Postcolonial Studies, Vol. 8, No. 2, pp. 199–218, 2005

Routledge
Taylor & Francis Group

What is a technological author? The pirate function and intellectual property

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> [T]hat was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, 'What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor.
>
> St Augustine, *The City of God*, Book 4, Chapter 4 (AD 413–426)

> You gentlemen can say, 'Hey gal, finish them floors!
> Get upstairs! What's wrong with you! Earn your keep here!
> You toss me your tips
> and look out to the ships
> But I'm counting your heads
> as I'm making the beds
> Cuz there's nobody gonna sleep here, honey
> . . .
> And in that quiet of death
> . . . they'll pile up the bodies
> And I'll say,
> 'That'll learn ya!'
>
> Kurt Weill and Bertolt Brecht (Threepenny Opera,1928), Nina Simone (1964): *Pirate Jenny*

The pirate figure has commonly functioned as a raced, gendered subaltern who effects the inversion of hegemonic power relations. In St Augustine's anecdote, a ('barbarian') pirate rhetorically inverts Alexander's imperial power, while Brecht evokes the revolutionary threat embodied in a servant, whose secret identity as the Pirate Captain of the Black Freighter enables her final revenge against class and gender oppression.

Pirates who threaten to invert power relations through appropriating things less tangible than ships and bodies have become a growing concern for the managers of twenty-first-century economic globalization. Appropriating, modifying, and

ISSN 1368-8790 print/ISSN 1466-1888 online/05/020199–20 © 2005 The Institute of Postcolonial Studies
DOI: 10.1080/13688790500153596

sharing a range of less tangible but equally crucial objects, intellectual property 'robbers' today traffic in images, music, and software. Although business analysts regard this as a novel problem, supposedly precipitated by the unprecedented importance of 'knowledge' as a force of economic production, historians of science and law tell stories of intellectual property theft that predate the current IPR discourse by two centuries. Adrian Johns traces numerous 'pirate' activities in nineteenth- and early twentieth-century transatlantic print culture, including sheet music piracy and other infringements of print media copyright in Britain and the USA. Richard Drayton has showed how British imperial networks of botanical knowledge, centered at Kew Gardens in London, co-ordinated intricate links between scientific knowledge, colonial commerce, and plant specimens from around the globe—one of many colonial 'knowledge economies' of the eighteenth and nineteenth centuries. These ecological networks undergirded British military and economic power, and invariably rested on the metropolitan appropriation of ecological knowledge from the margins of the empire.[1] Here the colonial state, and scientific organizations such as Kew Gardens and the Royal Geographical Society, might be thought of as performing the act of piratical appropriation. The growth of scientific knowledge itself depended on diffuse global networks of sharing even prior to the colonial period—for example, European Renaissance science could not have emerged without the multiple appropriations of texts and ideas from medieval Islamic scholarship.

Even 'real' maritime piracy is by no means a relic of the past, and it functions today via a strong reliance on global communications technology. The International Maritime Bureau reported 445 pirate attacks on ships in 2003, and 325 in 2004, many of which resulted in the death of entire crews.[2] Former *Wired* editor Mark Frauenfelder suggests that

> most pirates know in advance if the ship and its cargo is worth an attack, because they use state of the art equipment to monitor Inmarsat communications and even fax transmissions listing every single cargo item. Quite a substantial portion of Inmarsat reception units that are being sold in Germany or the United States are channelled to those regions where they are of invaluable service to modern age pirates.[3]

The Inmarsat network was originally created for maritime use, and maritime law enforcement units admit to intense anxieties about its use in the wrong hands. Technologically savvy pirates develop increasingly accurate intelligence even as law enforcement attempts to increase security through the development of that very technology. The most famous example of anxiety over the use of satellite communications by 'rogue' actors is the case of Osama bin Laden, whose Inmarsat satellite phone, purchased in New York in 1996, connected him with a global network of associates.

Anti-piracy discourses now frequently intersect with anti-terrorist security discourses, where both pirates and terrorists function as threats to free markets and civilized nations. Media sociologist Nitin Govil argues that the relationship between intellectual property piracy and terrorism has been naturalized by policy makers, international police, and popular culture since 9/11: 'For example, British detectives claim that Pakistani DVDs account for 40% of anti-piracy confiscations

in the UK, and that profits from pirated versions of *Love, Actually* and *Master and Commander* funnel back to the coffers of Pakistan-based Al Qaeda operatives.'[4]

In February 2003, a *Forbes* cover story depicted Chinese piracy as a small dragon nipping at Bill Gates's head. Gates appears bemused but not unduly worried. The problem is represented as annoying and inconvenient for western business, but one that will inevitably be cleaned up with the coming of full-fledged modernity to backward nations. By January 2005, however, Chinese piracy was cast as a persistent and abiding threat to US national security in a *New York Times* magazine article that urged analysts to regard with skepticism the 'generous and optimistic' reading of Chinese piracy as simply a natural gap in its implementation of what are, on its books, fundamentally good, strong laws. Perhaps, we are encouraged to think, the process of bringing China to fully adult modernity is not so much like the tutelage of a recalcitrant adolescent by a wise and patient teacher. Instead, perhaps a new 'analogy has some merit'—'the fight to protect American intellectual property' is more like 'the war against weapons of mass destruction' (*New York Times* magazine, January 9, 2005, pp 43 and 41). 'As with stolen bombs,' we are told, 'the chief worry about losing control over intellectual property is not that American manufacturers will forgo sales opportunities; the fear is that its new "owners" will turn our own innovations back on us and inflict much broader economic damage' (p 41). It's more than lost dollars, we are being told; it's about our way of life.[5]

The discourse of network security, the anxiety about piracy, and the fear of terrorist hackers circulate around a perceived contradiction at the heart of technological and electronic progress. The very technologies that appear to embody post-Enlightenment modernity and progress seem to facilitate the destruction of western civilization by those who 'hate our values and freedoms.' This paradox is implicitly supported by a popular technological determinism. Assumptions circulate in popular circuits of cultural and economic analysis, that technologies carry inherent good or bad values. For example, the 'bad' corrupt values of video games are held to 'naturally' produce violent boys, but the 'good' modern value of the internet in the hands of evil primitives appears paradoxical, and perversely inverted into the mode of destruction of modernity.

The critique of technological determinism is not new, and many historians as well as techno-entrepreneur/pundits urge us to jettison this outdated model, and instead to think of technology as a tool that is only as good as the actors and social networks it operates within. The technological determinist assumption is a resilient one, though, and, despite being officially discarded numerous times in the last three decades, it has invariably managed to sneak its way back into the euphoric celebration of new technological frontiers.[6]

My intention here is not simply to critique technological determinism and the social conservatives who often advocate it, but to ask how we might critique, deepen, and extend the argument about technology's social networks (often the default 'progressive' position) via an examination of law and political economy in the context of new media technologies.

