

Online Media Piracy: Convergence, Culture, and the Problem of Media Change

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DECLARATION

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma of the university or any other institute of higher learning, except where due acknowledgement has been made in the text.

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Abstract

This thesis proposes that there is a symbiotic relationship between the emergence of online media piracy and the industrial, economic and legal changes that have shaped contemporary popular media in the early 21st century. The Internet is at the heart of most recent transformations of the popular media environment, such as the emergence of video-on-demand formats for film and television consumption and the impact this has had on the nature of those media forms. This thesis discusses the powerful role played by online media piracy in shaping these developments, both through changing the expectations of consumers, and the options that are available for distributors of media content. As well as exploring the diverse forms and practices of online media piracy today, this thesis also explores theories of media change, considering how we might understand such piracy as a force underpinning media change, and how the changes it has helped shape might be placed in a broader historical context. To that end, the history and impact of online media piracy are considered alongside other examples, such as the arrival of video recording devices and the expansion of cable television in the 1980s and 90s, and the significance of international trade deals impacting access to media via “geoblocking” and other techniques of access management. Finally, this thesis also examines debates around copyright, and the potential political significance of piracy as a tool for accessing media and culture, viewing online media piracy as a crucial practice appearing at a nexus of industrial and popular interests, tied to technological, economic and legal developments, and to changing consumer behavior and expectations.

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completing a PhD thesis an enjoyable and connected one, and particularly Grace, for being a good friend.

List of Abbreviations

- AFACT: Australian Federation Against Copyright Theft
- AFL: Australian Football League
- ASA: Australian Screen Association
- BBC: British Broadcasting Corporation
- CAB: Australian Copyright Amendment Bill (2015)
- CD: Compact Disc
- CNN: Cable News Network
- DBC: Dallas Buyers Club
- DMCA: U.S. Digital Millennium Copyright Act
- DNS: Domain Name System
- DRM: Digital Rights Management
- DVD: Digital Video Disc
- DVR: Digital Video Recording
- EPL: English Premier League
- IP: Intellectual Property
- ISP: Internet Service Provider
- MPAA: Motion Picture Association of America
- NBC: National Broadcasting Company
- NET: U.S. No Electronic Theft (NET) Act 1997
- OTT: Over the Top
- PIPA: U.S. Protect IP Act
- RIAA: Recording Industry Association of America
- SOPA: U.S. Stop Online Piracy Act
- TPB: The Pirate Bay
- TRIPS: The Agreement on Trade-Related Aspects of Intellectual Property Rights
- URL: Uniform Resource Locator
- VCR: Video Cassette Recorder
- VOD: Video on Demand
- VPN: Virtual Private Network

WIPO: World Intellectual Property Organization

WTO: World Trade Organization

Introduction



Figure 1: Telstra TV campaign 2018 (<https://www.youtube.com/watch?v=2yLgOItJdBw>)

In 2018, Australian telecommunications company Telstra launched a new promotional campaign for “Telstra TV”. The first of two thirty second television advertisements opens on a dark suburban rooftops before quickly cutting through two domestic living room scenes.¹ In one, a late middle-aged couple is struggling to launch a television application, and in the next a family is negotiating over what children want to watch on television. The voiceover accompanying these scenes says “What happened to TV? Where’s my favorite show? Where did it go?” A snippet from *Stranger Things* (2016--) intervenes, in which Mike yells at the camera, “I don’t know!” The voiceover continues – “TV’s escaped. On screens and apps and free-to-air. Season one is here... Season two is... I don’t know where” – as bright lights connoting television programs fly off into the urban night sky (Figure 1). Cut to a young woman (Figure 2), watching with some trepidation as these lights, revealed to be ghostly

¹ At the time of writing these two advertisements can be viewed at <https://www.youtube.com/watch?v=2yLgOItJdBw> and <https://www.youtube.com/watch?v=ejQdyiMREgQ>.

still images from television series, swoop away from her tablet and out into the night to join the others.



Figure 2: Telstra TV campaign 2018 (<https://www.youtube.com/watch?v=2yLgOItJdBw>)

Having offered these images of anxiety over media change, the advertisement promises an immediate resolution. The lights representing various television series funnel down into a black device emblazoned with the Telstra logo as the voiceover asks “But what if there were one thing... that gave you all these things, in one place, with one simple search?” The advertisement closes with “New Telstra TV. It’s a beautiful thing.” This quick series of scenarios represents something well-known but important about the contemporary media environment. The roles that television networks were thought to play in Australians’ everyday lives are consigned to the past and, with a measure of concern and regret, it is broadly acknowledged that a new kind of effort is required to decide how, and when, to view the television one wants to view.

The companion advertisement to the one just described begins with the young woman from Figure 2, still watching the same show captured in that image, *Outlander* (2014, 2016--), but now on a television set. The advertisement cuts to a young man cooking in the kitchen behind her. He asks if they can watch *American Horror Story* (2011--) tonight, and she finds that series using her Telstra TV remote as a voiceover suggests: "one simple search, for all the best TV". But she then declares "I can't find it". The man looks up, first puzzled, then with a wry smile, and she happily settles in with *Outlander* again. If the first advertisement was a story about anxiety, this is a story about control. The media change referenced here may require new kinds of effort from television consumers, but new tools are available to help with this task, and when properly selected, they offer an unprecedented degree of personalization.

When I first began work on this PhD dissertation I imagined that it would be focused on television. I had written an undergraduate honors thesis on the recent prominence, influence, and defining features of, "quality" or "prestige" television. The changes I discussed are evident in the ways that both *American Horror Story* (a horror anthology series) and *Outlander* (a period romantic fantasy drama) utilize their high production values, and incorporate sexual content and violence that would have previously been unusual, or even completely impossible, within the medium of television (Fuller 2013). I imagined that I would extend that work by focusing on the relation between these changes to television content and new kinds of television distribution. Some of those ideas are still clearly part of my argument here (see chapter two), but my focus on television distribution brought me to notice the changes in, and new importance of, how television is actively acquired by the

people that watch it. And this brought me to focus on the impact and the practice of what is commonly referred to as “Internet piracy” or “digital piracy”. I will define this more carefully in chapter one, but for the purposes of this introduction I will specify that the piracy I am referring to is the unauthorized digital reproduction and distribution of unaltered copyrighted media products.

I watched the first season of *American Horror Story* on a laptop computer in my bedroom, and I watched it alone, but also in ongoing dialogue with friends both in Australia and overseas. Some were watching a year or two after the series first aired, as I was. Some had already watched it, either on the U.S. cable channel FX as it aired or, like me, as downloaded video files. Although I did have access to a subscription television service (in Australia, this is usually referred to as “pay TV” rather than “cable”) that included *American Horror Story*, I obtained my episodes through a website that indexed torrents of television series. I have never watched *Outlander* – as that Telstra advertisement knows, the changes I flagged above have not undone many of the firm ties between popular genres and the gendered dimensions of television viewing. *Outlander* was available on free-to-air television in Australia, though, and my mother watched the early episodes there, and then downloaded the whole first season onto a USB drive to give to my grandmother, who subsequently downloaded the second. I may have never watched *Outlander*, but I did teach my grandmother how to torrent.

I am clearly part of what Stephen Richard Witt refers to, in *How Music Got Free* (2015), as the “pirate generation” of the developed world. From my mid-teens until I subscribed to

Apple Music in 2015, I acquired music exclusively by downloading digital files from free file-sharing services. During those years of piracy I recall purchasing only a handful of CDs, something that took up much of my teenage disposable income before piracy was an option. Joining Apple Music changed everything about the way I obtained and listened to music, moving me from files stored on a computer or portable MP3 player to streaming; and I immediately stopped pirating. What would be the point? Apple Music is actually more convenient: I didn't have to deal with torrent sites, tracking down things I wanted was rarely a problem, downloading was seamlessly integrated with the search tool, and managing storage, or transfer between devices, was no longer a problem. And compared even to the cost of Internet access the price was eminently affordable – a new CD cost me AUD\$30 in 1999, while Apple Music was AUD\$12 a month in 2015 for as much music as I wanted. There are occasional moments when something I want isn't in the Apple catalogue, but availability was an occasional issue with piracy as well. Like the Telstra TV advertisements, the success of Apple Music's streaming service suggests that if authorized media content can be offered with comparable flexibility and convenience for a reasonable price, then far fewer people would choose the effort of keeping up with developments in online piracy.

It is hard to imagine a potential reader that would not already be familiar with narratives about piracy, whether through public discourse on the threat it poses to media industries, through popular media coverage discussing this threat or talking about the popularity of piracy, or through direct experience with piracy as a mode of media consumption. As I began this thesis, piracy was a hot media topic. On the international front, moves to shut down the famous torrent site The Pirate Bay (henceforth, TPB) had culminated in a

December 2014 raid on Swedish hosting servers (McCormick 2014; Zetter 2014), and some of TPB's founders had fled the country evading arrest. In Australia, new proposals for a Copyright Amendment Bill included dramatic claims about the cultural and economic costs of such piracy. Over the following four years, the online media piracy landscape has changed in very significant ways. Certainly, similar economic and legal contests continue. As I began revising this thesis for submission, a new Dutch Supreme court decision requiring Internet Service Providers (henceforth, ISPs) to block access to TPB went into effect (Andy 2017), and similar legislation was passed in Australia in 2017 targeting TPB and other sites. As I finish this introduction, a seven year inquiry in France has finally determined that the site administrators of torrent index Liberty Land are liable for the copyright infringement of its users, leaving them facing a massive damages claim (Andy 2018). But in the intervening years some once spectacularly popular forms of online media piracy have declined. As Martin Fredriksson has argued, "the copyright debates" around piracy have recently "waned", "largely because of the expansion of streamed media that provides what appears to be free (or cheap) access to culture" (Fredriksson 2015).

