Authors, Users, and Pirates: Copyright Law and Subjectivity

James Meese

https://doi.org/10.7551/mitpress/9780262037440.001.0001

Published: 16 February 2018 **Online ISBN:** 9780262344517 **Print ISBN:** 9780262037440

CHAPTER

5 Reimagining the Pirate: Approaching Infringement Relationally

James Meese

https://doi.org/10.7551/mitpress/9780262037440.003.0006 Pages 111–130

Published: February 2018

Abstract

The fifth chapter outlines how the pirate could be viewed relationally and explains how potentially infringing acts can be reinterpreted as innovative and lead to the production of new knowledge. It also reflects on the broader cultural contexts in which relationality operates through a discussion of the Stop Online Piracy Act and Protect IP Act protests. These protests argued that western citizens should be viewed as user-pirates and deferred the label of pirate to actors in the Global South. The chapter concludes by stating that while the pirate is often institutionally and discursively constrained, any act of piracy will reveal both an element of "use" and a latent authorial capacity.

Keywords: Piracy, Pirate, Innovation, Informal economies, Copyright law, User, Authorship

Subject: Technology and Society

Collection: MIT Press Scholarship Online

This chapter proceeds from the premise that it is worthwhile to examine the socio-legal discourses that surround the pirate. This subject tends to be constituted through a variety of competing rhetorical claims rather than in reference to the minutiae of copyright law.[1] I will explore these different rhetorical claims and also examine what happens when non-legal actors resist particular modes of subjectification in favor of others. There is value in analyzing these cultural discourses as they can shed light on how power is constituted in law and also tell us more about how the process of subjectification operates within the context of our relational approach. The chapter also examines the links between infringement and authorship through an exploration of creation in low IP (intellectual property) environments and copying practices in media industries and on social media. The analysis provides further detail around processes of subjectification in which some copiers

are designated pirates and others authors, and draws attention to the links between copying and modes of authorship.

The chapter begins by arguing that the pirate subject can be productively examined beyond the confines of legal doctrine, before moving on to a study of the protests against the Stop Online Piracy Act (SOPA)[2] and PROTECT IP Act (PIPA),[3] which occurred in 2012. The discourse that emerges from these protests reveals clear interrelations between the pirate and the user, shedding light on how Western piracy is recovered from the edges of law. The chapter then examines the suppressed relationship between the author and the pirate by outlining the productive elements of infringement. We see that copying can sustain creativity, enhance communities on social media platforms, and function as a driver of economic activity.[4] Collectively, this
p. 112 approach recuperates the pirate and excavates the residual ↳ subjects of the user and author that emerge and disappear at different times during these debates.

Identifying the Pirate: Moving Beyond Law

There is real value in exploring and analyzing the pirate beyond the boundaries of legal doctrine. Over the last decade or so, a number of scholars have productively critiqued the strict application of copyright law. Lawrence Lessig tells the now relatively well-known story of Stephanie Lenz, who filmed her eighteen-month-old son dancing to Prince's "Let's Go Crazy" and uploaded it to YouTube.[5] Universal Music Group eventually found the video and demanded that YouTube take it down, and the platform complied. Lessig argues that this sort of amateur creativity should be allowed to flourish online and be left "free from regulation."[6] Anupam Chander and Madhavi Sunder make similar arguments with respect to fan fiction, calling for these transformative creative practices to fall under the fair use exception and suggesting that "authors should not readily 'cease and desist,' as copyright owners demand."[7]

These studies examine how particular forms of creativity are framed by narrow interpretations of copyright law that attempt to position them as infringing. They also usefully discuss the cultural implications of the over-enforcement of intellectual property rights, and the links between cultural development and copyright. Yet, law still stands as the central organizing principle of these analyses, which results in piracy being read (and the "issue" ultimately being solved) through a legal lens. This involves a familiar analytic process. First, an analysis of the problems and contradictions of the legal framework takes place, and then through locating unjust or illogical applications of the law, a critique and diagnosis of intellectual property law can occur. Scholars aim to recuperate "everyday," formerly legal practices that have since been made illegal, and a call for "balance" and a prescription for legal reform is offered.

It is worth noting which practices are not accounted for in these analyses. Many scholars are willing to argue for the recuperation of transformative amateur creativity or even minor instances of file sharing, but they often distance themselves from or seriously qualify their support for commercial piracy. Lessig argues that commercial piracy "is not just a moral wrong, but a legal wrong."[8] Similarly, Lucas Hilderbrand is willing to
p. 113 recover ↳ bootlegging from its "negative" or "criminal" connotations but he refuses to acknowledge more substantial acts of piracy.[9] For Hilderbrand, bootlegging is concerned with the egalitarian or productive redistribution of culture and information, whereas pirates steal for profit.[10]

This restrictive approach places law at the heart of what is essentially a cultural conversation. Piracy is not just an offshoot of law but a complex social and cultural act carrying a set of broader agencies beyond that of "infringement." Adrian Johns supports this sociocultural approach and notes that historically, piracy has been more than just "a mere accessory to the development of legal doctrine":

> Piracy cannot be adequately described, let alone explained, as a mere byproduct of such doctrines. It is empirically true that the law of what we now call intellectual property has often lagged behind

> piratical practices, and indeed that virtually all its central principles, such as copyright, were developed in response to piracy. To assume that piracy merely derives from legal doctrine is to get the history—and therefore the politics, and much else besides—back to front.[11]

Although Johns is speaking about historical analysis, his critique still holds when analyzing piracy and the pirate today. There is an inherently close relationship between piracy and copyright doctrine, of course, but the subject is as much culturally as it is legally determined.

A diverse group of scholars have approached piracy as a productive cultural force, with only passing reference to the legal doctrine that ostensibly seeks to regulate the practice. As noted in the introduction, Rebecca Tushnet offers an interesting challenge to the embedded logic of copyright law, arguing that particular forms of non-transformative copying can serve the general social good by functioning as free speech.[12] Referencing the First Amendment to the US Constitution, she argues that "copying may sometimes be an instance of free speech even when it is also copyright infringement" and details how copying can assist self-expression, persuasion, and affirmation (for example, when reciting the Pledge of Allegiance).[13] Tushnet still makes a distinction in regard to commercial piracy, arguing that there is "no free speech right to download entire works for which [she] could readily pay," but her analysis is refreshing for the way it approaches copying in a more holistic fashion, moving beyond the fixation on transformation that the fair use exception occasionally engenders.[14]

