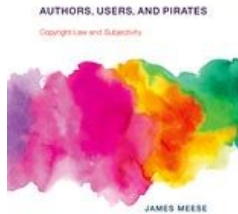


## Authors, Users, and Pirates: Copyright Law and Subjectivity

James Meese



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### CHAPTER

## 5 Reimagining the Pirate: Approaching Infringement Relationally

James Meese

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### 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

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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.<sup>1</sup> 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)<sup>2</sup> and PROTECT IP Act (PIPA),<sup>3</sup> 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.<sup>4</sup> Collectively, this 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.<sup>5</sup> 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."<sup>6</sup> 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."<sup>7</sup>

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."<sup>8</sup> Similarly, Lucas Hilderbrand is willing to recover ↳ bootlegging from its "negative" or "criminal" connotations but he refuses to acknowledge more substantial acts of piracy.<sup>9</sup> For Hilderbrand, bootlegging is concerned with the egalitarian or productive redistribution of culture and information, whereas pirates steal for profit.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup> 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).<sup>13</sup> 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.<sup>14</sup>

p. 114 Cultural research takes this critique even further by drawing extensively on empirical research and cultural 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.”<sup>15</sup> 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.”<sup>16</sup> 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?<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup> This turn to the political is unsurprising if we consider the fact that a number of copyright activists (including, most notably, Lawrence Lessig)<sup>21</sup> 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.<sup>22</sup>

p. 115 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 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> The bill would also allow the Attorney General to sue the owner or operator of an infringing website.<sup>28</sup>

p. 116 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 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.”<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup>

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.<sup>32</sup> 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 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."<sup>33</sup>

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*."<sup>34</sup> 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 "blackened out its site and hadn't ever used its home page in such a political way."<sup>35</sup>

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.<sup>36</sup> 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).<sup>37</sup>





**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.<sup>38</sup>



**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.<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> 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."<sup>42</sup> 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 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."<sup>43</sup> 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."<sup>44</sup>

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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."<sup>45</sup> 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

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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 (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,<sup>46</sup> comedians,<sup>47</sup> chefs,<sup>48</sup> and adult video producers<sup>49</sup> 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.”<sup>50</sup>

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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”<sup>51</sup> 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.”<sup>52</sup> 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 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.”<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup> 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.”<sup>56</sup> This is clearly identifiable in the redefinition of online copyright infringement as “file sharing,”<sup>57</sup> but also more recently in the invocations to share (rather than, say, copy) on social media platforms.<sup>58</sup> 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](http://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.<sup>59</sup> Numerous creators have also adopted this discourse and encouraged copying to support the wide distribution of their

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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.<sup>60</sup> 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 survive if it is “spreadable” and able to be distributed across multiple platforms by both authorized and unauthorized actors.<sup>61</sup>

p. 124 These changes in distribution suggest that much as it does for chefs and fashion designers, copying also 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”<sup>62</sup> and “reach beyond YouTube.”<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> 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:<sup>66</sup>

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.”<sup>67</sup>

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.<sup>68</sup>

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”<sup>69</sup> or, more bluntly, simply a “jerk.”<sup>70</sup> 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.”<sup>71</sup> 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.”<sup>72</sup> 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.<sup>73</sup> In contrast, Karley Sciortino, another photographic subject, felt honored to be included in a piece of Prince’s artwork.<sup>74</sup>

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 been 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!<sup>75</sup>

p. 126 But Prince did not get off scot-free. Though generous in her response to his work, Mooney also used the post to 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."<sup>76</sup> Any profits would go to the Electronic Frontier Foundation. Prince publicly approved this response to his artistic practice on his Twitter feed.<sup>77</sup> 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.<sup>78</sup>

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.

p. 127 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.<sup>79</sup> Joe Karaganis explains the everyday inequalities of distribution in these 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."<sup>80</sup> 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."<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup>

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."<sup>85</sup>

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.<sup>86</sup> 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."<sup>87</sup> 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."<sup>88</sup> 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—which can sell for as much as ↵ 10,000 pesos (US\$524–526 at the time of writing)—for locals and overseas collectors.<sup>89</sup> He has even performed similar services for the Imcine, Mexico's state-run film institute.<sup>90</sup> 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.

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## 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,<sup>91</sup> 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.<sup>92</sup> 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,

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## Authors, Users, and Pirates: Copyright Law and Subjectivity

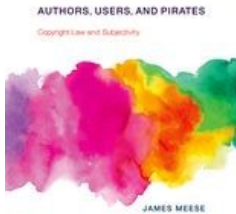
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### CHAPTER

## 6 Producing the Pirate: The Courtroom and Cultural Power

James Meese

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### Abstract

Chapter Six examines how the pirate has been interpellated in different jurisdictions across the copyright wars of the twentieth and twenty-first centuries, with a particular focus on the intermediaries that were charged with enabling online copyright infringement, namely peer-to-peer networks and Internet Service Providers. The chapter charts a narrative of gradual acceptance. Whereas initial decisions interpellated peer-to-peer networks as piratical and also as locations where individuals could become interpellated as pirates, by the early twenty-first century, the courts became somewhat more understanding. Instead, they viewed intermediaries as less liable and individuals as users who engaged in copyright infringement, rather than as subjects entirely defined by their piratical actions. I also reflect on how Apple and their customers were able to avoid the pirate moniker during their Rip, Mix, Burn campaign in 2003 and consider on the potential futures of the pirate subject.

**Keywords:** [Australia](#), [United States](#), [Copyright Law](#), [Pirate](#), [Piracy](#), [Online Copyright Infringement](#), [Digital Piracy](#), [User](#)

**Subject:** [Technology and Society](#)

**Collection:** [MIT Press Scholarship Online](#)

Since the turn of the millennium a number of high-profile cases concerning online copyright infringement have been tried in different jurisdictions. These cases have been instigated by members of the film, television, and music industries in an attempt to stem the increase in online piracy taking place on and through peer-to-peer (P2P) networks. Judges have made findings with respect to the legality of these networks and have also decided on the extent to which Internet service providers (ISPs) have a role to play in stopping copyright infringement. In the examples that follow, we will see how the bulk of these decisions draw on and subsequently formalize dominant cultural narratives that have already been identified around the pirate

subject. The user and pirate gradually become intertwined as legal institutions become increasingly unwilling to draw firm boundaries between these two subjects.

In the previous chapter, I argued that we needed to move beyond law to understand the pirate, and to set out a broad conceptual rethinking of the subject that had little to do with formal legal doctrine. Although legal doctrine does not address the pirate and treats infringement relatively strictly, legal institutions are not hermetically sealed off from culture. The cultural discourses around piracy that were examined in the previous chapter operate beyond law but are also in a dialogue with law, and legal institutions hear this discussion and contribute to it by producing legal interpretations of cultural life.<sup>1</sup>

p. 132 In this chapter, we see examples of the judiciary recognizing the cultural contribution of law and making an effort to protect it. This becomes particularly apparent in cases featuring US-based companies in non-US jurisdictions. Courts want to maintain their unique ability to “produce” pirates and so are particularly unwilling to authorize extrajudicial enforcement ↳ strategies pursued by content holders. Therefore, although we can clearly see a relational pirate emerge in the last few years, it is important to note that this is due to highly strategic reasons that are related to legal institutions’ attempts to retain cultural control. This chapter also challenges the scope of their ability to control culture, suggesting that much of the development around subjectivity is related to the law’s struggle with unforeseen technological changes, rather than a meaningful effort to engage with the subjectivity of individuals actually affected by copyright law.

A final point to note is that this chapter has a particularly antipodean flavor as many of the cases discussed took place in Australia. This is because major content industries based in the United States have used Australia as a legal laboratory for a number of years, instigating cases that, if successful, would allow for stricter (or more effective) methods of copyright enforcement. These could then potentially be rolled out to other countries. The Australian Screen Association (ASA, though previously named the Australian Federation Against Copyright Theft, or AFACT), the local arm of the Motion Picture Association of America (MPAA), coordinated many of these cases locally. Therefore, this chapter also offers some insight into the global politics of copyright and the practice of jurisdiction-shopping, in which comparatively remote countries with assumedly more flexible law or lessdeveloped precedent become the staging ground for an international battle over copyright enforcement. With all of this in mind, the chapter proceeds as follows. We begin by examining the history of these copyright battles, focusing on two of the most prominent cases regarding P2P technologies: *A&M Records, Inc. v. Napster, Inc.*<sup>2</sup> in the US (referred to in this chapter as *Napster*) and *Universal Music Australia Pty Ltd. v. Sharman Networks Ltd.*<sup>3</sup> (*Sharman*) in Australia. We then consider two of the more notable online piracy cases of recent years to explore how a particular jurisdiction has changed its interpretation of the pirate over the past decade or so: *Roadshow Films v. iiNet Ltd.*<sup>4</sup> (*iiNet*) and *Dallas Buyers Club v. iiNet Ltd.*<sup>5</sup> (*Dallas Buyers Club*).