Both Telstra TV and Apple Music represent a new set of relations between media consumers and television distribution. Behind these are not only industrial and technological changes, but several decades of effort by contrary, impatient, disobedient, and creative people who were not paid by any television network, telecommunications provider, or record company. Across the following chapters I am interested in the emergence of this new style of media consumption, centered on active personal selection and organization. I will call it *content acquisition*. But I am also interested in how content industries have been pushed to make

changes, and market said changes, by the practices of online media piracy. Within the framing offered by the Telstra advertisements with which I began, television is now paradoxically harder to find and understand, because there is more access to it. The pressures built up by un-met consumer demand have resulted in rapid shifts in television's modes of distribution, and these in turn have resulted in newly diverse, coexisting modes of accessing television content. In the field of cultural studies, it is now common to describe such changes as "media convergence" or "convergence culture", but these are also terms subject to a considerable amount of debate. Therefore, before refining what I mean by online media piracy, what I understand to be its historical and present relations to media content industries, and what it means to think of this piracy as an integral part of contemporary media change, I need to clarify my position in relation to these ideas. The rest of this introduction is thus focused on the three keywords from my subtitle: convergence, culture, and media change.

Convergence

The terms "media convergence" and "convergence culture" have generated and supported a great deal of scholarly discussion in recent years. They are different, but they are linked by more than a word. Terry Flew offers a fairly standard definition of media convergence: "The interlinking of computing and ICTs, communication networks, and media content that has occurred with the development and popularization of the Internet, and the convergent products, services and activities that have emerged in the digital media space." (Flew 2008, 22). There are, however, many different kinds of change rolled in together here. James Hay

and Nick Couldry identify four different ways in which the expression “convergence” has been “deployed” over “the first decade of the twenty-first century”:

as a description of a new synergy (a “horizontal” realignment) among media companies and industries, as the multiplication of “platforms” for news and information, as a technological hybridity that has folded the uses of separate media into one another (e.g. watching a television broadcast on a cell phone), and as a new media aesthetic involving the mixing of documentary and non-documentary forms.

(Hay and Couldry 2011, 473)

Elements of all these aspects of convergence appear across my thesis, and thus despite the fact that this description opens a critique of “the overuse of” and “limited conceptualization” of convergence (Hay and Couldry 2011, 473), this is an idea with which I must be engaged.

The writers usually associated with the label convergence culture are undeniably influential on the ways online media piracy is understood today. In the following chapters I will discuss the work of Henry Jenkins, Joshua Green, and Clay Shirky, for example, and Manuel Castells is a touchstone for a great deal of literature on “piracy cultures”. Literature using this term stresses that media companies are being forced to reassess the nature of consumer engagement and the value of audience participation in response to a shifting media environment. This shifting environment is newly characterized by digitization and the flow of media across multiple platforms, the further fragmentation and diversification of the media market, and the increased power and capacity of consumers to shape the flow and reception of media content. It is at this level, where the power of consumers is invoked, that

the convergence culture arguments are unavoidable for my work. What I will call the mainstreaming of online media piracy impacts on debates both about the importance of participation in a new media environment, and what Jenkins, Sam Ford and Green call, in *Spreadable Media*, “the uneasy relationship between capitalism and communication capacity” (Jenkins, Ford, and Green 2013, 156).

Many of the difficulties with the concept “convergence culture” are apparent in the special edition of the journal *Cultural Studies*, titled “Rethinking Convergence Culture”, cited above. Hay and Couldry’s dominant concern is that the “culture” in convergence culture displaces attention that needs to be paid to the contexts of media use, and also presumes that changes in the media environment must map on to changes in the cultural environment, given that media studies has established (when, for example, studying audiences) that media is constitutive of cultural identities. They want, to borrow from the title of Couldry’s own essay in this collection, “More Sociology, More Culture, More Politics” (Couldry 2011). The demand for a politics in discussions of media (481) is particularly pressing for my argument, given that the practices of online media piracy are already politicized by accepting the use of the term “piracy” (see chapter one) and the extent of debates around piracy’s political intent.² Finally, for my purposes, Hay and Couldry are concerned about a tendency for analysis to focus on “increasingly *individualized* engagements with media” (2011, 481-82, original emphasis) that they associate with the influence of first John Fiske

² Hay and Couldry charge that, “to the extent that the most well-known of these media studies venture into discussions about political activism or citizenship... they tend to emphasize the virtue of ‘interactivity’, and to cast the non-professionalism of DIY media, and the ‘grassroots’ of media mobilization, in terms of a generalized, universalist understanding of democracy rather than in terms of the messy contradictions and contingencies of democratic citizenship in the historical and geographical production of convergence/cultures and, we might add, in wider politics.” (481)

and then Jenkins. This individualization, they suggest, may not gel easily with broad assertions about “culture”. This seems a reasonable criticism, and my own focus on content acquisition prioritizes individual choice in ways that risk losing sight of the field that situates and even requires that choice. Watching *Outlander* on an iPad after downloading it via torrent falls within a “convergence” framework, but it is not individual in a way that can be separated from the industrial, legal, economic, social, and cultural nexus that invites, enables, and defines that practice.

“Convergence” is not a term exclusively associated with Jenkins, but like many others I will use him here as representative of this broader set of arguments. Indeed, in response to that special edition, Jenkins noted an emphasis on his own work, among the “cluster of writers” associated with “Convergence/Culture” (Jenkins 2013a, 267). In this response, Jenkins defends his work against association with the overreaching suggestion that “mass media empires” are “dissolving” (270) in the wake of growing consumer power, and against accusations that his thesis is “totalizing” (275). He stresses that he has taken “no vantage point... above the fray” of ongoing changes in media and popular culture, and tried instead to “describe... what this process looks like from various localized perspectives” (Jenkins 2006a, 12). He also indicates his strong agreement that “it is time to pull back from both utopian and dystopian rhetoric” for a more “nuanced” account of digital participation (2014, 273). This agreement is followed, however, by the suggestion that his critics have “dismissed too quickly and too sweepingly the consequences of expanding the communicative capacity available to many compared to the far more narrow communication channels at play during the broadcast era” (274). Jenkins insists that cultural studies should remain “open to new

possibilities and emerging models rather than giving way to any discourse of inevitability”, whether that is “the technological determinism that assumes new media will necessarily democratize culture” or “economic determinism that assumes consumer capitalism will always fully contain all forms of grassroots resistance” (274).

Jenkins rightly identifies the principal focus of the cultural studies critique of convergence culture as “the political and economic implications of convergence culture” and also “the adequacy of the concept of participatory culture to address the full range of experiences people are having in and through digital media” (268). While distancing his work from any association with “technological determinism” he stresses that “many different factors, not simply the growth of networked computing, have served to make the current moment one where the stakes for participatory culture are especially high” (269). The very concept of “convergence” clearly stakes a historical claim, and at times, and in the hands of some writers, this claim does seem excessively broad. In his most sweeping rhetorical mode, for example, Shirky declares that “real technological revolutions are human revolutions as well. The architecture of the Internet has effected the largest transfer of power from organizations to individuals the world has ever seen, and it is only just getting started.” (Shirky 2001, 37). The open-ended idealism of such claims certainly needs some qualification. However, there may be other ways to leverage usefulness from the convergence framework.

From the early history of Internet development until long into the development of peer-to-peer networking, the aim of increasing forms of communication between different tools and

machines (different possible attachments to a network) was referred to as “interoperability”. Drawn from military logistics to describe computerized networking, interoperability names the capacity for different devices, databases, software, and other systems to work together by sharing information. This aspect of “media convergence” is clearly necessary for online media piracy to exist. Engaging with the convergence framework in this respect does not require agreement with all the arguments associated with the term “convergence culture”, or indeed attributing any specific values to the practices it encourages. Moreover, this allows me to limit the reach of the metaphor implied in “convergence”. The shift from watching one program on one screen with your family at one broadcast time, to watching different programs on different devices acquired by different means in different spaces is clearly not captured completely by describing it as a “converging”.

While distinctions do need to be drawn between types of online media piracy in the wake of the new technical possibilities of the Internet, I will argue that we can talk about their effects as transformed modes of media circulation without claiming any determined social impact. I want to distance my discussion from any radical liberatory claims about the importance of media piracy, and while the activities I am describing are not simply an industrially prescribed activity, neither do they represent a complete break from all previously recognizable forms of media consumption. Rather, they represent an influential, alternative mode of media consumption that, while it was not pursued by all media consumers, was broadly enough embraced that it required significant industrial responses. Over time these responses have managed, with some degree of demonstrable success, to

fold this activity back into the not only everyday but authorized operations of content industries.

Culture

This thesis is not the place for another attempt at the enormous task of defining culture along the lines of the efforts of Raymond Williams (Williams 1983a, 11-14, 87-93) and Tony Bennett (Bennett, Grossberg, and Morris 2013, 110-118). Williams famously claims:

Culture is one of the two or three most complicated words in the English language.

This is so partly because of its intricate historical development, in several European languages, but mainly because it has now come to be used for important concepts in several distinct intellectual disciplines and in several distinct and incompatible systems of thought. (1983a, 87)

Bennett describes further ways in which the use and meaning of “culture” has “multiplied extraordinarily” (2013, 111) even as the “unqualified use of culture as a normative standard” (112) – Williams’s “teashop” (Williams 1983a, 11-12; 2002, 93-94) – and its association with the “works and practices of intellectual and especially artistic activity” (Williams 1983a, 80, quoted in Bennett 2013, 112) have both declined. While I am interested, in this thesis, in recovering some of the usefulness of Williams’s discussion of how multiple meanings for (and multiple histories of) the same practices can be in play at the same time, culture itself will not be my focus.

This being said, there are some themes from the long discussion over the meaning and significance of “culture” that specifically matter to this thesis. The disagreements between Jenkins and the critics of “convergence culture” point to long histories of debating how social power is manifest in the field of culture, and represented and negotiated there. Both Williams and Stuart Hall are key figures in this history (see Turner 2003) which tends to accept that the full range of Williams’s meanings for culture remain active and important at some level, but emphasizes that culture cannot now be usefully understood as a static field of aesthetic objects. This matters to me because online media piracy is directed towards objects that can themselves be described as “culture”, but the “cultural practices” which are my object of study include the production and highly uneven distribution of those objects, and especially contentions about the different kinds of value that they have in themselves, can obtain from their limited distribution, or can acquire in their wider circulation. In this context, I will take on John Frow and Meaghan Morris’s definition of “culture not as organic expression of a community, nor as an autonomous sphere of aesthetic forms, but as a contested and conflictual set of practices of representation bound up with the processes of formation and re-formation of social groups” (1993, xx).

