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<td>Editor:</td>
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<td>Book title:</td>
<td>Piracy: leakages from modernity</td>
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<tr>
<td>Place published:</td>
<td>United States</td>
</tr>
<tr>
<td>Publisher:</td>
<td>Litwin Books</td>
</tr>
<tr>
<td>Year:</td>
<td>2014</td>
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<td>URL:</td>
<td><a href="http://litwinbooks.com/piracy.php">http://litwinbooks.com/piracy.php</a></td>
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The pirate imaginary and the potential of the authorial pirate
James Meese

Introduction

The figure of the pirate and acts of piracy themselves are most frequently defined by their opposition and exception to the legal framework of copyright law. However, the term ‘pirate’, used to describe those who have been seen breaching the such legal framework, does not just evoke images of rows of computer towers in a back room, adjacent to a pile of blank discs ready for commercial reproduction and distribution, or the ubiquitous footage of the youthful and impressionable ‘movie downloader’ found on the beginning of DVDs (see Loughan 2008). It also carries a deeper cultural resonance, reminding us of bands of renegades, hijacking European ships returning from colonial outposts, or in the contemporary era, of the two most evocative pirate imaginaries which exist co-currently: The machine-gun wielding Somalian pirate – a martyr-rebel and a refugee of globalization – or more humorously, Johnny Depp’s, Keith Richards inspired, Captain Jack Sparrow, the debonair star of the successful Walt Disney franchise Pirates of the Caribbean (Ali and Murad 2009).

While Captain Sparrow originally appears as a scheming pirate, in subsequent films he slowly reveals an ethical side, which belies his rough exterior. This character’s development becomes even more interesting, considering the franchise owner Walt Disney has exhibited a fierce determination to protect their intellectual property rights from pirates (and also the entirely legal public domain) over the years (see Lessig 2004). The Walt Disney Company seems to refuse the possibility of piracy, which good-hearted unless that piracy involves Jack Sparrow or another such fictional pirate, and so can contribute to their extensive intellectual property holdings and profits. However, this writer is much more hopeful, and the following chapter will reveal how ‘the pirate’ has been structured discursively and materially by intellectual property law itself, as well as the interested parties surrounding this discussion, and will go some way to explaining how piracy manages to operate productively through and beyond these constraints.

The past decade has seen content industries and a collection of academics, lawyers and librarians engage in an increasingly public battle around copyright’s transition to a digital landscape. These ‘copyright wars’ (Hunter 2005) have led to some productive discussions around the future of information management and knowledge curation, however, both sides have a tendency to continually focus on specific forms of piracy. The content industries regularly frame the figure of
the pirate as a criminal, with the famous campaign – ‘Piracy, it’s a crime’ – which features on the start of most commercial DVDs clearly stating that downloading is both an ethical wrong and illegal. This is a claim, which manages to educate the consumer, while also justifying the industry’s broader public and legal campaign against the pirate (Grimmelmann 2009, 2021). Conversely, the aforementioned advocates for ‘free culture’ qualify their support for piracy, often viewing certain piratical practices as a form of free speech, while ignoring the constitutional specificity of such a political programme.

When certain kinds of piracy are normalised and idealised in public debate, alternative discourses of piracy, and other piratical practices, are pushed out of view. The chapter will compare and contrast three imaginaries of piracy, in order to explore the ramifications of this process. The pirate as criminal and the pirate as revolutionary will be explored through a discussion of the recent debate around the Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA), and the recent shutdown of digital locker website Megaupload. Following on from this discussion, a subsequent examination of *Roadshow Films Pty Ltd & Ors v iiNet Ltd* will instead position the pirate as a neutral media consumer, establishing piracy as a banal form of media practice.

In so doing, this chapter will draw on work by Lawrence Liang (2005, 2009), Kavita Philip (2005), Rosemary Coombe (1998) and Rebecca Tushnet (2004), in order to outline the residual authorial capacity that can be inherent within the neutral pirate. Imaginaries that populate the public sphere regularly fail to acknowledge both the productive and creative capacities of the pirate figure as a liminal subject and the ‘dialogic’ nature of cultural production and consumption (Coombe 1998). The chapter views the neutral pirate as the imaginary best able to illuminate these capacities, but also raises the possibility of abandoning the term ‘piracy’ completely, as the word fails to capture these nuances and too often falls victim to an unproductive criminal/hero dichotomy.