Cultural research takes this critique even further by drawing extensively on empirical research and cultural
p. 114 theory. Kavita Philip contends that the ↳ pirate has largely "functioned as a raced, gendered subaltern" and points out that calls for copyright reform in the West not only identify the pirate as a "limit point" but tend to locate this limit point in Asia, which stands as a representation of "bad piracy."[15] This allows copyright activists in the West to support the development of new technologies like peer-to-peer (P2P) networks or remixing while firmly situating this support within the confines of "western liberal democratic law."[16] Small-scale Western copyright infringement can thus be recuperated as an inherently democratic and non-threatening practice. Lawrence Liang furthers this critique by exploring how piracy operates in relation to the purchasing power of citizens from particular countries. His analysis starts from a similar place as Philip's, asking a pertinent question: Why can an illegal practice like downloading music "find redemption," whereas other forms of piracy cannot?[17] He goes on to suggest that the piracy of cultural products in the Global South is "tainted" by commerce, making it harder to justify than infringing intellectual property in order to access medicines or learning materials.[18]

Over the last decade the pirate has also emerged as a generative political subject and a number of media and cultural studies scholars have analyzed the emergence of pirate parties in some depth. Martin Fredriksson has conducted sustained empirical research on these parties and discovered that they have concerns about a perceived loss of democracy due to the influence of corporations in political decision-making.[19] They also have a strong belief that the political contestations around today's information society are essentially questions about civil liberties, and this has become central to the platforms of various national pirate parties.[20] This turn to the political is unsurprising if we consider the fact that a number of copyright activists (including, most notably, Lawrence Lessig)[21] believe that fairer copyright laws are essentially unachievable due to the tight structural connections between political representatives and major content industries, formed through established lobbying networks and political donations. Still, as Patrick Burkart notes, despite brandishing the representational figure of the pirate, these parties represent a somewhat minor form of middle-class activism rather than a serious call for revolution.[22]

The rest of this chapter will be dedicated to further exploring these discourses around the pirate, identifying when authorship and use are evoked or ignored in these emotive debates, and advocating for a reassessment of
p. 115 the pirate in general. We see that our current understandings of the subject ↳ are tied to particular cultural views around the proper use of existing corporate networks of production and consumption. Citizens of

countries in the Global North regularly call on the subject of the user to disavow or dismiss their piracy and, as Philip notes, locate piracy overseas.[23] Nonetheless, further examination of how piracy operates in various industries, on social media, and in the Global South ultimately leads us to an understanding of the pirate as a generative subject. The cultural capacities and affordances of authorship, whether they involve claims of creativity, innovation, or cultural or economic progress, are not unique to the author.

SOPA and PIPA: Middle-Class Users and the "Foreign" Pirate

SOPA and PIPA were two infamous antipiracy bills introduced to the US House and Senate with a significant amount of fanfare in 2011. The Democratic and Republican parties supported the bills and the Motion Picture Association of America, the Recording Industry Association of America, and the US Chamber of Commerce also publicly backed the reforms.[24] The bills focused on copyright infringement occurring on offshore websites and introduced a range of new powers for copyright enforcement. Under SOPA, the US Attorney General could demand that a website be removed from the Internet if it offered goods or services that engaged in, enabled, or facilitated copyright infringement.[25] Another provision in the bill stated that Internet service providers (ISPs) would have to "take technically feasible and reasonable measures designed to prevent access by its subscribers located within the United States to the foreign infringing site," which suggested that ISPs would have to monitor subscriber activity in some fashion.[26] PIPA offered an alternative way to stem copyright infringement by requiring "domain name system providers, financial companies, and ad networks" that held a relationship with copyright infringing websites to alter their practices to avoid making copyright infringing material easy to access.[27] The bill would also allow the Attorney General to sue the owner or operator of an infringing website.[28]

Although these legislative proposals were welcomed by politicians of all stripes as well as lobbying organizations for various content industries, they were strongly opposed by many legal experts, Internet activists, and major players in the tech industry. The opposition's major concern was the wide scope of liability
p. 116 that SOPA and PIPA established around copyright ↳ infringement, along with the proposed deployment of a range of highly controversial enforcement mechanisms. Edward Lee notes that the strategies PIPA authorized, namely, the ability of the US Attorney General to make foreign websites effectively disappear from US search engines, bore an incredible similarity to the practices used by China to enforce its contentious online censorship regime, known as the "Great Firewall of China."[29] The bill also demanded that tenuously connected intermediaries (such as financial companies and ad networks) become involved in copyright enforcement efforts, which was not well received. If enacted, the bill would have required these parties to take measures to avoid linking to (or working with) infringing overseas sites, shifting the burden of enforcement directly onto major transnational companies like PayPal and Google.

Criticism of SOPA was even more damning. The major problem with the bill was its broad remit. It was structured in such a way that US citizens would be unable to access a website if it offered goods or services that engaged in, enabled, or facilitated copyright infringement. Because the bill focused on actors that assisted infringement as well as infringing conduct, a broad reading of this provision would make much of the Internet in breach of the proposed law. As Michael Carrier noted,

> [a]ny means making it easier for others to access copyrighted content could be punished. Such a standard could ensnare in its grasp numerous websites and services, including YouTube, Google, Facebook, Flickr, Dropbox, and blogs, each of which could be found to enable or facilitate infringement.[30]

The expanded danger of liability represented a direct threat to a group of highly successful and previously "lawful U.S. Internet companies," and so the tech industry was unsurprisingly worried about the bill.[31]

The bills' most vociferous critics were initially a familiar group of actors, namely, digital rights activists, nonprofits, and academics. Internet engineers and law professors were signing letters and sending them to Washington but the looming threat of SOPA and PIPA had not yet captured the imagination of the general public.[32] Furthermore, although the tech industry was worried about the bill, its concerns were not yet made public. Indeed, it was only thanks to the efforts of the digital rights nonprofit Fight for the Future that the public at large was made aware of the potential threats of SOPA and PIPA. As Lee explains, the group was able to spread the word by arguing that the bill essentially introduced a form of online censorship "because it allowed
p. 117 the Attorney General to blacklist domain names and make the content of ↳ the affected websites effectively disappear—without adequate safeguards to ensure the site was criminally infringing or deserved to be shut down."[33]

Fight for the Future eventually contacted the wider tech industry through the Mozilla Foundation, the organization that developed the open-source browser Firefox, and "informed the group that, not only did SOPA have a chance of passing in the House, *the bill will pass*."[34] The threat of the bill passing with little debate immediately energized the industry and discussion turned to the best way of protesting the bill and raising awareness about the issue. One of the Fight for the Future members suggested that since they were organizing the campaign around censorship, one way to protest the bill would be for sites to artificially "censor" themselves to show what would happen if SOPA passed. This was a compelling tactic but raised issues for some of the larger organizations in the room like Google, which had never "blacked out its site and hadn't ever used its home page in such a political way."[35]