## A&M Records, Inc. v. Napster, Inc.

p. 133 *A&M Records, Inc. v. Napster, Inc.* was the first time that the relatively new practice of copyright infringement through peer-to-peer networks was addressed in a courtroom setting.<sup>6</sup> Napster was a P2P network developed in 1999 by Shawn Fanning, a nineteen-year-old US college student. The free ↳ service allowed individuals to share MP3 files from selected folders, search other people’s shared folders, and download music files. Napster continually scanned users’ folders in order to retain a dynamically updated central index that users could search, and when someone clicked on a file (hoping to download it), Napster made sure the user hosting the file was online and able to send it across.<sup>7</sup> Then,

Napster would communicate the IP address and other relevant details of the host user to the requesting user. At that point, Napster’s role in the transaction would be complete, and the actual transfer would take place directly over the internet between the hosting and requesting users.<sup>8</sup>

The ability to quickly search a repository of music files (both popular and obscure) and download songs for free proved to be incredibly popular, and only a year later Napster was “at its peak with twenty million users sharing six hundred thousand MP3 files.”<sup>9</sup>

It was only a matter of time before Napster was sued. The service was publicly criticized by a number of recording artists, and record companies felt that they could not turn a blind eye to the significant amount of infringement occurring online.<sup>10</sup> So, in December 1999, the Recording Industry Association of America along with a number of record companies filed suit against Napster, Inc., accusing the company of engaging in “contributory and vicarious copyright” infringement.<sup>11</sup> The case was first heard at the US District Court for the Northern District of California, where Federal District Judge Patel granted a preliminary injunction to the plaintiffs, restraining Napster from “engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs’ copyrighted musical compositions and sound recordings.”<sup>12</sup>

This was an unprecedented decision because Napster was effectively a neutral service.<sup>13</sup> Although it was used predominantly for copyright infringement, the peer-to-peer function at the heart of Napster could just as easily be used for non-infringing purposes. This is an important point as US copyright law had effectively refused to limit innovative technologies that could be used in substantially non-infringing ways since the *Betamax* case in 1984 (previously mentioned in chapter 2).<sup>14</sup> Universal Studios and Walt Disney had sued Sony, claiming that the record button on Betamax VCRs would lead to a spate of copyright infringement in homes across America. Famously, MPAA head Jack Valenti went so far as to claim that “the VCR is to the American film producer and the American public as the Boston  strangler is to the woman home alone.”<sup>15</sup> The Supreme Court disagreed, stating that “[T]he Betamax is ... capable of substantial non-infringing uses [and that] Sony’s sale of such equipment to the general public” would “not constitute contributory infringement of [the] respondent’s copyrights.”<sup>16</sup> Considering this legal precedent, Napster founder Shawn Fanning, CEO Hank Barry, and their legal team sensed that they had been treated unfairly in the district court, so they appealed the decision.

The Ninth Circuit Court of Appeals reviewed the case in a narrow fashion. Rather than engaging with the wider cultural politics of copyright that emerged from the case (as we will soon), the court “reviewed legal principle within the [doctrinal and conceptual] framework” outlined by Judge Patel in the original case;<sup>17</sup> the court of appeals was essentially checking that precedent supported the original judgment. The court found that Napster’s operations were not covered under fair use and, moreover, the service not only failed to police online piracy but knowingly encouraged and assisted “the infringement of plaintiffs’ copyrights.”<sup>18</sup> This meant that Napster was engaging in contributory and vicarious copyright infringement. The only issue that the court of appeals had with the judgment was the scope of the preliminary injunction. In the end, Napster was not forced to shut down, but because the injunction required Napster to filter copyrighted content from its system, the service quickly started to lose popularity.<sup>19</sup> The company eventually went bankrupt and attempted to relaunch as a legal online music service.<sup>20</sup>

*Napster* stands as an important intervention in the socio-legal construction of the pirate subject because it was the first time that copyright law had to come to grips with P2P networks. In her judgment, Judge Patel noted that the decision would directly address “the boundary between sharing and theft, personal use and the unauthorized worldwide distribution of copyrighted music and sound recordings.”<sup>21</sup> It would also by necessity significantly develop legal subjectivity in copyright, as the way that legal institutions interpreted these boundaries would directly affect how legal subjects were positioned in relation to this emerging digital media ecology. As we will see, in addition to producing a new conceptualization of the pirate, which influenced understandings of the author and the user, the case also showed the legal system attempting to intervene in broader cultures of music consumption. Due to the narrow strictures of the appeal hearing, our analysis will focus on the district court hearing.

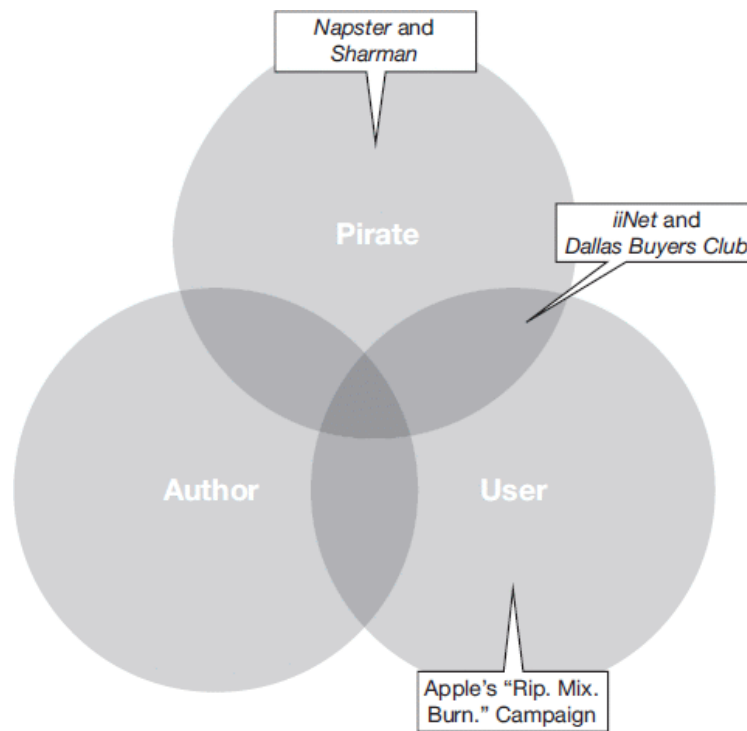
p. 135 Judge Patel found that individuals were engaging in copyright infringement on Napster, and that “facilitating the unauthorized exchange of copyrighted material was a central part of Napster Inc.’s business strategy.”<sup>22</sup> In short, the court decided that Napster was essentially a pirate network. This conclusion was established in the following ways. Judge Patel first tackled the issue of whether people on Napster were infringing copyright or simply sharing music through the affordances of the Internet, which was protected under fair use doctrine. She noted that “uploading and downloading MP3 files [was] not paradigmatic commercial activity,” but the “global scale of Napster usage and the fact that users avoid paying for songs that otherwise would not be free” meant that use of the program could not fall under personal use.<sup>23</sup> It was also noted that based on the evidence, “virtually all Napster users download or upload copyrighted files.”<sup>24</sup> Judge Patel also found that Napster was liable for the infringing acts of its users. This was based on emails between employees of Napster, which revealed that they knew infringing music was being transferred over their network.<sup>25</sup> Finally, Patel noted that Napster had the “ability to supervise the infringing activity and ... a direct financial interest” in it,<sup>26</sup> which supported a charge of vicarious copyright infringement (citing the precedent set in *Fonovisa Inc. v. Cherry Auction Inc.*<sup>27</sup> and *Gershwin Publishing Corp. v. Columbia Artists Management*<sup>28</sup>).