**The relationship between authorship and piracy**

In order to seriously engage with the pirate, this essay will move beyond the pirate’s traditional position at the edges of legality, and instead undertake a positive analysis of piracy, treating the pirate as a productive and heterogeneous figure. This is a substantial shift away from how most scholars have approached piracy, and a brief examination of the scholarly record reveals a deep ambivalence about the pirate, most clearly seen in the often arbitrary distinctions that are made between commercial and non-commercial piracy. When discussing commercial piracy, scholars
usually refer to large-scale operations that occur in street markets throughout the global South (for examples see Sundaram 2010; Athique 2008). It can also refer to services like Kazaa!, however, where businesses are built off the back of widespread digital piracy (Rimmer 2007). Conversely, non-commercial piracy such as bootlegging, particular file-sharing practices or transformative amateur media creation, that may or may not fall under particular copyright exceptions such as fair use or fair dealing provisions, are generally viewed in a positive light by many scholars (Benkler 2006; Jenkins 2006), who see this sort of copying as inherently ‘creative’. These differences lead to unequal mobilisations of the pirate and piracy, and so these terms are often imbued with a questionable ideology.

Such trends are particularly noticeable when looking at the work of scholars who focus on contemporary issues surrounding digital media. While they eagerly critique the hegemonic tendencies of copyright law, the majority are happy to either distance or seriously qualify their support for ‘piracy’. Noted copyright reform campaigner and scholar Lawrence Lessig, for example, argues that large-scale, commercial piracy “is not just a moral wrong, but a legal wrong” (2004, 63). Further, while Lucas Hilderbrand (2010) is willing to recover bootlegging from its ‘negative’ or ‘criminal’ connotations, he still refuses to acknowledge other acts of piracy as a productive force. In Hilderbrand’s eyes, while bootlegging is concerned with the egalitarian or productive redistribution of culture and information, pirates steal for profit, and are simply involved in the commercial duplication and the sale of knockoffs. He is willing to acknowledge the “grey areas and contradictions” (2010, 23), which remain in his differentiation, but stops short of providing a detailed argument for maintaining it.

Lawrence Liang (2005) and Kavita Philip (2005) have come closest to clearly outlining the issues that these predominantly Western scholars have with commercial piracy. Liang (2005, 10) notes that their opposition generally can be classified as either ‘strategic or ethical’. Many might have little opposition to commercial piracy, but are wary of supporting such a problematic practice as part of their advocacy against stricter IP regimes. Of greater concern to these scholars however, are the ethical distinctions that ‘free culture’ advocates such as Richard Stallman and Lawrence Lessig make between commercial and non-commercial piracy. In comparison to media practices such as remix culture and sampling, which have creative potential, these writers view non-transformative commercial piracy as a practice with few redeeming features, and in particular position Asian piracy as a “limit point of difference from bourgeois law” (Philip 2005, 212). But, as Liang goes on to argue, this is an intellectual position that is not only rooted in privilege, but also one that refuses to acknowledge alternative ways of looking at piracy. Conversely, Liang, through a postcolonial
reading of citizenship, convincingly situates non-transformative piracy as a form of cultural infrastructure that provides disenfranchised citizens from the global south with access to cultural goods (2005; 2009). He offers a pathway through the vague assumptions that surround the spectre of piracy and the pirate, suggesting that such any future analysis must shift from looking at what piracy is, but rather at what it does (2005, 15).

In addition to this work, a group of legal scholars have recently turned their attention towards the communicative potential of non-transformative copying, echoing the attempt to frame piracy as productive. This scholarship is another useful way of extending our perceptions of the pirate, as it frees us from only being able to think about piracy as a positive strategy when available to culturally disenfranchised subjects. Rebecca Tushnet (2004), for example, makes a convincing case for the free speech capacities of non-transformative copying and in a similar fashion; additionally, John Tehranian (2011) explores the ways in which copyrighted works can still shape and form personal identity. These works suggest that use, consumption and even pure non-transformative copying can serve a vital social purpose (Tushnet 2004, 566), raising questions around exactly what constitutes ‘piracy’. This work represents a worthy attempt to understand non-transformative copying and commercial piracy as a potentially progressive social practice, rather than a practice that can only exist and be understood in relation to the broader legal framework of copyright law.

