from the invites channel. This is because of the very high proportion of users from this area being bad for the site – either leechers, traders, sellers and/or cheaters.)

¹ The names of the closed file-sharing services are redacted to preserve their privacy.

² Similar paths led to the other communities discussed in this chapter. To some I was invited by a member, to others I passed an entry exam. The most difficult obstacle to entry into such communities in most cases is not securing an invitation, but rather knowing about their existence in the first place. As a member, I conducted participant observation, and revealing my researcher identity when conducting in-depth interviews with key members.

³ Internet Relay Chat – an early messaging platform still popular in these circles.

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I laughed out loud. In the last few years I got used to the black YouTube screens telling me the “This video is not available in your country”, but it was completely unexpected to see that the ‘pirates’ are also locking me out from their musical archives.

All the grand visions on the digital information economies describe information as an inexhaustible resource, where users do not compete with each other: instead of scarcity there is abundance. And yet, it seems, even piratical pools of stolen digital property are subject to some of the dangers facing traditional commons. If not over-grazing, then under-provision and abuse are issues, and they are obviously addressed by those who have some control over the entity that is responsible for the collection.

I was greeted by a bot: a simple algorithmic daemon that checked the internet address of my computer against a blacklist and kicked me out without any further questions. But someone had to write that bot, others have to maintain the blacklist, and still others had to detect that there was something fishy with users from my region. This simple, sobering message is only a sign of something bigger, more complex. It hints at a system of rules and governance mechanisms whose contours are only barely visible in the background.

It is these constructs that are the subject of this text. To begin with, I will bring three different examples of voluntary intellectual property (IP) enforcement in piratical file-sharing communities. I demonstrate that though the emergence of such rules may sound counter-intuitive, they are the logical results of the development of norms in the underground file-sharing scene. I then move to discuss whether or not the long-term consolidation of such norms is harmonious with the default ethical vision of copyright. Here I show that current practices in the IP field are scattered in both the legal and the ethical dimensions, and stable (social, business) practices consolidate not according to their legality but according to whether they comply with the default ethical vision. Finally I suggest that voluntary IP regimes can be effective enforcement mechanisms that rights-holders should begin to experiment with.

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This is not the Sherwood Forest

[W] is not unique in the current peer-to-peer (P2P) file-sharing scene, neither in its secrecy, nor in its rules-based entry regime. Such a site seems odd only for those who think that The Pirate Bay (TPB) is *the typical* site in the P2P piracy scene. The TPB and other *open networks*, however, only represent the public face of file sharing: beyond them there is a whole network of *closed, private trackers* that lurk in the depths of dark-nets (Biddle, England, Peinado, & Willman, 2001).

This Janus-facedness of P2P file sharing is a direct consequence of the relentless legal pressure on file sharing over the last decade. The pure logic of network effects would suggest the emergence of a natural monopoly (or possible oligopoly) of file-sharing networks. The continuous attacks by law enforcement organizations, however, eroded this emerging single network –née Napster – into a few open and an unknown number of closed P2P networks.

The obvious difference between open and closed networks is that the former serve anyone, while the latter are only accessible to registered users. From this simple barrier to access a number of important differences arise, most importantly that the membership rules of a closed tracker enable the development of a community, with its own set of norms and its own governance mechanisms. An anonymous member of a public forum described the difference between open and private trackers with a vivid metaphor:

A private tracker is a close-knit community of upper-classes merchants and artisans, while a public tracker is some unsanitary open market with shady Arabian traders in the middle of U.S.-infested Iraq.⁴

In the litigation-heavy post-Napster era, a handful of file-sharing hubs willingly accepted the enforcement challenge, and responded to the attacks of rights-holders by a combination of technological prowess, personal sacrifice, the politicization of the debate and a daredevil

⁴ Sourced from: <http://filesharingtalk.com/archive/index.php/t-327504.html> - accessed May 2012.

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attitude. The strategy they employed was to provide a free and open platform to exchange everything, for everyone. They were also willing to defend these services technologically, in court and in the public arena. While The Pirate Bay is the poster child of this approach, there are a few dozen other open networks that offer similar services. The success of such a strategy is, however, ambiguous. On the surface, open trackers seem to be indestructible. But in recent years, many sites shut down as soon as their ‘admins’ (or site administrators) were served with lawsuits and court orders. Others, like The Pirate Bay itself, are blocked by an increasing number of Internet service providers (ISPs), and their admins-owners were handed prison terms and multi-million dollar fines. Though TPB is still defiant, the days of public BitTorrent trackers may soon be over.

Open BitTorrent trackers are, however, an exception rather than the rule. There are only a handful of open trackers that have more than a million peers, or offer more than a million torrents, and there are only a few dozen sites that are in the hundred thousand range in terms of both peers and torrents.⁵ On the other hand, as at May 2012, the biggest Hungarian *private* tracker was number 9 globally in terms of the number of torrents amongst open trackers, and number 2 (behind The Pirate Bay) in terms of the number of peers participating in file sharing. The fact that a Hungarian private tracker, catering for a Hungarian speaking audience, specializing in Hungarian speaking content is on par with the most popular global open trackers suggests that there must be a significant underworld within the file-sharing underground. (Zhang, Dhungel, Wu, Liu, & Ross, 2010) The file-sharing landscape is in a constant flux, but the relevance of closed networks is undeniable even if the individual trackers and their relative power changes from time to time.