As the following chapters will show, ideas about “culture” enter scholarly studies in a range of ways compatible with this idea, but nevertheless not all in agreement with each other. There are often very different kinds of emphasis placed on the media content circulated by piracy as “culture”, on the social context(s) of those engaging in piracy as “culture(s)”, or on the practices of that circulation itself as culture. What often matters most is the relation between ideals of democratic access to “culture” and the industrial production of different

fields of “culture”. One of the critical frameworks that returns most often is best known under the heading of “The Frankfurt School”. The most prevalent references drawn from this mode of critical theory, produced largely in Germany in the 1930s and then in the U.S. during and just after World War II, are Walter Benjamin and Theodor Adorno. While there are other theoretical frameworks used to talk about the importance of access to culture, and about what limits or affords different kinds of access to culture (including those of Williams and James Carey, for example), the recurrence of this Frankfurt School mode of critical theory is important because it opposes the meaningfulness of cultural engagement to the industrial production of culture as a field of commodified objects.

Benjamin and Adorno famously do not agree about the value of culture, or what it contains, and certainly not about the imaginative and productive possibilities of mass-produced popular culture. In an extended discussion of the impact, particularly on Adorno, of Benjamin’s famous essay on “The Work of Art in the Age of Mechanical Reproduction” (see Benjamin 1992), Miriam Bratu Hansen notes that Adorno “chose the term ‘anthropological materialism’ to sum up all points on which he found himself disagreeing with Benjamin” when it came to the possibilities offered by contemporary culture (Hansen 2004, 16). Where Benjamin usually discussed popular culture as a place of creative and critically engaged insight, Adorno instead saw a crisis of value and a crisis for humanity posed by the industrialization of culture. In his most famous work with Max Horkheimer, Adorno argues that the “culture industry” typified by cinema and popular music involves the mass production of a subjectivity that wants to consume commodities, and sees its (alienated) desires as met by mass production that requires no active engagement from them (see Horkheimer and Adorno 2002).

The tensions between these perspectives recur across decades of literature on the impact and context of online piracy. Often, as in Shirky's claims about the revolutionary potential of the Internet, these tensions manifest in attempts to fend off a broadly accepted culture industry thesis. This echoes in Ekin Gündüz Özdemirci's vision of torrenting as finally undermining the tyranny of the culture industry:

For what appears to be for the first time in history, the BitTorrent protocol makes it impossible to maintain dominance over technology. This protocol seems to have a potential to free the artwork from the "control of the capital owners" which Adorno and Horkheimer called... the "economic mechanism of selection" and replace it with the individual mechanism of selection (Özdemirci 2014, 171).

Rather than embracing the culture industry thesis to see online media piracy as either supporting or resisting it, I want to agree with Williams that there is no such thing as "the masses", "only ways of seeing people as masses" (Williams 2002, 98). I will instead take online media piracy as a form of engagement with popular culture, and this engagement as a set of practices that have become increasingly everyday with far reaching consequences for what Adorno called "the culture industry".

As scholars of law and language like Lawrence Lessig and John Logie have broadly agreed, the media "pirate" is a rhetorical figure for drawing out the blunt interestedness of stakeholders in popular culture. It also matters, on the same terms, that studies of piracy often slip between the terms "entertainment media" and "popular media", with the latter clearly laying more claim to the culture people should be able to access, because it forms and represents shared social relations. Whether online media piracy addresses or aids such

a claim foregrounds contentions over whether or not media piracy is in fact a collective or community effort, rather than simply something that involves many people – whether or not it manifests any wider or more significant social relations. One of the reasons cultural studies might be more interested in piracy studies than it has been so far is the fact that it is centrally concerned with how individuals and groups understand and interact with legal, economic and social channels for the limited distribution of culture. This involves questions about the degree to which social power is centralized through cultural distribution, and in what respects the actions of individuals and groups might pose alternatives to such dominant arrangements. It is key to the critiques of convergence culture within cultural studies cited above, but also its fascination and usefulness for other writers in the same field, that the emphasis on “participation” in the work of writers like Shirky, Jenkins or Castells means there seems to be little room for discussion of power differentials, even though all agree that broadening cultural participation is of value. To what extent participation is increasing, and what kind of participation matters, are important questions for both fields. Does it matter if only a narrow set of companies produce the media content that most people identify with as a key source of pleasure? What if those massified pleasures generate profit for a relatively small group of companies and stakeholders? Does disrupting that apparently stable system of cultural production by cutting through specific revenue streams matter beyond particular bank balances? What is the social importance of the divide between cultural producers and cultural consumers – does it reflect other relations of power that may be harmfully inequitable? And, finally, what is the significance of a situation where people who profit from the status quo in cultural production can have those who disrupt it punished, or at least threatened with punishment?

In the scholarly literature on piracy one of the key debates is whether close analysis supports the political claim – made by some electoral parties and (anti-)copyright activists – that media piracy works in the interests of ordinary people, enabling communal relations through increased access to available forms of culture. In chapter three I will discuss this debate, with reference to activism and arguments surrounding copyright in relation to both capitalism and creativity, but also with reference to related claims about the radical political potential of piracy. These contentions connect with a long history of debate about the democratization of culture in cultural policy studies (Bennett 1992; McGuigan 2008), from educational agendas to positions on, for example, broadcasting as a form of cultural access. In fact, Jenkins also stresses the importance of contextualizing debate about “participatory culture” in a longer history of “struggles over media and participation”, in which such writers as Bertolt Brecht and Williams have suggested that more participation or direct involvement in media by ordinary people could bring about better, more democratic, outcomes (Jenkins 2014, 268-269).

As work on the political economy of media piracy by scholars like Yue Jie (2014), Ramon Lobato (with Thomas 2012; with Meese 2016b), and Laikwan Pang (2012) suggests, online media piracy may be most interesting because it offers good evidence for some competing theories about the relations between culture, law and economy. What seems clear is that online media piracy has had a cultural impact beyond any possible loss of revenue for specific rights holders, and thus beyond its most visible status as a legal problem. This doesn't evade a discussion of legality. In fact, in the prevalence of online media piracy we can see an uncommon willingness to break laws, which depends, according to a range of

studies, on justifications conscious of who loses and who profits from the circulation of media content. Nevertheless, while most discussions of media piracy focus on its ethics, I am more interested in the significance, and cultural implications, of its sheer prevalence.

One critical framework I make use of in this thesis, and which is also foundational for cultural studies, is the theorization of everyday life. One of my key arguments stresses the ordinariness of online media piracy through its integration into everyday life, but the everyday is more complex than “not special”. Or, rather, “not special” is a more significant idea than it is widely thought to be. For example, David Morley’s research into television audiences in the 1980s uses “everyday” as descriptor for domestic time and space. But he also argues that “the media are an integral part of the way the everyday is conducted”, thus situating “the everyday” as a particular practice (Morley 1986, 9). And his participants in turn use the word both as a synonym for “continually”, and as a way of talking about ordinary reality rather than representation: “It’s like everyday life.” (77). Across this thesis I will draw on the work of Henri Lefebvre to talk about the relation between everyday life, leisure, and productivity, and on the work of Michel de Certeau to talk about the ways power is enfolded into everyday life without requiring a hierarchical narrative of top-down control.

I will employ de Certeau to position everyday pirate “tactics” as ways of using and doing the online circulation of popular media, while also acknowledging how these tactics have, by various “strategic” industrial attempts to capture them, transformed the media systems that arose in the twentieth century. This relation between the ordinary, or everyday, and the

experience and negotiation of change is another argument which will bring me back to the work of Williams, this time on the ordinariness of culture (see Williams 2002). I agree with writers on media piracy, like Jonas Andersson Schwarz and James Meese, who reject both the political lionization and demonization of “pirates”, and stress the ordinariness of piracy as a mode of media consumption. Online media piracy has become an ordinary part of the terrain of media consumption in many, if not most, parts of the world. In the second decade of the twenty-first century it is, as Schwarz argues, part of the “backdrop for everyday life” (Schwarz 2012, 585). I will also stress, however, that this ordinariness does not undermine its extraordinary impact. If the most important effect has been demanding changed forms of distribution for media content, and shaping those new forms, this alone involves consequential shifts in how media consumers think about and engage with media texts. Online media pirates have devised and maintain significant new modes of content *circulation* that have made post-distribution circulation a newly important and highly visible stage in the life of all media content.

Change

It is axiomatic that I am writing at a particular historical “conjuncture”, following the use of this term by writers like Hall and Lawrence Grossberg. For cultural studies, conjuncture involves “an interrogation of contexts”, which, after Hall, Grossberg interprets “as a particular way of constructing contexts” (Grossberg 2010, 20). The “cultural-historical conjuncture” is a “radical contextuality”, starting with the recognition

that the identity, significance, and effects of any practice or event... are defined only by the complex set of relations that surround, interpenetrate, and shape it, and

make it what it is. No element can be isolated from its relations, although those relationships can be changed, and are constantly changing.... This radical contextualism is the heart of cultural studies. (2010, 20)

The specificity of the moment in the history of online media piracy at which I am writing means that both the conditions and practices I am writing about may change dramatically. This question of the conjuncture is thus crucial to my approach, and I have organized this thesis so as to lay out the historical, media, legal, and cultural contexts for online media piracy before turning to critically reflect on the difficulty of writing at a cultural-historical conjuncture which is, as Grossberg says, “constantly changing”.

