What is the Marketplace of Ideas?

Abstract

Santilles and Felder's *Software Piracy in Research: A Moral Analysis*[1] aims to "spark debate over important tensions between ethics codes, copyright law, and the underlying moral basis for these regulations" and offer a practical, consequentialist-based moral reconciliation between academic researchers pirating software and their departments and U.S. law forbidding such practices. As the U.S. Constitution's intention of intellectual property is to, "Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," Santilles and Felder formulate a justification that intellectual property is to not be infringed upon with the exception of cases wherein such "protection [would] stifle the marketplace of ideas."[2]

In this paper I argue that this formulation cripples the potency of intellectual property law by morally justifying legally indefensible cases of infringement by failing to define the "marketplace of ideas" and is not to be taken seriously.

Part I: Explication - *Software Piracy in Research: A Moral Analysis*

Santillanes and Felder begin by introducing a scenario; a recent PhD recipient would like to continue his research, but the community college at which he is hired cannot afford to supply him with the incredibly expensive proprietary software needed in order to fulfill this desire and he is not paid nearly enough to procure the software license himself. This PhD recipient must pirate the software he

1 Santillanes, G., & Felder, R.M. (2015). *Software piracy in research: a moral analysis.* Science and Engineering Ethics 21. 967-977.
2 Ibid. 8.

needs, or end his research.[3] The pair proceed to explain that such a scenario is quite common, citing studies across various collegiate departments that found non-trivial amounts of faculty admitting to using pirated software despite the severe, documented stances against piracy held by information technology institutions such as the Association of Computing Machinery and universities such as the University of Illinois, University of Manitoba, and Rutgers.[4] It is this pervasive moral struggle between the good of research and the licensing of software in academic circles that Santilles and Felder aim to resolve in "Software Piracy in Research: A Moral Analysis."

Santillanes and Felder reason that these codes against software piracy "generally adopt the language of U.S. copyright law,"[5] and that the concept of intellectual property has been well-defended by the instrumental approach used by Hick[6] and Hettinger,[7] with Hick arguing that the right of intellectual property is a gift given in hopes of the receiver's better promotion of "society's pool of knowledge," as is stated in Article I, Section 8 of the U.S. Constitution. Essentially, the "instrumental approach" that Santillanes and Felder speak of, is the concept that intellectual property law incentivizes innovation by allowing authors the right to profit from their intellectual work.[8]

Santillanes and Felder examine the U.S. Federal Code, which allows owners of intellectual property whose rights have been infringed upon to seek actual damages or statutory damages from the infringer of up to $30,000 on a per each work infringed upon, *unless* the infringer "believed and had reasonable grounds to believe that his or her use of the copyrighted work was a fair use under section 107," *or* if the infringer is an employee of or is a "nonprofit educational institution, library, or

3 Ibid. 968.
4 Ibid. 969.
5 Ibid. 970.
6 Hick, D. H. (2008). *The metaphysics and ethics of copyright.* PhD dissertation, University of Maryland, College Park.
7 Hettinger, E. C. (1989). *Justifying intellectual property.* Philosophy & Public Affairs.
8 Santillanes, G., & Felder, R.M. (2015). *Software piracy in research: a moral analysis.* Science and Engineering Ethics 21. 971.

archives" reproducing the infringed upon work via copying (17 U.S.C. sec. 504 c.2). Santillanes and Felder find this indicative of the possibility that the infringement of intellectual property may be legally permissible in cases wherein an academic has a "legitimate claim of fair use."[9] Furthermore, and most importantly, Santillanes and Felder cite 17 U.S.C. sec. 107, wherein the doctrine of fair use allows for the reproduction of copyrighted work, *"for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use),* ***scholarship, or research, is not an infringement of copyright,"*** the caveat being that, when evaluating whether or not the use of intellectual work is fair use, one of the factors to consider includes "(4) the effect of the use upon the potential market for or value of the copyrighted work." While the U.S. Federal Code defines these exceptions, Santillanes and Felder argue that their real-world application is "not … so lenient," and, in fact, "some believe these limits will continue to narrow, given the influence of publishers' lobbies."[10]

With these facts in mind, Santillanes and Felder introduce their "Moral Basis for Copyright," which is embedded in rule consequentialist logic. Consequentialist logic arguing that an action is morally right, so long as it is mandated by an optimific rule, and a rule is optimific if its adoption by society would "produce the best overall consequences." The Federal Code copyright code and the U.S. Constitution's justification for intellectual property is a case of rule consequentialism, then, as the rules they prescribe are with the intent on producing the "best overall consequences;" specifically, in order to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Santilles and Felder paraphrase the moral rule currently in place as such:

9 Ibid. 972.
10 Ibid. 973.

> *In order to promote the marketplace of ideas, which requires authors to have an incentive to produce, authored works must not be infringed upon.*[11]