⁵ See the list of trackers indexed by IsoHunt, a search engine for files available through open trackers: <http://ca.isohunt.com/stats.php?mode=btSites> - accessed October 2012.

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Tracker Category	Torrents	Members	Seeders	Leechers
thepiratebay.se	1 512 045		3 894 707	1 537 437
Music	1 339 876	156 362	8 874 254	113 885
www.torrentportal.com	1 220 121		810 017	894 301
0-Day	1 102 604	9 358 610	16 418 755	1 337 426
fenopy.com	934 843		10 976 228	11 206 835
www.mininova.org	867 880		571 034	709 864
btjunkie.org	593 640		1 451 423	600 748
archive.org	512 849		5 685	8 226
0-Day	386 105	600 000		
Music	339 611	93 596	1 326 771	27 042
0-Day	277 553			
torrentreactor.net	268 638		1 339 159	522 989
TV & Movies	261 139	152 636		
www.kat.ph	259 896		789 034	312 326
www.bittorrent.am	252 541		953 167	369 386
bitsnoop.com	214 867		3 573 115	1 216 281
tokyotosho.info	186 542		260 510	230 195
XXX	182328	1720756		
www.torrents.net	160 952		772 613	236 419
Music	142 106	7 650	99 279	2 145
0-Day	138 913	100 000	1 044 942	72 496
0-Day	136905	2121718	2400176	109054
www.nyaatorrents.org	132 078		105 626	83 726
Music	132 076	1 906	34 259	358
www.hightorrent.to	125 832		25 956	47 661
0-Day	123 592	68 786		
bt.ktxp.com	120 138		46 179	79 037
0-Day	115 960	100 255	386 599	45 110
extratorrent.com	111 672		551 293	217 994
h33t.com	110 566		604 668	173 703

Tracker Category	Torrents	Members	Seeders	Leechers	sum peers
fenopy.com	934 843		10 976 228	11 206 835	22 183 063
TV & Movies	24 335	37 657	10 120 617	11 477 897	21 598 514
0-Day	1 102 604	9 358 610	16 418 755	1 337 426	17 756 181
Music	1 339 876	156 362	8 874 254	113 885	8 988 139
thepiratebay.se	1 512 045		3 894 707	1 537 437	5 432 144
bitsnoop.com	214 867		3 573 115	1 216 281	4 789 396
www.torrentcrazy.com	98 290		1 899 946	1 127 780	3 027 726
0-Day	136905	2121718	2400176	109054	2 509 230
www.seedpeer.me	55 499		1 878 231	269 621	2 147 852
btjunkie.org	593 640		1 451 423	600 748	2 052 171
0-Day	81 866	688 529	1 710 265	154 132	1 864 397
torrentreactor.net	268 638		1 339 159	522 989	1 862 148
www.torrentportal.com	1 220 121		810 017	894 301	1 704 318
www.torrentdownloads.net	35 713		918 999	593 216	1 512 215
torrent.cd	62 454		1 134 760	272 294	1 407 054
Music	339 611	93 596	1 326 771	27 042	1 353 813
www.bittorrent.am	252 541		953 167	369 386	1 322 553
l337x.org	81 621		1 045 979	247 842	1 293 821
www.mininova.org	867 880		571 034	709 864	1 280 898
www.limetorrents.com	41 477		670 741	468 081	1 138 822
0-Day	138 913	100 000	1 044 942	72 496	1 117 438
www.kat.ph	259 896		789 034	312 326	1 101 360
0-Day	73699	243533	973665	51556	1 025 221
www.torrents.net	160 952		772 613	236 419	1 009 032
0-Day	100 422	100 000	915 891	26 737	942 628
TV & Movies	85303	98000	798651	13626	812 277
0-Day	67 142	1 992 973	740 123	40 912	781 035
h33t.com	110 566		604 668	173 703	778 371
extratorrent.com	111 672		551 293	217 994	769 287
0-Day	109 047	300 000	456 759	287 845	744 604
0-Day	86 176	233 655	580 278	70 860	651 138

Fig 1&2: The biggest open and closed networks in October 2012. The first table shows open networks (in green) and closed networks (in red) ordered by the number of files (torrents) available through them. Notice that the biggest music-only closed tracker has nearly as many files as TPB, the latter also serving movies, TV shows, software, e-books and porn in addition to music. The table on the right shows the same trackers ordered by the number of peers

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simultaneously participating in a file-sharing swarm. TPB hardly made it to the 5th place in this case.

The response of closed networks to enforcement efforts has been to retreat into obscurity and maintain a low profile. This obscurity makes the systematic study of such networks almost impossible – meaning there is a risk of losing crucial information on the actual social practices around file sharing. The numbers suggest that these closed networks – much like their more visible counterparts – play an important role in educating many on what IP is, how it works, what fairness is, and how cultural markets should and do operate. Every day millions negotiate complex rules which not only govern the life of these piratical communities but also shape their users’ expectations on the future of cultural marketplaces.