One of the most interesting characteristics of online media piracy is how clearly it needs to be understood as a conjunctural reality, as a field of radically contextualized practices all of which are determined by specific industrial, legal, economic, cultural, collective, and individual factors. These determine not just what place piracy has in relation to specific uses of media content, but what piracy means as a form of media use. The practices of online media piracy have transformed, directly and indirectly, how we understand and experience the circulation of culture. Online media piracy – including the threat it is sometimes thought to pose to content industries – thus impacts on how a broad array of cultural forms circulate. One of the reasons for hesitating to call this impetus for change “convergence” is that it exceeds media interoperability and yet cannot be homogenized into a set of cultural values. The changes online media piracy has inspired vary in intensity and emphasis according to specific contexts. To return to the advertisements with which I began, Telstra TV is addressing forms of anxiety, pleasure and consumer behavior that will be recognizable

in many places, but not everywhere. And even if they seem familiar elsewhere, the moment of Telstra TV's appearance is still economically, legally, industrially, technologically and culturally Australian. More even than that, it belongs to a particular moment in the history of Australian telecommunications as a conjuncture of those fields.

As a research topic, online media piracy is often caught up in discourse on new media, and in particular discourse on the relations between technological change and cultural change. Clearly the rapid expansion of forms of online distribution from the 1990s is propelled by the availability of new technologies. For example, the dominance of music over video piracy in the late 1990s and the start of the 2000s is at one level simply a matter of what was technologically possible for most users. That fact stated so bluntly does not, however, explain why people wanted to use new technology in that way – why they sought to refine available technologies in that direction as well as tailor their use in that way. Technological change also underpins the difference of piracy when it involves digital content, the distribution of which is more difficult to control because of its form. This recognition also raises questions about relations between the users and producers of technology as well as between users and producers of content. The problems encountered by content industries confronted with the cultural uses of digital technology, and generated by their attempts to profit from them, have only grown with the proliferation of mobile digital media devices over time. For all these reasons, my thesis is necessarily also engaged in debates over technological determinism, media change, and the relations between them.

The Internet is at the heart of most recent transformations of the popular media environment, such as the emergence of video-on-demand (VOD) formats for film and television consumption, but these changes are continuous with earlier changes, including the emergence first of music downloading, and then music streaming and online self-curated radio sites, the expansion of cable television in the 1980s and 90s, and international trade deals impacting media rights throughout the world. But the Internet itself has never been a static formation, and this thesis discusses how the emergence of new forms of peer-to-peer networking have generated new forms of online media piracy, that have had dramatic and lasting effects on media “content industries” and popular culture more generally. This includes a transformation of the relationship between users of media technologies and the everyday forms of access to and curation of popular media.

In his famous book on *Television*, which in some respects forms a model for my thesis, Williams contends that when we discuss new technologies “we really do not know whether we are talking about a technology or about the uses of a technology” (Williams 1974, 2). This seems a very useful prompt for responding to the problem of the relationships between technological and cultural change, and although Jenkins would certainly align his version of convergence culture with that same claim, I think returning to Williams can reframe online media piracy as a media practice that is as ordinary (and extraordinary) as television ever was. Moreover, I would argue that in the case of either television or online media piracy, the ambiguity of talking about technology and its uses doesn’t need to be resolved, because what Williams calls the “very complex interaction between new needs and new inventions” needs to be maintained (1974, 8). I will particularly be drawing on Williams to propose that

there is a symbiotic relationship between the emergence of online media piracy and the industrial, economic, legal and technological changes that have shaped popular media since the 1990s.

Structure of the thesis

I will close this introduction with a brief map of the chapters that follow, relative to the positions outlined above. First, however, I want to make a comment about method. I have not attempted to conduct interviews or ethnography with either “pirates” or their supporters or opponents. I do draw on some such studies here (including De Kosnick 2012; Schwarz 2012, 2013; da Rimini and Marshall 2014), and also on other representations of “pirates” and their attitudes to piracy (including Meese 2014; Witt 2015; Fredriksson 2016). As I discuss at length in chapter four, although I want to engage with this new literature on “piracy cultures”, and indeed engage the approaches and findings of that literature with cultural studies, I am more interested in the historical-cultural conjuncture that produces online media piracy in its many contemporary forms, which in turn produces this new scholarly interest in studying “pirates”. In this respect individual accounts of piracy are not as interesting to me as the broader field in which the recording of such accounts is something undertaken by academics, by the producers of piracy resources, and by industrial and legal representatives seeking to counter media piracy.

Chapter one, “Online Media Piracy and Content Acquisition”, introduces the historical context for online media piracy and its subsequent impact. This involves overviewing the

events surrounding its emergence and transformation, and outlining my own approach to piracy practices. To this end, chapter one defines some key terms, including my use of the term “piracy” and what is meant by some of the common names for piracy tools. It also maps some themes that link chapters two to four, including centrally “content acquisition”, and situates this concept in relation to the literature on convergence, participation, and everyday life. With these outlines and definitions, chapter one also works to map the conceptual and historical foundations of the field of “piracy studies” that has emerged in recent years and which I draw on across this thesis.

In chapter two, “Convergence: Television and the Internet”, I will consider more closely the emergence of what I have called content acquisition through a case study of television. Contemporary television is assembled with the Internet in a range of ways that enable new modes of promoting, distributing and consuming television aligned with the interests of television as an industry, even while this assemblage also affords ways of watching television that move beyond authorized channels via peer-to-peer file-sharing and torrenting, streaming, and other still-changing techniques. This account particularly focuses on the overlap between literature on media convergence and literature on fan culture, considering how the attachment-driven activity identified as making fans a particular kind of television audience might provide a perspective on some of the questions raised around piracy activities. The case of television allows me to consider both how piracy practices emerge and change differently in relation to different content industries, and how they interact with more apparently ordinary, everyday forms of media consumption.

Chapter three, “Copyright Wars”, turns more directly to the definition of copyright, and to the legal principles and instruments which aim to draw an unambiguous line between legal content acquisition and piracy. Considering the widely acknowledged difficulties attending this aim, chapter three overviews a set of legal and economic concepts, practices and events well-known to the literature on media piracy studies, and to scholars of rights and intellectual property, but which might be troubled by a focus on content acquisition. This chapter not only considers how “piracy” has been defined and redefined following the mainstreaming of media piracy that was enabled by peer-to-peer networking and online digital culture, but also asks what the ordinariness of online media piracy understood as content acquisition means for ongoing copyright debates, litigation and legislation. Chapters two and three thus respectively situate my thesis in cultural, media, and communications studies and in piracy studies, and overall my thesis is clearly situated at this interdisciplinary junction.

There has recently been an expansion of scholarly attention to what is sometimes called “Piracy Cultures”. Chapter four takes this label as a cue to considering more closely what it means to discuss online media piracy as *cultural*. The “piracy cultures” literature is generally oriented towards either communications studies or cultural studies, and often takes up theoretical approaches, tools and terms familiar to cultural studies. But as with piracy studies more broadly it rarely foregrounds this question, and chapter four considers a range of recent writing on “piracy” and “pirates” to ask what cultural studies might now contribute to the analysis of piracy practices. This chapter foregrounds the specific example of online sports piracy as a way of linking this discussion to all the previous chapters,

positioning online media piracy at a conjuncture of industrial and popular interests, tied to technological, economic and legal developments that do not entirely determine it.

By way of conclusion, chapter five, titled “The Problem of Media Change”, turns to the difficulty of writing about a historical-cultural conjuncture while it is changing. Situating the broader thesis at the intersection of historiographical, media, and cultural theory, this chapter explores the problem of the “newness” ascribed to all digital media and culture, even that which is now decades old. A project like the one I have undertaken here inevitably engages with rapidly changing fields of practice (as well as inquiry) and is thus easily overwhelmed by its object’s orientation to the present, and even the future. Yet the debate about how to discuss media change is not very easily adapted to the problem of thinking about such a polymorphously hybrid legal, economic, technological and practical object as online media piracy. Taking on this reflexive theoretical task seems an appropriate way to raise the seemingly imperative “what next” question for a cultural studies approach to online media piracy.

Chapter 1 – Online Media Piracy and Content Acquisition

My central argument in this thesis is that the transformations of media culture usually described by the term “media convergence” were significantly influenced what is commonly referred to as “online”, “digital”, or “Internet” media piracy. In this first chapter I will both establish a historical context for that argument and introduce a range of concepts that will help me explain how media industries have attempted to counter this by mimicking it in authorized forms. In response, those piracy practices have themselves continued to change, producing new ways of operating and new forms of individual and collective access to media, with further consequences for its production and circulation. In overviewing these questions I will also outline a range of central themes for this thesis.

I must begin with three points about terminology. First, “piracy” itself is not the only or necessarily the best term for the practices I am discussing here, being neither obvious nor even descriptively correct, and having gained its current recognizability from a very specific set of interested debates. I will seek to explain the importance of this choice in this chapter. Second, “online” media piracy is not the only possible qualification for “piracy” that I could validly use here, and many of the writers I will cite have chosen some version of Internet or digital piracy instead. Here, my choice is an attempt at precision. I will have very little to say in this thesis about non-digital forms of piracy, or even offline piracy dealing with digital goods. However, not all of the piracy I am discussing happens on “the Internet” as it is commonly understood. I am also exclusively interested in piracy of popular media, and one of my central concerns will be the relations between piracy and media industries. My third

terminological choice, then, will be to refer to these industries as “content industries”, rather than “media”, “entertainment”, or “culture” industries. This last choice is consistent with most writers on copyright and online media piracy, but like the other choices I have made here it requires some historical contextualization.