There was extensive discussion about whether an online protest directed at the general public would be a good use of time and resources. A number of prominent parties including Google withdrew their support for a blackout, but eventually Fight for the Future received support from Tumblr and a highly successful day of online protest occurred on November 16, 2011.[36] SOPA was not withdrawn (although some amendments were made) but the protest was successful in mobilizing a wider group of concerned Internet users, as well as additional members of the tech industry, in a public campaign against the bill. So, Fight for the Future, along with its new coterie of tech companies, aimed for a second online blackout on January 18, 2012. Importantly, Google and *Wikipedia*, two of the largest sites in the world, agreed to participate, as did more bespoke online communities such as Tumblr and Reddit. The involvement of Google and *Wikipedia* dramatically extended the impact of the protest, with 162 million people visiting *Wikipedia* during the blackout only to be redirected to information about SOPA and PIPA (see figure 5.1).[37]

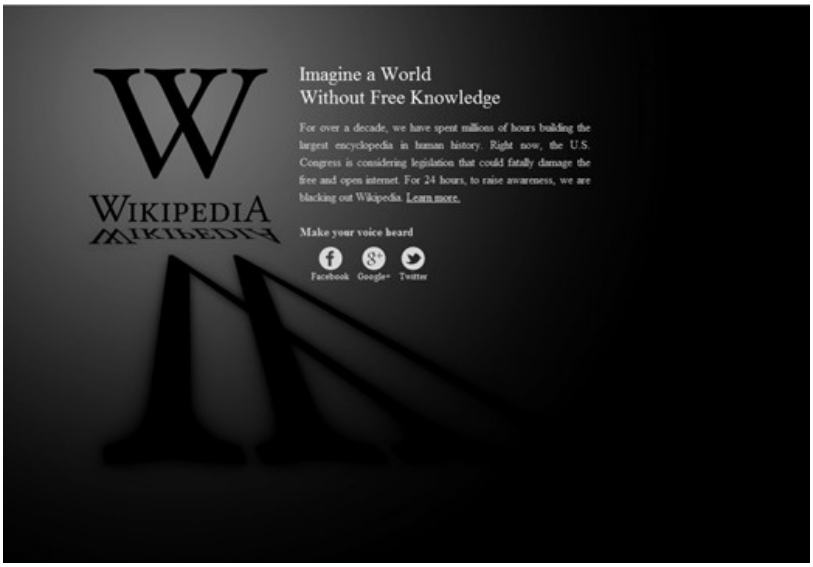

Figure 5.1 *Wikipedia* was one of the websites that participated in the blackout protest against SOPA and PIPA.

Credit: David Holmes (CC BY 2.0).

Alongside these online protests, a modest number of people took to the streets in New York, San Francisco, and Seattle (see figure 5.2). Significantly more people tried to contact their representatives directly to voice their concerns, to the extent that

> Engine Advocacy, a service that helps people call their local members of Congress, said that as many as 2,000 a second were trying—demand so heavy that many of the calls could not be completed.[38]

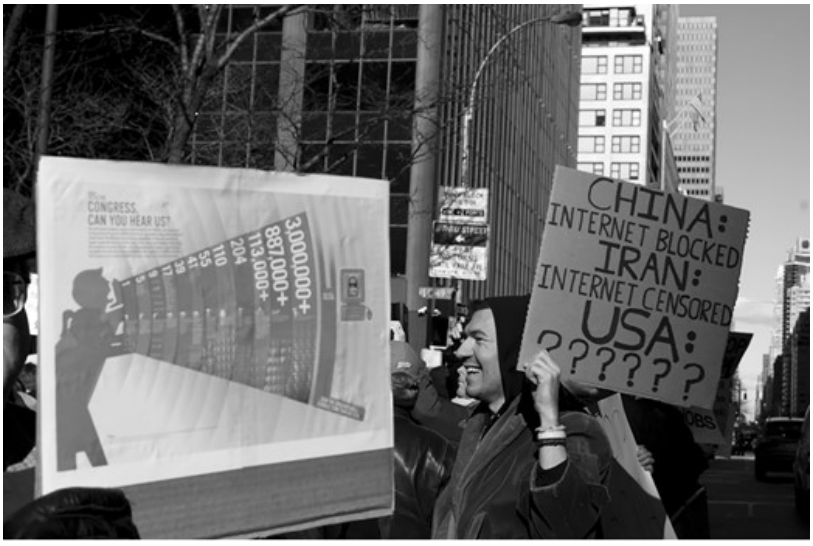

Figure 5.2 Protesters on the street in New York.

Credit: Guy Dickinson (CC BY-SA 2.0).

p. 118 It took only a few hours of this global protest before lawmakers started publicly withdrawing their support for the bills, and PIPA and SOPA were pulled from consideration two days after the January protest.[39] The story of these protests is compelling: a small nonprofit mobilizing major tech companies and eventually much of the online community to take down two pieces of legislation that had received support from all the key players in

Washington. But there is another story to be told here about the different ways the bills and the protest movement positioned piracy and the pirate.

Both SOPA and PIPA replicated the Western-centric discourse around piracy discussed earlier in this chapter. This was particularly apparent after the first round of protests. SOPA's sponsor Lamar Smith argued that the bill targeted "rogue sites" that functioned beyond US borders:

> These foreign websites are called "rogue sites" because they are out of reach of U.S. laws. Movies and music are not the only stolen products that are offered by rogue sites. Counterfeit medicine, automotive parts and even baby food are a big part of the counterfeiting business, and pose a serious threat to the health of American consumers.[40]

p. 119 In a similar fashion, PIPA explicitly sought to enhance enforcement measures "against rogue websites operated and registered overseas," and this is how the bills were primarily sold to the American public.[41] As the quote above reveals, however, they were also positioned as a way of protecting the American consumer. Online copyright infringement was regularly occurring within the United States but "piracy" and the pirate were located overseas, with the American citizen framed as a law-abiding consumer.

The SOPA and PIPA protests "located" the pirate in a similar fashion. For example, one of Google's public statements on SOPA criticized its attempt to "censor the Internet" but did suggest that there were "smart, targeted ways to shut down foreign rogue websites."[42] This statement recognized the pirate as a subject that was both present in these public policy debates but also firmly located outside of America's borders.

There was also an attempt to link criticisms of the bills to broader concerns around free speech and freedom more generally. The statement accompanying *Wikipedia*'s decision to blackout its front page captured the tenor of many of these protests, with the Wikimedia Foundation Executive Director Sue Gardener stating that the
p. 120 bills were a direct threat to the "free and ↳ open" web and voicing *Wikipedia*'s support of "everyone's right to freedom of thought and freedom of expression."[43] This narrative was echoed on the busy *Wikipedia* page "Wikipedia:SOPA Initiative/Action," where individuals debated whether to black out the site. Contributors argued strongly in favor of the blackout, claiming that SOPA would "destroy our freedom, our internet, our digital frontier" and "prevent global free speech," and that the "potential consequences of this bill on the internet and free speech [were] dire indeed."[44]

This discussion around freedom and free speech pointed to another notable facet of the SOPA/PIPA protests: protesters fought these bills by adopting the subjectivity of the user. Instead of specifically mentioning piracy or relating to the subject of the pirate, they talked about the right to use an uncensored Internet and the need to protect online platforms like *Wikipedia* and Google. In a similar fashion, the ongoing mentions of freedom and the defense of free speech throughout these protests spoke to the "respectable face of middle-class copyright critique."[45] Despite the fact that copyright infringement was occurring in the United States at the time, the political response of protestors was not to recognize this piracy but to resist this subjectification and instead present as misidentified users who were bearing the brunt of an ill-informed and poorly executed antipiracy operation.