Most closed networks are highly regulated spaces. Most of the rules are there to ensure the long-term survival of the common resource pool of shared files in an increasingly hostile legal and technological environment. They also make sure that the collection is as comprehensive as possible and maintains the highest achievable standards in terms of technical quality. Other rules establish internal administrative hierarchies, decision-making processes and conflict resolution methods: in other words, they establish the foundations of a self-governing community. And in at least some communities, we also find some rather unexpected rules, such as seeds of voluntary copyright regimes complete with restrictions on the exchange of certain works, informal notice and takedown processes and enforcement capabilities. But before discussing this aspect of the communities any further, I will outline three examples and discuss how they operate.

Example 1: specialized, international file-sharing community

[K] is an international torrent tracker catering to film ‘buffs’. It has a detailed set of rules on what can be shared via the site. In the manifesto of the site the first rule of [K] is made clear:

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[We do] not allow Hollywood/Bollywood mainstream. From its inception, [K] was designed as a source for non-mainstream and off-beat movies. We try to distance ourselves from the pervasive and easily available Hollywood (and Bollywood) mainstream and show people that a huge and exciting world of cinema exists beyond that. Therefore we do not allow any mainstream movies on the tracker. The definition of "mainstream" is very elusive and almost impossible to state precisely. It is within the discretion of the tracker moderators to decide on each specific case. As a general rule, we limit our definition of mainstream to Hollywood and Bollywood movies made after the 70s. Classic Hollywood movies are allowed and welcome - even though some of them may enjoy mainstream popularity, we have high respect for their artistic quality and importance in cinema history. We draw the line with the advent of the big-budget Hollywood blockbuster (with movies like Jaws and Star Wars) which brought on a rapid deterioration in the quality of movies. Modern independent productions are allowed and we might make special exceptions for new Hollywood movies from special directors. Also allowed are most "mainstream" movies from other countries - what might be a common mainstream movie in Hungary might be totally unknown elsewhere. For further information, see this collective forum thread for the discussion of the "mainstreamness" of specific movies. We are well aware that the enforcement of this rule makes a subjective judgment on the artistic quality of a movie that some people are bound to disagree with. However, this rule is the very foundation which has made [K] such a distinguished source for high-class world cinema.

This general rule is the source of much complex debate. In the forums dedicated to the topic, there is a detailed list of authors whose specific works are not to be shared. It is, for example, forbidden to share Steven Spielberg's whole oeuvre, but it is OK to share the Coen Brothers pre-2001 films (but not films after 2001). Sam Mendes is forbidden, but pre-1998 Christopher Nolan is OK. Milos Forman is generally acceptable, but his 1999 film *Man on the Moon* is prohibited.

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Some of these bans are there because the work is seen as mainstream. But other works are put on the list at the request of their producers. One of the administrators described the process in an email interview. When asked whether works are banned from the site on the request of certain rights holder, the following response was given:

The short answer to is Yes. We have been asked on a number of occasions if we could remove a file by the producers of the work. Only earlier this week did I receive a request to remove something. Most often the producer will ask for it to be removed until a certain date or until they break even on the film. We have also 'paid' (in ratio) producers to keep their work on the site.

This response offers valuable insight into the backroom dealings of piratical communities and rights holders. It suggests that at least some authors and producers are willing to engage with pirates directly, and instead of asking lawyers to send takedown notices, they make such request directly and politely. In return, these pirates seem to respect these requests, and attempt to negotiate deals that are mutually beneficial for all the parties involved.

Furthermore, the final sentence confirms a long suspected detail: some producers/authors are not only victims but also beneficiaries of the cultural black markets. These producers are willing to tolerate some (actual or perceived) losses in exchange for some of the benefits they receive in their capacity as users.

Example 2: specialized local community

[B] is a now defunct Hungarian file-sharing network that catered for the political extreme-right. It was organized along the political values of nationalism, national-socialism and social conservatism. It had a rich supply of Nazi propaganda, military history, anti-Semitic and

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racist literature, as well as cultural products from the local national-conservative music scene.

Its manifesto stated:

The aim of the tracker is to share content that is nationalistic, or due to political reasons is banned elsewhere. Our aim is not to hurt the authors and producers of nationalistic works, so certain restrictions are in place to prevent that.⁶

Its uploading rules made it explicit that:

What you upload should conform to the nationalistic (Christian conservative, nationalistic/radical) values. You can upload works that contradict these values, but you should explain why you think the material is worthy for sharing (ie: it has some informative or deterrence value). If what you upload confronts our values, and no explanation is provided as for why it is worthy of sharing, the material will be deleted. The reason for this rule is to suppress content that advertises deviance and other liberal values.