Consider again the inverted power relations invoked in the pirate epigrams above. Although a 'pirate-standpoint epistemology' might offer a seductive critique of corporate systems of power that seem to operate ever more oppressively

through global networks of trade and legality, it would limit us to a simple, pre-Foucauldian model of power as transparently and monolithically repressive. This article does not seek simply to celebrate the pirate as the agent of inversion of repressive power relations. The rebellious teen hackers, the sound and video collagists, music samplers and remixers, third world consumers, and re-creators of the electronic commons have forceful and effective critiques of 'the system' (variously conceived as global capitalism, corporate monopoly, elitist cabal, and so on). My point is not to take up these arguments on their own merits, nor to adjudicate the claims of the corporation, the state, and the pirate. I do not wish to call upon either the uncorrupted rule of law or the pirate hacker as solution to global technological development; nor do I aspire to arbitrate between the Microsofts and the Groksters of the twenty-first century.

While the pre-modern, colonial, and postcolonial histories of piracy and the global traffic in ideas give us insight into the role of knowledge in global economies and dispel the fallacy of the supposed novelty of today's 'knowledge economy,' I do not wish to suggest that history indicates a long unbroken continuity of structurally identical piratical appropriations of knowledge. Clearly, even while it participates in a longer history, the current discourse of piracy is specific to our present historical and economic moment, and illuminates particular characteristics of the emerging forms of global informational capitalism. I wish, however, to read the current debate over 'sharing,' 'openness,' and 'freedom' in software, music, and film data not as an entirely unique and unprecedented moment, but, rather, via a genealogical understanding of its legal and political economic conditions of enunciation.

What can we learn if, rather than joining the chorus of libertarian or radical critiques of corporate ownership and intellectual property, we investigate the assumptions that undergird the current discussion of piracy? We might track the ways in which certain narratives of authorship, creativity, and ownership emerge. What are the continuities of this new kind of authorship—a fundamentally *technological* authorship—with prior assumptions about authorship? What forms of globalized citizenship and personhood are being shaped via the emerging legal discourses of intellectual property, on both sides of the struggle for access to new forms of information?

Twenty-first-century piracy discourses

Let us look at recent struggles over access to new forms of information, as routes into reading the figure of the pirate as it functions discursively in twenty-first-century global technological circuits.

On March 29, 2005, a controversial post-Napster conflict was heard at the US Supreme Court, in a dispute over file sharing between MGM studios and Grokster Ltd, a 'peer-to-peer' software company. The MGM v. Grokster case ('*Grokster*') has been followed closely because of its potential to criminalize common practices of sharing on the internet, in much the same way that the 1984 Sony v. Universal Studios case ('*Betamax*') threatened to criminalize the use of a novel invention, the Sony 'Betamax' VCR. The outcome of Grokster

(undecided at the time of writing) is important to the average western late industrial capitalist user in ways that illuminate the construction of technological authorship.

Although the Grokster case is represented by film studios as a war of survival against rogues, thieves, and pirates, it is seen by a (largely western) technologically-imbricated public as a threat to emerging parameters of individual creative authorship, in amateur, educational, and entrepreneurial contexts. Thus a broad middle-class consuming population appears on the verge of being classified as inherently criminal. In comparison with the protests of Alexander's barbarian and Pirate Jenny, whose threats of inversion seem radically to topple the world, the protests of this group circulate through the fissures and contradictions in existing social configurations. Tracking these circulations offers us more nuanced insights into the emerging configurations of technological cultures, and enables us to ask how new discourses of technoculture effect certain possibilities (for subjects, for states, for institutions, for global relations, for power and resistance) and foreclose others.

Infringing machines

The landmark 1984 Betamax case, or Sony v. Universal Studios, set the precedent for the legal use of technological innovations that have since repeatedly raised the specter of new forms of legal and illegal copying. In 1983, Universal and Disney attempted to stop Sony from selling its video tape recorder (VTR), alleging that it was sold and used primarily for copyright-infringing purposes. However, the Supreme Court ruled 5 to 4 that 'there is no basis in the Copyright Act upon which respondents [Universal Studios and Walt Disney Productions] can hold petitioners [Sony] liable for distributing VTR's to the general public' (p 3).[7] It was a close decision, and much of the deliberation ranged over the nature and use of the novel technology that enabled consumers to accumulate a library of recordings. The unprecedented copying power that the VTR put in consumers' hands appeared to threaten studios' ownership of their intellectual property. Although Universal attempted to argue that infringing uses defined the purpose and existence of the new technological machine, the Supreme Court ultimately disagreed, recognizing the VTR as capable of diverse uses, not all of which were illegal:

> [A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce. (p 16)

The Electronic Frontier Foundation website, explaining the historic Betamax ruling, comments: 'In other words, where a technology has many uses, the public cannot be denied the lawful uses just because some (or many or most) may use the product to infringe copyrights.' Film studios, seeing their profits undercut by the VTR, had attempted to block a technology they saw as inherently threatening. In a now infamous statement that summed up the studios' fears at the time, Motion Picture Association of America chief Jack Valenti warned: 'I say to you that the VCR is to the American film producer and the American public as the Boston

strangler is to the woman home alone.' (The quote is famous because it appears to show Valenti as an irrational technophobe, but its yoking of piracy and gendered violence is more striking, and I will turn to other instances of the trope later in this article.)

Hollywood studios' argument that video tape recording technology was inherently dangerous failed, undercut by the faith in the productive yet contradictory connection between novel consumer technologies and economic growth under post-industrial capitalism. The Supreme Court's majority rejected the idea that VTR technology was inevitably and primarily linked with piracy, suggesting, rather, that something about the connection between technological change and capitalist productivity was at stake, and that the 'wheels of commerce' must not be blocked.

The two sides of the Betamax lawsuit were reprised in the 2005 MGM v. Grokster case, with MGM studios making arguments almost identical to those of Universal and Disney twenty-five years before. In this 2005 lawsuit, MGM represents peer-to-peer (P2P) sharing networks as inherently destructive to principles of ownership and copyright. MGM's brief represents P2P software technologies as infringing machines, and calls for inserting proprietary safeguards within the architecture of electronic networks.[8]

Writing on the twentieth anniversary of the Betamax ruling, Fred von Lohmann summed up a familiar lesson: 'New technologies make copyrights more valuable because they unleash new markets and business models.'[9] Lohmann, senior intellectual property attorney with the Electronic Frontier Foundation, represents the techno-entrepreneurial resistance against big media corporations, reminding us that 'if you want a vibrant technology sector, you let the innovators invent without forcing them to beg permission from media moguls first.' The gloomy technological determinism of the media corporation is rejected here in favor of the optimistic determinism of the technologically-driven free market.