However, Santilles and Felder argue that this rule is *not optimific;* they believe that, if this rule were followed by society (as it is), it would not produce the best overall consequences, citing Thomas Jefferson's written reservations about overzealous application of intellectual property rights having the potential to "hinder rather than encourage inventions"[12] and the dissent of Justice Blackmun in *Sony Corp. of America v. Universal City Studios, Inc.*, wherein Blackmun asserted that society suffers ("deprived of the contribution of … knowledge") when a researcher or scholar is not allowed the ability to reference and quote the work of prior scholars in the form of duplicating video tapes.[13] Ironically, the law of copyright presents a danger to its own intended beneficent consequences. The researcher-software piracy dilemma the authors illustrated at the beginning of their essay is indicative of these very concerns of Jefferson and Blackmun. Santilles and Felder present their alternative moral rule, a "reformulation" of the one stated above:

> *In order to promote the marketplace of ideas, which requires authors to have an incentive to produce, authored works must not be infringed upon, except in cases where the protection will stifle the marketplace of ideas.*[14]

11 Ibid. 972.
12 Boyle, J. (2008). The public domain: Enclosing the commons of the mind. New Haven: Yale University Press.
13 Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).
14 Santillanes, G., & Felder, R.M. (2015). *Software piracy in research: a moral analysis.* Science and Engineering Ethics 21. 974.

This rule, Santilles and Felder reason, would allow the hypothetical PhD candidate to overcome his moral dilemma and pirate his coveted research software—though it may remain a legal dilemma.

Part II: Attack - What is the marketplace of ideas?

The critically damaging assumption that Santilles and Felder make, and do not account for, is the precise scope of the "marketplace of ideas." They incorrectly assume that the "marketplace of ideas" has a set synonymity with academic institutions where formal research occurs, as is the focus of their paper—however, the moral formulation they present does not properly confine the "marketplace of ideas" in any realistically or morally feasible manner by making their added exception ("… *except in cases where the protection will stifle the marketplace of ideas*") to the original formulation applicable to incredible amounts of blatant copyright infringements:

The authors attach this concept of the "marketplace of ideas" to the U.S. Constitution's intent to "promote the Progress of Science and useful Arts." Given this clarification, what restricts the "Progress of Science and useful Arts" to academic research and archival institutions? I can argue for music being a "useful Art;" it happens to be the focus of a profitable industry (are not profits useful?). If music is a "useful Art," then the restrictions of music licensing and prohibition of its piracy is a matter of stifling the "marketplace of ideas." The 99¢ price of a song stifles the creativity of a musician who could possibly derive innovative inspiration from its enjoyment, and the licensing which restricts a song's sampling or use without the distributor's consent stifles the progress of a "useful Art."

Similarly, if an aspiring director found it necessary to contribute to the progress of a "useful Art" with their own works. Like the researcher Santillanes and Felder speak of, this director would like to perform a kind of research by surveying many films of interest—and perhaps, to this director, the cost of surveying these films would be personally prohibitive, precisely as in the case of the academic

researcher who cannot afford the license to necessary software. When the "marketplace of ideas" is so generously defined as the place where ideas are shared, traded, and developed, the only difference between the Santilles and Felder's PhD candidate who desires to pirate research software and the aspiring director who wants to pirate a copy of every film in his genre of interest *is that one of them has a PhD.*

Software is useful. Software is an art. One can argue that software is a science. What, then, when applying Santilles and Felder's formulation of intellectual property moral rule, makes proprietary software and closed source codes morally permissible? As Richard Stallman argues in "Software Should Be Free," one of the crucial harms of non-free (in particular, non-open-source) software is the fact that, "Other developers cannot learn from the program, or base new work on it."[15] Paraphrased to juxtapose against the premises of Santilles and Felder's formula, closed-source software of any sort stifles the marketplace of ideas!

In short, Santilles and Felder's addition to the formula allows the marketplace of ideas to cannibalize itself with an accidental endorsement of pervasive piracy beyond that of the underpaid community college researcher; it becomes the *exception*, rather than the norm, that "authored works must not be infringed upon," as the "cases where the protection of will stifle the marketplace of ideas" would be *every* case, as it is easily argued for that the act of research and contributing to the ambiguously defined "marketplace of ideas" is not exclusive to the few who possess PhDs and commit research to peer-reviewed papers.

Part III: The anticipated defense

15 Stallman, R. (2010). "Why Software Should Be Free." *Free Software, Free Society: Selected Essays of Richard M. Stallman, 3rd Edition.* Free Software Foundation. 4.