The chapter contributes to this emerging space of scholarly interest by conducting a holistic investigation of the figure of the pirate, one that allows commercial piracy and non-transformative copying to be viewed as an activity which can be analysed and understood, not just as an extant problem or as an issue of taxonomy, but as a practice and object of analysis worthwhile in and of itself. The following section will examine various imaginaries of the pirate, outlining the limited scope available to the pirate in contemporary discourse, before drawing on evidence from a recent court case to outline the mundane realities of piracy. Over the course of this analysis, the true figure of the pirate slowly emerges – as a subject in copyright law but also as a political agent and a potential creative force – and a case is made for viewing the pirate as productive site that requires serious analysis.

**Imagining the Pirate: The ‘activist’ pirate and the SOPA and PIPA Protests**

The standard limited imaginaries of the pirate figure become particularly apparent when looking at the debate that raged over the potential enactment of SOPA and its Senate sister bill PIPA, two anti-
piracy bills which were due to be enacted by the United States legislature in 2011. Despite emerging public concern around the scope of the legislation, the bills themselves were introduced to the House and the Senate respectively with strong bipartisan support (Carter and Grim 2011), and the Motion Picture Association of America, the Recording Industry Association of America and the U.S. Chamber of Commerce also publicly backed the bill (McCullagh 2012). The text of the legislation itself is concerned with offshore websites who are infringing the copyright of United States businesses and creative artists. Whereas PIPA was a comparatively measured bill, only targeting “domain name system providers, financial companies, and ad networks” that supported or dealt with the offending website (McCullagh 2012). SOPA was seen to be much more draconian, giving the U.S. Attorney General the power to remove entirely, potentially infringing foreign websites from the Internet with little to no oversight, as well as carrying a host of potentially actionable monitoring and blocking privileges.

In a sense, this legislative trajectory should not be a surprise. It echoes the existing narrative of copyright reform in the United States, which has regularly seen the heavy influence of industry in the creation of new legislation in the U.S Congress, leading to the exclusion of the public from the copyright legislative process (Litman 2001). This proposed legislation attempts to marginalize piracy and frame it as a wholly negative crime in a similar fashion to previous copyright reforms, outlining the consistency of this legislative approach and its direct connection to the content industries view of piracy. Rather than situating piracy as generative or even as a passive form of consumption, content industries have historically tended to see piracy as opposed to these two modes of engagement, and the legislative text generally echoes this framing.

These proposed bills were consistent with this history, and legislators sought to position this reform as only of concern to ‘pirates’. However, it was clear from the emerging public disquiet, that the scope of these bills was broader than intended. This was evidenced by the growing coalition of like-minded technology companies, public interest groups and free speech advocates started to publicly voice their concerns with the bill. It wasn’t until Wikipedia announced plans for a twenty-four hour blackout beginning on 18 January 2012 (blocking access to their site and linking visitors to SOPA and PIPA related information and petitions), that a formal day of protest became a reality. Outlining their reasons for the blackout, Wikimedia Foundation Executive Director Sue Gardener (quoting a Wikipedia public statement), referred to the proposed legislation as “devastating” to the “free and open” web, and voiced her support for “everyone’s right to freedom of thought and freedom of expression”, noting that the response to a call for a protest, saw the largest participation in a community discussion ever seen on Wikipedia. The action publicised the issue of SOPA and PIPA.
to the general public, with an estimated 90 million people visiting Wikipedia during the blackout, only to be redirected to information about SOPA and PIPA (Cohen 2012). Even establishment media stalwarts like the *New York Times* welcomed the ensuing “collapse…of two flawed bills to prevent online piracy” (Editorial 2012).