The preceding critique of SOPA and PIPA reveals the relational nature of the pirate in the contemporary West. Although the Pirate Party is a visible actor through its various national and local iterations, more often than not copyright infringement in places like the United States is defended or reidentified as use. This happens at a scholarly level with acts recuperated as either innovative (such as sampling) or defensible (for example, peer-to-peer file sharing), and it also happens at the level of public protest. The fact that foreign piracy is occurring overseas and should be stopped was never seriously questioned during the SOPA/PIPA protests, only the method of enforcement. This embrace of the user subject position and relegation of the pirate to foreigners comes to define citizens in the United States and other Western countries. They have been called pirates by

industry groups like the Motion Picture Association and the International Federation of the Phonographic Industry throughout the 2000s and 2010s, but individuals can and often do resist this mode of subjectification and mobilize other socio-legal discourses to prevent being defined as unrepentant pirates. There is always the
p. 121 (comparatively) more authorized subject of the ↳ user available for them to inhabit. I will continue to discuss the relational connections between the Western middle-class user and the pirate in more detail in the next chapter. At this point, it is enough to point out that there is a close relationship between these two parties and move on to explore the interrelations that can occur between the pirate and the author.

The "Pirate" as a Productive Actor

There is a common presumption among many lobbying groups, legislators, and members of the general public that copyright is a vitally necessary legal technology for any innovative sector populated by creative practitioners. Yet a number of highly creative fields are either not protected by copyright or essentially ignore copyright laws that do exist for their supposed protection. Fashion designers,[46] comedians,[47] chefs,[48] and adult video producers[49] all operate in low IP or no IP environments. But despite the absence of rigorous and enforceable copyright, these sectors are still able to innovate. This is because in many of these industries, copying is good for business. Kal Raustiala and Christopher Sprigman have conducted an extensive overview of this phenomenon in their book *The Knockoff Economy* and suggest that a lack of IP protection can be beneficial. They note that in the fashion industry copying speeds up the fashion cycle, which means that clothing comes in and out of style more quickly. As popular designs get copied, they lose "distinctiveness," forcing leading designers to innovate once more, starting "new trends—and, as a consequence new sales."[50]

We also see copying emerge as a central driver of creativity in the arena of the professional kitchen. Neither recipes nor finished dishes are protected by copyright. Although some recipes can be "valuable business information"[51] and protected by trade secret law, for example, the recipe for Coca-Cola or Kentucky Fried Chicken's eleven secret herbs and spices, most recipes (even in high-end restaurants) can be copied in their entirety. The preponderance of copying is further entrenched in the restaurant business by the practice of "staging," in which "a young chef works essentially as an intern under the tutelage of another chef."[52] This method of instruction in fact *requires* the young chef to copy new dishes and techniques to build a repertoire of skills they can take with them after leaving. Copying functions as a necessary educational tool, which in turn
p. 122 generates innovation in the entire sector. The ability to copy both directly and indirectly (through ↳ recipes) allows chefs "to learn from one another, and thereby keep incrementally improving their offerings."[53]

Although chefs and fashion designers operate in industries rife with copying, they are nonetheless both professions that produce culturally (and occasionally, legally, in the case of fashion design) recognized forms of authorship. Thomas Keller and Giorgio Armani are seen as artists on a level with other cultural producers, from painters to composers, who produce work protected by copyright law. The most famous practitioners all have a style attributable to them and are original and innovative in their work, all key markers of authorship. Yet they are also all pirates who have copied and will no doubt continue to copy throughout their careers. This places the phenomenon of copying in an interesting position.[54] In the above cases, copying is not considered the obverse of authorship, but is seen as central to the ongoing maintenance of each industry. It functions as an educational tool, a marker of status, and a driver of innovation. Since copyright law and other IP regimes are largely not relevant in these industries, we cannot automatically call this infringement in the formal sense; instead, we can identify an alternate history of copying that functions as a productive force, as well as locate a blurring of the boundaries between authorship and piracy.

This overlap of the author and pirate also occurs on social media. The replicable nature of online content is one of the more noticeable changes of the last decade or so. Copying is now a standard practice on social media platforms, with individuals passing on videos of cute puppies, poignant photographs, relevant GIFs, and

hilarious memes to friends, family members, and distant acquaintances.[55] Much of this material is copyrighted content, but the law is rarely enforced in these spaces. This is partly due to a discursive shift in how this distribution is understood. As Jenny Kennedy notes, "a technologically situated discourse of sharing has persisted throughout networked culture."[56] This is clearly identifiable in the redefinition of online copyright infringement as "file sharing,"[57] but also more recently in the invocations to share (rather than, say, copy) on social media platforms.[58] Sharing offers a positive way of thinking about this method of distribution (see figure 5.3).

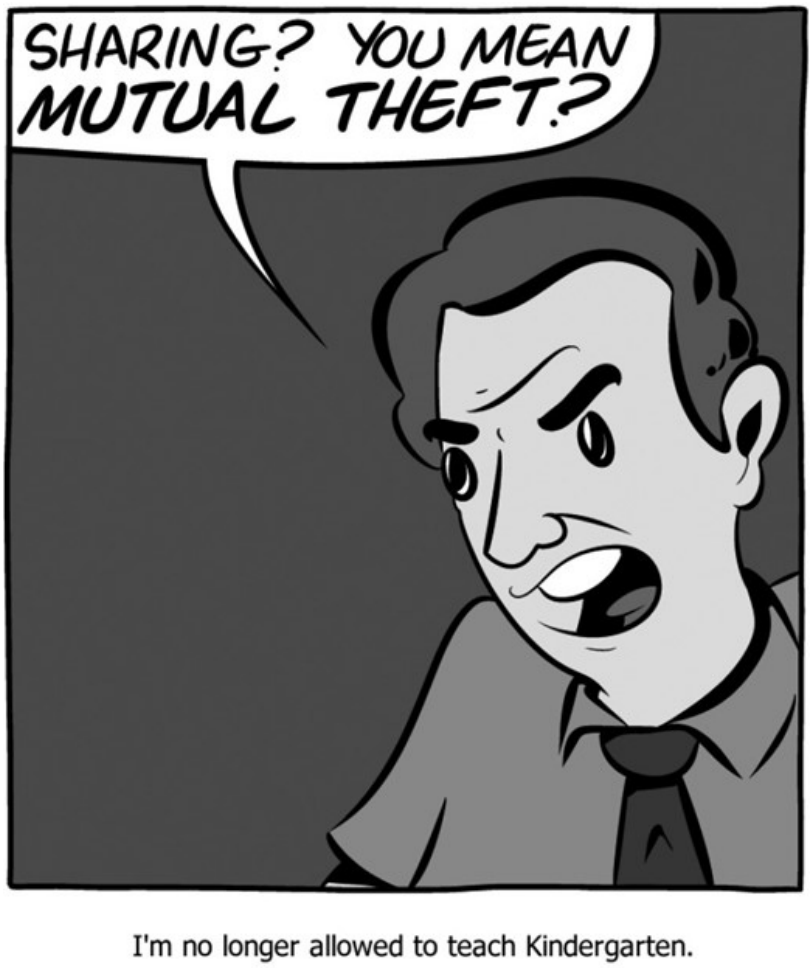

Figure 5.3 "Sharing" is a contested term and often used in place of "piracy" in discussions about online distribution.