Authorship, piracy and the global 'knowledge economy'

If we step back from the claims and counter-claims of technological determinism, copyright infringement, and amateur creativity *per se* and observe their conditions of enunciation, what insights emerge? Let us set aside questions about the inherent nature of new technologies (that is, I do not want to ask of technologies such questions as: Do they 'want' to be free? Do they inherently effect democratization and sharing, over against the repressive power of the state and corporation?). I wish to sketch a genealogy of technoscience that eschews the commonly available narrative in which 'freely' available technology is seen as inherently transgressive, utopian or liberatory, straining against the repressive power of the corporation. This discourse of techno-entrepreneurship is a simple inversion of a new age/luddite discourse which saw technology as inherently repressive, and liberation as possible only through the destruction of technology (and the victory of a non-instrumental 'humanity') or the retreat into a pre/non-technological utopia.

In the process of being produced as global technological citizens, we are drawn into authenticating some kinds of equivalences and protecting some types of difference. The conditions of possibility for discourses about technological authorship are imbricated with emerging global legalities. How are particular practices of technological identity, authorship, and citizenship either called forth into the realm of legal and economic regulation, or designated as sub-legal and pre-rational?

My purpose here is not so much to make the subaltern pirate speak, in all her oppositional authenticity, as to ask how the figure of the pirate is emerging via the discourses of global legalities and counter-legalities, corporate property rights and defiant anti-property activisms, pro- and anti-copyright advocates. In a continuation of Foucault's question, 'what is an author,' I suggest that we might ask: 'what is a pirate?'

I attempt to suggest an understanding of the pirate function, analogous to Foucault's author function. The figure of the pirate seems to emerge, at the turn of the twentieth century, as a key component in the shaping of early twenty-first-century bourgeois law. At this historical moment, a particular confluence of digital copying, its affiliated modes of creativity, a 'crisis' in bourgeois legalities and culture apparently precipitated by the telecom and digital revolutions, and the space-time compression of global cultures and economies, creates the conditions for the public recognition of the fragmented 'author functions' that Foucault identified. At the same time, shifts—both conservative and progressive—in bourgeois legalities seek to preclude the apparently chaotic fragmentation of the author into its component author functions.[10]

Drawing the lines between author/geeks and pirate/rogues

Historian Adrian Johns tells a fascinating story of sheet-music piracy at the turn of the nineteenth century, when a middle-class boom in piano-ownership created huge demands for cheap sheet music, but coincided with the advent of cheap photolithography, which enabled entrepreneurial pirates to supply sheet music at a fraction of the price of music publishing houses. Johns explains:

> The problem facing the music publishers was not one of legal principle. The difficulty lay in enforcing the law. Although copyright violation, be it of books or sheet music, was illegal in Great Britain, it was a civil offense, not a criminal one. This meant that tracking down perpetrators was largely a matter for their victims. They had the right to search for copies, but not to enter private premises to do so—unless the pirates themselves admitted them, which was, obviously, unlikely.[11]

Johns's complex analysis eschews technological determinism in favor of a social history of pirates. Grokster's Supreme Court *amici curiae* (liberal supporters of P2P networks in the early twenty-first century), and Johns (with respect to the early twentieth century), take liberal positions with respect to individual rights and enlightened, historically nuanced positions against technological determinism. They remind us that technology itself can neither

be designed for nor function toward solely one end; it does not itself militate in favor of good or bad, legal or illegal actions; it is social networks of meaning and practice, co-emergent with technological tools, that shape ongoing trends of innovation and use.

Adrian Johns concludes his essay 'Pop Music Pirate Hunters' by noting that we should understand pirates' social networks not just for academic reasons, but because an understanding of pirates' social context enables us more successfully to enforce the rule of law:

> Only by replicating the social knowledge of Willetts [a sheet-music pirate] himself could Preston and Abbott [music industry-employed pirate-catchers] defeat him. The moral of the story is therefore simple. The best way to counter piracy is to appreciate the culture of the pirates themselves—and to understand it better than they do. (p 77)

Analogously, pirates are invoked at key points in several *amicus curiae* briefs submitted in support of Grokster *et al*. As extreme cases of technological misuse, pirates offer the limit point toward which a discourse of liberal legal reform can make gestures of disavowal. The disavowal of the radical disruptive potential of the pirate serves to underscore the reasonableness of the reformer's argument.

As the Brief *Amici Curiae* of Computer Science Professors states,

> Each *amicus* respects the value of intellectual property. All have published copyrighted works, some hold patents, and some have seen their copyrighted works made available without authorization on a peer-to-peer (P2P) file-sharing technology. None condone the unlawful use of file-sharing technology.[12]

Here P2P networks are invoked in continuity with more conventional forms of capitalist intellectual property ownership, such as copyrights and patenting. Piracy is set apart as different in kind, in opposition to the briefs of MGM and other studios, who attempt to represent all file-sharers as pirates.

Lawrence Lessig, writing as Counsel of Record in the Brief for Creative Commons as Amicus Curiae in support of Respondents (Grokster *et al*.), elucidates:

> [J]ust as gun owners who defend the legal use of guns are not endorsing cop killers, or free speech activists who attack overly broad restrictions on pornography are not thereby promoting the spread of child pornography, so too is the defense of p2p technologies not an endorsement of 'piracy.' (p 5)

To emphasize the opposition of Grokster's *amici* to piracy, Lessig cites his own widely read work:

> See Lawrence Lessig, *Free Culture* 10, 18, 62, 63, 64, 64, 66, 139, 255 (2004) (describing 'piracy' as 'wrong'). And unless these broader issues are kept in view, this Court could be drawn into a decision that could harm the wide range of creators who depend upon both copyright law *and* p2p technology to effect the distribution of their creative work. (p 5)

Twenty-first-century activists who defend the electronic commons against corporate privatization seek successfully to ground a future consensus on the basis of the exclusion of 'bad' copying, distinguishing illegal sharing from good, creative sharing. The mode of condemnation of pirates as disrespectful of profits and property sets the parameters of the emergent consensus on technology, property, and identity. Legal scholar Lessig, Computer Science and other *amici curiae*, and historian Johns all situate their argument for reform by distancing it from illegal pirate activities.