In these findings we see the court gradually producing moral judgments about the people who worked at Napster, the people who used it, and the technology that supported the entire enterprise. For example, although it was recognized that P2P technology had non-infringing capabilities, the court viewed the network architecture as largely benefiting consumption that could be classed as piracy. This distinction makes little sense legally because when it comes to fair use, if one follows the *Betamax* decision, not much separates P2P technologies from earlier analog technologies in the abstract.<sup>29</sup> Still, Judge Patel contended that the type of copying that occurred through Napster was of a different order than analog forms that fell under fair use provisions. The potential of a reproducible file that could be circulated en masse across the world was emphatically different from videotaping a television program or sharing a record because it stood as a severe economic threat to content industries.

p. 136 The actions of users were tackled in a similar fashion. As noted earlier, Judge Patel remarked that the court had to decide whether users were simply “sharing” content or engaging in “theft.”<sup>30</sup> She ultimately found that the size and scale of Napster meant that it was impossible to argue that individuals were using the network for personal use; they were instead pirates. The conceptualization of piracy that the judgment put forward was positioned as something occurring on a mass scale, through anonymous parties, for an individual’s own economic benefit, and entirely devoid of intimacy. It therefore stood in stark contrast to “sharing,” which implied social interaction and friendship. The possibility that friends were sharing music using the affordances of P2P technology was not considered in detail. Nor was there much reflection on whether these activities echoed earlier liminal practices around media that were either defended as valid private uses of copyrighted material or tacitly accepted as non-enforceable acts of private infringement.<sup>31</sup> Kylie Pappalardo notes that this decision signaled the beginning of an increasingly common judicial tendency of courts failing to engage in detailed analyses of “users’ actual downloading practices” or their “motivations for downloading,” preferring to simply tar the bulk of activities on these networks as piracy instead.<sup>32</sup>

The Napster employees were then corralled into this moral analysis, as they had active knowledge of the activities occurring on their network. Much was made of a document authored by cofounder Sean Parker that stated Napster could not know the “real names and IP addresses” of people sharing music because they were “exchanging pirated music.”<sup>33</sup> This was viewed as damning evidence that the company’s business strategy was predominantly built around widespread piracy. The court used the document to make an important distinction. Napster was not ignoring the fact that piracy was occurring on its network but establishing and actively encouraging new forms of illicit music consumption in order to build a user base and ultimately make money. It was in effect a pirate company using a pirate network to serve pirates (see figure 6.1).





**Figure 6.1** Judicial decisions and broader socio-legal discourses located infringing acts in different areas of the relational triad throughout the “copyright wars.”

This damning interpretation was further bolstered when Judge Patel reflected on the extent of Napster’s impact on the market for musical content. She found that “Napster use [was] likely to reduce CD purchases by college students, whom defendant [*sic*] admits constitute a key demographic,” and also noted that the network raised barriers to entry for the music industry, which had “entered the digital download market very recently, or plan to enter it in the next few months.”<sup>34</sup> This was an interesting reflection by Judge Patel, suggesting that Napster was going to be solely responsible

for a shift in the cultural consumption of music. The implication was that although people had been happy to purchase CDs prior to the launch of this service, the rise of Napster was going to fundamentally alter the market because “in choosing between the free Napster service and pay-per-download sites, consumers [were] likely to choose Napster.”<sup>35</sup>

Judge Patel’s judgment also offers an interesting interaction between law, technology, and consumption that tells us something about how the pirate subject was produced in this case. First, Judge Patel presumed that P2P technology (and more specifically Napster) was playing a central role in instigating new piratical practices of consumption. In short, peer-to-peer technology and new companies like Napster produced pirates. Second, this change was assumed to already be occurring and the natural decline of the music industry (if Napster was not curtailed) was taken as a given. Although there was evidence that copyright infringement occurred on Napster, there was no proof that the music industry was in decline, nor was it possible for legal institutions to accurately guess at the organization of the market over the years that followed. This brings us to our final point: Judge Patel felt law had a duty to intervene, to stop Napster from producing pirates, to challenge the cultural power wielded by Napster, and to respond to the existential threat it posed on behalf of the market.

This legal interpretation had some implications for subjectivity. It interpellated a swath of people who used Napster as pirates instead of users. Moreover, it presumed that unless Napster was prohibited, an increasing number of ordinary people would be interpellated in this manner once they stopped buying CDs and started using free P2P networking. This approach placed the blame for the reassignment of subjectivity on technology and companies, suggesting that the combination of these two actors encouraged people to turn toward piracy.

But this was a flawed argument. In actuality, the record companies that filed the suit and the court itself immediately positioned both Napster and P2P as pirate technology and created these stark distinctions between the user and the pirate. Indeed, the music industry and the law refused to consider the possibility of relationality by not recognizing that various exceptions and limitations to copyright as well as a tacit acceptance of infringing acts had long sat in the gray areas between the user and the pirate.

Even so, the bigger question is, what did the district court seek to achieve with this legal and cultural intervention? The argument that the judgment was in consideration of the market is unconvincing, as it was unlikely that the decision was going to stop either the practice of distributing MP3 files over the Internet or the development of P2P technology. Technology innovators and entrepreneurs often flout laws in the search for greater efficiencies (and, of course, more money) and people do not read cases in detail or necessarily change their practices in response to law (as the decade of widespread online piracy that occurred following this case shows). In its judgment, the district court was contributing a performance of authority and, in doing so, recognizing the cultural power of the pirate. Judge Patel acknowledged that the power wielded by Napster was dangerous and needed to at least be addressed, even if law was always going to be on the losing side of the battle. Indeed, the decision was only the first salvo in this contest, and the cultural battle continued across the Atlantic as record companies sought to shut down one of the P2P services that appeared in Napster's wake: Kazaa.

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## Corporate Narratives of Digital Culture: The Kazaa Case and the Apple Revolution

*Napster* was not an unqualified victory for the music industry. A number of clever entrepreneurs realized that Napster was only liable for contributory and vicarious copyright infringement because employees could see what files were being shared across their network and had the power to filter these files. This was because of the service's central index. Therefore, the solution for any enterprising P2P operator was to simply develop systems that captured little to no information and could decentralize this indexing process. The new P2P services did not retain logs of data and either "split indexing duties evenly across all peers in the network" or "limit[ed] indexing duties to certain supernodes."<sup>36</sup> So, as Napster reoriented its business model toward more legitimate ends, its users moved on to any of the number of peer-to-peer services that were looking to take Napster's place.

Undeterred by the limited effect of its judicial victory over Napster, the music industry filed suit against two of the more prominent new services, Grokster and Kazaa, in the US and Australia, respectively. I will focus on the Kazaa case, *Universal Music Australia Pty Ltd. v. Sharman Networks Ltd.*, because it featured a notable discussion of "pirate cultures" and the decision also went on to inform *iiNet*. The case began in a similar fashion to Napster's, with a consortium of record companies (and in this instance also individual bands and artists) filing suit against Sharman Networks, the owner of the "extremely popular" post-Napster P2P file-sharing service Kazaa, which was based out of Sydney.<sup>37</sup> The consortium accused the defendants of various forms of copyright infringement, but the plaintiffs' central claim was that Sharman Networks was liable for authorizing copyright infringement. In response, Sharman Networks argued that at most all it had done was distribute a piece of software that allowed copyright infringement to occur and claimed that it had no power to control the files on its network.<sup>38</sup>

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The presiding Federal Court judge Murray Wilcox did not agree with Sharman's stance and found Sharman Networks (as well as a number of conamed defendants) guilty of authorizing copyright infringement. Regular emails and information from a marketing focus group revealed that executives knew that copyright infringement was a prominent activity on Kazaa and that people largely viewed the service "as a free music downloading ↵ search engine."<sup>39</sup> Moreover, despite Sharman Networks' working with a company, Altnet, to

return licensed files along with unlicensed files when a person conducted a search, it was also evident that users preferred to download infringing material.<sup>40</sup> Further, although Judge Wilcox was not prepared to find that Kazaa had a central server like Napster, he did find that the network had the capacity to filter out particular items. Indeed, Sharman Networks had implemented a filter for adult content, but it had chosen not to introduce a similar filter for copyrighted content.<sup>41</sup> Subsequently, the court found that Sharman Networks had at least some “power to prevent” infringement and so “authorized” the infringing acts.

The court also found that Kazaa actively encouraged people to infringe copyright, which is of great relevance for our study of the pirate. Judge Wilcox noted that Kazaa publicly advertised a Sharman Networks campaign titled “Join the Revolution” that criticized record companies and promoted peer-to-peer file sharing on a web page. Moreover, he noted that although the campaign did not “expressly advocate the sharing of copyright files ... to a young audience ... the effect of this webpage would be to encourage visitors to think it ‘cool’ to defy the record companies by ignoring copyright constraints.”<sup>42</sup> Judge Wilcox also found that Kazaa was promoted as a filesharing facility by Sharman Networks and actively encouraged people to engage in the activity through promotions.<sup>43</sup> The pressing point for the judge was that “these acts took place in the context that Sharman knew the files shared by Kazaa users were largely copyright works.”<sup>44</sup> The facts were enough for the court to find that Sharman Networks infringed copyright by “authorising Kazaa users to make copies of those sound recordings and to communicate those recordings to the public.”<sup>45</sup> Sharman appealed to the Full Federal Court of Australia but, before the case was heard, agreed to settle out of court for a reported A\$15 million.<sup>46</sup>

p. 141 It is particularly interesting that Sharman Networks’ attempts at developing a culture of “revolutionary” file sharing was so critical to the case. Judge Wilcox was incredibly concerned with its “Join the Revolution” campaign and believed that it encouraged an already active culture of copyright infringement present on the Kazaa network. Notably, he did not consider the fact that Kazaa’s manifesto outlined “methods of licensing filesharing,” unlike Napster, or that there were potentially innocuous reasons for using the technology.<sup>47</sup> He even reflected on the personal beliefs of the people using Kazaa and stated that he did not have “any reason to believe that ↵ any significant proportion of users would care whether or not they were infringing copyright.”<sup>48</sup> Therefore, like *Napster*, this case was not only about the technical operation of the Kazaa network but also about the fact that Kazaa appeared to produce and actively support pirates (see figure 6.1). Pappalardo notes that this judicial tendency of identifying the production of piratical subjects through technology entirely suppresses users. They are not viewed as real people but instead positioned as “caricatures of digital thieves.”<sup>49</sup> Copyright law was once again deployed on cultural terrain, performing its authority in an attempt to stop the incessant development of pirates and reclaim its authority to produce (relatively narrowly constituted) legal subjects.