A pirate history I: Discourse

In accounting more carefully for what “piracy” means for the central object of my research, I want to structure this first section around, and in response to, John Logie’s rhetorical analysis of discourse on media piracy. In *Peers, Pirates and Persuasion* (2006), Logie is interested in the “rhetorical hermeneutics” (after Stephen Mailloux) of such discourse; that is, in how a series of “contested terms” serve as “focal points for the competing parties” in the piracy debates of the late twentieth and early twenty-first centuries. Logie structures his book around five such terms – “hacking”, “theft”, “piracy”, “sharing” and “war” (2006, 21) – arguing they are rhetorical devices that “consistently distort both the technologies and the social behaviors they purport to describe” (21). I also take up Logie’s terms here in a minor version of what Ted Striphas calls the “historico-definitional” mode (2015, 397), acknowledging that “some important social and historical processes occur *within* language’, giving rise to new existential territories that only later come to be populated by technical artefacts” (Striphas 2015, 397, quoting Williams).³ These terms offer a starting point for my

³ Striphas’s study of “algorithmic culture” takes its cue from Williams’s *Culture and Society* (1960), in which Williams takes transformations in the words “industry, democracy, class, art and culture” as embodying “a general change in our characteristic ways of thinking about our common life” (Williams 1960, xi, quoted in Striphas 2015, 398). Striphas also suggests a list of words that, through their “history and interconnection”, might offer similar insight into the way the “coordinates of culture” are shifting now: “analog, *application*, *cloud*, *code*, *control*, *convergence*, *copy*, *data*, *design*, *digital*, *format*, *free*, *friend*, *game*, *graph*, *hack*, *human*, *identity*, *machine*, *message*, *mobile*, *network*, *noise*, *peer*, *platform*, *protocol*, *search*, *security*, *server*, *share*, *social*, *status*, *web*” (398, *emphasis added*). As Striphas notes, these words existed long before their current usage came into vogue, but they have become key to the way we think about a newly connected world. It is worth noting how many of them – marked by my added emphasis – are involved in online media piracy.

own very short history of online media piracy and the technological and cultural changes that made it possible. Finally, I will add to Logie's useful list some terms from the scholarly meeting point between "media convergence" and "piracy studies".

Logie argues that "of all the shifting, fluid terms used to describe the Internet and its associated cultures, no term is more contested than 'hacker'" (2006, 22; see also Johns 2009, 473-91). Between the 1960s and the 2000s, the moral valence of "hacking" morphed from a figure Logie characterizes as "digital explorers" (Logie 2006, 24), who might be lionized as "changing the world" in a manner akin to astronauts (27-28), to a set of troublesome and destructive criminals. Adrian Johns describes this as the "transformation of hackers from anarchic geniuses into criminals and terrorists" (2009, 491) metonymically representing the dangers of a newly technologically connected world. We can clearly see such a transition in popular images of hackers. When young David Lightman accidentally hacks into a national military system in the movie *WarGames* (Badham 1983), he may be careless with his talents, but they expose a problem that it is not of his making, and which needs exposing. David is, in the end, a heroic genius with a moral grasp on the difference between play and destruction that saves the world.



Figure 3: *2600: The Monthly Journal of the American Hacker* 4.6, June 1987 (see Johns 2009, 488).

WarGames was so successful that The Mentor, author of the 1986 Hacker Manifesto, properly titled “The Conscience of a Hacker” (Blankenship 1986), credits it as the only thing anyone knew about hackers when he was writing (Blankenship 2002), although it is around this time that, Johns notes, that “a digital counterpublic came to constitute itself. Hackers developed a number of flamboyantly libertarian periodicals aimed at the knowing” (Johns

2009, 487; see Figure 3). A late sequel to *WarGames*, *WarGames: The Dead Code* (Gillard 2008), was notably unsuccessful and released direct to DVD. Regardless of its quality in general, a key problem faced by this film is that the equation of hacking with childhood creativity and naiveté had not survived the preceding 25 years. Even by 1995, when the teen protagonists in the film *Hackers* (Softley 1995) repeatedly cite the “Hacker Manifesto”, their hacking is more clearly self-interested, motivated by peer competition as well as boredom and curiosity, and hacking’s social consequences are intimately tied to corporate extortion.

None of these young hackers use their skills to share popular media, although Crash and Burn in *Hackers* meet while taking over television station signals in order to manipulate what is screened. They may seem to have little to do with what we now know as online media piracy. However, the link between hacking and media piracy is not only about computer skills. The generationalization of early stories about hacking was matched by early and indeed long-dominant stories about online media piracy. Further, the Hacker Manifesto itself stakes a claim in hacking as action against established networks of power and profit:

This is our world now... the world of the electron and the switch, the beauty of the baud. We make use of a service already existing without paying for what could be dirt-cheap if it wasn't run by profiteering gluttons, and you call us criminals. We explore... and you call us criminals. We seek after knowledge... and you call us criminals. (Blankenship 1986)⁴

Despite the connotations of “criminal trespass” built into the name (Logie 2006, 24), “first generation hackers” were at times represented positively, as in Steven Levy’s account of a

⁴ Very similar rhetoric is apparent in Piotr Czerski, “We, the Web Kids” (Czerski 2012), which circulated widely, including among academics and pirate politics in 2012 (for a discussion of this, see Fredriksson 2014, 1036).

“hacker ethic” (24-28), which is egalitarian, anti-authoritarian and based on freedom of information.

This image of the hacker continues to have a popular as well as critical life. Fictional characters like Skye in *Marvel’s Agents of S.H.I.E.L.D* (Tancharoen, Whedon, and Whedon 2013--) refer to the now long history of anti-authoritarian “hacktivism”, the phrase “life hack” has entered the popular lexicon to signify attempts to get the most value for the least everyday effort, and figures like Aaron Swartz and Julian Assange are highly visible continuations of hacker disruption as well as representing the dangerous power of the institutions they strive to thwart.⁵ Logie’s book could share a shelf with McKenzie Wark’s *A Hacker Manifesto* (2004), a Marxist analysis of intellectual property in the information age that introduces the term “vectoralist” to identify a “class” which aims to profit from channeling information and hacker innovation. Wark argues that, “where private property dominates, as in the vectoral world, it accelerates the hack by recognizing it as private property, but thereby channels the hack into the relentless reproduction of the commodity form.” (2004, 270). This is an argument to which I will return in chapter three, but the way Wark conflates hacking and piracy is useful to me here. The hackers are the producers who “are the source of all the images, the stories, the wild profusions of all that culture becomes”, and while “the vectoralist class wrestles all this into the commodified form... the

⁵ Swartz was a computer programmer and Internet activist who became most famous for downloading a large number of academic articles from digital library JSTOR, being subsequently charged with forms of “wire fraud” and “computer fraud”, among other charges, before committing suicide while under indictment. Assange is a hacker and computer programmer most famous for founding anonymous publishing service Wikileaks, and seeking asylum in the Ecuadorian embassy in London while avoiding rape charges in Sweden, extradition orders in England, and possible extradition to the U.S. to face charges related to national security.

producing classes bootleg and pirate any and every expression of information freely” (2004, 309).

Both Johns and Logie argue that a subset of hackers known as “crackers” – those who crack the codes protecting rights of various kinds – helped inspire condemnation of new digital technologies that eventually propelled online media piracy to international visibility and influence. While Levy’s *Hackers: Heroes of the Computer Revolution* (Levy [1984] 2010) mourned the popularization of a hacker figure identified with kids who “electronically ventured into forbidden digital grounds” (Logie 2006, 30), Logie notes this did not prevent such crackers from referring to themselves as hackers. While Johns (2009) focuses on the links between telephone and computer hackers, Logie’s key example is Napster, the “peer-to-peer” file-sharing client for MP3 audio files launched in 1999 and closed down after legal action in 2001.

Despite Napster’s brief success it nevertheless offers an iconic story of how online media piracy works, of who contests it and how, and the after effects of its success. Napster is an example I will return to several times across this thesis, along with the now equally iconic torrent index The Pirate Bay, founded by Swedish group Piratbyrå in 2003 and subject to ongoing legal action from 2006 through to 2018. These examples have become touchstones for the legal, economic and cultural difference of the digital age (see Figure 4), and for online media piracy more particularly. As Dan Fleming puts it, “the first decade of the twenty-first century began with Napster and ended with The Pirate Bay” (2012, 674).

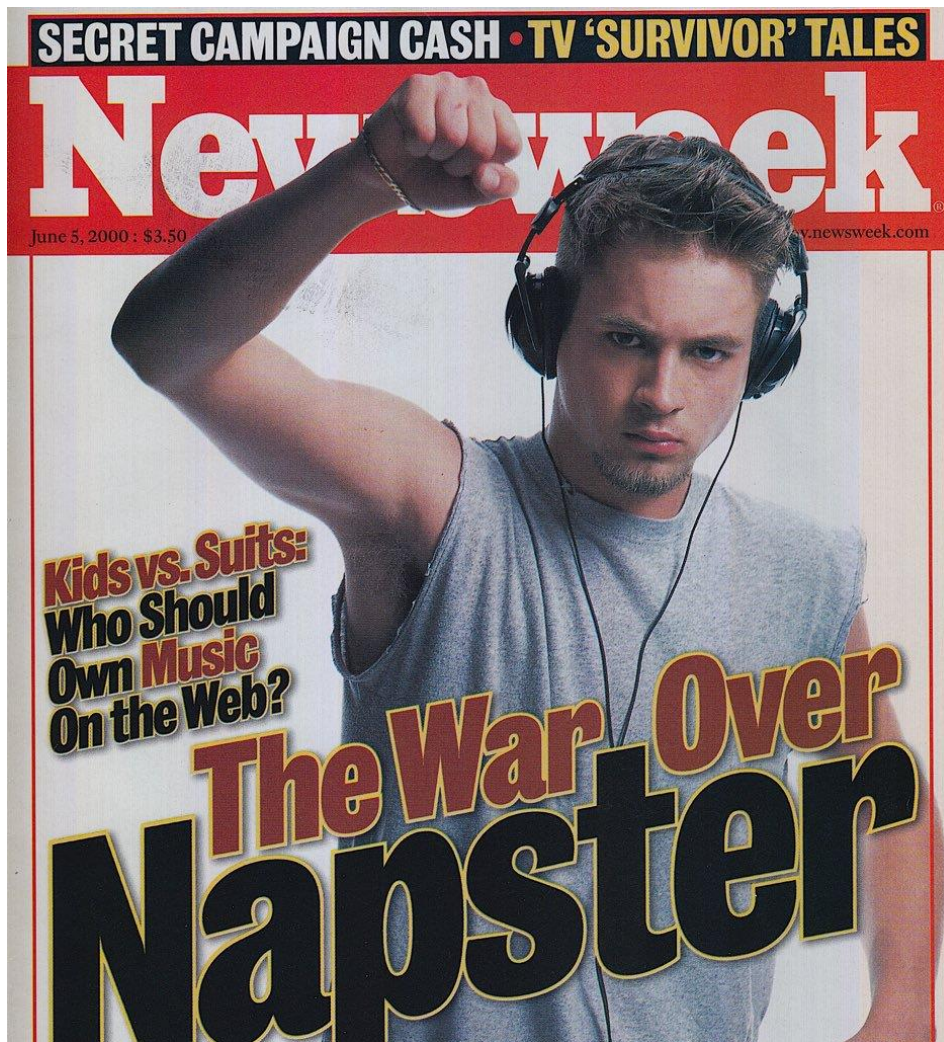


Figure 4: Newsweek cover, 05/06/2000

While I will juxtapose these cases with less well-known examples, here I want to use the familiar example of Napster, which Logie sees as adding to the new popular taxonomy of “white-hat security workers and black-hat malicious hackers” the “grey hats who create their own ethics” (2006, 33-34).