The conditions of enunciation for discourses of technoculture will require the formation of a new consensus on the forms of public criminalization of certain kinds of piratical exchange. In much the same way as madhouses, brothels, prisons help us track the conditions of enunciation of discourses of civilization, legality, sexuality, and science, the emerging spaces of marked illegality may help us understand the new configurations of technocultural legalities.

What is a technological author?

What are the cultural politics of *riffing* and *ripping off*, and how do they help us understand technological authorship? The question of technoscientific discursivity was something Foucault briefly touched on in *What is an Author?* but he saw it as radically different from discursivity in art and fiction. How does the digital revolution, with its mantra of *rip/mix/burn*, and its interpellation of high-bandwidth[13] multicultural youth, make a difference to how we read modern authorship? Modes of technological authorship throw into relief and exacerbate many of the internal tensions Foucault noted in the author function, and blur the lines between cultural and technological creativity. I also want to re-frame the question about authorship, via the context of the political and epistemological question of the postcolonial margin. That is, I want to ask a familiar feminist question of Foucault's author function – who can speak as an author at the precise time that authorship emerges as an attribute of autonomous subjects? What does it mean that, at the very historical moment that technological authorship seems to become widely accessible, the law marks off certain authorial spaces as transgressive? What difference does it make that a particular kind of ripping off happens on the margins of the industrialized world, among the 'less developed' members of the WTO, at the apparent edges of the reach of western liberal democratic law, where the lines between authentic original and corrupted copy are being blurred by street vendors and high-tech entrepreneurs?[14]

How do the emerging legal and cultural discourses of ownership help produce particular technoscientific configurations of national and cultural narratives? How does the technological authorship narrative appear if we anchor our investigations at sites in the global south which are perceived, in the liberal democratic discourse of development stages, to be mired in the 'not yet'? Putative newcomers to the rule of law, developing nations are represented as adolescents growing toward nation- and statehood, awakening to the joys of shop-lifting but still unprepared for full-time shop-keeping.[15] This discourse of the 'not yet' is by

no means a stable one; indeed, its very anxiousness is symptomatic of the contradictory terrain it traverses.

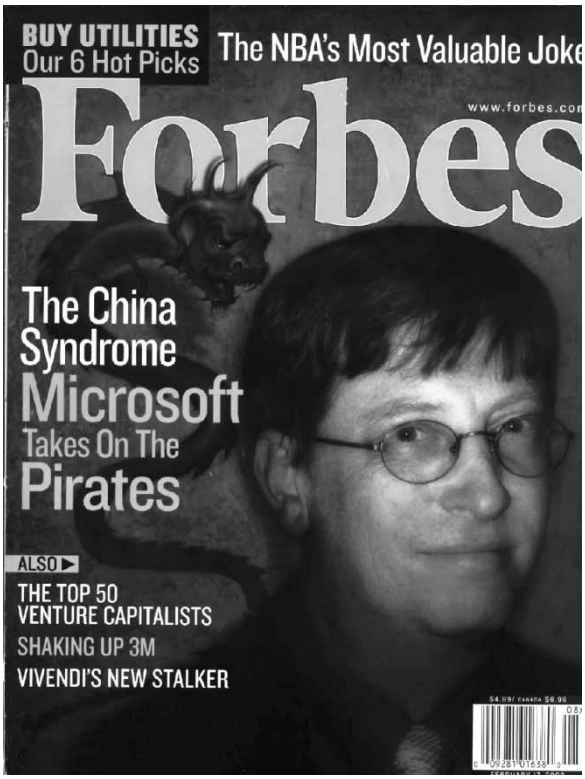
In the next section I address the subject of technological authorship by attempting to trace the political economy of the copy, tracking the cultural constitution of heterogeneous homogeneities. Let me offer a vignette by way of illustration.

The geo/techno/politics of copying

In Beijing's Hailong market Microsoft's Windows XP costs $245 with logo and shrink-wrap, and $5.50 on an unmarked CD. A recurring, indignantly re-told story in the technology news media of the past decade has been of 'Chinese piracy.' The west produces a range of technology and consumer goods (end products of a cultural-economic process in which production, 'novelty,' and 'need' are created, studied, shaped, and fed by global networks of manufacturers, advertisers, franchises, opinion polls, consumer advocates, and other *hardworking* members of advanced capitalist societies). These are mundanely copied and sold in many 'pirate' markets the world over. The copies are enthusiastic mimics and relentless betrayals—they look the same as the original, and, in the case of software, they perform the required tasks in the same way as the original; but they cost a fraction. This drives Bill Gates crazy for obvious reasons of profit and power; but it equally angers western leaders, policy makers, journalists, entrepreneurs, and workers. The excessive ways in which these objects disturb not only the object's corporate owners, but also the full range of advanced industrial bureaucratic and entrepreneurial subjects, reveals an anxiety about authenticating sameness and regulating difference. This anxiety accompanies the urgency of authentically naming as 'same' only those objects that have a place in a specific cultural and historical political economic schema—one whose contours can emerge successfully only through an engagement with objects such as the unmarked same-yet-different CD in the Hailong marketplace.

Institutional efforts to re-crown the original technological object with its apparently purloined aura cannot take place via a simple return to the sacred status of the original, as this would contradict the logic of universal technological consumption.[16] Instead, the ideological work involved in naming the original as 'real' and the copy as 'fake' is that of world-shaping: the work of policing the new parameters of piracy. This policing is animated by the task of restoring the threatened sanctity of the author, even as that fragile construction tends to be exposed yet again, this time via the fragmenting/reconstituting effects of digital technoscientific practices.

The activities of Microsoft and global intellectual property organizational formations produce difference and sameness in governable ways. A 2003 *Forbes* magazine report on the 'China syndrome' represented the piracy problem as a small but fierce and determined-looking dragon nipping at Bill Gates's head, as I mentioned earlier. Let us look more closely at this report.[17]