Yet this engaged political protest, which also saw people taking to the streets in New York, San Francisco and Seattle (Wortham 2012), barely explored the potential agencies and capacities of piracy. The protest was largely about the problematic means of enforcement rather than questioning whether or not piracy itself was an issue. There was a general critique of the legislative framing of piracy, however even this account was limited due to the protesters own tendency towards hyperbole. The debate was largely positioned around political issues of democracy, first amendment rights and censorship (Tsukayama 2012), and despite Wikipedia’s attempt to globalise these issues, this was a discussion that largely concerned affluent consumers who were on the right side of the information economy. The broader protest was able to elide a full engagement with the pirate figure, and ten days after the event, the *New York Times* saw no problem in separating the righteous anger of SOPA protesters, from the “piracy by Web sites in countries like Russia and China”, which were still “a real problem for the nation’s creative industries” (Editorial 2012).

**The criminal pirate: Megaupload and Kim Dotcom**

A day after the SOPA protests, U.S. authorities shut down Hong-Kong based website Megaupload, one of the world’s largest file-sharing sites, and arrested and charged seven people residing in New Zealand with copyright crimes. A statement released by the Federal Bureau of Investigations (FBI) and the U.S Department of Justice explains that the individuals were charged with “engaging in a racketeering conspiracy, conspiring to commit copyright infringement, conspiring to commit money laundering, and two substantive counts of criminal copyright infringement” (FBI 2012). The statement goes on to accuse the Megaupload consortium of causing in excess of 500 million dollars harm to ‘copyright holders’, and earning more than 175 million dollars “through advertising revenue and selling premium memberships” (FBI 2012). Although Megaupload was promoted as a digital locker site, ostensibly for long-term and personal digital storage, the statement alleges that particular activities, such as paying regular uploaders of popular infringing content prove that Megaupload made its money on the back of substantial copyright infringement. These were unprecedented charges, and the arrests represent the start of one of the largest criminal copyright cases in United States history.
The case would appear to be of immediate interest, namely due to fact that an international anti-piracy operation was successfully conducted, within twenty-four hours of worldwide protests against a set of controversial proposed copyright reforms, which aimed to better facilitate such enforcement activities. However, a significant amount of attention was solely focused on Megaupload founder and owner Kim Schmitz (also know as Kim Dotcom). Within hours of his arrest, lurid stories about this well-proportioned, German ex-hacker, who had made millions off the back of his latest venture, emerged. Kim Dotcom commandeered a fleet of luxury cars with suggestive personal numberplates such as ‘GOD’, ‘WANTED’ and ‘GUILTY’, he lived in a New Zealand mansion worth over US 20 million dollars (TorrentFreak 2010), and for added novelty value, for a period of time he also was the world’s number one player on popular online multiplayer game Call of Duty: Modern Warfare 3 (MW3) (Kim Dotcom aka MEGARACER is #1 in MW3, 2011). To add to this intriguing portrait, in the initial raid, he was arrested in a panic room, which he retired to, following “a prearranged plan formulated by his bodyguard” (TorrentFreak 2010).

The case has not yet been adjudicated, nor the accused extradited; however, no matter the result, what is of particular interest is how Kim Dotcom conveniently fit into an established narrative around criminality, as he engaged in the expected activities of a high-flying criminal entrepreneur. This positioning of Kim Dotcom as a ‘criminal pirate’, is not so much a comment on his guilt or innocence, but rather a comment on how the pirate figure can be so easily positioned as one of excess. Indeed, whereas the SOPA and PIPA protests aimed to position their ‘use’ and any accusation of piracy as excessively virtuous, in comparison, Kim Dotcom was framed as excessively criminal, and indeed a master of excess in all of its forms, be it bodily, or in terms of his ‘geekiness’ (as noted in his ridiculously high MW3 ranking).