All nationalistic works are banned in the six months following their official release. If the six months passed, sharing these works is permissible. (This rule is in place to ensure that the livelihood of nationalistic authors is granted, and to make sure that the tracker does not hurt them financially. Six months should be enough for you to buy these works.). For works beyond the six months limit, please provide a link where the work can officially be bought, and add the following lines: ‘Support our nationalistic artists! If you like this CD/DVD/book/work, please buy it, and so support their work!’ (This rule is also to support the nationalistic artists.)

⁶ Note, that networks of piracy have important anti-censorship dimensions, just as in many earlier historical contexts. See Coombe (1998) and Darnton (1982, 2003) for two very different sets of examples.

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In this case we see a fan community that also happens to be piratical. But in this case, such as in many other online fan communities,

...subcultural demands may construct conditions under which other goals predominate over consumer desires at either a micro or a macro cultural level. In other words, status within a subculture may be dependent not on consuming goods through any means possible but instead on consuming them 'legitimately'. (Downing, 2011: 768)

Example 3, local, mainstream file-sharing community

Székelys are ethnic Hungarians living in eastern Transylvania, Romania. They have been struggling to maintain their traditional cultural distribution channels. Despite the significant financial support of the Hungarian state bookstores selling Hungarian language books, we have seen the closing down of such stores and cinemas playing Hungarian dubbed films are few and apart. To address these issues, Székely youth have set up its own file sharing service – [C] – to supply themselves with films, music and e-books in Hungarian. [C] includes the following rule in its section dealing with copyright:

[C] does not support the sharing of works, whose gifted authors are active in Transylvania and who created something worthy of remembering in music or in film. Uploaders of such content have to have the proper authorization to share, unless the author authorized the sharing by him/herself. Such content will be immediately removed upon request of the author or rights-holder. If the content does not meet the aforementioned limitations, its sharing is supported without further limits.

The administrators of [C] also attempt to formulate what constitutes 'legitimate' consumption, and the threshold is the active presence of an artist in the life of the local community. It is arbitrary, and it is formulated in a language that only badly imitates © legalese, but again,

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nothing really forces them to make *any* distinction. It is also worth noting that, similarly to the two examples presented above, the users of [C] are willing to deny themselves important cultural products to protect the livelihoods of the producers.

Though these three file-sharing networks differ in almost every dimension, they have similar voluntary restrictions on sharing certain works. [K] is a highly specialized, prestigious, international network catering to 30,000 film professionals and fans. [B] was used by a few thousand political extremists to obtain and spread Nazi paraphernalia, military history and nationalistic rock music, while [C] has 50,000 users and is a general service defined by age, ethnicity and geography. Yet all three arrived to a point in their development where they felt there was a need to address intellectual property issues, and have made important distinctions between certain authors and works – offering protection to some and not others.

What might be the reason behind such behavior? Why would the technologically sophisticated file-sharing pirates safe behind layers of IP address filters, anonymization services and privacy guarding Virtual Private Networks (VPNs) with servers hosted in far away countries and confronting only inefficient domestic law enforcement, voluntarily restraint themselves in *anything*? It is this question that I attempt to answer next.

Open v closed, public v private: the benefits of limited access

In order to answer these questions, we must first understand the role that such rules serve in the private tracker communities. Closed, private trackers are relatively small communities⁷ whose most important goal is to *maximize the value of the library of shared files*. The value of the collection is a function of at least three separate factors: (1) the ‘completeness’ of the

⁷ Based on the available sources the average headcount of the known closed trackers is around 47 thousand. User headcount is defined by the technical and human resources necessary to manage the community.

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collection as a whole; (2) the technical quality of the individual files; and, (3) the robustness of the community that supports the collection. Every action, taken in each of the aforementioned dimensions is to protect and nurture the collection, even if that (significantly) reduces the usefulness of the network for the individual user.

(1) Protecting the collection

The mechanisms that serve to maximize the value of the collection are similar to how Lawrence Lessig (2006) describes the different layers of regulation in his book *Code 2.0*. Some of the rules are embedded in the file-sharing technology, creating an architectural layer of regulation. This layer enables the development of a second, economic system upon itself; while a third layer of social norms and hierarchies makes the system complete.

It should be noted that in Lessig's (2006) model, law is a fourth factor. In an illegal, underground piratical file-sharing community, law only indirectly affects the internal organization of the network. On the other hand, there are written laws within the network, but these laws would be regarded as norms from Lessig's perspective. In the following I conflate the written rules and informal norms of these communities as norms, and preserve the law dimension to the category of national and supranational legislation.

On the level of technological control we find the capacity to measure the amount of data up- and downloaded by each user. This measurement enables site administrators to detect and punish free-riders, who would rather just download and not seed the content for others. Such a feature, which is hard-coded into the technological layer, opens up the opportunity to set the thresholds for punished, tolerated and rewarded levels of user contribution, effectively introducing a price for consumption (download) and a price for labor (upload) into the system. Such a process turns "private BitTorrent communities [...] from computer systems into economic systems" (Kash, Lai, Zhang, & Zohar, 2012: 1).