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The article repeatedly attached the words 'counterfeit' and 'fake' to the illicit reproduction of sameness by Chinese companies, while emphasizing the 'real' nature of the branded product—sameness produced by a legitimate circuit of global production. It expressed an earnest hope that 'China may someday grow out if it—as Japan, Taiwan, Singapore and Korea all have, in varying degrees.' We learn that China remains 'a country where the *rule of law* is not a given' (p 82); and that 'China doesn't covet Microsoft *the way other countries do*' (p 82; emphases added). The sameness produced by China's copying cultures is illegitimate—a vestige of its communist command economy (a discredited, backward, culture of sameness) and a marker of its primitivity. It is excessive—no accidental aberration, it is an unashamed celebration of the technological freedom to produce sameness on demand: 'Pirated copies of Windows aren't just sold one at a time on the street. Hundreds are sold at once to Chinese businesses, preloaded on computers made in Chinese factories' (p 82). China must be taught shame at this naked reproduction; it is called upon to grow into a more adult culture of sameness (in business practices, and in individual rights)—one which is regulated and guaranteed by the rule of law, and in which coveting consumer goods is fine, as long as it is done in the same manner in which advanced capitalist consumers covet. As the article draws to a close (anticipating the inevitable coming of age for

intransigent backward economies), an augur of legitimate sameness appears. In contrast to the 'drafty college classrooms' and 'state-run' enterprises cited earlier, new spaces are visible as China responds to 'a giant technology transfer' funded by Bill Gates: 'Microsoft . . . is taking the time to partner with dinky startups. Its first joint venture partner, Censoft Corp. Ltd., recently completed a building in a high-tech zone in northwestern Beijing that *looks like any airy Silicon Valley office*' (p 84, emphasis added).

The new high-tech building is the same as a Silicon Valley office in all the ways that matter to a global economy: China has emerged, in this paragraph, from illicit to licit sameness; the cultures of copying brought by technology transfers (the phrase deliberately echoes the phrase used by British colonial administrations and imperial historians) produce sameness in legitimate, recognizable, and governable ways. The *Forbes* cover story looks forward to the full flowering of intellectual property rights legislation in China.

What difference does digital make?

Digital copying instantiates a fundamentally new kind of copy—what is radically different from prior forms of mechanical reproduction is, as Stanford-based legal scholar Lawrence Lessig puts it, the physics of piracy of the intangible. Copyright law is triggered every time there is a copy made of an original. As Lessig illustrates:

> Before the Internet, if you purchased a book and read it ten times, there would be no plausible *copyright*-related argument that the copyright owner could make to control that use of her book. . . . Now if you read the book ten times and the [e-book] license says you may read the book only once or once a month, then *copyright law* would aid the copyright owner in exercising this degree of control, because of the accidental feature of copyright law that triggers its application upon there being a copy.
>
> (*Free Culture*, p 80)[18]

While Lawrence Lessig is the pre-eminent leader of the free culture movement, he draws a distinction, in his own politics, between protecting genuine creativity (*good*) and defending simple piracy (*bad*). He assures his readers that his aim is to protect the sanctity of property and the vitality of consumer capitalism, not to reduce industrial society to the anarchy of barter markets or the sterility of command economies. Exploring the connection between corporate sellers and pirating nations, he reminds us that

> the copyright gives the owner the right to decide the terms under which content is shared. If the copyright owner doesn't want to sell, she doesn't have to . . .. If we have a property system, and that system is properly balanced to the technology of a time, then it is wrong to take property without the permission of a property owner. That is exactly what 'property' means.
>
> (*Free Culture*, p 79)

In other words, property assumes a bourgeois subject, a sovereign self-acting owner. Lessig's formulations also suggest an analogy between sovereign

self-acting owners and sovereign states. The owner operates on the world stage, itself, we recall, redrawn since the mid-twentieth century under first the GATT and then the WTO; all those, both individuals and nations, drawn onto this world stage must be constituted as (or rhetorically dressed up like) sovereign self-acting subjects, in order that they might be equally treated by the law. Thus for example, in response to the common Southern critique of corporate property, Lessig argues that 'Asian law' incorporates a recognition of foreign and international copyright, and thus that Asian pirates and Asian nations are violators of the law under which they have chosen to live: 'No country can be part of the world economy and choose not to protect copyright internationally. . .. If a country is to be treated as a sovereign . . . then *its laws are its laws* regardless of their source' (p 78). Here the country functions as sovereign owner/consumer/citizen on the world stage. *Its laws are its laws*.

The repetition of law as only itself, as never exceeding its definition, suggests that law is hermetically sealed off from history (named here simply as *source* rather than as networked dynamic process); that reparations for actions that occur in diachronic networks are outside the purview of synchronic applications of equity. As Collier *et al*. have argued, bourgeois legality plays a role in producing the very differences to which it denies relevance:

> The ideal of equal treatment before the law not only makes it difficult for law to address, and thus to redress, the differences in power and privilege that law defines as occurring outside of or before it, but legal processes actually enforce and confirm inequalities among people and peoples in the process.

Lessig is, however, no simplistic defender of the law. Through his prolific writing and activism, he is setting out a complex agenda—one that involves what many see as a radical revisioning of liberal property law. To most enthusiastic users of the creative commons, Lessig is in fact a champion of the underdog, the voice of the voiceless against the power of the corporation, the man who argued passionately before the US Supreme Court in *favor* of the right to rip, mix, and burn. He argues, in *Free Culture*, that 'it is extraordinarily troubling with respect to transformative uses of creative work' that 'copy and paste' has become a crime (p 80). He argues that a historically vibrant domain of creativity, the *de facto* commons of 'presumptively unregulated use,' has become almost accidentally overregulated, beginning with the removal by Congress in 1976 of formal requirements for the granting of copyright. The generation of youth that have grown up with the internet are most severely affected, since all their modes of knowledge and entertainment are already interpellated by digital systems of production, distribution, and consumption. Inconsistently, the forms of creativity proper to these systems are regulated by a set of misguided laws (i.e. laws not properly cognizant of the nature of new technologies, and laws that misrecognize the nature of the creative process, causing an unintentional shrinking of citizens' potential creativity). The multiple new artistic and cultural forms created by ripping and mixing are Lessig's examples of 'transformative' uses—that is, uses which transform the content of materials out there, or which transform the markets they compete in. This is good piracy.