Credit: Zach Weinersmith, smbc-comics.com/comic/sharing.

Social media platforms have adopted this discourse of sharing as part of a broader strategy of engagement, with the goal of becoming economically viable businesses.[59] Numerous creators have also adopted this
p. 123 discourse and encouraged copying to support the wide distribution of their ↳

content. Part of the reason photographer Brandon Stanton (who runs the *Humans of New York* blog) developed such a substantial following is that he regularly posted his content on a Facebook page, allowing his photos to be shared across the platform. This is a common strategy nowadays, with numerous amateurs (and aspiring professionals)—from make-up artists to powerlifters—using the affordances of social media platforms to build an audience and, ideally, monetize their content.[60] Professional media organizations have also responded to this compulsion to share, structurally integrating with social media platforms to allow their content to be widely circulated. This changed mode of distribution and consumption has been most clearly described by

Henry Jenkins, Sam Ford, and Joshua Green, who suggest that media is only able to survives if it is "spreadable" and able to be distributed across multiple platforms by both authorized and unauthorized actors.[61]

These changes in distribution suggest that much as it does for chefs and fashion designers, copying also
p. 124 structures the media industry and functions as a central site of economic generation for both large companies
↳ and small-scale creative entrepreneurs. These actors have numerous reasons for encouraging the sharing of their content and not enforcing potential claims of copyright infringement. For large media companies, this practice echoes the earlier broadcast media practice of providing content for "free" and generating income from advertising. Even if these companies ultimately demand payment for content at some stage through a paywall, allowing some content to spread online is a simple way of building an audience around a brand. This is also one of the primary reasons why individual entrepreneurs encourage the sharing of their content. Indeed, the YouTube Creator Academy encourages creators to "[s]hare [their] videos on linked social platforms" to "reach off-site audience members"[62] and "reach beyond YouTube."[63]

The intertwined phenomena of sharing and spreadable media also produce an authorial pirate. As noted earlier, part of the task of this chapter is not simply to identify piratical behavior that can be legally identified as authorship but also to locate the pirate as a generative actor that can draw on authorial capacities in a broad sense. The preceding discussion locates acts of infringement that are either tacitly accepted or encouraged by copyright holders to enhance their economic activities.[64] Therefore, the wholesale copying (or sharing) of copyrighted content can at times act as a generative economic practice. Thinking about creativity and production in a cultural sense then (rather than in terms of the letter of the law), the pirate no longer stands on the outer edge of copyright law but alongside the author as an economically and creatively productive subject.

We are not just limited to this sort of meta-level conceptual thinking to locate a relational connection between the pirate and the author. The spreadable nature of media has presented some interesting case studies in reuse and appropriation that clearly trouble the boundaries between infringement and authorship.[65] One of the most notable recent cases is that of Richard Prince, an appropriation artist who exhibited a number of other people's Instagram posts during the Frieze Art Fair. The photos were "blown up and jet-printed on six-foot canvas" but otherwise edited only slightly:[66]

> Although he did not alter the usernames or the photos themselves, he removed captions. He then added odd comments on each photo, such as "DVD workshops. Button down. I fit in one leg now. Will it work? Leap of faith" from the account "richardprince1234."[67]

p. 125 The prints were exhibited with little comment in 2014 at the Gagosian Gallery in New York, but when Prince sold most of the prints for US$90,000 each at the Frieze Art Fair in 2015, media outrage quickly followed.[68]

The media narrative centered on Prince's theft of the images, stating that an artist was making money from "stolen" photos and claiming that he was "controversial"[69] or, more bluntly, simply a "jerk."[70] The subjects of the photos themselves had a more complicated response to the practice. Unsurprisingly, a number of people were furious that their photos (and their identities) had not only been made public but also commoditized. An Australian photographer Peter Coulson felt "violated" and compared the act to having "your house broken into."[71] Prince had used one of his photos of a model, Alice Kelson, in his exhibition. Coulson had given Kelson permission to post his photo to Instagram, which is how Prince got access to it. Anna Collins, a college student, was similarly unimpressed with "a middle-aged white man making a huge profit off of [her] image."[72] It is worth noting, however, that "the shot of Collins and her boyfriend gazing at the glowing screen of a sticker-covered laptop" was actually taken by her sister, who would hold copyright in the image.[73] In contrast, Karley Sciortino, another photographic subject, felt honored to be included in a piece of Prince's artwork.[74]

Interestingly, a significant number of the photos chosen for Prince's exhibition were of models from the "adult lifestyle brand" Suicide Girls. The company's models are defined by an "alternative" look that incorporates

tattoos, piercings, and dyed hair and are regularly featured on the brand's Instagram account. The brand took a novel approach to Prince's appropriation. Its founder Selena Mooney noted in an Instagram post that their images had often being stolen or reappropriated by other companies but felt that Prince's activities were different:

> If I had a nickel for every time someone used our images without our permission in a commercial endeavor I'd be able to spend $90,000 on art. I was once really annoyed by Forever 21 selling shirts with our slightly altered images on them, but an Artist? Richard Prince is an artist and he found the images we and our girls publish on Instagram as representative of something worth commenting on, part of the zeitgeist, I guess? Thanks Richard![75]

But Prince did not get off scot-free. Though generous in her response to his work, Mooney also used the post to
p. 126 launch the Suicide Girls' new series of ↳ prints. The company would print any of the altered Suicide Girls images to the exact specifications of Prince's artwork at the discount price of US$90, which Mooney cheekily noted was "99.9% off."[76] Any profits would go to the Electronic Frontier Foundation. Prince publicly approved this response to his artistic practice on his Twitter feed.[77] There is a legal argument to be made about whether or not Prince's appropriation was fair use, but the more interesting issue emerges from the relationship between attribution and genre, a discussion begun in chapter 3. Just like the middle-class music downloader earlier in this chapter, artists are not always seen as pirates when they copy.[78]

The practice of appropriation also underlines the awkward tensions that emerge between the author and the pirate around the question of power. Collins, the college student whose image was featured in the exhibition, referenced the gendered history of authorship that prioritizes men over women. This history implicitly authorizes Prince's appropriation practices and allows him to make a profit from it. Indeed, in each of the examples of copying discussed above, a designation of authorship is as much the product of an existing system of power relations, and conventions of genre and style, as formal law. This of course reveals a stark division between authorship and piracy. Authorship is a mode of cultural authority often granted to those in power, whereas an individual is more likely to be aligned with the pirate if they lack power. Yet Prince's case also underlines the close but often obfuscated connections between the author and the pirate. As his activities show, these subjects are connected through many instances of actual creative practice, and it is often only through the direct or indirect deployment of power that boundaries can be established between these two figures.