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It is important to note that these P2P markets are not free-markets, and the prices are not automatically defined by supply and demand. On the contrary, prices are set by the not so invisible hands of the site administrators to signal preferred behavior and to address certain shortcomings of the P2P activity. By rewarding the sharing of certain content and penalizing the sharing of others, such pricing mechanisms are able to ensure that older, less popular, niche, fringe or otherwise *archival* content stays accessible at all times within the community. By setting download prices to zero these sites play an important role in directing attention to certain works and authors. Such mechanisms help admins to ‘curate the collection’ and shape the cultural canon within the network.

The accessibility of long-tail content is a strong differentiating factor amongst file-sharing networks. On general, open networks can only rely on chance: that is, the commitment of individual users to sharing, or the law of large numbers when it comes to making content in the long tail available. A strict ‘ratio rule’ – for example, where one is expected to upload 1 megabyte for each megabyte downloaded – may incentivize sharing in general, while ratio rewards for sharing marginal content and for fulfilling requests boosts the availability of such niche content. Such measures help to maximize the completeness of the collection as a whole. The same rules, on the other hand, severely restrict the freedom of the individual to download anything they wish, and therefore limit nomadic, explorative consumption patterns (Bodó & Lakatos, 2012), just like any other market mechanism.⁸

In the case of P2P file sharing, technology and logics would suggest a lack of scarcity and a subsequent freedom in consumer choices. Though this image may be somewhat true for open trackers, in closed networks, especially with strict ratio rules, we see the re-emergence of artificial scarcity. This is in part in response to the perceived problem of free riding and the

⁸ The already quoted Kash et al. (2012) study provides the empirical evidence that such an introduction of ratios affects what is being consumed within the community. In a previous study of ours, we have found evidence that the chance to consume cultural goods free of charge encourages explorative, nomadic consumption, where individuals are more willing to experiment with unknown cultural experiences (Bodó & Lakatos, 2012). The Kash et al. (2012) study suggests that in ratio based networks, explorative nomadism is more pronounced when the virtual cost of consuming archival, long-tail content, with low potential to boost the upload quota, is set to zero.

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under-provision of certain parts of the content commons. Of course secrecy and access barriers also serve a number of other important goals, such as (a sense) of protection from enforcement, and the maintenance of what Dent describes as,

...ritual, political, and material power [...]The capacity of some social groups to keep others from finding out about those discursive practices and then employing them is nonetheless what helps to maintain the given social hierarchy. (2012: 665)

(2) The P2P digitization machine

The second factor that defines the value of the collection is the technical quality of individual files. File-sharing networks are not only highly efficient content distribution networks, but also vast digitization machines. Most networks rely on the contributions of individual users to build an impressive catalogue of content not accessible anywhere else.⁹ The technical infrastructure to create digital copies is more-or less accessible, but the production of high quality copies is far from trivial. Closed networks thus have to solve three closely related problems: the encouragement of users to create digital copies in the first place; help users so these copies will be of high quality; and filter low quality entries from user's contributions.

Closed trackers mobilize the community resources to address all these issues at once. These community efforts include very detailed and self-explanatory guides on the know-how of producing good digital copies; a multitude of forum threads where technical questions are asked and answered; and, an army of community members ready to lend a helping hand to anyone asking. Sophisticated user feedback mechanisms are coupled with administrative control to identify and remove sub-par files. Closed file-sharing networks have the important role of coordinating and organizing some of the anarchic and uncoordinated digitization

⁹ See Zhang et al. (2010) on the rate of cross-pollination of content amongst different private and public networks.

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activity happening all the time on the Internet by setting digitization standards and providing the quality assurance mechanisms.¹⁰

(3) No commons without a corresponding community

The library of shared files, which is at the core of a closed P2P network, is a prime example of a regulated, peer-produced, common property regime, with “particular institutional forms of structuring the rights to access, use, and control resources” (Benkler, 2006: 60). The rights, described by Hess and Ostrom (2003) regarding the use of common-pool resources, are all well defined in closed P2P file-sharing communities. It is easy to identify within such networks what Elinor Ostrom identified as the preconditions for a successful common property regime (1990: 90): clearly defined access barriers; locally relevant, context-specific rules; collective choice arrangements; institutions to monitor and sanction behavior; arrangements to resolve conflicts; and, relative autonomy. Most of these institutions are established and operating through the community forums which become a crucial component in the closed file-sharing infrastructure.

Each underground knowledge commons relies on four separate, but closely intertwined technological infrastructures: (1) the resources (storage capacity, bandwidth) of individual users; (2) the torrent tracker, which coordinates the shared individual resources; (3) the search engine, which provides the meta-information on the shared resource; and, (4) the online forums and other communication channels which enable interaction between group members. Most open trackers have one or both of the second and third infrastructures, but offer little in the fourth domain. This latter infrastructure is, however, the space where the community and the norm formation take place. It is on this infrastructure where the rules that differentiate ad-hoc, accidental, anarchic piratical libraries from well managed and regulated knowledge

¹⁰ The destruction of gigapedia (GP), a vast, underground academic and scientific e-text archive was important for this very reason. While the already digitized collection remains accessible through other venues, the community that put that collection together in the first place is scattered, and the post-GP sites do not offer the same level of social support and control of the digitization process as GP did. If this situation persists, it will severely limit the continuous supply of high quality digital copies in the future.