Napster’s development stands out in the history of simultaneous technical and ethical experimentation with the possibilities of digital culture because its rapid popular expansion forced the music industry into simultaneously legal and industrial responses. Napster’s “hacker” image was played up by the media, but also by Napster itself, which as a

corporation continued to use Fanning as a figurehead long after he had ceased to control the company. While this image drew attention to the legal grey area that Napster was making highly visible, it was also a brand icon, and “the implicitly transgressive aspects of Fanning’s public persona offered Napster a point of connection with its anticipated users” (Logie 2006, 38). The epitome of the dorm-room hacker genius, Fanning matched the “ambiguous” image of the file-sharing pirate, “generally a young white man hiding behind a computer screen somewhere in Europe or North America, downloading movies and music” (Arvanitakis and Fredriksson 2014, 1).

Napster needed people to know they could share files, and where and how to share, at first because it required the spread of new literacies and then later because publicity over trials might have deterred users. That the opposite seemed to happen is widely documented. The spectacle of Napster’s success as the first “mainstream” peer-to-peer file-sharing service (Shirky 2001, 27) is mapped by an array of statistics, cited by many with varying emphasis:

Napster accumulated users at an extraordinary rate. In just 18 months, without any advertising, it had attracted 38 million users; in 2 years, this number had risen to almost 60 million. With over 500 000 people logged into the system at any one time in the year 2000 (Leyshon 2003, 549);

“Between February and August 2000, the number of Napster users rose from 1.1 million to 6.7 million, making it the fastest-growing software application ever recorded” (McCourt and Burkart 2003, 339); and a number of universities sought to restrict access to Napster “to conserve network bandwidth” (Truelove 2001, 62), with 20-30% of all traffic on the servers of Northwestern University in January 2000 directed to Napster (Logie 2006, 5). All of this

culminated in a monthly peak of 2.7 billion audio files in February 2001 (Atkinson and Fitzgerald 2014, 112), just before the service was shut down.

Alongside services like Gnutella and Freenet, “inspired by Napster”, Napster both modelled “the emergence of fully distributed information sharing systems” (Adar and Huberman 2000) and disrupted the music industry’s dominant model of distribution and thus its profit model (Shirky 2001, 32). It was “the most significant of all players,” in a broader moment of transformation, “if only for the sheer might of its brand and inertia of its legacy” (Truelove 2001, 74).⁶ The subsequent life of “Napster” captures a great deal about the future of the record industries’ attempts to negotiate the challenges of online media piracy. As journalists and historians have outlined, after the lost court cases of 2001-2002, Napster went bankrupt, and its name and image, liquidated under court observation (Menn 2003, 304; Nieva 2013), were bought by software company Roxio to rebadge the online music store Pressplay, which Universal and Sony had set up in response to Napster (Graves 2016). This new “legal Napster” was a subscription download service, and its new main competitor was the download version of the iTunes store. Kelley Truelove et al. (2001) map the various authorized and unauthorized attempts to capture the online music consumer audience at this time, and “Napster 2.0” was quickly bought by retail company Best Buy during the “mid-aughts mania among retailers vying for a stake in digital music” (Graves 2016).⁷ However, the Napster user-base was not carried by the brand-name in the wake of its shutdown.

⁶ Jenkins recalls a 2003 “New Orleans Media Experience” event at which, “If the game industry folks had the smirking belief that they controlled the future, the record industry types were sweating bullets; their days were numbered unless they figured out how to turn around current trends (such as dwindling audiences, declining sales, and expanding piracy). The panel on ‘monetizing music’ was one of the most heavily attended.” (Jenkins 2006a, 9)

⁷ David Choi and Arturo Perez outline how Napster propelled the development of better digital audio files: “Before Napster, Universal, BMG and Sony had promised to make music available for downloading by the end of 1999, only to let the deadline pass, invoking ‘lack of adequate technology’ as their reason” (2007, 171). It

In 2011, Napster was bought by Rhapsody International, a streaming music provider which was one of a number of services begun around this time (2001 in Rhapsody's case), attempting "to create a legal version of Napster, one where people could listen to unlimited streaming music for a flat monthly fee" (Graves 2016; see also Truelove et al. 2001). This was widely thought to be the end for the Napster name (see Nieva 2013), but in 2016, seeking to expand its market share against the services available from Spotify, Apple, and Google, Rhapsody also attempted to leverage the Napster image. As *TheVerge* quixotically announced it, "Rhapsody rebrands itself as Napster because ヽ_(ツ)_/_" (Popper 2016). Each of these attempts to legally harness Napster's once ground-breaking appeal were shadowed by ongoing developments in online media piracy as well as by the legal competitors such moves openly acknowledged.

Across the years in which content industries and legal systems worked to popularly cement the equation between hacking and theft that events like Napster had simultaneously made visible and questioned, copyright laws were also being transformed. In chapter three I will consider how legislation such as the U.S. No Electronic Theft (NET) act (1997) and Digital Millennium Copyright Act (1998) set the stage for ongoing actions by which content industry lobbyists and government support have striven to thwart, predict, and channel the

also pointed out market flaws in the content industries first authorized attempts at digital downloading: "PressPlay only offered songs owned by Sony and Universal, while MusicNet offered songs only from its partners. They also operated with a monthly fee for which its target market was not willing to pay. Concerned about cannibalizing their CD sales, PressPlay and MusicNet offered file formats that restricted members from transferring a downloaded music file to a friend or even to a portable MP3 player", and other copying restrictions (171). iTunes improved on this address to the Napster consumer, and Apple Music drew on the new model developed by platforms like Spotify. While music streaming services do not allow the same kind of file management or manipulation as downloading from Napster once did, they also make it unnecessary for the purposes of convenient sharing – it is easier to send someone a recommendation they also access through the extensive content library of a streaming service.

development and use of online tools for copyright infringement. Among these actions is the insistent representation of a new figure in place of the hacker – the online media “pirate”. Labelling those who used such technologies to infringe copyright as “pirates” is a direct product of the Napster trial era, and of litigation against peer-to-peer services more broadly (see Appendix). This brings me to the third of Logie’s five terms – through hacking and theft to piracy.

Many scholars have offered histories or analyses of the use of “piracy” to talk about copyright infringement (see also Litman 2001; Arvanitakis and Fredriksson 2014; Crisp 2014; Meese 2014; Larsson 2017). Logie notes the “sharp contrast” between the Oxford English Dictionary’s two primary definitions of piracy: one being the crime of robbery on the sea or rivers, and the other being infringement of a patent or copyright (Logie 2006, 69). Given the way the prior definition imports connotations of threat into the latter, Logie rejects the widely “uncritical acceptance of ‘piracy’” as a label since it was used to describe “Napster’s activities” in a 2000 court decision (2006, 67). In characterizing the piracy label as an intentional branding exercise on the part of content industries, Logie goes far beyond Jessica Litman’s recognition that during the 1990s the meaning of “piracy” was expanded from counterfeiting to mean “any unlicensed activity” (Litman 2001, 85).

The RIAA didn’t make this connection when they declared, in 2003, that:

Today’s pirates operate not on the high seas but on the Internet, in illegal CD factories, distribution centers and on the street. The pirate’s credo is still the same – why pay for it when it’s so easy to steal? The credo is as wrong as it ever was.

Stealing is still illegal, unethical, and all too frequent in today's digital age. (quoted in Jie 2014, 195).⁸

The label was supposed to counter a general sense that music downloading was just common practice, rather than theft. Particularly among the young users of services like Napster. With reference to the making and sharing of cassettes by "Johnny Teenager", Litman argues:

These "pirates" are doing the same sort of things unlicensed users have always done—making copies of things for their own personal use, sharing their copies with their friends, or reverse-engineering the works embodied on the copies to figure out how they work. What's changed is the epithet we apply to them. (2001, 85)

Another link might be added here, however, to stress a connection between piracy-at-sea and forceful intervention in the industrial management of communications: pirate radio. Johns notes such other precedents as "pirate" buses (2009, 7), the pirate "tape worlds" arising from the arrival of new audio-recording technologies in, for example, African countries (460). But he devotes an entire separate book (Johns 2011) to the way pirate radio stations transmitting unlicensed radio broadcasts into the U.K. transformed the media environment that was previously ruled by public broadcasting. In the 1960s in the U.K., "pirate radio" came to refer to radio stations run from ships and sea forts broadcasting from international waters, playing mostly pop and rock music that wasn't catered for by the legal services operated by the British Broadcasting Corporation (BBC). Pirate radio included

⁸ Logie notes that one 2005 Recording Industry Association of America (RIAA) definition of "online piracy" encompassed not only "unauthorized uploading of a copyrighted sound recording", and "downloading a sound recording from an Internet site, even if the recording isn't resold", but even "certain uses of 'streaming' technologies" (2006, 68).

famous figures of the British music industry, like John Peel (Chapman 1992), and boasted an audience of millions of ordinary listeners (Boyd 1986). Here, the metaphorical significance of “piracy” is more obvious: these stations were broadcasting from international waters to avoid being subject to the laws of the land, until the Marine Broadcasting Offenses Act curtailed their practices in 1967, and in the case of Radio London they were even on a “pirate ship” (Boyd 1986, 86-87). Much like the “pirates” of the Internet age, they were also providing access to sought after media products, particularly for younger demographics, and in the aftermath of their activities BBC radio was restructured, including a pop music service, BBC Radio 1, for the first time from 1967.