As the discussion at the start of this chapter showed, this deployment of power is also present in global conceptualizations of piracy, where piracy in the Global South is starkly separated from Western practices of "sharing" or "remix." But this piracy can similarly be reframed as a generative activity, like the media practices examined above. Numerous scholars have noted that piracy develops "provisional and informal infrastructure," supporting new distributive pathways and forms of access for countries that have been left out of the institutional networks of modernity.[79] Joe Karaganis explains the everyday inequalities of distribution in these
p. 127 countries. Whereas "wealthy elites" in capital cities have access to "[m]ovie theatres, DVD and CD ↳ retailers, bookstores, and software vendors," "[s]maller cities and the provinces are chronically underserved."[80] Therefore, pirate networks allow media to flow to these areas, "radicalizing media access for subaltern groups" and "allowing the entry of vast numbers of poor urban residents into media culture."[81] In this context, piracy is not a parasitical act but rather a foundational prerequisite for media circulation that can fulfill a number of central social and cultural functions.[82]

Piracy is also related to pricing. Liang and Achal Prabhala note that citizens in the Global South have to "commit significantly higher proportions of their income" to purchase books.[83] Their comparative analysis of the cost of books in different countries is particularly illuminating, showing that the standard price of books in India is prohibitive for a large segment of the population:

> It is instructive then that the prospect of paying $440.50 for Roy's *God of Small Things* in the USA is evidently alarming. Yet, the notion of paying $6.60 for the book in India (which in Indian terms is exactly the same value as US$440.50 in the United States, by this logic) is not treated with similar alarm.[84]

Therefore, piracy does not only function as distributive infrastructure or a site for consumption and pleasure, but also offers critical cultural infrastructure. This has had an impact in India, with piracy allowing "groups excluded from the technical education common in the Indian middle and upper classes" to "climb the value chain in the information economy."[85]

Another salutary aspect of generative piracy is its archival capacity. In his studies of pirate DVD distribution in Mexico City, Ramon Lobato has noted that some pirate stalls do more than simply sell in-demand films to customers at a price point they can afford.[86] In some cases, they also function as important repositories of culture, where moments of film history are captured, retained, and distributed to a local and global audience. He tells the story of Juan, who runs a stall in Tepito that specializes in "old Mexican movies" sourced from official DVDs, "8mm and 16mm reels," and "VHS and Beta recordings of TV broadcasts."[87] For Juan, this piracy functions "as a social service as well as a business, one which keeps films in circulation and keeps Tepiteño culture vibrant."[88] More than just selling Mexican films cheaply to locals, it gives life to orphan works that have been abandoned by studios that have closed down but continue to retain the film's copyright, leaving the work with no authorized method of distribution. In addition to all this, Juan sources and copies obscure films—
p. 128 which can sell for as much as ↳ 10,000 pesos (US$524–526 at the time of writing)—for locals and overseas collectors.[89] He has even performed similar services for the Imcine, Mexico's state-run film institute.[90] Lobato's study paints a compelling picture of Juan's piracy as a generative act, one that responds to market demand and also sustains local and national film cultures.

Conclusion

This chapter has referred to notions of use and authorship in a relatively liberal fashion. Unlike other chapters in this book, which have at least addressed case law or legislation, here we needed to move beyond the institutional framework of law to accurately examine the pirate. This departure revealed how the pirate is structured in relation to existing sites of power. The chapter also located generative aspects of piracy and discussed how infringement can sustain industries, support wider cultural and educational development, and lead to further innovation.

The examples discussed offer a number of lessons for copyright law, the legal framework that has largely been absent from this chapter. The various cultural discourses that exist around piracy underline the limitations of legal institutions, which often speak about piracy in relation to infringement. In contrast, a cultural analysis presents us with piracy that can function (and occasionally look) like authorship and also provides evidence as to how individuals become interpellated as pirates, with subjectification largely tied in to broader networks of capital and power. Therefore, it is worth paying attention to new discourses that attempt to recuperate acts of copying, such as sharing, and new "spreadable" practices that challenge or call into question how law seeks to structure modes of production, distribution, and consumption. The SOPA and PIPA protests were also instructive, as they responded to the enforcement of antipiracy laws by articulating concerns about free speech and censorship. In these cases, grounded in the context of affluent digital and social media use, we saw a strong pushback against the "piracy" label and a broad attempt to trouble the clear distinctions between authorship, use, and piracy that law seeks to maintain.

The discussion around the generative potential of piracy also presents a challenge to copyright law, namely around the philosophy that undergirds the law itself. Although copyright law can be justified by various

p. 129 philosophical positions,[91] one of the most commonly invoked is the utilitarian ↳ approach, which offers authors a limited monopoly as it is the best way of encouraging creativity and innovation. Yet this chapter presented a series of examples of piracy or copying that supported innovation and creativity either directly or indirectly. Therefore, we can envisage a relational pirate that not only retains some of the capacities that are presumed to reside solely in the author, but also directly challenges the structural separation of these subjects.[92] Bringing a relational approach to bear on piracy has uncovered a series of interstitial connections between subjects, as well as interesting moments of divergence between the practices of businesses,
p. 130 individuals, and formal law, offering an alternative narrative of piracy. ↳