It is worth thinking more about the particular cultural interpretations that supported this judicial approach. At around the same time that *Napster* was being heard, Apple was riding high off the back of a popular advertising campaign titled “Rip. Mix. Burn.” The campaign encouraged people to take advantage of the iTunes platform and the CD-RW drive built into iMacs to “rip” their music collections and make mix CDs. The campaign was clearly centered on providing people with control and creative agency over their music collections, as Apple’s then-CEO Steve Jobs explained in a press release:

iMac has evolved into an entertainment center, where you can create desktop movies, manage your digital music library and burn custom music CDs ... iMovie and iTunes are so easy to learn and use, even your parents can use them without getting confused.<sup>50</sup>

This campaign fit squarely within the broader discourse around everyday user creativity discussed in chapter 4, as well as Apple’s own corporate discourse of branding their users as “creative, non-conformist and innovative.”<sup>51</sup> Apple was providing everyday people with the freedom to manage and reimagine their music collections, and the ability to self-identify as “creative” users.

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But at the time this campaign was launched, format shifting was not legal in a number of countries. Indeed, as we saw in chapter 4, Australia, the UK, and Canada took some time to introduce an exception for format shifting into statutory law. In the US, although format shifting for personal use had always been fine, it became murkier if you shared format-shifted content (or a mix CD) with others. Therefore, the campaign received some heat from Michael Eisner, head of Disney at the time, who accused Apple of fostering piracy, and also worried the music industry, which started to use digital rights management for CDs, introducing technological copyprotection measures that made “ripping” music from CDs extremely difficult to do.<sup>52</sup> Yet, with that all being said, there was a distinct difference between the language used around Kazaa and Napster and that used around the Apple campaign. Although Apple customers were engaged in copying that depending on jurisdiction and the spread of the content could be considered piracy, Apple presented the acts of ripping and mixing as an evolution of traditional modes of fandom rather than a revolution in the vein of Kazaa’s campaign. All the people who were ripping, mixing, and burning were gradually interpellated by culture as authorized users rather than pirates (see figure 6.1).

If we return to the *Sharman* judgment, we can see that many of the service’s users would easily have fit into the “creative user” subject offered by Apple. For example, Kazaa’s market research, which was presented as evidence in the case, revealed that many subscribers used “free downloading as a precursor to purchasing a CD” as a way of “sampling the full complement of a CD’s songs on-line first.”<sup>53</sup> And like users of Apple iMacs, Kazaa subscribers also engaged in ripping, mixing, and burning by downloading songs, burning mix CDs, and playing the CDs in other players and cars.<sup>54</sup> But whereas Apple was largely successful in its corporate framing of piracy, Kazaa’s revolution failed.

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This outcome was largely due to the relationship between culture and law and its impact on legal subjectivity. Apple, Napster, Kazaa, and others offered a range of new ways to consume and distribute music, allowing many individuals to infringe copyright law (often by engaging in quite similar practices). Although its campaign met with some resistance, Apple was also recognized as an innovative company on the rise, and it had mobilized an array of notable artists to support its campaign, from Barry White to Smash Mouth. In contrast, the extreme existential threat that peer-to-peer networks represented to the music industry led to a number of lawsuits and allowed a legal discourse of infringement and piracy to emerge around P2P users. The wider cultural contexts in which these revolutions took place had a real effect on how each company and its users were interpellated by law (if law engaged with these discourses at all, as it declined to do in Apple’s case). Despite these divergent legal discourses, what we see in practice are in fact close links between the pirate and the user. Apple’s ability to reposition copyright infringement as a creative act by iMac users and Judge Wilcox’s attempt to redefine users as pirates in *Sharman* highlight how different market actors can interpellate individuals as users or pirates according to particular legal and cultural discourses.

## The Fifty-First State: The United States, Australia, Free Trade, and the Copyright Experiment

Before we continue our examination of the pirate we need to briefly consider geopolitics. The next two cases we examine are also from Australia, but as flagged in this chapter’s introduction, the emphasis on this jurisdiction is not due to chance or convenience. Australia has functioned as a legal petri dish for large media companies in the United States for a number of years. The MPAA has prevailed on its local arm the ASA to instigate cases in Australia on its behalf, and large multinational companies have similarly reached out to their network of Australian film and television companies and asked them to do the same. Australia is the ideal location to conduct this sort of legal activity for a number of reasons. First, the close alliance that the two countries share means that the Australian government regularly supports the strong protectionist rhetoric of the United States around IP, despite the fact that Australia is a net importer of intellectual property.<sup>55</sup>



Second, in recent years, content industries have viewed Australia as the most amenable jurisdiction in which to attempt to sue intermediaries. After *Napster*, a number of cases were brought against P2P software providers in the US through the secondary liability principles of US law.<sup>56</sup> Throughout these cases there were points of disagreement around issues of precedent, however, such as the extent of the “scope and application of the Sony protection,” leading to “inconsistent” legal interpretation.<sup>57</sup> The law was also unable to grasp the difference between the physical and digital worlds, allowing new P2P networks to exploit “loopholes” in existing law.<sup>58</sup> The UK and Canadian jurisdictions offered no respite. Their authorization laws—broadly equivalent to secondary liability laws—were narrowly constituted and content industries would have risked a public defeat at trial if they had engaged in litigation there.<sup>59</sup> In contrast, authorization laws in Australia were broadly constituted in both statutory law and through jurisprudence, so content industries were more confident of not risking an embarrassing public defeat at trial if they engaged in litigation there.

p. 144 The Australian and United States Free Trade Agreement (AUSFTA) stands as the final piece in this political and legal puzzle. The AUSFTA was one of the most significant copyright reform efforts ever undertaken by Australia. The agreement required that Australia adopt numerous elements of US IP law, extending its copyright term but also acceding to a range of strong enforcement measures such as the criminalization of the manufacture, use, and distribution of tools that could circumvent technological protection measures.<sup>60</sup> Most interestingly for our purposes, the agreement also required Australia to import a “safe harbor” regime from the United States for local ISPs. This law protected a defendant from liability for authorizing infringement if they simply provided “facilities for making, or facilitat[ed] the making of, a communication,” in theory protecting an intermediary (like an ISP) from the infringing activity occurring on its network.<sup>61</sup>

This legal protection came at a cost. In exchange, intermediaries (or carriage service providers) would be required to adhere to a notice and takedown process. Among various other conditions, the provider would need to “implement a policy that [provided] termination, in appropriate circumstances, of the accounts of repeat infringers” and comply with any relevant industry codes that were in force.<sup>62</sup> By the mid-2000s content industries were slowly coming to accept that there was no easy way of stopping online piracy and that endless court cases were not going to solve the problem. Therefore, this trade agreement offered two solutions. Ideally, it would introduce a notice and takedown process along the lines of the regime in the United States’ Digital Millennium Copyright Act, but it would also offer the possibility of returning to the courtroom if intermediaries did not adhere to its conditions.

But there was a major flaw in the plan. The AUSFTA did not operate as cleanly as the US notice and takedown system on which it was based. US law is clear and simply requires intermediaries to “remove” infringing material at the behest of the copyright holder or their representatives.<sup>63</sup> The country also has a broad definition of “intermediary” and courts have granted “safe harbor” protection to search engines, ISPs, email providers, and social media platforms, among others.<sup>64</sup> In contrast, Australian law requires an intermediary to act on a policy that allows repeat infringing accounts to be terminated. It is not clear from this description, however, what such a policy entails and at what point an account needs to be terminated. As we will see in the [next section](#), this creates a problem as intermediaries and content industries have very different opinions on what constitutes an appropriate process for the termination of an account.