Despite Megaupload being the 13th most visited Internet site at one point (Superseding indictment 2012, 2), the discourse around Dotcom echoed the awkward discursive positioning of the New York Times. Piracy was something that foreigners did, and in particular eccentric foreign criminals. Although everyday users regularly accessed Megaupload, the ensuing narrative was able to differentiate these activities, from the clearly criminal ‘piracy’ of Kim Dotcom. However, as the following detailed examination of the ongoing case Roadshow Films Pty Ltd & Ors v iiNet Ltd shows, piracy itself functions in opposition to these previous examples. Rather than the pirate being a figure of democratic or indeed criminal excess, a more productive way of understanding the pirate figure is to view it as a terribly mundane figure.
The ‘ordinary’ pirate: Roadshow Films Pty Ltd & Ors v iiNet

*Roadshow Films Pty Ltd & Ors v iiNet Ltd* offers a valuable space from which to explore the practice of piracy and the pirate figure. The legal framing of the case is relatively narrow, with the majority of the case centred on questions of authorisation and reasonable steps. Robert Burrell and Kimberlee Weatherall offer a succinct summary of the case, which the full bench of the High Court of Australia found in favour of iiNet:

The High Court [was] being asked to determine whether an Australian ISP, iiNet, which refused to implement a graduated response policy, [could] be held liable for having authorised the copyright infringement of its subscribers (2012, 725)

Despite appearing to be a relatively limited legal brief, the case is a touchstone for a number of pressing issues around digital regulation, and as David Lindsay (2012, 53.1) notes:

…[t]he decision is significant, both domestically and internationally, as it is the first time that a court at the apex of a national legal system has considered the liability of an ISP for infringements committed by its subscribers.

Therefore, as will become apparent throughout this discussion, the case cannot avoid engaging with the broader policy debate around digital piracy and the resulting judgment carries a wider impact than just the issues of infringement and authorization at hand.

The case itself has had a problematic trajectory, with the applicants appealing every step of the way. After an initial appeal to the full bench of the Federal Court of Australia was dismissed, the subsequent appeal to the full bench of the High Court was heard in late 2011 and a judgment was handed down on 20 April 2012. While this drawn out legal to and fro provides a wealth of information to analyse, this essay will focus predominantly on the initial Federal Court case, rather than the judgement of the Full Court of the Federal Court or the High Count, as the substantive facts of the case are clearly outlined in the lower court, with only the specific aspects of the appeal dealt with in the High Court judgement. The setting of a court case provides a valuable space from which to assess the figure of the pirate, as unlike the rhetorical flourishes, which often inform public debate and the process of legislative reform, in the arena of a courtroom, statements and facts do not
go unchallenged and specificity becomes all important when identifying and locating both acts of piracy and the pirate figure proper.

The applicants in the case were “34 film and television production companies that own copyright in an extensive catalogue of popular movies and television series, [and] the litigation [was] coordinated by the Australian Federation Against Copyright Theft (AFACT)”, who accused one of Australia’s largest internet service providers of authorising infringement committed by its customers via BitTorrent (Burrell and Weatherall 2012, 726). However, this case has an extensive prehistory and the initial charge was constructed strategically, it being merely the final stage in AFACT’s sustained effort to establish and ultimately win a landmark online piracy case. They began testing the waters in September 2007, when they hired web security firm DtectNet to investigate “190 Australian ISPs in relation to four different types of file-sharing protocols” (Roadshow Films Pty Ltd v iiNet Limited 2010). They then narrowed their investigations to the BitTorrent protocol and targeted four Australian ISPs: Optus, Internode, Exetel and iiNet.

AFACT then went on to assist in the general collection of evidence for the applicants. Aaron Guy Herps, Manager of Digital Affairs for AFACT signed up to iiNet, and on 27 June 2008, went to and used uTorrent to download popular films and television programs of the applicants. A few months later, between 11 to 20 February 2009, Herps repeated this process, but employed an IP address filter, which allowed uTorrent to only connect to iiNet users. AFACT Operations Manager Greg Fraser also assisted in this process, and collectively their efforts, ably assisted by the Dtectnet software, allowed AFACT to prove clear evidence of copyright infringement (Roadshow Films Pty Ltd v iiNet Limited 2010). They were allowed to select twenty of these accounts (herein referred to as RC-20) that would stand in as a representative sample of infringers during the court case.