Arguments against simply accepting the term “piracy” as a descriptor of online media file-sharing are nevertheless fairly convincing, which begs the question of why I am using the term “piracy” myself, for which its familiarity cannot be an entirely sufficient defense. Piracy is the right term for my argument precisely in order to capture the *threat* that content industries seek to identify in all, but especially new, practices that might be, just as newly, deemed to infringe on copyright. The term acknowledges the urgency that content industry lobbyists and litigators have sought to invest in their actions and, moreover, it has subsequently been embraced by many of those infringing on copyright.

The peer-to-peer trials of the early 2000s extended into the “copyright wars” of the mid-2000s, which included not only further trials but the emergence of anti-copyright lobbying groups and “pirate” political parties all focused on a countervailing interpretation of the relations between media, culture, and copyright law (see Fredriksson 2014; 2016). To return to Wark’s terms, the theft or sharing question involved deciding on an extension of

copyright in these cases, given that they sought to identify proprietary rights in digital copies and to define copyright infringement by potential loss of profits:

The public good is to be measured by the margins of the vectoralist industries and by nothing else. Having secured its interests thus far, the vectoralist class then argues for complete enclosure within property of every aspect of information. They want to encrypt information, binding it artificially to particular material objects. They want criminal sanctions for anyone else who breaches this now absolute private property right. (Wark 2004, 71)

These are questions I consider in detail in chapters three and four, but here I am interested in how the political-legal debates and the popular practices of the 1990s and 2000s established a new discursive terrain.

Looking back across almost two decades of such rhetorical conflict we can see the problem of how to name the practices of media circulation I am discussing in this thesis as a recurring issue, and one that reveals something important. Introducing an account of the “war on piracy”, copyright scholar and activist Lawrence Lessig cites George Lakoff and Mark Johnson to describe how the social and political metaphor of war is used, at least in the U.S., to constitute “a license for policy change and political and economic action. The very acceptance of the metaphor provided grounds for certain interferences ... the populace would have to make sacrifices; if we didn’t meet the threat we would not survive” (Lessig 2008, xiv). Lessig notes the “dangerous” elements of applying this metaphor to “contexts in which, in fact, survival is not at stake” (xv). Logie similarly discusses how content industry representatives seek to influence the copyright debates by utilizing war metaphors, comparisons to terrorism, “Churchillian” combative speeches, and similar rhetorical

escalation (2006, 108; see also Özdemirci 2014, 159). It is in order to contest such inflated rhetoric that Logie argues against using the term “piracy” at all. However, more than a decade later, avoiding the term piracy seems impossible when writing about the struggle between digital rights and the “sharing” practices of digital culture. It is now key to a historical field of debates about what it means and, more precisely, what it threatens.

Already in 2001, Litman’s *Digital Copyright* focuses an entire chapter on the problem of “Choosing Metaphors” to discuss how the story of U.S. copyright shifted from a “bargain” between parties to the “property” of one party (77-88), and Larsson’s recent book on “legal challenges in digital times” claims these are all explicable by metaphors (Larsson 2017). As Jessica Reyman notes, before also unpacking allusions to wars against terrorism and drugs in anti-piracy campaigns (2010, 128), legal scholars have themselves long been interested in the metaphors used to explain relations to intellectual property (22) and this is as true of groups lobbying to limit copyright as those lobbying to expand it. Logie himself notes that “piracy” advocates respond to such rhetoric with their own discourse on “revolutionary” technologies, and the “liberation” of culture or information. While speakers decrying Napster subtly referred to World War II and “9/11”, pro-Napster speakers were using the language of the American revolution, such as “live free or die” (Logie 2006, 109-111). By positioning peer-to-peer services as merely facilitating sharing, piracy advocates actively avoid acknowledging that they also host files, copy media, and upload materials. This may be legally necessary at times, but it is also part of the same rhetorical struggle.

A pirate history II: Tools

The peer-to-peer trials of the early 2000s (see the Appendix) focused on a definitive question that will return many times across my thesis because it underscores most critical analysis of piracy practices and most popular discourse on media piracy since the late 1990s, as well as most case law and related legal theory: is the distribution or exchange of digital files of copyrighted material “theft” or “sharing”? In calling such practices “piracy”, the content industry representatives aimed to remove any ambiguity on this question, but the answer is nevertheless not simple. While Logie argues that advocates of peer-to-peer services are “right to reject formulations that position them as thieves or pirates”, he equally insists that such services are “not a form of ‘sharing’ as the term is conventionally understood” (2006, 100). Even the terminology “peer-to-peer” implies a positive ethical terrain despite its technically accurate description of the relation between computers and servers in the mechanics of an example like Napster. The more contestable term “file-sharing” carries this implication even more clearly.

If rhetorical analysis is useful for helping us understand the legal arguments and public discourse on this subject, it is also worth considering the importance of that technical accuracy. Any history of online media piracy must be a history of tools as much as a discursive history. Even at the level of governmental, industrial and popular response to online media piracy, particular tools afford or limit practices. The “tools” relevant to such a history are vary varied. They may be, technically or just by agreed terminology, “platforms”, “clients”, “protocols”, “sites”, “indexes”, “apps” or “applications”, “programs”, “nodes”, “algorithms” or “servers”, but they are the technical means by which online media piracy is put into practice. Some clarity about these types of technology will be useful to contextualizing the practices I discuss in the following chapters.

From the late 1990s to the present we might loosely identify five types of online media piracy practices encompassing a mix of tools: trading media user-to-user via forums of various kinds; peer-to-peer (often abbreviated as P2P) file-sharing using decentralizing applications like Napster as a connecting point for users; second generation peer-to-peer file-sharing using the successors to such services and the BitTorrent protocol (commonly referred to as torrenting); “anonymizer” tools like Virtual Private Networks (henceforth, VPNs); and unauthorized streaming, both peer-to-peer and through websites that host streaming content. These practices/tools do not succeed one another, although there are clear shifts in historical dominance even if precise dates are arguable. They are also not confined to any one country, region, or brand, although which options are available or commonly used can vary widely from place to place and over time. Listing these broad types allows me to add some definitions and explanations that build preliminary links for later elaboration.

Under forum-based trading I include online spaces for the sale (even of physical copies), direct sharing (posting or exchange of whole files) including on direct download sites, or discussion of unauthorized copies of media objects. These may function more like markets, more like advertising bulletin boards, more like helpdesks, or more like fan communities, and they may trade in information about piracy, including publications, rather than pirated goods themselves. However different these activities, these resources are approached in the same way by users – as relatively fixed online spaces where one can trade in pirated media content or knowledge about piracy. They also maintain the clearest links with the piracy practices that preceded the Internet, about which I will have more to say below. But

it is in operating as relatively fixed locations, with a Uniform Resource Locator (URL) functioning as an address that locates both the space and the interactions of its users in relation to a specific domain, that trading forums are very different from my next two peer-to-peer categories.

The new digital form of media piracy that Napster represents is usually described as “peer-to-peer” file-sharing, although it is worth noting that by 2000-2001, when Napster was on trial, academic and technical commentary was already debating this term and whether or not such services were “sharing”. As Clay Shirky records, the immediate and widespread impact of Napster’s success on programmers and platform developers also included criticisms of its design. Having “settled” on peer-to-peer as a name for this de-centralizing “revolution in file sharing and related technologies” (Shirky 2001, 21), definitional debate grew.⁹ Fending off literalism, by which the game *Doom* (1993) but not Napster would be peer-to-peer and “Alexander Graham Bell is a peer-to-peer engineer but Shawn Fanning is not,” Shirky argues that such a framing “is plainly not helping us to understand what makes [peer-to-peer] important” (2001, 21). What makes Napster, Freenet, AIMster and so on all similar is the way they “solve connectivity problems” using “the hundreds of millions of devices that have been connected to the edges of the Internet in the last few years” (Shirky 2001, 21), giving them “relative autonomy” but leveraging their connectedness to overcome “variable connectivity” and allow “temporary network addresses” (22). While it was in no

⁹ Da Rimini and Marshall argue that “cooperation is enforced on a technological level” in peer-to-peer, when uploading is automatically part of the downloading process, without peers necessarily realizing that this is occurring. They also distinguish between “peer-to-peer” file-sharing, where files are stored on a user’s computer and they share with others via a tracker and a swarm of uploaders/downloaders, and something like Napster which they see as a “hybrid’ P2P system” based on its “central server from which people uploaded and downloaded files” (da Rimini and Marshall 2014, 326).

way confined to such uses (see Steinmetz and Wehrle 2005), the usefulness of peer-to-peer technology for online media piracy is based in what Shirky calls “decentralizing not just features, but costs and administration as well” (2001, 23). The peer-to-peer services of this generation found means to bypass fixed addresses and decentralize file transfers to individual computers rather than servers – and the relative anonymity this ensured was a boon to the new generation of media pirates.

BitTorrent can be described as a “second generation peer-to-peer application” (see Qiu and Srikant 2004, 367), or as a more “elegant system... for direct peer-to-peer file-sharing, that is, for not needing a ‘hosting’ service to which files are uploaded and from which they are then downloaded” (Fleming 2012, 671). It works by breaking up the files queued for sharing so that pieces can be “downloaded in an out-of-order manner based solely on their rareness” (Vlavianos, Iliofotou, and Faloutsos 2006, 1). Torrents are often accessed through indexing sites, such as TPB, which function as search engines that connect users with the files they want, as distinct from the more client-based functionality of earlier peer-to-peer programs: “a peer has to obtain a torrent metafile which contains information about the content of the torrent”, linking to a tracker which records and monitors “all the peers (TCP endpoints) that are downloading in a specific torrent swarm” (Locher et al. 2006, 85). The fact that *human* peer-to-peer interaction is not required by this process is an issue I will discuss further in chapter four, but it is crucial to the efficiency of such sites. While all peer-to-peer platforms produce faster and more reliable downloads the more “seeders” are available, torrenting breaks files down into smaller components for even greater decentralization and reliability so that you acquire a file from the torrent rather than from another single user, regardless of the original upload source.