Notes

1. John Logie, *Peers, Pirates, and Persuasion*: *Rhetoric in the Peer-to-Peer Debates* (West Lafayette, IN: Parlor Press, 2006), 53. This is partly because copyright law only legally recognizes (and enforces) the infringement of copyright rather than the highly emotive concept of "piracy." See also Jessica Reyman, *The Rhetoric of Intellectual Property* (New York: Routledge, 2010); Patricia Loughlan, "Pirates, Parasites, Reapers, Sowers, Fruits, Foxes … The Metaphors of Intellectual Property," *Sydney Law Review* 28, no. 2 (2006): 211–226; and Patricia Loughlan, "'You Wouldn't Steal a Car': Intellectual Property and the Language of Theft," *European Intellectual Property Review* 29, no. 10 (2007): 401–405.
2. Stop Online Piracy Act, H.R. 3261, 112th. Cong. (2011) (hereafter SOPA).
3. PROTECT IP Act, S. 968, 112th Cong. (2011) (hereafter PIPA).
4. Rebecca Tushnet, "Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It," *Yale Law Journal* 114 (2004): 535–590; and Kal Raustiala and Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (Oxford, UK: Oxford University Press, 2012).
5. Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin, 2008), 27.
6. Ibid., 38.
7. Anupam Chander and Madhavi Sunder, "Everyone's a Superhero: A Cultural Theory of 'Mary Sue' Fan Fiction as Fair Use," *California Law Review* 95, no. 2 (2007): 600.
8. Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004), 63.
9. Lucas Hilderbrand, *Inherent Vice: Bootleg Histories of Videotape and Copyright* (Durham, NC: Duke University Press, 2009), 23.
10. Ibid.
11. Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago: University of Chicago Press, 2009), 6.
12. Tushnet, "Copy This Essay."
13. Ibid., 537.
14. Ibid., 567.
15. Kavita Philip, "What Is a Technological Author? The Pirate Function and Intellectual Property," *Postcolonial Studies* 8, no. 2 (2005), 199, 212.
16. Ibid., 207.
17. Lawrence Liang, "Beyond Representation: The Figure of the Pirate," in *Access to Knowledge in the Age of Intellectual Property*, ed. Gaëlle Krikorian and Amy Kapczynski (Cambridge, MA: MIT Press, 2010), 357.
18. Ibid.
19. Martin Fredriksson, "The Pirate Party and the Politics of Communication," *International Journal of Communication* 9 (2015): 909–924. See also Martin Fredriksson, "Copyright Culture and Pirate Politics," *Cultural Studies* 28, no. 5–6 (2014): 1022–1047; and Martin Fredriksson,"Piracy, Globalisation and the Colonisation of the Commons," *Global Media Journal: Australian Edition* 6, no. 1 (2012), available at http://www.hca.westernsydney.edu.au/gmjau/archive/v6_2012_1/pdf/martin_fredriksson_RA_6_1_2012.pdf.
20. Fredriksson, "The Pirate Party and the Politics of Communication."
21. See Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (New York: Twelve, 2011).
22. Patrick Burkart, *Pirate Politics* (Cambridge, MA: The MIT Press, 2014), 31.
23. Philip, "What Is a Technological Author?"
24. James Meese, "The Pirate Imaginary and the Potential of the Authorial Pirate," in *Piracy: Leakages from Modernity*, ed. Martin Fredriksson and James Avanitakis (Sacramento, CA: Litwin Books, 2014), 23. See also Bill Herman, *The Fight over*

Digital Rights: The Politics of Copyright and Technology (Cambridge, UK: Cambridge University Press, 2013).

25. SOPA §103(a)(1)(B).
26. Ibid., §102(c)(2)(A)(i).
27. Declan McCullagh, "SOPA's Latest Threat: IP Blocking, Privacy-Busting Packet Inspection," CNET, November 19, 2011, http://www.cnet.com/au/news/sopas-latest-threat-ip-blocking-privacy-busting-packet-inspection/.
28. Michael Carrier, "SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements," *Northwestern Journal of Technology and Intellectual Property* 11, no. 2 (2013): 22.
29. Edward Lee, *The Fight for the Future: How People Defeated Hollywood and Saved the Internet—For Now* (Self-Published, 2013). Available at http://thefightforthefuture.com/wp-content/uploads/2013/07/The-Fight-for-the-Future_-How-P-Lee-Edward.pdf.
30. Carrier, "SOPA, PIPA, ACTA, TPP," 22.
31. Hayley Tsukayama, Beth Marlowe, and Dominic Basulto, "SOPA (Stop Online Piracy Act) Lawmaker Opposition Grows as Debate Heats Up," *Washington Post*, November 19, 2011, https://www.washingtonpost.com/business/sopa-stop-online-piracy-act-lawmaker-opposition-grows-as-debate-heats-up/2011/11/18/gIQADBdQZN_story.html.
32. Lee, *The Fight for the Future*.
33. Ibid.
34. Ibid.
35. Ibid.
36. Ibid.
37. See ibid. , as well as Meese, "The Pirate Imaginary and the Potential of the Authorial Pirate."
38. Jenna Wortham, "With Twitter, Blackouts and Demonstrations, Web Flexes Its Muscle," *New York Times*, January 18, 2012, http://www.nytimes.com/2012/01/19/technology/protests-of-antipiracy-bills-unite-web.html.
39. Hayley Tsukayama, Greg Sargent, and Sarah Halzack, "SOPA Bill Shelved after Global Protests from Google, Wikipedia and Others," *Washington Post*, January 20, 2012, https://www.washingtonpost.com/business/economy/sopa-bill-shelved-after-global-protests-from-google-wikipedia-and-others/2012/01/20/gIQAN5JdEQ_story.html.
40. Lamar Smith, "Setting the Record Straight on SOPA," *The Hill*, December 14, 2011, http://thehill.com/blogs/congress-blog/technology/199385-setting-the-record-straight-on-sopa.
41. PIPA S. 968, 112th Cong. (2011), Sec. 3.
42. Hayley Tsukayama, "Google to State Anti-SOPA Stance on Home Page," *Washington Post*, January 17, 2012, https://www.washingtonpost.com/pb/business/technology/google-to-state-anti-sopa-stance-on-home-page/2012/01/17/gIQANeD05P_story.html.
43. Sue Gardner, "English Wikipedia Anti-SOPA Blackout," Wikimedia Foundation, January 16, 2012, https://wikimediafoundation.org/wiki/English_Wikipedia_anti-SOPA_blackout.
44. "Wikipedia:SOPA Initiative/Action," *Wikipedia*, accessed May 23, 2016, https://en.wikipedia.org/wiki/Wikipedia:SOPA_initiative/Action.
45. Ramon Lobato, "Constructing the Pirate Audience: On Popular Copyright Critique, Free Culture and Cyber-Libertarianism," *Media International Australia* 139, no. 1 (2011): 121.
46. Kal Raustiala and Christopher Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design," *Virginia Law Review* 92, no. 8 (2006): 1687–1777.
47. Dotan Oliar and Christopher Sprigman, "There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy," *Virginia Law Review* 94, no. 8 (2008): 1787–1867.
48. Emmanuelle Fauchart and Eric Von Hippel, "Norms-Based Intellectual Property Systems: The Case of French Chefs," *Organization Science* 19, no. 2 (2008): 187–201.
49. Kate Darling, "IP without IP: A Study of the Online Adult Entertainment Industry," *Stanford Technology Law Review* 17, no. 3 (2013): 709–771.
50. Raustiala and Sprigman, *The Knockoff Economy*, 43.
51. Ibid., 71.
52. Ibid., 75.
53. Ibid., 90.
54. For work on the history of copying and the concepts and values that underpin this notion, see Marcus Boon, *In Praise of Copying* (Cambridge, MA: Harvard University Press, 2011); see also Margie Borschke, *This Is Not a Remix: Piracy, Authenticity and Popular Music* (London: Bloomsbury Publishing, 2017).
55. See Tim Highfield, *Social Media and Everyday Politics* (Malden, MA: Polity, 2016); and James Meese, "'It Belongs to the Internet': Animal Images, Attribution Norms and the Politics of Amateur Media Production," *M/C Journal* 17, no. 2 (2014), available at http://journal.media-culture.org.au/index.php/mcjournal/article/view/782.