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The concerted effort by a number of US content industries to strategically proceed with lawsuits in friendly jurisdictions is a natural extension of the broader practice of “forum shopping” or “regime shifting,” in which the United States and Europe gradually moved “intellectual property lawmaking from WIPO [World Intellectual Property Organization] to GATT [General Agreement on Tariffs and Trade] to TRIPS [(The Agreement on) Trade-Related Aspects of Intellectual Property Rights],” expanding the scope of intellectual property protection in the process.<sup>65</sup> In a similar fashion, the following cases are not merely examples of rights holders enforcing their copyrights but rather should be read as attempts to establish new enforcement regimes through the courts and to contribute to a broader public relations exercise: showing the general public that copyright

holders are serious about tackling online piracy. In short, these lawsuits are not just discrete civil actions but part of a broader geopolitics of copyright enforcement driven largely from the shores of the United States.

## ***iiNet and Dallas Buyers Club: The Latest Round in the Piracy War***

The *iiNet* and *Dallas Buyers Club* suits were brought in response to the fact that people were continuing to engage in significant levels of online copyright infringement. The music industry had won many of the P2P battles of the 2000s, but people continued to download music and were starting to download entire films and television series with relative impunity. This was largely thanks to the rise of BitTorrent, a novel P2P program that distributed the responsibility of uploading files to the network across several users. This drastically sped up the ability to transfer files and users could now “quickly upload and download enormous amounts of data, files that [were] hundreds or thousands of times bigger than a single MP3,” building up significant personal media libraries in the process.<sup>66</sup> This change in piracy dragged the Western film and television industries directly into the fray and meant that all of the major content industries were collectively committed to dealing with the piracy problem as quickly as possible. Their strategy involved moving past peer-to-peer networks themselves and focusing on more stable actors that could be clearly identified and charged. *iiNet* targeted an intermediary—the Internet Service Provider—and *Dallas Buyers Club* went one step further and targeted the infringing individual. I will briefly outline how each case proceeded and then analyze the collective implications of these decisions for the pirate subject.

In *iiNet*, a consortium of thirty-four Australian film and television companies accused an Australian ISP, *iiNet*, of authorizing the copyright infringement that occurred on its network. The case is important for a number of reasons. Most notably, it was “the first time that a court at the apex of a national legal system [had] considered the liability of an ISP for infringements committed by its subscribers.”<sup>67</sup> It was also the latest battleground in the content industries’ global war on piracy. Although the plaintiffs were a collection of Australian film and television companies, the Motion Picture Association of America “was the mover behind [the] case.”<sup>68</sup> The suit was advanced by AFACT (now the ASA) in order to obscure the fact that a body representing the “vibrant ... American motion picture, home video and television industry” had pushed its local representatives to file suit.<sup>69</sup>

In addition to locating a friendly jurisdiction, AFACT and the MPAA picked their target carefully. A confidential diplomatic cable written by the US Ambassador to Australia at the time, Robert McCallum Jr., explained that the MPAA wanted to avoid tangling with Telstra—Australia’s former telecom monopoly—whose own ISP, BigPond, had cornered half the market.<sup>70</sup> Telstra had the financial resources to maintain a long and potentially damaging legal battle. In comparison, as the third largest ISP in Australia, *iiNet* was large enough for the case to have some impact but small enough that the ISP lacked the resources or energy to defend a well-financed legal campaign headed by an assortment of national and multinational entertainment companies. Moreover, the fact that “*iiNet* users had a particularly high copyright violation rate, and that its management ha[d] been consistently unhelpful on copyright infringements” stood as further motivation for the MPAA to pursue legal action.<sup>71</sup> With all this careful preparation, AFACT and the MPAA can be forgiven for being quietly optimistic when the case began.

The case was first heard in the Federal Court of Australia in 2009, where Justice Dennis Cowdroy had to decide “whether [*iiNet*] had, by failing to take any steps to stop infringements, authorised the infringements of particular *iiNet* subscribers.”<sup>72</sup> AFACT had sent weekly emails to Michael Malone, the managing director of *iiNet* from June 2008 to August 2009, alleging that particular *iiNet* users had infringed copyright.<sup>73</sup> A spreadsheet was attached to each of these emails detailing the date and time of infringement, the IP address of the customer, the particular copyrighted material downloaded, and the studio to which the copyright was attached.<sup>74</sup> AFACT claimed that per the terms and conditions of *iiNet*’s customer relationship agreement and in

accordance with the notice and takedown provisions introduced by the AUSFTA, iiNet should have disconnected these users rather than continuing to serve them.<sup>75</sup>

iiNet countered by arguing that the AFACT notices carried no legal weight and that any concerns should have been passed on to the relevant authorities.<sup>76</sup> It also noted that the mere provision of the Internet could not be seen as inducing or even authorizing copyright infringement, and that the infringements took place exclusively through the BitTorrent system, which was not an illegal protocol, nor under iiNet's control.<sup>77</sup> Furthermore, by cutting off a user's access to the Internet, iiNet would not just be cutting off the means of infringement but also access to a host of other services, such as Internet banking, news, and email, and this would represent a disproportionate punishment, especially when based on evidence that was simply presented to the ISP and not yet tested in court.<sup>78</sup> Justice Cowdroy found in iiNet's favor, supporting many of these arguments, and stated that he did not believe iiNet had provided the "means" of infringement.

Undeterred by this decision, the collection of production companies marshalled by AFACT appealed to the full bench of the Federal Court. Their appeal was heard by Justices Emmett, Jagot, and Nicholas in 2011 and was dismissed. The film and television companies then appealed to the High Court. The court agreed to hear the appeal and the hearings began in late November 2011; four months later on April 20, 2012, the court unanimously dismissed AFACT's appeal. The majority judgment of Chief Justice Robert French and Justices Susan Crennan and Susan Kiefel supported iiNet's submission, finding that AFACT's interpretation of authorization assumed "obligations on the part of an ISP which the Copyright Act [did] not impose."<sup>79</sup> The justices also found that the AFACT warning notices "did not provide iiNet with a reasonable basis for sending warning notices to individual customers containing threats to suspend or terminate those customers' accounts."<sup>80</sup> As a concluding point, the justices noted that "the statutory tort of authorisation of copyright infringement" was "not readily suited to enforcing the rights of copyright owners in respect of widespread infringements" and suggested that a legislative intervention was the best way of stemming online piracy.<sup>81</sup>

p. 148 In the *Dallas Buyers Club* case, the copyright holders of the film *Dallas Buyers Club* (or DBC) made a preliminary discovery application to an Australian court. They had identified 4,726 IP addresses that were sharing the movie on BitTorrent without permission and were asking for ISPs to be legally compelled to pass on the personal details of the individuals associated with each address.<sup>82</sup> A group of ISPs (of which iiNet was one) challenged the application, arguing that the evidence provided was not sufficient, the claim was speculative, the court should not "order them to divulge their customers' personal and private information," and "the monetary claims which the applicants had against each infringer were so small that it was plain that no such case could or would be maintained by the applicants."<sup>83</sup> Finally, the defendants contended that if the court required them to divulge the information, the privacy of the account holders should be "adequately protected" and the copyright holders should not send them "speculative invoices."<sup>84</sup>

Speculative invoicing was one of the central reasons why these ISPs refused to release the account information. This common enforcement action involves copyright holders (or their representatives) sending letters that accuse individuals of copyright infringement. The letter usually offers the recipient the possibility of coming to a financial settlement with the copyright holder and the suggested sum is a significant amount of money, often around a few thousand dollars. Importantly, these letters suggest that if a settlement is not reached, further (and more expensive) legal action may ensue. This strategy has been criticized for essentially functioning as an income stream for copyright holders rather than a genuine attempt at deterrence, for charging sums incommensurate with the copyrighted material, and for interfering with an individual's right to due legal process.<sup>85</sup> The tactic was common in the US and the UK but had not yet found favor in Australia. It was suspected that *Dallas Buyers Club* was the first attempt to export that practice to Australia.