Bad piracy is Asian piracy:

> All across the world, but especially in Asia and Eastern Europe [later references to this phenomenon drop the European reference and call it simply Asian piracy], there are businesses that do nothing but take other people's copyrighted content, copy it, and sell it …. This is piracy plain and simple. Nothing in the argument of this book [*Free Culture*], nor in the argument that most people make when talking about the subject of this book, should draw into doubt this simple point: This piracy is wrong.
>
> (*Free Culture* p 77)

Within the space of three pages Lessig asserts numerous times, and firmly enough for his followers to understand, that Asian piracy is deeply wrong/inexcusable/unjustifiable because of its flouting of bourgeois law and the laws of the free market. Here Lessig is firmly drawing a distinction that, to his consternation, had been commonly blurred in public discussions of the free culture movement. He is particularly concerned to draw this distinction because both his followers and critics often see his advocacy of free culture as flouting the laws of markets and property. Asian pirates thus serve as his limit case: the limit point of difference from bourgeois law, the point toward which the energies unleashed by the free culture/free software movement tend, often, chaotically and euphorically, to move, but the dangerous borders from which it must be turned back, lest the foundations of bourgeois law be threatened. If his earlier book (2001), *The Future of Ideas: The Fate of the Commons in an Interconnected World*, described by Michael Wolff as 'Silent Spring of ideas,' made Lessig the popular guru of a social movement, *Free Culture* is both an onward cheer and a limiting caution. Lessig notes how the failure of his rational argument strategies before the Supreme Court taught him a difficult lesson about the intrusion of politics into the objective space of the law—a move which one might expect to open the door to a host of radical critiques of bourgeois legality. But in 'Asian piracy' Lessig finds his alibi for the saving of bourgeois law. Global capitalist free markets and liberal law are the best we have, he wants us to conclude—abandon those lifelines and we fall into the pit of Asian sameness. We lose the difference—the same difference that undergirds and sustains competition, of liberal multiculturalism, of unequal distribution—that makes us creative, successful, and technologically productive.

The other Lawrence

In the summer of 2004 in Bangalore, India's Silicon Valley, I met Lawrence Liang, legal scholar and activist for the freeing of knowledge in the public domain. The two lawyers Lawrence, in two silicon valleys, brought into sharp convergence for me the stakes in global constructions of sameness and difference.[19]

Lawrence Liang points out that P2P and hi-tech, real-time electronic remixing depend on high bandwidth and/or state-of-the-art computing power. On the other hand, the software, game, and film CDs available on Indian city streets for less than a dollar are examples, for Liang, of 'transformative piracy.' He deliberately echoes Lessig's phrase transformative here, but removes it from the association with the creative genius of an autonomous author. 'For Lessig it's a content problem—[The question is:] with your piracy are you creating something?

The answer here would be "No." But it's providing an entry point into the material for a large number of people who otherwise would have no access to it.' Liang describes himself as interested in India's 'stolen modernity'—the pirate economies through which people rip, mix, and burn their own hybrid/illegal versions of modernity, without permission from its authors.

In opposition to Indian bureaucrats and entrepreneurs who call anxiously for a stronger enforcement of the IPRs of MNCs, Liang celebrates the possibilities of copying and sharing, the leaks in modernity, or what he calls the 'porous legalities' of postcolonial 'stolen modernities.'

These leaks in modernity happen in banal and everyday instances of ripping off, in which populations outside the law sidestep the processes by which they are supposed to define themselves as bourgeois legal subjects. In the absence of ownership and respect for property, they can only be assigned a position outside bourgeois legality. Their authorial function lies not in the creation of localizable content but of dispersed, shared meaning, through the activities of an electronic commons. A shared imagination emerges via the activities of producing, circulating, and consuming appropriated digital texts. The possibilities of being a subject in this sphere are detached from the requirement of unique authorship—the bourgeois author recedes; the appropriative function is foregrounded.

This recalls, of course, Foucault's reminder of how we ought to trace the author function: 'it is a matter of depriving the subject ... of its role as originator, and of analyzing the subject as a variable and complex function of discourse' (*What is An Author?*, p 390).[20] Liang relishes the task of dethroning the author subject, which is often located in the industrialized west, but could just as easily be located down the street from the book-filled garage that serves as his Bangalore office, in the corporate conglomerates that are more happily cathected with high-bandwidth creative authors than with low-bandwidth pirates.

Lessig, on the other hand, restores the author's unique creative abilities to the foreground, while skillfully acknowledging the rupture brought by digital copying. Where Lawrence Liang attempts to push this rupture to its Foucauldian conclusions, Lawrence Lessig offers a corrective, seeking to save bourgeois law and the authorial subject from the precipice of digitally-enhanced accelerated decay. Both recognize the threat posed by the digital revolution to the notion of authorship and private property; but the geo/cultural/political locations of the two Lawrences undergird the differences in their aims and tactics, which are worked out through each of their readings of 'Asian piracy.' Lessig restores the bourgeois author to his creative role, 'mark[ing] the manner in which we fear the proliferation of meaning' (Foucault, *What is An Author?*). Liang seems to pick up at exactly that romantic, implausible moment in *What is An Author?* In which Foucault calls for a form of culture in which creative writing (*fiction*) would 'not be limited by the figure of the author':

> It would be pure romanticism ... to imagine a culture in which the fictive would operate in an absolutely free state, in which fiction would be put at the disposal of everyone and would develop without passing through something like a necessary or constraining figure. (Foucault, *What is An Author?*, p 391)

Yet Foucault suggested that, as our society changed, the author function would disappear, 'in such a manner that fiction and its polysemous texts will once again function according to another mode':

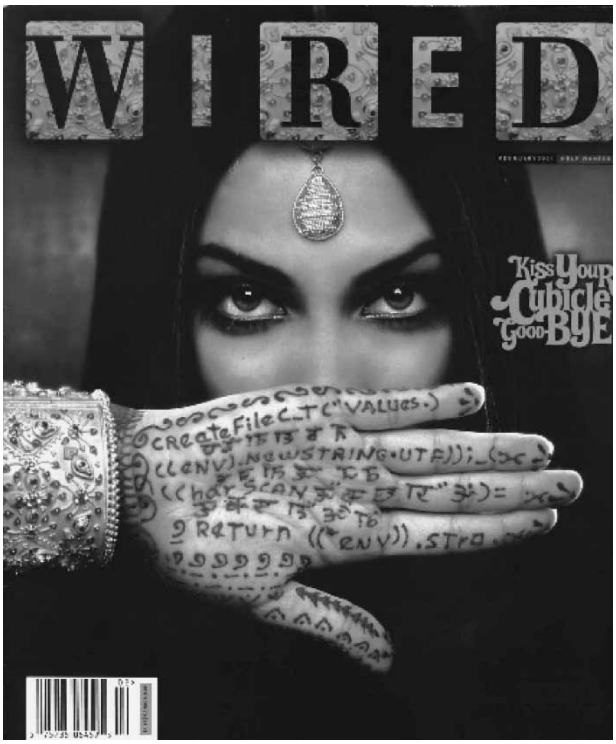
> All discourses, whatever their status, form, value ... would then develop in the anonymity of a murmur. We would no longer hear the questions ... who really spoke? ... And what part of his deepest self did he express in his discourse? Instead ... what are the modes of existence of this discourse? Where has it been used, how can it circulate, and who can appropriate it for himself? What are the places in it where there is room for possible subjects? Who can assume these various subject functions? And behind all these questions, we would hear hardly anything but the stirring of an indifference: What difference does it make who is speaking? (Foucault, *What is An Author?*, p. 391)

This indifference to who is speaking characterizes Liang's celebration of piracy as death-of-author. In Lessig's view, however, it makes a large difference who is speaking; and this difference arises from the unchallengeable priority of ownership and free markets.