The most obvious defense against my criticism is that there is a non-nominal difference in the societal contribution of a scientific paper to the promotion of "the Progress of Science and useful Arts" and the societal contribution of a music album to the promotion of "the Progress of Science and useful Arts." One may argue that music and film simply do not fall under the definition-umbrella of "useful Arts" in the first place, and even if they do, it is best to restrict the definition of the "marketplace of ideas" to established institutions of research and innovation, as it is their exact spoken purpose to contribute to the "Progress of Science and useful Arts." Thus, the realm of "Progress," even in film and music, should be restrained to the work performed in such institutions.

Part IV: My response

Pink Floyd's *Dark Side of the Moon* is a greater contribution to "the Progress of Science and useful Arts" than the Ig Nobel award-winning *Pressures produced when penguins pooh – calculations on avian defecation.*[16] Of course, *Pressures produced when penguins pooh – calculations on avian defecation* is an exceptional case of triviality; the point here is, the fact that research was sponsored by an academic institution and published in a peer-reviewed journal is not a sufficient measurement of its contribution to the "marketplace of ideas" or the "Progress of Science and useful Arts." If the researcher of Santilles and Felder's invention had been researching the aerodynamics of penguin feces, would his use of pirated software to perform this research still be morally defensible as a circumnavigation of the stifling of the "marketplace of ideas" by the protection of intellectual property law?

We may assume that this researcher found his work important enough—by virtue or by personal investment—to contemplate piracy, but this *belief* in importance is not enough reason to justify piracy

16 Meyer-Rochow, V.B., & Gal, J. (2003). *Pressures produced when penguins pooh – calculations on avian defecation.* Polar Biology, Volume 27, Issue 1, pp 56–58.

when said researcher could very well be producing something as charmingly pointless as *Pressures produced when penguins pooh – calculations on avian defecation.* Some of the examples I offered above may appear absurd, such as the film director who would like to pirate terabytes worth of copyrighted video in order to learn from and ultimately add to the marketplace of ideas (cinema-wise)—they appear absurd because they are rationalizations no more vindicable than that of the researcher who is compelled to pirate expensive software so as to continue his work. The defense that an individual with a clear mind is perfectly capable of assessing his or her potential contribution to the marketplace and morally weighing it against the transgression of the piracy necessary to make this contribution is an optimistic assumption to make when it happens to be so effortless to pirate software for even the most trivial pursuits. It requires self-discipline to even deliberate whether or not to break intellectual property law when breaking intellectual property law happens to be so convenient and easy. Thus, rationalizations such as that of Santilles and Felder's researcher and my own characters are not unimaginable, especially when allowed the justification that they may infringe upon protections so long as doing so overcomes the *stifling of the marketplace of ideas.*

I agree that there is a self-defeating paradox in intellectual property law as observed by Santilles and Felder; an intent to promote the proliferation of ideas while simultaneously protecting creators from the proliferation of ideas from the exploitation of their work by others. Perhaps Santilles and Felder's application of consequentialist rule is morally correct and does produce the optimal consequences for society as it best advocates the growth of the marketplace of ideas and the intentions of the U.S. Constitution—however, the loose definition of the "marketplace of ideas" allows for its extension far beyond the scope of plain, journaled science, and even if it were confined to formal science, this narrowed definition would be a kind of privileged self-exceptionalism that excludes un-journaled research and does not fully fulfill the formula's explicitly stated intention to promote "the

Progress of Science and useful Arts" and invigorate the "marketplace of ideas." Furthermore, it would place undue importance of the intellectual property of academic research over the intellectual property of software with the wrongful assumption that one is the better contributer to the "marketplace of ideas" than the other, despite the formulation assuming that all authors of all sorts (definitely including software developers, as is in the case of the fictitious scenario that Santilles and Felder create at the beginning of their essay) are participants in the marketplace of ideas.

Santilles and Felder's formulation is unsalvageable, lest its true intention be to morally nullify the protections of intellectual property by justifying their non-existence as most beneficial to the marketplace of ideas, rather than exclusively defend the software piracy of academic researchers.

References

Boyle, J. (2008). The public domain: Enclosing the commons of the mind. New Haven: Yale University Press. 21.

Hettinger, E. C. (1989). *Justifying intellectual property.* Philosophy & Public Affairs.

Hick, D. H. (2008). *The metaphysics and ethics of copyright.* PhD dissertation, University of Maryland, College Park.

Meyer-Rochow, V.B., & Gal, J. (2003). *Pressures produced when penguins pooh – calculations on avian defecation.* Polar Biology, Volume 27, Issue 1, 56–58.

Santillanes, G., & Felder, R.M. (2014). *Software piracy in research: a moral analysis.* Science and Engineering Ethics 21. 967-977.

Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

Stallman, R. (2010). "Why Software Should Be Free." *Free Software, Free Society: Selected Essays of Richard M. Stallman, 3rd Edition.* Free Software Foundation.