In April 2015, Justice Nye Perram heard the case at the Federal Court of Australia and found for the plaintiffs, allowing preliminary discovery to take place. He was mindful of the concerns raised by the ISPs, however, so even though he required "the information to be provided," he imposed "safeguards to ensure that the private

p. 149 information remain[ed] private” and “to constrain the use to which the information [could] be put.”<sup>86</sup> The plaintiffs would only be able to use the private information to identify, sue, and negotiate “with end-users regarding their liability for infringement.”<sup>87</sup> When the parties reconvened to hear the final order, Justice Perram stipulated a further constraint. In order to guard against speculative invoicing, he required the plaintiffs to provide “the form of any letter they intend[ed] to send to account holders” to the court before they would be allowed to contact them.<sup>88</sup> The first draft letter was put forward and suggested that recipients contact a representative of DBC to discuss the matter further. In a hearing in June, Justice Perram made it clear that he would not approve a letter unless he was “shown what it was that DBC was proposing to demand monetarily or ... the methodology underlying its approach to the amounts it was going to claim.”<sup>89</sup>

DBC eventually submitted a letter that detailed the amount it would claim from each subscriber. The ISPs claimed this letter was yet another example of speculative invoicing. The parties returned to the courtroom in August of the same year to hear Justice Perram’s opinion of the letters and the damages sought. Once again, Justice Perram did not allow the letters to be sent out. He noted that it was fair for DBC to make a “claim for the cost of an actual purchase of a single copy of the Film for each copy of the Film downloaded” and for damages arising from the money it cost to access the infringer’s name.<sup>90</sup> But Justice Perram challenged DBC’s attempt to claim “a one-off licence fee from each uploader on the basis that each was engaged in the widespread distribution of the film,” noting that the idea that people would approach “DBC to negotiate a distribution arrangement in return for a licence fee [was] so surreal as not to be taken seriously.”<sup>91</sup> More pressingly though, he noted that “DBC ha[d] made no submission to [him] about how these damages might be calculated or what [it would] seek.”<sup>92</sup> In closing, Justice Perram did not only refuse to lift the stay on the private information but also required DBC to submit a A\$600,000 bond, so that if it went ahead with making excessive financial demands of infringers in contempt of the court, “it [would] not be profitable for it to do so.”<sup>93</sup>

p. 150 In December 2015, DBC attempted to lift the stay one more time. The plaintiffs maintained that they should be able to charge infringers a license fee, asked to submit a reduced bond of A\$60,000, and proposed to narrow the scope of their claim and target only the account holders of iiNet.<sup>94</sup> Once again, Justice Perram was not moved. He refused to reconsider the license fee issue and noted that DBC could not claim additional damages from subscribers on the basis of its current evidence.<sup>95</sup> Since DBC was still proposing to go beyond the constraints Justice Perram had set down in August, he did not address the application to lower the bond and refused to let DBC contact subscribers.<sup>96</sup> He ended the hearing by stating that proceedings would terminate in February 2016 unless DBC made a serious effort to explain how it was going to contact customers while staying in line with his August judgment. DBC did nothing after that point and the case was dismissed.<sup>97</sup>

When it comes to subjectivity, these cases function in a similar way to the earlier *Napster* and *Sharman* cases. In both *iiNet* and *Dallas Buyers Club*, legal institutions wanted to make sure they retained the sole ability to produce pirate subjects. Content industries were essentially hoping to get a legal rubber stamp for the novel enforcement measures they had devised, which would then allow them to enforce online piracy outside the courts. If the consortium of film and television companies had been successful in *iiNet*, Australian ISPs would have been compelled to cancel the accounts of subscribers that were accused of online copyright infringement. Similarly, if the copyright holders of *Dallas Buyers Club* had won their case, they (and other copyright holders) would have been able to repeatedly apply for preliminary discovery through the courts and then send invoices to suspected infringers. In both cases, what was at issue for copyright law was both legal and geopolitical. In a legal sense, the courts were reluctant to authorize enforcement mechanisms that would significantly affect individuals and devolve the evidential and decision-making processes to content industries. Tied to this was also the fact that companies and industry bodies from the United States had advanced the cases. Therefore, this production of subjectivity would not just have devolved from the courts to industry but would also have ended up moving from Australia to the United States.

In addition to protecting their own interests in the production of subjects, the courts also signaled a willingness to develop their own understanding of the pirate as a subject. Both cases considered the rights and

broader actions of allegedly infringing ISP subscribers, in contrast to how law had approached users of Napster or Kazaa. In *iiNet*, the Federal and High Courts were wary of approving an enforcement mechanism that would interpellate individuals solely as pirates and disconnect their Internet use, irrespective of the fact that individuals required the Internet for a variety of everyday activities.<sup>98</sup> Instead, the Federal Court articulated an image of a user–pirate, noting that although AFACT offered a picture of people continually flouting copyright law, based on the evidence presented in court, piracy existed ↵ as a minor media practice that was occurring alongside a number of other mundane activities such as emailing, listening to radio online, and streaming television. In a similar fashion, Justice Perram consistently treated prospective pirates as rogue users throughout *Dallas Buyers Club*, consciously protecting them from excessive settlements and noting that “it should not be assumed that every [letter] recipient has engaged in infringement.”<sup>99</sup> In contrast to this nuanced approach, the proposed enforcement regimes of canceling the ISP subscriptions of individuals or sending speculative invoices would routinely produce pirates with no due process and no consideration of the gray areas around this subject (see figure 6.1).

Both decisions were laudable because not only did the courts retain a careful understanding of the situated and relational nature of the pirate subject, but they also refused to intervene in wider policy processes, suggesting that many of the issues presented to the court should be considered by the legislature instead. Since we know that people do not care about the nuances of legal decisions, it is worth reflecting on what these careful judicial approaches to subjectivity mean. Throughout this chapter, we have seen that the courts are loath to allow other actors or processes to engage in legal subjectification. But as seen in the earlier example of Apple’s “Rip. Mix. Burn.” campaign as well as in discussions throughout the book, we also know that legal subjectivity is as much a cultural as it is a legal process. Therefore, I suggest that in these last two Australian cases, the courts were actually following culture rather than intervening and seeking (ambitiously) to lead cultural change as they did with Napster and Kazaa.

The cultural differences between these cases were stark and ultimately related to the role of the Internet in our everyday lives. During the time of *Napster*, the Internet was a relatively popular but in no way essential communication technology. Even around the time of *Sharman*, one could conceive of a moment when they would be “offline.” Today, this is no longer possible. The emergence of smartphones and the mainstream adoption of social media mean that we are living media lives.<sup>100</sup> Therefore, it is worth considering how the pirate and copyright law more generally operate (both explicitly and implicitly) with reference to this changing aspect of culture. Napster users were seen to be damaging an as-yet-unrealized future for online music as well as flagrantly ignoring their ability to purchase music from a still-vibrant CD market. Their consumption and subjectivity were constituted in relation to a cloistered pirate network and compared to an ↵ offline or analog existence. We were all online by the time of *iiNet* and *Dallas Buyers Club*, so at no point during these judgments were people’s infringing activities wholly separated from the daily consumption of varied and diverse forms of media. In a strange way then, with regard to the notion of subjectivity, the decisions were made before these final two cases were even heard. At the time of judgment, Australians consumers were both pirates and users, and the courts could not ignore this cultural context as they formulated their decisions.



## From Bazaars and Bedrooms to Subscribing and Streaming: The End of the Pirate?

As this chapter ends and we move toward the conclusion, it is worth reflecting on some recent changes that raise serious questions about the extent to which the pirate will be maintained as a strong and viable subject in the future. The subject came into its own when the Internet functioned as a relatively disruptive force and individuals and new companies took it upon themselves to make use of a variety of new and often unauthorized distribution streams. Over the last few years, however, the music, film, and television industries have arguably been moving back to a period of stability. In many nations, services have launched that allow people to stream music, film, and television for a relatively low price. It is unclear what macro effect this has had on infringement but there has been a growth in the purchase and use of legal media consumption platforms and a perceived decline in piracy.<sup>101</sup> Furthermore, countries like the UK and Australia are now asking ISPs to block major pirate sites (such as The Pirate Bay), making it increasingly difficult (but not impossible) for casual pirates to infringe copyright.

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Indeed, many artists have moved on from the fight against copyright infringement, with Radiohead and, more recently, comedian Louis C.K. releasing material through a “pay what you want” system in an attempt to remove the assumed major draw of piracy: the fact that you can access popular media for free.<sup>102</sup> The music industry is also starting to embrace streaming services like Pandora and Spotify and to monetize popular music and music videos on YouTube.<sup>103</sup> Existing revenue streams have been enhanced, with musicians making significantly more money from live shows and growing festival cultures encouraging fans to purchase an experience rather than a cultural artifact like a digital file.<sup>104</sup> In a similar fashion, streaming platforms such as Netflix and Hulu offer film and television companies new business models through which to generate income.

In this context, media companies have become slightly more hopeful and consumers less antagonistic. There has been some suggestion that we have started to move away from piracy and that soon we will become lawabiding consumers again. But has consumption really changed across the past decade and a half or has industry just given up? Brave experiments with streaming platforms have provided some life to the major industrial structures of the content industries (such as record companies), but recording artists do not earn much from them.<sup>105</sup> Moreover, the phenomenon of streaming has essentially mimicked the experience of piracy, providing audiences with a rich buffet of content with the very minor proviso that they will have to pay a small price to access it. In short, this period of stabilization has essentially seen the content industries come relatively close to matching piracy’s original terms: lots of content for a negligible price. Finally, a new battle has emerged around the practice of geo-blocking, in which these new platforms geographically restrict content in line with the licensing agreements they have made with content providers. In response, many people have purchased consumer-oriented virtual private networks that allow them to surf the Internet as though they are in another location and flout these barriers with relative ease.<sup>106</sup> Indeed, the practice of geo-evasion may soon lead to the decline of the long-held practice of geographical windowing of content.