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commons are negotiated. It is the participation in various online interactions that helps the lone, anonymous file-sharer to become part of a well-defined community, with its own hierarchies, habits, rules and notions of 'legitimate' consumption. A forum commenter described the role of community as follows:

The casual downloader would not care about community. They just want to go to the tracker, find what they want, download it, and stop the torrent as soon as they complete the download. They're not interested in getting to know other users of the tracker as well. In private trackers, dedicated members will try to maintain a good sense of community. This starts with keeping torrents seeding as long as possible, making good comments on torrents, and participating in the forums and/or IRC. [...] Believe it or not I used to try to post in the Pirate Bay forums, but given the huge number of people who go there, the forum activity is quite lacking."¹¹

The community, its rules, its governance mechanisms, its opinion leaders, its discussions, *its collective identity* is what can ensure the long-term survival of not only the commons in question, but also the practices that sustain these commons.

I believe that this sense of community is an often over looked factor in the studies on the motivations of file-sharers. There is a great deal of research that has attempted to identify the source of individual's attitudes on copyright piracy. Most of the studies, however, have focused either on the micro/individual level, such as: peer pressure (Becker & Clement, 2006); family/friend/superior influence (Svensson & Larsson, 2009); gender (Chiang & Assane, 2008); anonymity (Larsson & Svensson, 2010); an individual's socio-economic background (Cox, Collins, & Drinkwater, 2010); and, motivational background (Bô et al., 2004; Goode & Cruise, 2006). There have also been a number of studies focusing on the macro societal influences with examples including: global income inequalities (Karaganis, 2011); market failures (Bodó & Lakatos, 2012); mass litigation (Depoorter & Vanneste, 2005); sources of IP norms (Schultz, 2007, 2009); and, the mechanisms of gift economies

¹¹ Sourced from: <https://www.thepiratesociety.info/blog/?p=971> - accessed May 2012.

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(Barbrook, 1998; Giesler & Pohlmann, 2003; Leyshon, 2003; Skågeby & Pargman, 2005).

But so far only a few studies have realized that online communities with their own IP norms and ethics are the most important peer groups to shape the copy-norms of the individual (Beekhuyzen, von Hellens, & Nielsen, 2011; Cooper & Harrison, 2001; Downing, 2010, 2011; Lee, 2009; Rehn, 2004).

Current copyright legislation and ramped up enforcement is still unable to prevent mass-infringement. Despite this, it certainly creates a climate where one feels the need to justify one's actions and situate IP related cultural practices within the macro-framework of IP legislation. Likewise, there is also a feeling that one must explain one's individual beliefs about rights and wrongs. Closed file-sharing communities offer a platform to reconcile conflicting values, ethics and legalities, and serve as interpretative communities that distill their own ethics on the use of intellectual properties.¹²

Different file-sharing networks arrive at different conclusions on what they consider both proper and acceptable uses of IP. Some, such as The Pirate Bay take a radical IP abolitionist position: seeing themselves as digital 'Robin Hoods' who take from the 'evil' rich – which are usually American corporations – and freely give the spoils to the 'poor'. But the closed networks I cited seem to have left Sherwood Forest some time ago.

Probably the most important differentiating characteristic of closed file-sharing communities is their common property regime approach to the resources they use and produce. The rules seem to suggest that these networks realized that a parasitical, value maximizing approach to the 'natural resource' they are using – that is, the wider cultural environment which produces the works they share – would be counterproductive. For this reason they show signs of self-control which serve both the piratical commons *and* the wider cultural ecosystem. I previously defined the borders of the community as those set by the membership rules; and

¹² It is worth noting, that 'being a pirate' is hardly the most important component of the identity offered by closed networks. This is especially true within closed networks with a well defined thematic focus: for film buffs or political extremists, the fact that one has to commit in copyright infringement in order to access an unprecedented resource pool is in many cases more of a cognitive and emotional tax rather than something one would boast about.

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the common resource pool as the files shared by the members of the community. But those networks that have their own notions about ‘legitimate consumption’ seem to be ready to take the interests of producers, authors and some intermediaries into consideration. By taking non-members’ interests into account, these piratical communities are internalizing the externalities of their actions. They also recognize that only if the whole ecosystem thrives can their own closed common resource pool be successful.

It takes two to tango

The voluntary IP regimes in piratical communities are the results of complex background negotiations between pirates, producers and some times even traditional intermediaries. All sides have to have the willingness to engage in the discussions and must be satisfied with the outcomes if they are to keep cooperating. The motivation to reach an agreement is far from trivial, since the parties have cheap and easy alternatives to cooperation. Authors and rights holders have the full support of law on their side and could easily make life difficult for the pirates. The pirates, on the other hand, can always retaliate and/or disappear in the darknets. Why, then, do we see such arrangements appearing?