The authorisation charge levelled at iiNet stemmed from their apparent refusal to take action following allegations against their infringing users. From 2 June 2008 to 9 August 2009, AFACT sent weekly emails to Michael Malone, Managing Director of iiNet, alleging that particular iiNet users had infringed copyright. A spreadsheet was attached to the email detailing the date and time of infringement, the IP address of the customer, the particular films and television shows downloaded and the studio to which the particular piece of intellectual property was attached. AFACT alleged that as per the terms and conditions of iiNet’s Customer Relationship Agreement, iiNet should have disconnected these users rather than continuing to serve the infringing users, despite allegedly ‘knowing’ that they were consistently infringing copyright. The applicants also intimated that the structure of iiNet’s data plans and their actions (or rather lack of) regarding users
who pirated, suggested that the company had a direct financial interest in continuing to ignore this sort of activity (Roadshow Films Pty Ltd v iiNet Limited 2010).

Conversely, iiNet argued that the AFACt notices carried no legal weight. While AFACt viewed their weekly notices as clear cut evidence, iiNet contended that any legal issues should be passed on to the relevant authorities, and that “iiNet will not take the responsibility of judge and jury in order to impose arbitrary and disproportionate penalties purely on the allegations of AFACt” (Roadshow Films Pty Ltd v iiNet Limited 2010). Michael Malone and Steven Dalby also argued that the actual spreadsheets were not self-evident, and that they had difficulty understanding exactly what AFACt was alleging, or what they expected iiNet to do. The second plank of iiNet’s argument was that mere provision of the Internet could not be seen to be inducing or even authorising copyright infringement, and noted that the infringements took place exclusively through the BitTorrent system, which is not an illegal protocol, and not under iiNet’s control. Furthermore, by cutting off a user’s access to the internet, they wouldn’t just be cutting off the means of infringement, but would also be cutting off their access to a host of other services such as access to internet banking, news and email, and that this would represent a disproportionate punishment, especially when based on such limited evidence.

Federal Court Judge Justice Cowdroy found in iiNet’s favour and drawing on precedent set by landmark authorisation case University of NSW v Moorhouse, decided “that the respondent did not provide the ‘means’ of infringement’ in the sense that the phrase was used by Gibbs J, ‘in that it did not extend an invitation to the iiNet users to use its facilities to do acts comprised in the copyright of the Copyright Owners” (Roadshow Films Pty Ltd v iiNet Limited 2010). His judgement continued, noting that the respondent did not stand in the way of copyright holders pursuing people who had “directly infringed their copyright” or “constituent parts of the BitTorrent system for authorisation”, that iiNet had “adopted and reasonably implemented a repeat infringer policy”. Further, he noted that the infringement notices supplied by AFACt were in no way self-evident, and that AFACt’s own name “blurs the distinction between tortuous copyright infringement and criminal acts involving copyright”.

Undeterred by this decision, the collection of production companies marshalled by AFACt appealed to the full bench of the Federal Court, and subsequently took their case to the High Court, who dismissed the appeal. The final judgment was unequivocal, noting that “the concept and the principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners,” and that AFACt’s demands of disconnection, presented
ISPs with an ‘uncertain legal standard’. However, rather than providing closure to this long-running saga, the High Court instead gestured to Government, sagely noting that “pressures for change…are best resolved by legislative processes rather than by any extreme exercise in statutory interpretation by judicial decisions” (Roadshow Films Pty Ltd v iiNet Ltd 2012).

The RC-20 and the banal realities of piracy

The arguments and evidence advanced by both iiNet and the collective of production companies in the Federal Court case provide a compelling picture of modern day practices of piracy. The Internet usage and downloading practices of the RC-20 accounts, which feature throughout the case, are analysed intensely and from this evidentiary base, we can start to draw out a clearer picture of the pirate figure as it operates under copyright law. A number of particular aspects of this case demand attention, and a close reading reveals that piracy is better understood as a discrete media practice, and one that is not particularly profitable, rather than as an epidemic or indeed a revolutionary practice. Instead of being viewed as outlaw consumers or revolutionary protestors, the pirate can instead be viewed as a mainstream digital citizen, more interested in questions of infrastructure and access than opposition and exclusion.