56. Jenny Kennedy, "Conceptual Boundaries of Sharing," *Information, Communication & Society* 19, no. 4 (2016): 463.
57. See Nicholas John, "File Sharing and the History of Computing: or, Why File Sharing Is Called 'File Sharing,'" *Critical Studies in Media Communication* 31, no. 3 (2014): 198–211.
58. Jenny Kennedy, "Rhetorics of Sharing: Data, Imagination and Desire," in *Unlike Us Reader: Social Media Monopolies and Their Alternatives*, ed. Geert Lovink and Miriam Rasch (Amsterdam: Institute of Network Cultures, 2013), 127–136.
59. Ibid. See also Jean Burgess, "From 'Broadcast Yourself' to 'Follow Your Interests': Making Over Social Media," *International Journal of Cultural Studies* 18, no. 3 (2015): 281–285.
60. See Ramon Lobato, "The Cultural Logic of Digital Intermediaries: YouTube Multichannel Networks," *Convergence: The International Journal of Research into New Media Technologies* 22, no. 4 (2016): 348–360; Joanne Morreale, "From Homemade to Store Bought: Annoying Orange and the Professionalization of YouTube," *Journal of Consumer Culture* 14, no. 1 (2014): 113–128; and Patrick Vonderau, "The Video Bubble: Multichannel Networks and the Transformation of YouTube," *Convergence: The International Journal of Research into New Media Technologies* 22, no. 4 (2016): 361–375.
61. Henry Jenkins, Sam Ford, and Joshua Green, *Spreadable Media: Creating Value and Meaning in a Networked Culture* (New York: New York University Press, 2013).
62. "Get Discovered," YouTube, accessed May 23, 2016, https://storage.googleapis.com/creator-academy-assets/discovery/discovery%20-%20en.pdf.
63. "Reach Beyond YouTube," YouTube, accessed May 23, 2016, https://storage.googleapis.com/creator-academy-assets/reach-beyond/reach-beyond%20-%20en.pdf.
64. For further discussion of this point, see Ramon Lobato and Julian Thomas, *The Informal Media Economy* (Cambridge, UK: Polity Press, 2015).
65. Jenkins, Ford, and Green, *Spreadable Media*.
66. Alex Needham, "Richard Prince v Suicide Girls in an Instagram Price War," *The Guardian*, May 27, 2015, https://www.theguardian.com/artanddesign/2015/may/27/suicide-girls-richard-prince-copying-instagram.
67. Jessica Contrera, "A Reminder that Your Instagram Photos Aren't Really Yours: Someone Else Can Sell Them for $90,000," *Washington Post*, May 25, 2015, https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/05/25/a-reminder-that-your-instagram-photos-arent-really-yours-someone-else-can-sell-them-for-90000/.
68. Ibid.
69. Matilda Battersby, "Stolen Instagram Photo Sells for $90,000," *The Independent*, May 25, 2015, http://www.independent.co.uk/arts-entertainment/art/news/stolen-instagram-photo-sells-for-90000-10274267.html.
70. Allen Murabayashi, "Opinion: Richard Prince Is a Jerk," PetaPixel, May 26, 2015, http://petapixel.com/2015/05/26/richard-prince-is-a-jerk/.
71. Sarah Thomas, "Australian Photographer Peter Coulson 'Violated' by Richard Prince Instagram Art Scandal," *Sydney Morning Herald*, May 27, 2015, http://www.smh.com.au/entertainment/art-and-design/australian-photographer-peter-coulson-violated-by-richard-prince-instagram-art-scandal-20150528-ghatkt.html.
72. Madison Malone Kircher, "It Turns Out Two of the Women Whose Instagram Photos Were Hijacked by Richard Prince Didn't Even Shoot the Originals," *Business Insider Australia*, May 29, 2015, http://www.businessinsider.com.au/instagrammers-from-richard-princes-photos-didnt-take-the-original-pictures-2015-5.
73. Cait Munro, "Richard Prince Instagram Victims Speak Out," ArtNetNews,May 29, 2015, https://news.artnet.com/art-world/more-richard-prince-instagram-303166.
74. Ibid.
75. Selena Mooney, Instagram post, accessed May 23, 2016, https://www.instagram.com/p/3MsKqdHWX1/.
76. Ibid.
77. Richard Prince, Twitter post, May 28, 2015, https://twitter.com/RichardPrince4/status/603874714201751552?ref_src=twsrc%5Etfw.
78. See Adler, "Against Moral Rights," *California Law Review* 91, no. 1 (2009): 263–300.
79. Brian Larkin, *Signal and Noise: Media, Infrastructure, and Urban Culture in Nigeria* (Durham, NC: Duke University Press, 2008), 219. See also Lars Eckstein and Anja Schwarz, *Postcolonial Piracy: Media Distribution and Cultural Production in the Global South* (London and New York: Bloomsbury Publishing, 2014); Lawrence Liang, "Cinematic Citizenship and the Illegal City," *Inter-Asia Cultural Studies* 3, no. 6 (2005): 366–385; Ramon Lobato, *Shadow Economies of Cinema: Mapping Informal Film Distribution* (London: Palgrave Macmillan, 2012); and Ravi Sundaram, *Pirate Modernity: Delhi's Media Urbanism* (New York: Routledge, 2010).
80. Joe Karaganis, "Rethinking Piracy" in *Media Piracy in Emerging Economies*, ed. Joe Karaganis (New York: Social Science Research Council, 2011), 43.
81. Sundaram, *Pirate Modernity*, 112.
82. See Larkin, *Signal and Noise*, 240.

83. Lawrence Liang and Achal Prabhala, "Reconsidering the Pirate Nation: Comment," *African Journal of Information and Communication* 7 (2006): 110.
84. Ibid., 111.
85. Lawrence Liang and Ravi Sundaram, "India," in *Media Piracy in Emerging Economies*, ed. Joe Karaganis (New York: Social Science Research Council, 2011), 344.
86. Lobato, *Shadow Economies of Cinema*.
87. Ibid., 89.
88. Ibid.
89. Ibid.
90. Ibid.
91. Justin Hughes, "The Philosophy of Intellectual Property," *Georgetown Law Journal* 77, no. 2 (1988): 287–366; and Peter Drahos, *A Philosophy of Intellectual Property*, (Aldershot, UK: Ashgate Publishing, 1996).
92. See Carys Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham, UK: Edward Elgar Publishing, 2011).