From the pirates’ perspective, one might say that respecting rights holders’ claims is a way to avoid more formal scrutiny. By respecting informal requests they can avert the risk of facing more challenging formal legal procedures which can take down the network as a whole. As such, temporary and even permanent bans on certain works are necessary sacrifices to protect the rest of the collection. This is why I argue that the emergence of voluntary IP restrictions is a logical next step in the development of the rules that serve to protect the common resource pool: if piratical file-sharing communities see that by cooperating with rights holders, they can avoid devastating general prosecution.

But there is also another, more utopian, explanation. The restrictions on the common resource pool may also suggest that these communities have realized that the P2P library is part of a

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larger ecosystem, with which it is in a symbiotic relationship. The fate of this collection is dependent upon the well being of that cultural field which nurtures it and vice versa. When it comes to the protection of the resource they directly control – that is, the P2P library – they need to account for the externalities of their actions as well as attempt to protect that part which they do not have control upon (or only indirectly). By having sharing restrictions that redirect P2P demand to other, often legal channels, piratical communities imagine themselves in co-existence with legal markets as well as with rights-holders. This is one significant step beyond the usual descriptions of P2P black markets that suggest that piracy is either an autonomous domain, hostile to the legal markets in general, or is simply a response to the failures of legal alternatives (Bodó & Lakatos, 2012; Karaganis, 2011).

Authors and rights holders may also come to the conclusion that they have a great deal to gain from cooperating with their piratical audiences and customers. Some of them are explicit members of these networks, so they directly benefit from their existence as users. By being a member they also have more opportunities to represent their interests in the informal discussions on what counts as legitimate consumption.¹³ Studies on fan cultures show that in the case of transformative uses, the engagement of rights-holders with fans is a necessary component of the successful management of copy-norms and infringement issues (Condry, 2004; Fiesler, 2007; Lee, 2009; Lipton, 2010; Schultz, 2006). Other rights holders may have arrived at the conclusion that the black market circulation of their works may not have a devastating effect on their livelihood. The arguments here are well known, and in some cases are empirically well documented, such as: obscurity can be a bigger threat than piracy (Bhattacharjee, Gopal, & Sanders, 2003; Peitz & Waelbroeck, 2006; Waldfogel, 2010); free access may lead to increased sales (Boorstin, 2004; Bounie, Bourreau, & Waelbroeck, 2006); and, especially if authors have a limited interest in the long-term financial success of the work, they are simply more permissive. Traditional intermediaries can also use these networks to sample demand, test products and maintain an archive of discontinued products.

¹³ Authors can exercise a considerable influence on fan communities both positive and negative. For example, Metallica's stand against Napster or Trent Reznor's support of Oink both still serve as reference points in IP debates many years later. (Sano-Franchini, 2010)

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So both sides (if we treat producers and audiences separate, which is very much the characteristic of the modern, mediatized, commodified culture) may have an interest to cooperate, even if the setting in which they meet is clearly beyond the limits set by law. We have to ask then, how important a factor legality is in the case of bottom-up social practices that enjoy both long term stability and legitimacy from different stake-holder groups?

The ethical foundations of copyright

I would like to argue that, in the aforementioned cases, both consumers and producers are engaged in activities that are clearly illegal but accepted as legitimate. These exchanges are legitimized by the fact that the participants see them as ethical practices, which usurps the issue of their legality. The ethics of these practices may be contextual and ephemeral, but all of them are deeply grounded in the default ethical expectation of copyright.

James Grimmelman defines this default ethical expectation of copyright as follows:

The basic ethical expectation of copyright is that authors and audiences respect each other and meet in the marketplace. Authors behave well when they create and offer works that enrich the audience's intellectual and cultural lives. Audiences behave well when they offer authors the financial support needed to engage in creative work. The exchange is commercial, voluntary on both sides, reciprocal, and respectful. (2009: 2014)

When authors do not exercise the options given by statutory copyright, and tacitly or explicitly tolerate their works being shared on file-sharing networks under certain conditions, they 'behave well'. When piratical networks voluntarily redirect P2P demand to the marketplace, they also 'behave well'. When authors and piratical audiences engage in a mutually respectful dialogue and in reciprocal exchanges, as we could see in the case of [K],

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they both 'behave well'. The only catch is that this ethics is not universal, and it is not unconditional. It is situational and contextual: it only applies to certain authors, certain works, certain audiences and certain practices.

Statutory copyright, in contrast, is a universal but impersonal construct. It attempts to balance the general authors' rights against the interests of a general public. Its limits, most notably the length of protection, and exceptions are also generalized. This was not always the case though: bottom-up, extra-legal, community based, voluntary IP rules are actually older than the first statutory formulation of copyright. The history of printing, as a case in point, teaches us that early printers soon realized that they needed to curb unfair competition amongst themselves if they wanted the trade to flourish (Bodó, 2011a, 2011b; Darnton, 2003; Johns, 2004; Khan & Sokoloff, 2001; Wittmann, 2004).