In the initial hearing the applicants attempted to argue that one of the reasons that iiNet ignored the AFACT warning notices, was because it was more commercially advantageous for them to allow users to keep infringing copyright. However, as Justice Cowdroy made clear in his judgement, this claim would only be substantiated if subscribers to iiNet used up ever-increasing amounts of bandwidth and then upgraded to a more expensive plan. Of the selected RC-20 accounts, only ten subscribers actually did this, and one that did so actually reverted back to a cheaper plan. In addition to this, fifteen of the twenty subscribers “used up their full monthly quota regularly”, meaning that these ‘pirates’ were in commercial terms, some of iiNet’s least profitable subscribers. This activity stood in stark contrast to the appellants attempt to frame of the RC-20 as voracious consumers of pirate media, who needed more and more bandwidth to maintain their downloading habits. In a series of exchanges during his cross-examination, iiNet CEO Matthew Malone explained how many of these users were not necessarily solely engaged in illegal copyright infringement, but instead were most likely balancing these practices with the legal consumption of numerous other forms of media (Roadshow Films Pty Ltd v iiNet Limited 2010).
This position was supported by a further finding of the court, which again questioned the incessant framings of piratical excess outlined by the appellants. The RC-20 were selected as a representative example of copyright infringers, and it was never in doubt that many of these internet users pirated regularly. However, as Malone suggested earlier, the court found that copyright infringement was “not a primary or even significant usage of quota on th[e]se accounts”, even when looking at the “worst examples” of infringement (Roadshow Films Pty Ltd v iiNet Limited 2010). This was a challenging finding as it suddenly brought the figure of the pirate forward and approached it holistically. The pirate wasn’t an ideological revolutionary storming the barricades of the content industries, or a criminal opportunistically stealing from artists. Instead, pirates were revealed to be simply engaging in a form of media practice, one that existed alongside a number of other mundane activities.

This sense of piratical banality was explored further when Justice Cowdroy productively drew on Universal Music Australia Pty Ltd v Sharman License Holdings Ltd in order to establish the difference between the activities of iiNet and its users in relation to the structural operation of file sharing networks in the early 2000s (Roadshow Films Pty Ltd v iiNet Limited 2010). Sharman Networks owned Kazaa, an early P2P client, and their system was shaped around and used solely for the infringement of copyright. Executives actively sought to promote file sharing and frame it as a positive action, with the most obvious example being their ‘Join the revolution’ advertising campaign, positioning piracy as a political tool:

THE KAZAA REVOLUTION
30 years of buying the music of [sic] they think you should listen to.
30 years of watching the movies they want you to see.
30 years of paying the prices they demand.
30 years of swallowing what they’re shovelling.
30 years of buying crap you don’t want.
30 years of being a sheep.
Over. With one a single click.
Peer 2 peer, we’re sharing files.
1 by 1, we’re changing the world.
Kazaa is the technology.
You are the warrior.
60 million strong. And rising.
Join the revolution
KAZAA
Share the revolution

This language stands in stark contrast to the activities of the RC-20, who clearly did not access media solely through oppositional or revolutionary infrastructure. This doesn’t empty out the politics from the act of piracy, but it does mean that one can start to think of piracy in a more nuanced manner, rather than as something that simply inhabits a marginal and counter-hegemonic site of production and circulation.

Indeed, perhaps the most useful element of iiNet, is that it refuses to remove the pirate figure from the broader legitimate political environment, in which this form of consumption operates. Whereas AFACT were seeking the disconnection of users following allegations of piracy, the Court took time to note the political necessity of the Internet as a technology. The Constitutional Council of France’s characterisation of access to the Internet as akin to a ‘human right’ was mentioned, and the Court took “judicial notice of the fact that the Internet is increasingly the means by which the news is disseminated and created” (Roadshow Films Pty Ltd v iiNet Limited 2010). While the court was predominantly following this line of argument in order to demonstrate the neutrality of iiNet as a service provider, this argument also established the citizenship demands and human rights of alleged pirates and their households. In acknowledging that pirates are citizens, the Court opened up a space for potentially understanding piracy as a legitimate and democratic (as opposed to revolutionary or oppositional) political activity, one that formed part of a genuine attempt to actively engage with questions around general cultural critique (Coombe 1998) and the formation and maintenance of types of cultural infrastructure (Liang 2009).