At first glance, it appears that pirates may have won the war after all. Despite the numerous legal challenges detailed throughout this chapter, there was very little demanded from pirates in the end. There was no real change in their scope of consumption—instead, the necessity of a smorgasbord of content was taken as a given—and it only took a move from The Pirate Bay to Netflix and the payment of a few dollars a month for these pirates to become users. Considering the similarity, perhaps pirates were just under-served audiences all along, essentially users re-interpellated by industry and occasionally by law while they waited for the music, film, and television industries to provide the type of services promised way back in the *Napster* case. This relational aspect of piracy appeared in *iiNet* and *Dallas Buyers Club*, as copyright law started to reassess the way these actors had been considered and to account for the wider cultural changes that had occurred around them. Legal

p. 154 institutions recognized that pirates were also users and that their demands needed to be accounted for in any judgment made, a notable discursive shift from the way individuals using Napster had been constituted.

Still, it is worth recognizing that the pirate remains an active actor in the international arena, with a range of multilateral and bilateral trade agreements seeking to interpellate a criminal pirate subject. For example, the multinational Anti-Counterfeiting Trade Agreement (ACTA) features the emotive phrase “pirated copyrighted goods”<sup>107</sup> and extends criminal liability to piracy on a commercial scale even if this sort of copyright infringement involves “commercial activities for ... indirect economic or commercial advantage,”<sup>108</sup> which, as Michael Carrier notes, is “not defined in ACTA.”<sup>109</sup> Considering the value ascribed to intellectual property globally as an economic unit and the preponderance of treaties focused on protecting IP, the pirate should retain its presence as a subject in international law even though it has become somewhat dormant in domestic jurisdictions. Moreover, the notion that the problem of access has been entirely solved is largely a UScentric view. Despite the emergence of various legal platforms, the majority of audiences from other countries still need to engage in some unauthorized activity in order to access particular forms of content, which suggests that piracy will continue for some time yet.<sup>110</sup> In addition to this, the prospective domestication of 3D-printing technologies and the emergence of live streaming as a method of content distribution, among other technological developments, suggest that debates around piracy and intellectual property will be ongoing.<sup>111</sup> Practices are gradually trending toward a more authorized path but it is highly doubtful we have seen the last of the pirate.

## Notes

1. See Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham, NC: Duke University Press, 1998).
2. See *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001); and *A&M Records, Inc. v. Napster, Inc.* 114 F. Supp. 2d 896 (2000).
3. *Universal Music Pty Ltd. v. Sharman License Holdings* [2005] FCA 1242.
4. *Roadshow Films Pty Ltd. & Ors v. iiNet Ltd.* [2010] FCA 24; *Roadshow Films Pty Ltd. & Ors v. iiNet Ltd.* [2011] FCAFC 24; and *Roadshow Films Pty Ltd. & Ors v. iiNet Ltd.* [2012] HCA 16.
5. *Dallas Buyers Club LLC v. iiNet Ltd.* [2015] FCA 317; *Dallas Buyers Club LLC v. iiNet Ltd.* (No 3) [2015] FCA 422; *Dallas Buyers Club LLC v. iiNet Ltd.* (No 4) [2015] FCA 838; and *Dallas Buyers Club LLC v. iiNet Ltd.* (No 5) [2015] FCA 1437 (16 December 2015).
6. See generally Bryan Choi, “The Grokster Dead-End,” *Harvard Journal of Law & Technology* 19, no. 2 (2006): 393–411; Rebecca Giblin, *Code Wars: 10 Years of P2P Software Litigation* (Cheltenham, UK: Edward Elgar Publishing, 2011); and Matthew Rimmer, *Digital Copyright and the Consumer Revolution: Hands Off My iPod* (Cheltenham, UK: Edward Elgar Publishing, 2007).
7. Giblin, *Code Wars*, 15.
8. *Ibid.*
9. Stacey Lantagne, “The Morality of MP3s: The Failure of the Recording Industry’s Plan of Attack,” *Harvard Journal of Law & Technology* 18, no. 1 (2004): 272.
10. Most famously, Metallica went so far as to stage a public protest outside Napster’s headquarters. See Lee Marshall, “Metallica and Morality: The Rhetorical Battleground of the Napster Wars,” *Entertainment Law* 1, no. 1 (2002): 1–19.
11. *A&M Records, Inc. v. Napster, Inc.* 114 F. Supp. 2d 896 (2000) at 1.
12. *Ibid.*
13. The dangers of this interpretive approach to innovative technologies have been explored in Jessica Litman, *Digital Copyright* (New York: Prometheus Books, 2001); Rimmer, *Digital Copyright and the Consumer Revolution*; and Sarah Holthusen, “The Napster Decision: Implications for Copyright Law in the Digital Age,” *University of Queensland Law Journal* 21, no. 2 (2001): 245–250.
14. *Sony Corp. of America v. Universal City Studios Inc.*, 464 U.S. 417 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984).
15. *Home Recording of Copyrighted Works: Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, Ninety-seventh Congress, second session, on H.R.*

- 4783, H.R. 4794 H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 (1982), last updated May 30, 2002, <http://cryptome.org/hrcw-hear.htm>.<sup>↗</sup>
16. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984) at 52.
  17. Kathy Bowrey and Matthew Rimmer, “Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law,” *First Monday* 7, no. 8 (2002), available at [firstmonday.org/article/view/974/895](http://firstmonday.org/article/view/974/895).<sup>↗</sup>
  18. A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004 (9th Cir. 2001) at 49.
  19. See Holthusen, “The Napster Decision,” for further details.
  20. David Kravets, “Napster Trial Ends Seven Years Later, Defining Online Sharing along the Way,” *Wired* accessed August 31, 2007, <http://www.wired.com/2007/08/napster-trial-e/>.<sup>↗</sup>
  21. A&M Records, Inc. v. Napster, Inc. 114 F. Supp. 2d 896 (2000) at 2.
  22. *Ibid.*, at 61.
  23. *Ibid.*, at 42, 46.
  24. *Ibid.*, at 10.
  25. *Ibid.*, at 13.
  26. *Ibid.*, at 69.
  27. Fonovisa Inc. v. Cherry Auction Inc. 76 F.3d. 259, 37 U.S.P.Q.2d 1590, 9th Cir. 1996.
  28. Gershwin Publishing Corp. v. Columbia Artists Management 443 F. 2d 1159, 1162, 2d Cir. 1971.
  29. This is not a novel claim. The best brief articulation of this argument is found in Lucas Hilderbrand, *Inherent Vice: Bootleg Histories of Videotape and Copyright* (Durham, NC: Duke University Press, 2009), 109–113.
  30. A&M Records, Inc. v. Napster, Inc. 114 F. Supp. 2d 896 (2000) at 2.
  31. John Logie, *Peers, Pirates, and Persuasion: Rhetoric in the Peer-to-Peer Debates* (West Lafayette, IN: Parlor Press, 2006), 58–59.
  32. Kylie Pappalardo, “A Tort Law Framework for Copyright Authorisation” (PhD thesis, Australian Catholic University, 2015), 92.
  33. A&M Records, Inc. v. Napster, Inc. 114 F. Supp. 2d 896 (2000) at 13.
  34. *Ibid.*, at 31, 35.
  35. *Ibid.*
  36. Choi, “The Grokster Dead-End,” 395–396.
  37. Universal Music Pty Ltd. v. Sharman License Holdings [2005] FCA 1242. This framing of Kazaa as an Australian service necessarily simplifies the complicated structuring of the company across its history. As Matthew Rimmer explains: “In January 2002, while related legal action was pending against it in the Netherlands, Kazaa BV transferred ownership of key assets to the newly formed Sharman Networks, Ltd. ... Sharman is a company organized under the laws of the island-nation of Vanuatu and doing business principally in Australia.” See Matthew Rimmer, “Hail to the Thief: A Tribute to Kazaa,” *University of Ottawa Law and Technology Journal* 2, no. 1 (2005): 180.
  38. Universal Music Pty Ltd. v. Sharman License Holdings [2005] FCA 1242 at 54.
  39. *Ibid.*, at 151.
  40. *Ibid.*
  41. *Ibid.*, at 267.
  42. *Ibid.*
  43. *Ibid.*, at 405.
  44. *Ibid.*, at 406.
  45. *Ibid.*, at 420.
  46. Giblin, *Code Wars*, 136.
  47. Pappalardo, “A Tort Law Framework for Copyright Authorisation,” 110.
  48. Universal Music Pty Ltd. v. Sharman License Holdings [2005] FCA 1242 at 340.
  49. Pappalardo, “A Tort Law Framework for Copyright Authorisation,” 99.
  50. Apple, *Apple Unveils New iMacs with CD-RW Drives & iTunes Software*, press release, February 22, 2001, <https://www.apple.com/pr/library/2001/02/22Apple-Unveils-New-iMacs-With-CD-RW-Drives-iTunes-Software.html>.<sup>↗</sup>
  51. Jean Burgess, “The iPhone Moment, the Apple Brand and the Creative Consumer: From ‘Hackability and Usability’ to Cultural Generativity,” in *Studying Mobile Media: Cultural Technologies, Mobile Communication, and the iPhone*, ed. Larissa Hjorth, Ingrid Richardson, and Jean Burgess (New York: Routledge, 2012), 35.
  52. Peter Cohen, “Disney Boss Accuses Apple of Fostering Piracy,” *Macworld*, March 1, 2002, <http://www.macworld.com/article/1003743/eisner.html>.<sup>↗</sup>
  53. Universal Music Pty Ltd. v. Sharman License Holdings [2005] FCA 1242 at 154.
  54. *Ibid.*
  55. See Catherine Bond, Abi Paramaguru, and Graham Greenleaf, “Advance Australia Fair? The Copyright Reform Process,”