Such 'synthetic copyright regimes' (Khan, 2002) were personal or rather, communal. As a courtesy of trade, they reflected the consensus within the printing community on what was both permissible and undesirable behavior. They also defined the conditions, under which they applied, and under which they could be suspended.¹⁴ The emergence of formal IP regimes slowly crowded out such self-regulatory solutions. Up until the arrival of the Internet we find such community based, extra-legal IP regimes mostly at the social, cultural and political fringes, such as in bootlegging subcultures, amongst the bands catering the American counter-culture, or in various non-Western settings at the time when the cassette recorder arrived (Heylin, 1995; Larkin, 2004; Manuel, 1993; Schultz, 2006). The rapid and violent changes in technology, cultural markets and social practices in the last decade created a set of practices that became illegal, despite their perceived ethicality. The tools included in the general IP framework (limitations and exceptions, fair use provisions, the three step test) so far failed to provide a truly safe harbor to the many of the newly emerging social practices that are in line with the default ethics of copyright. In such cases the constantly re-negotiated

¹⁴ Wittmann, for example, describes the conditions under which German publishers could resort to piracy in the 18th century: "Even its most vehement enemies called pirate editions as justifiable when the original publisher's prices were increased, their discounts were low, codes of conduct were broken, colleagues as well as the public were damaged, or if pirate editions were only distributed in regions where the original itself was not available." (Wittmann, 2004: 6)

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informal arrangements were more flexible to adjust to these practices than the statutory IP regimes, anchored in multiple supra-national institutions.

The emergence of voluntary IP regimes in piratical communities is an important signal that even if they have little respect for statutory copyright or are unwilling to honor every claim made by rights-holders, those millions who engage in piratical practices are well aware of their responsibilities as members of a cultural community. Their decisions, however, are less based on laws, and more defined by the ethics negotiated within the community.

This development has at least three important lessons in it. The first one considers the relationship of IP laws and social practices in the near future. I argue that as long as the main question of the IP field is not *how people can be forced to obey the law*, but rather *under what conditions they choose to respect the wishes of authors and ensure the reproduction of different cultural fields*, the survival of different social practices will be a factor of their ethical disposition rather than their legality. In other words we should expect ethically robust practices to persist even if their legality remains in question, and unethical practices will face considerable public opposition even if they are found to be legal.¹⁵

The system is constantly in a state of flux: File-sharing services come and go; file-sharing technologies emerge, mutate and become obsolete; generations of ‘pirates’ turn on, tune in and drop out; rights holders’ attitudes change, as do market conditions; and, legal alternatives arise, mature and disappear. In this rapidly changing landscape, certain practices and alternatives are closer to the ethical standard while some are farther away. Those that are closer to the default ethical vision will continue to enjoy public support even if they are not legal, and those legal practices that do not conform to the ethical expectations, will face considerable resentment even if they are vehemently enforced.

¹⁵ Hardly anyone shed a tear for the forfeiture of the Rolls-Royce Phantoms of Megaupload owner Kim Dotcom, but even less sympathy goes to the US rights-holder groups and authorities, as it turns out they raided Megaupload knowing that they will not be able to take the case to court. Sony found itself in a PR nightmare as it raised the price of Whitney Houston’s songs minutes after her death. Spamigating (mass-litigating) companies, copyright trolls, corporations turning against their customers, companies and individuals supporting SOPA/PIPA/ACTA are just a few examples to practices that are though legal, because of their questionable ethical disposition had to face severe backlash.

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The second lesson refers to the re-establishment of communality into the mediatized, industrialized and commodified processes of cultural production, distribution and consumption. The rise of formal and impersonal IP regimes was followed by the rise of impersonal, global, media conglomerates that are more focused on financial returns than on any cultural mission (Hesmondhalgh, 2007; Turow, 2009). These entities not only connect authors and audiences, but also separate them: their interests are different from those of the producers, whose work they market, and from the interests of the audiences they cater to. They have their own priorities and financial interests in the business of cultural production and distribution, and so far they have been very successful in representing them in the formal IP frameworks.

P2P networks are heralded sometimes as dis-intermediaries and at other times as new intermediaries between authors and audiences. I suggest that P2P networks create communities where producers and consumers, authors and fans can, and do, interact. Through these interactions a mutual realization of consumers and producers may emerge that there is no 'us' versus 'them' in this conflict: authors, rights-holders and other commercial intermediaries are also part of the community, to which users, down-loaders and consumers belong. Piratical networks with voluntary IP regimes have the potential to abolish the artificial separation of producer and consumer, and reunite these two groups into non-industrial mode of cultural community, so characteristic of a pre-mediated era, where culture is produced by those who consume it, and vice versa. Here cultural artifacts are distributed and transformed through the acts of 'consumption'.

The final point is that voluntary IP restrictions in piratical communities are probably the most effective enforcement mechanisms up to date. Closed file-sharing communities have developed tools of social control in spaces where statutory copyright is irrelevant. The enforcement efforts that target these networks destroy not just the resource pools and the communities that built them, but also destroy the social controls that are in place. Paradoxical as this may sound, the aforementioned piratical communities may be the enforcement allies

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that rights-holders have been seeking all this time. In any case, it is apparent that they both have at least one interest in common: a sustainable cultural ecosystem.

So maybe it is time to ask ourselves: should we set the foxes to watch the geese?

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