Lessig would argue that the particular ways in which copyright and technology have developed since 1976 have rendered copyright an ideological tool to curb the 'proliferation of meaning.' But implicitly in Lessig's model, 'meaning' is produced (by default) by 20-year-old hacker boys in technological universities; even by P2P sharing; but not by Asian piracy. A classic illustration of Lessig's argument is Jesse Jordan, a student at Rensselaer Polytechnic who was sued by the Recording Industry Association of America (RIAA) for running a search engine. Lessig suggests that Jordan's battle with the RIAA turned him from a conservative kid to a rebel activist straining against the limits of capitalist property law. I don't mean to say simply that Lessig recognizes only young male authors. Of course, Lessig recognizes as creative all kinds of remixing and creative copying, including audio remixing, creatively remixed videography, and other forms of late industrial technological practice, regardless of the race and gender of the author. The question I'm interested in posing is historical and political economic, rather than one solely of identity. As Liang points out, this kind of creativity depends on bandwidth. But this should not be reduced to a simple claim about the digital divide. The forms of access to authorship are shaped by historical legacies of technoscientific colonialism. Technology transfers institutionalized in the colonies militarily strategic forms of technology (railways, roads, ammunition, troop medicine, public health, etc.), but not those forms of technology that form the basis of individual access to information archives.

The forms of global citizenship and the political economy of authorship are shaped by irreducibly hybrid/transnational histories of race, class, gender, and colonialism. For example, the management of global bio-diversity reached its earlier zenith under the global empires of the British, French, and Dutch, through their scientific networks of botanical gardens, sexualized practices of taxonomy, racialized theories of climate, and marketized networks of natural commodities. Tropical medicine and the urban control of bodies were perfected in colonial administrations in Africa and Asia, with gender and race shaping forms of identity and politics. Computing technology, a comparatively recent field, has

disproportionately been associated with the intellectual resources of the developing world, including India, China, South Korea, and Taiwan. Representations of the economic threat posed to the west by Asian countries has commonly been gendered, as, for example, in a recent issue of *Wired* magazine, whose cover represented the outsourcing threat as an exotic Asian woman on whose hand was inscribed henna patterns formed by lines of computer code.[21]



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Her hand forms a mysterious veil across her face; but closer inspection of the apparently traditional patterns reveals a sophisticated familiarity with modern technology, one whose very embeddedness in 'otherness' threatens the lives of simply/transparently modern (i.e. not exotically/opaquely/deceptively/threateningly hybrid-modern) American software programmers.

The exotic woman represents not the literal figure of a female programmer, but the general figure of effeminate/mysterious difference. She functions like a pirate—she employs methods outside of first world rationality, in order to steal jobs that properly reside in metropolitan office towers or suburban strip malls. First person accounts on CNN's *Lou Dobbs* (for example, the confessional: 'I trained the Indians who outsourced me out of my job!') find tragedy in white-collar job losses which bring the specter of the loss of homes, cars, and other possessions that make up the identity of modern industrialized subjects.

The Indian nationalist response to the US contradictions of outsourcing is, in turn, gendered in ways that recapitulate nationalist anti-colonialisms. Under late modernity, technology offers a hard weapon with which to resist/turn back on itself the penetrative power of western capitalism. The nationalist technoscientific rhetoric of world markets resists western domination in so far as the rhetoric of westernization (delayed modernity, backwardness, infantile democracy, etc.) denies full masculinity to the ex-colony. It seeks instead to re-masculinize the post-colonial space by the assertion of technological superiority and full and equal membership in a global free market.

Having globalized our frame of analysis, it is now productive to recall Adrian Johns's observation that pirates at the turn of the nineteenth century often took refuge in the private sphere in order to evade the law's reach, employing living rooms in private homes to stash huge stacks of pirated sheet music. This association of pirates with the feminized and sacralized spaces of the domestic frustrated the corporations' pirate-hunters, whose strategies of criminalization were designed to work for public, masculinized spaces. Although pirates are feminized in this example, as in the *Wired* cover image, it would be an overgeneralization to suggest a necessary connection between the representation of piracy and effeminacy. In Jack Valenti's infamous 1984 comparison between the VCR and the Boston Strangler, the pirate is represented as a rogue masculine threat to the domestic feminine. The criminalization of piracy is best represented, perhaps, in classic Orientalist fashion, rendering the danger in a number of possible binaries: for example, the lower-class/immigrant/over-sexed brutal animal, a threat to white womanhood, or the effeminate/foreign/under-sexed nerd who threatens American manhood via surreptitious theft of its jobs and properties.

In the process of being produced as global citizens, communities, nations, and individuals are either drawn into or written out of the scope of bourgeois legality. Certain forms of authorship are sanctioned and others cast into the realm of the criminal. Those forms of authorship that reject the priority of ownership and the sanctity of private property cannot be afforded a place in a sphere which recognizes only conflicts between private/propertied interests. Bourgeois law is not inclined to incorporate the Asian pirate, further, because s/he is claiming neither a nativist pre-technological indigenous identity nor universal free market citizenship. There are only certain kinds of differences permitted in the enforcement of legal equality, and the difference of the pirate cannot qualify.

How are the very conditions of gendered nationalist and technoscientific authorial discourse imbricated with legal, political and economic discourses of property, global economic uniformity, and the rule of law? In Lessig's model all bodies are equivalent. All pirating bodies whether in first or third worlds must be judged by the same law, must all be made accountable to the task of preserving private property and global free markets. Here the pirating third world body cannot be seen as historically and geographically constructed—that is, as the intersection of specific colonial and postcolonial geographies and histories. To see technoscientific embodied practice as always already embedded in a network of geographies and histories suggests that we analyze the pirate function (analogous to the author function) as a series of interrogations of what makes possible/plausible/enjoyable the act of piracy—Who can be a pirate? Who does

not need to be a pirate? How does the act of piracy respond to the repressive function of the law of copyright by which transgressive authorial acts are policed? While I have by no means offered complete answers to these questions, I have sought here to sketch what a genealogical project in technocultural legalities might look like. It is worth thinking further, I wish to suggest, about the ways in which the particular confluence of technoscientific copying, its affiliated forms of creativity, the 'crisis' in bourgeois law and society with respect to the telecom and digital revolutions, and the so-called space-time compression of the world economy, creates the conditions for the very proliferation of difference, the fragmentation of the author into its component 'author functions,' that bourgeois legalities seek to preclude.