- Journal of World Intellectual Property* 10, no. 3–4 (2007): 284–313; James Meese, “Resistance or Negotiation: An Australian Perspective on Copyright Law’s Cultural Agenda,” *Computers and Composition* 27, no. 3 (2010): 167–178; Matthew Rimmer, “Robbery under Arms: Copyright Law and the Australia–United States Free Trade Agreement,” *First Monday* 11, no. 3 (2006), available at [firstmonday.org/ojs/index.php/fm/article/view/1316](http://firstmonday.org/ojs/index.php/fm/article/view/1316)<sup>↗</sup>; and Kimberlee Weatherall, “Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia’s Recent Copyright Reforms,” *Melbourne University Law Review* 31, no. 3 (2007): 967–1174.
56. See *Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.* 125 S. Ct. 2764 (2005) and *In re Aimster Copyright Litigation* 333 F.3d 643 (7th Cir. 2003).
  57. Giblin, *Code Wars*, 98, and see chapter 5 of this book.
  58. Giblin, *Code Wars*, 103.
  59. See *ibid.*, 104–126.
  60. This reform process has been detailed by Bond, Paramaguru, and Greenleaf, “Advance Australia Fair?”; Meese, “Resistance or Negotiation”; Rimmer, “Robbery under Arms”; and Weatherall, “Of Copyright Bureaucracies and Incoherence.”
  61. Copyright Act 1968 (Cth), s39B.
  62. Copyright Act 1968 (Cth), s116AH.
  63. See Section 512 of the Online Copyright Infringement Liability Limitation Act or 17 U.S.C. §512.
  64. *Ibid.*
  65. Laurence Helfer, “Regime Shifting: the TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking,” *Yale Journal of International Law* 29, no. 1 (2004): 7. Also see Blayne Haggart, *Copyfight: The Global Politics of Digital Copyright Reform* (Toronto: University of Toronto Press, 2014).
  66. Clive Thompson, “The BitTorrent Effect,” *Wired*, January 1, 2005, <http://www.wired.com/2005/01/bittorrent-2/>.<sup>↗</sup>
  67. David Lindsay, “Liability of ISPs for End-User Copyright Infringements: The High Court Decision in *Roadshow Films v. iiNet*,” *Telecommunications Journal of Australia* 62, no. 4 (2012): 53.1.
  68. Robert McCallum Jr., “Film/TV Industry Files Copyright Case against Aussie ISP,” Diplomatic cable, November 30, 2008, reference ID: 08CANBERRA1197, accessed July 23, 2013, <http://cablegatesearch.net/cable.php?id=08CANBERRA1197&q=iiNet>.<sup>↗</sup>
  69. “Our Story,” Motion Picture Association of America, accessed May 21, 2016, <http://www.mpaa.org/our-story/>.<sup>↗</sup>
  70. McCallum Jr., “Film/TV Industry Files Copyright Case against Aussie ISP.”
  71. *Ibid.*<sup>↗</sup>
  72. Lindsay, “Liability of ISPs for End-User Copyright Infringements,” 53.8.
  73. *Roadshow Films Pty Ltd. & Ors v. iiNet Ltd.* (2010) FCA 24 at 97.
  74. *Ibid.*
  75. *Ibid.*, at 99.
  76. *Ibid.*, at 179.
  77. *Ibid.*, at 401.
  78. *Ibid.*, at 411.
  79. *Roadshow Films Pty Ltd. & Ors v. iiNet Ltd.* [2011] HCA 16 at 77.
  80. *Ibid.*, at 78.
  81. *Ibid.*
  82. *Dallas Buyers Club LLC v. iiNet Ltd.* [2015] FCA 317 at 1.
  83. *Ibid.*, at 2.
  84. *Ibid.*, at 3.
  85. For a critical view of this practice, see TorrentFreak, *The Speculative Invoicing Handbook* (Self-Published, 2009).
  86. *Ibid.*, at 86–87.
  87. *Ibid.*, at 87.
  88. *Dallas Buyers Club LLC v. iiNet Ltd.* (No 3) [2015] FCA 422 at 6.
  89. *Dallas Buyers Club LLC v. iiNet Ltd.* (No 4) [2015] FCA 838 at 13.
  90. *Ibid.*, at 15.
  91. *Ibid.*, at 15, 23.
  92. *Ibid.*, at 32.
  93. *Ibid.*, at 35.
  94. *Dallas Buyers Club LLC v. iiNet Ltd.* (No 5) [2015] FCA 1437 at 3, 4, 10.
  95. *Ibid.*, at 47.
  96. *Ibid.*, at 52.
  97. *Ibid.*, at 55.
  98. 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), 19–37.
99. Dallas Buyers Club LLC v. iiNet Ltd. (No 3) [2015] FCA 422 at 422.
  100. Mark Deuze, *Media Life* (Cambridge, UK: Polity, 2012).
  101. See Raphaël Nowak, *Consuming Music in the Digital Age: Technologies, Roles and Everyday Life* (London: Palgrave Macmillan, 2016), 20–28.
  102. Mike Vago, “Louis CK Releases Pay-What-You-Want Live Album,” A. V. Club, August 11, 2015, <http://www.avclub.com/article/louis-ck-releases-pay-what-you-want-live-album-223638>.<sup>↗</sup>
  103. Helienne Lindvall, “How Record Labels Are Learning to Make Money from YouTube,” *The Guardian*, January 4, 2013, <http://www.theguardian.com/media/2013/jan/04/record-labels-making-money-youtube>.<sup>↗</sup>
  104. Amy X. Wang, “Recorded Music Is in Trouble, but Live Concerts Are Making More Money Than Ever,” Quartz, February 26, 2016, <http://qz.com/625934/recorded-music-is-in-trouble-but-live-concerts-are-making-more-money-than-ever/>.<sup>↗</sup> Of course, alongside these changes fans are also increasingly fetishizing physical cultural artifacts. See Dominik Bartmanski and Ian Woodward, “The Vinyl: The Analogue Medium in the Age of Digital Reproduction,” *Journal of Consumer Culture* 15, no. 1 (2015): 3–27.
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  106. See generally Ramon Lobato and James Meese, eds., *Geoblocking and Global Video Culture* (Amsterdam: Institute of Network Cultures, 2016).
  107. Anti-Counterfeiting Trade Agreement, at E-1, Oct. 1, 2011, 50 I.L.M. 239, 243 (2011) art. 5(k).
  108. ACTA, at art. 23, § 1.
  109. 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): 21–31. See also Matthew Rimmer, “Trick or Treaty?: The Australian Debate over the Anti-Counterfeiting Trade Agreement,” in *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath*, ed. Pedro Roffe and Xavier Seuba (Cambridge, UK: Cambridge University Press, 2015), 169–201.
  110. See Lobato and Meese, *Geoblocking and Global Video Culture*.
  111. Angela Daly, *Socio-Legal Aspects of the 3D Printing Revolution* (London: Palgrave Pivot, 2016); Luke Heemsbergen et al., “Social Practices of 3D Printing: Decentralising Control and Reconfiguring Regulation,” *Australian Journal of Telecommunications and the Digital Economy* 4, no. 3 (2016): 110–125; and Adam Rugg and Ben Burroughs, “Periscope, Live Streaming and Mobile Video Culture,” in *Geoblocking and Global Video Culture*, ed. Ramon Lobato and James Meese (Amsterdam: Institute of Network Cultures, 2016), 64–73.