Towards a new understanding of the pirate

Once the banal nature of piracy is established, the aura of hyperbole around the pirate dissipates and a neutral assessment of the agencies and capacities of this problematic figure can take place. The pirate is too often positioned in opposition to creativity, transformation and all that the author can feasibly represent and a neutral assessment suggests that there is an authorial capacity, which resides within the pirate, one which significantly challenges the hegemonic structure of copyright
law. The work of Rosemary Coombe (1998), Kavita Philip (2005) and Rebecca Tushnet (2004) is useful in developing Lawrence Liang’s (2009) framing of piracy as a form of cultural ‘infrastructure’, and helps to outline how non-transformative copying can form part of a progressive social practice, further clarifying and contextualising the piratical activities of the RC-20, and the legal and social arena in which these practices are assessed and debated.

Coombe (1998, 253) explains the historical and institutional background of this separation between author and pirate, noting that the category of the author “reinforced exclusions elsewhere enacted to restrict membership in the public sphere”. The “institutionalisation and legitimation of certain modalities of production, circulation, and consumption” helped to “limit the number of cultural producers who might claim authorial privilege” (1998, 253). However, as she argues elsewhere, this very institutionalisation ignores the ‘dialogic’ nature of culture, and the political and material ways in which such a dialogue is instantiated (1998, 86). She explains how the “overzealous application and continuous expansion of intellectual property protections” limits the “quintessentially human” need to “make meaning, challenge meaning, and transform meaning” (1998, 84), and suggests that the struggle to fix meanings of cultural property through the use of intellectual property rights, limits this ability to “respond to a sign with signs” (1998, 85). This limitation is not just democratically dangerous, Coombe notes, but also calls forth the “simultaneously prohibitive and productive” power of law, invoking the signifying power of the law itself (1998, 87).

Conclusion

Coombe’s work helps to situate the practice of copying within a postmodern society, where signs and semiotic inference form a part of daily life, and also explains the quotidian effects of law, where certain forms of authorship and copying are allowed and others marginalised, shaping particular legal subjectivities. These examples, which echo the mundane, daily activities of the RC-20, allow us to reframe copying as a form of cultural communication, existing in a culture where the “repressive function of the law of copyright” is always present, continually policing “transgressive authorial acts” (Philip 2005, 217). This communication can take place in overt displays of cultural critique, such as the transformative practices of parody and satire, but even non-transformative copying can be viewed as a form of authorial agency, with the use and consumption of cultural signs and goods adding to greater cultural literacy, communication and connection, as users engage with the contemporary cultural milieu. This stance is supported by Tushnet (2004, 565-71), who outlines how copying can establish distributive infrastructures of access in developing nations, contribute to the development of self-expression through the shared consumption of cultural
material, and can require the exercise of judgement and creativity. All of these practices are materially generative activities, which are supported and sustained by non-transformative copying and in many cases by what the law would otherwise term piracy.

This chapter has established the pirate as a constituent subject with its own productive and creative capacities. Rather than seeking to only highlight ‘acceptable’ forms of piracy, the pirate has been approached holistically, with the essay weighing up the ramifications of this repositioning. Such a theoretical trajectory has allowed a number of different elements of piracy to come to the fore. The iiNet case outlined the mundane and many times limited nature of what is too often termed excessive piracy, and the subsequent discussion of the generative capacities of piracy have helped to problematize traditional understandings of the pirate figure. This is not to say that the author and pirate are essentially the same, but in explaining the authorial capacities of piracy, this chapter has sought to highlight the porousness between these subjects, a porousness that subverts the artificial barrier that copyright law maintains between them.

Looking ahead, this theoretical repositioning raises serious questions about the validity of the term ‘pirate’, especially considering the ways scholarship, media and the law itself have consistently positioned it as a figure of revolutionary or criminal transgression. Acknowledging this relational connection between subjects of copyright law seriously challenges the dominant positioning of the author in law, but more importantly brings the pirate back from the margins, and allows it to take up a central role in discussions around copyright law. However, the communicative potential of cultural artefacts, suggests that non-transformative copying will continue to move beyond the discursive constraints placed around it by law. Considering the similar agencies and capacities available to both the author and the pirate, it becomes increasingly clear that terms like ‘piracy’ simply reinforce unequal institutional structures, at the expense of a fully realised understanding of how we all engage with, create and reproduce cultural artefacts.
References


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