Notes

This is part of a new project exploring forms of property and technoscientific knowledge. I am grateful to the Center for Research on Information Technology and Organizations (CRITO) at UC Irvine for funding, and audiences at symposia on Critical Legalities (UC Irvine) and Feminist and Queer Rearticulations of South Asian Studies (UC Davis), whose comments have helped me think through the project's present gaps and future possibilities. Special thanks to Bill Maurer, Donald Moore, Mark Poster, and Geeta Patel for their comments, and to Rod Fergusson for our original conversation on the March 2004 Wired 'covergirl'.

[1] See Richard Drayton, *Nature's Government, Imperial Britain, and the Improvement of the World*, New Haven and London: Yale University Press, 2000; Kavita Philip, 'Imperial Science Rescues a Tree: Global Botanic Networks, Local Knowledge, and the Transcontinental Transplantation of Cinchona', *Environment and History*, 1(2), 1995, pp 173–200.

[2] London, February 7, 2005, IMB's 2004 Annual Report on Piracy and Armed Robbery against Ships, summarized in the report: 'Annual death toll from piracy rises,' http://www.icc-ccs.org/main/news.php?newsid = 40

[3] Mark Frauenfelder, http://www.boingboing.net/2004/11/18/pirates_eavesdroppin.html, accessed March 30, 2005. I do not attempt here a literal history of piracy; that has been taken up superbly by many historians; see for example *The Many Headed Hydra*; and Adrian Johns's work in progress on the history of piracy from the invention of printing to the present day.

[4] Nitin Govil, 'War in the Age of Pirate Reproduction,' *Sarai Reader* 4, 2004. http://www.sarai.net/journal/reader4.html

[5] 'China's appropriation and dissemination of the world's most valuable products and technologies, if they continue unabated, will ultimately mean a lot more than dollars lost. China's pirating and counterfeiting could radically change the way entertainment, fashion, medicine and services are created and sold' (p 41).

[6] Part of the reason for technological determinism's incomplete excision from technocultural discourse is that even those forward-looking techno-pundits who urge old-fashioned luddites to discard their superstitious belief that evil lurks within the heart of the machine, themselves hold dear the idea that the transparent, free market use of technology, and progressive, democratic social change, are inevitably yoked together.

[7] Supreme Court Ruling that Sony was not liable for copyright infringement, Sony Corporation of America, *et al*. v. Universal City Studios, Inc., *et al*. No 81-1687, Supreme Court of the United States, 464 U.S. 417. See http://www.eff.org/legal/cases/betamax/#documents for a useful case document archive.

[8] MGM asserts that Grokster and Streamcast 'designed and marketed their services as engines of infringement' and that they 'designed services tailor-made for finding, copying, and distributing copyrighted media files' (Reply Brief for Motion Picture Studio and Recording Company Petitioners, pp 14–15).

[9] http://www.eff.org/IP/P2P/MGM_v_Grokster/?f = betamax_20th.html

[10] See Jane Collier, Bill Maurer, and Liliana Suarez-Navaz, 'Sanctioned Identities: Legal Constructions of Modern Personhood,' *Identities*, 2(1–2), 1997, pp 1–27.

[11] Adrian Johns, 'Pop Music Pirate Hunters,' *Dædalus*, Spring, 2002, p 69.

[12] Brief *Amici Curiae* of Computer Science Professors Suggesting Affirmance of the Judgment, archived at http://www.eff.org/IP/P2P/MGM_v_Grokster

[13] I employ a distinction between high and low bandwidth to distinguish among classes of users/creative authors. This get around the problems with core/periphery, metropole/(post)colony, center/margin formulations, since

the distribution of access does not neatly follow the borders of nations or empires. (The 'digital divide' rhetoric nevertheless retains outdated/problematic assumptions about national or gender distinctions *en masse*—cf. Terry Harpold, 'Dark Continents: Critique of Internet Metageographies', *Postmodern Culture*, 9(2) 1999; Martin Lewis and Karen Wigen, *The Myth of Continents*: *A Critique of Metageography*, Berkeley: University of California Press, 1997.)

[14] Better referred to as 'bourgeois law,' following the argument made by Collier *et al*: 'We choose this term in order to call attention to the deep historical connection between the development of capitalism and the development of a legal system designed not—as under feudalism—to enforce God's laws on earth but to enforce the rule of laws created by "men" for "men." Although other scholars, particularly those in critical legal studies … have used terms such as "liberalism" or "liberal legalism," we prefer the Soviet scholar Pashukanis' term, "bourgeois law," because it identifies the primary creator and beneficiary of law as an individual who "owns" property…. Moreover, the term "bourgeois law" encompasses such possible opposites of "liberalism" as "conservatism," "libertarianism," and "socialist legalism," even as it includes variant traditions such as "Common," "Civil," and "Socialist" legal systems.'

[15] Think, for example, of the anti-outsourcing xenophobic narratives of the US media, or the recurrent anxieties over technological expertise and H1B visas. Third world nationals are represented as shoplifting white-collar jobs but are purportedly unable to create job wealth of their own, according to these narratives.

[16] Cf. Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* (1936). The post-mechanical reproduction rhetoric of consumption has a doubled/apparently contradictory logic: on the one hand, consumers must celebrate the ubiquitous availability of art—e.g. the Dali poster in the dorm room announces the bourgeois citizen-subject's democratic access to the work of art—at the same time the narrative of mystical authenticity is sustained, by which the author is re-crowned the sovereign genius, his hand visible in the unique marks of paint on the original canvas, which, residing in the museum or private collection, testifies to a unique genius which penetrates the heart of things and gives it meaning. Benjamin saw print making and photography as announcing an important break with older forms but at the same time as continuous with older forms of copy-making such as woodcuts. However, it seems that a more fundamental rupture is initiated with the digital copy which literally produces multiple originals. A copy that has no loss is radically different from print and copy technologies in which the 'master' copy could always maintain its authentic status.

[17] *Forbes* magazine, February 17 2003, *The China Syndrome: Microsoft Takes on the Pirates*.

[18] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York: Penguin Press, 2004. Also available at http://free-culture.org/

[19] The following quotes are from an interview I had with Lawrence Liang in Bangalore on August 13, 2004. Several of Liang's essays can be found at http://www.altlawforum.org/PUBLICATIONS.

[20] Paul Rabinow and Nikolas Rose, *The Essential Foucault*, New York: The New Press, 2003, pp 377–391.

[21] *Wired* magazine, Issue 12.02, February 2004.