While it is not as immediately obvious, anonymizers are also historically a product of the peer-to-peer development (Lua et al. 2005). Platforms like Freenet (from 2000) used peer-to-peer distribution to allow anonymous Internet communication, and software like Tor (from 2002) connects peer computers in an overlay network that effectively conceals the location of Internet traffic. While not the subject of famous trials, the development of anonymization is crucial to many forms of contemporary media acquisition that occupy a new kind of grey area when they are not clearly identified as piracy. The types of anonymizing tools available have expanded over the last decade, including through popular commercially available VPN software. These can be used to evade many forms of monitoring Internet activity, including local bans on particular websites or apps that may or may not be used for piracy, or bypassing geoblocks on sites with media content that is meant to only be accessible to users in particular regions. Unauthorized access to streaming media content might proceed via such anonymizers (Burroughs and Rugg 2014), may involve a revised form of BitTorrent that encompasses streaming (Vlavianos, Iliofotou, and Faloutsos 2006), or may operate via unauthorized set-top boxes that access streams via a bypass code. However, the provision of unauthorized streams is also a distinctive online media piracy practice. Whether embedded on websites or shared through third-party clients, pirate streams return in some respects to a more direct mode of sharing in which individual streamers are identified even if they are utilizing a decentralizing peer-to-peer technology to provide the stream.

None of these different practices have become redundant, in part because they serve different interests and suit different contexts or users, but also because all of them have

changed in response to new Internet technologies, shifting practices of industrialized media circulation, and a changing legal and economic environment which may transform a legal mode of consumption into an illegal one by new trade arrangements, legislative amendments, or court decisions. The Internet itself was, of course, such a transformation, but piracy practices themselves also propel such change and not least through technological innovation. Keeping piracy tools and resources in mind can make the familiar examples of the peer-to-peer file-sharing trials look rather different.

With reference to a range of research in the early 2000s, You Jie argues that the anti-piracy rhetoric and litigation campaigns of this period were about protecting “pre-digital distribution infrastructures” more than financial losses. The “cost of structural transformation”, as well as general uncertainty and fear long impeded the record industry’s “adventure into cyberspace”, particularly for “the biggest incumbents” (2014, 200-201). A drive to foreclose on digital innovation does seem to characterize the concerted efforts of industry representatives at the time (see chapter three). In 2000, the my.MP3.com service was on trial for copyright infringement, with the case “closely watched by many companies seeking to stake a claim in the potentially lucrative area of Internet music distribution, including Napster”, which was then in the midst of its own litigation (The New York Times 2000). my.MP3.com asked users to verify their ownership of a CD by inserting it into their computer and stipulating that they were using a legally acquired disc, after which “consumers can then stream their music – which is housed on the mp3.com servers” (Wired Staff 2000) – from any computer. CEO of parent website MP3.com, Michael Robertson, argued in in *Wired* that his company was doing “exactly” what copyright law was designed to do:

When you buy a CD, it's our viewpoint that you are buying a license to listen to that music on any format and on any device in the world, and that's exactly what we are doing here. We're talking about fair use, and fair use supersedes copyright law.

(Wired Staff 2000)

Robertson thus, conveniently of course, distinguished my.MP3.com from Napster (Logie 2006, 78), which he charged with being built on "pirated music" while his service was by contrast producing a new "service model" "price point" for ongoing access to music (Wired Staff 2000).

Access on my.MP3.com was theoretically to products that users had already purchased, although having physical possession of a CD does not guarantee this, and Robertson acknowledged having borrowed rather than bought a CD to demonstrate how the service worked. However, he also stressed that this was part of how recordings circulated beyond the Internet: "I bet you've borrowed a CD before; we all have. That is a problem that is inherent in the CD itself. So we can't go back in time and change that." (Wired Staff 2000).

As U.S. copyright is meant to limit unauthorized reproduction and not control use after purchase (Lessig 2004; Litman 2001), this seems like a meaningful difference from Napster. This is the path subsequently taken by iTunes (from 2001) and then Apple Music (from 2015): offering people new forms of access to media content they already possess in new ways, as well as subscription-based access to a library of new content for sale. However, the new vistas of digital music distribution were at this time so ill-suited to the existing profit models of RIAA members that my.MP3.com's defense that their product involved *access* rather than duplication, as charged, was unconvincing. In fact, music industry

representatives were similarly hostile to Apple's innovations with the iPod (also 2001) and iTunes (see Elmer-Dewitt 2007).

By 2007, Warner Music CEO Edgar Bronfman would look back with regret at the music industry's resistance to digital music acquisition, while looking forward to the future commercial benefits of platform convergence, or "interoperability" (in Elmer-Dewitt 2007). Reflecting on the fight against peer-to-peer circulation of music, which in 2005 he had described as a war against consumers, Bronfman claimed the industry had "lost" (see Logie 2006, 122),:

We used to fool ourselves... We used to think our content was perfect just exactly as it was. We expected our business would remain blissfully unaffected even as the world of interactivity, constant connection and file sharing was exploding. And of course we were wrong. How were we wrong? By standing still or moving at a glacial pace, we inadvertently went to war with consumers by denying them what they wanted and could otherwise find, and as a result of course, consumers won. (Elmer-Dewitt 2007).

By this time Bronfman could see an endgame in collaborating with iTunes,¹⁰ and it was one that fulfilled the predictions of technologically informed cultural critics like Shirky, who had argued in 2001 that what the RIAA called "music piracy" was a form of "civil disobedience":

against a refusal by the music industry to adapt to Internet economics. But the refusal of users to countenance per-unit prices does not mean they will never pay for

¹⁰ At a 2005 conference on "mobile entertainment" in 2005, where representatives of music artists and recording companies contested claims about sharing the profits of mobile music downloads, Warner Music representative Michael Nash also set a hopeful tone, claiming that "The generation lost through (Schwarz) piracy may be found again through mobile." (Bruno 2005, 10)

music at all, merely that the economic logic of digital data – its replicability and replenishability – must be respected. Once the industry adopts economic models that do, whether through advertising or sponsorship or subscription pricing, the civil disobedience will largely subside (2001, 34-35).

Robertson saw his clash with the recording industry as a confrontation between old and new media worlds, but as I will discuss in chapter five, such lines are almost always too sharply drawn. The currently dominant model of digital music distribution is not that of my.Mp3.com or the early iTunes, which also relied on CDs, and also not that of Napster. Subscription music streaming services make up a massive portion of the contemporary music industry, led by Spotify (launched in 2008) and followed by Apple Music - although in some specific markets, like Japan and China, local apps such as Tencent are crucial.¹¹ Yet the ground did shift for music content industries in what we might call the “Napster moment” and this is the kind of impact that interests me.

Shirky’s essay “Listening to Napster” was written at the point when the platform’s success was clear but its future was uncertain, and in it he draws on the runaway success of the HTML language at the expense of other more elegant options for content dissemination on the Internet to proclaim that developers and commentators must “follow the users” (Shirky 2001, 27):

As we’ve learned from the history of the Internet, adoption is a better predictor of software longevity than elegant design. Users will not adopt peer-to-peer

¹¹ Late in 2017, international news outlets like the BBC and Bloomberg reported the success of Tencent’s new music streaming channels, estimating 700 million monthly users (Atkinson 2017).

applications that embrace decentralization for decentralization's sake. Instead, they will adopt those applications that use just enough decentralization, in just the right way, to create novel functions or improve existing ones. (Shirky 2001, 26).

While Apple and other players in what were then called the "carrier" industries were clearly listening to Napster well before the "content" industries decided they had to, my contention in this thesis is that they were not following just any kind of user, but more specifically following the pirates.

Technology and Convergence

In this section I want to return to Logie's list of terms that work as rhetorical devices that define piracy for particular ends, and supplement that list with some further terms that have arisen as academics working in the humanities and social sciences have grappled with the consequences of the changes described above. When deployed to describe online media piracy practices, each of these three terms – "prosumer", "user", and "content" – constitutes a different attitude to what counts as piracy and the significance and consequences of such practices. I am not proposing that these terms have superseded those Logie explores. Indeed, the following chapters demonstrate that "sharing", "theft", "piracy", and "war" all continue to be rhetorically effective concepts, given that they dominate the literature in this area. The exception is "hacking", which is now rarely used to talk about unauthorized media acquisition, although Ramon Lobato and James Meese (2016b) do refer to the circumvention of geoblocking as "geo-hacking".¹² Like Logie's terms, prosumer, user and content are words that locate online media piracy in specific ethical relations to society

¹² Even when hacking does include unauthorized access to media content, as in the Sony Pictures hack from 2014, which contained a number of unreleased films, popular commentary represents this as copyright infringement but not as "piracy" (see Goldman 2014).

and culture at large, but I select them here for their focus on the way content industries have worked to incorporate online media piracy practices. All are framed here by media convergence as, recalling my discussion in the introduction, a story simultaneously about technological and cultural change.

Lessig (2011) situates the “culture wars” inspired by tensions between copyright holders and online media piracy in a longer history of contentions over the ways access to “culture” is shaped by both social convention and technological changes. He sees an anti-technology pessimism as one of the bedrock attitudes underpinning fear of digital culture, but at the same time sympathizes with the fear that valuable cultural practices can be overrun by media change. Ekin Gündüz Özdemirci traces anxious reactions against “developments in the distribution of information” from Plato to home video, and argues that “file-sharing over the Internet ... should be evaluated in the same way” (2014, 157). Lessig draws from a related history of examples of technological pessimism, in writers like Aldous Huxley and John Philip Sousa, in order to outline a distinction between “read-write” and “read-only” versions of culture (see also Lessig 2008). A read-write culture, for Lessig, is one in which people both consume media and produce new media of their own, as opposed to a read-only culture in which people are passive consumers. Looking at the fear early playback technologies inspired in writers who feared the loss of autonomous creativity if those who appreciated and circulated music became only consumers receiving what was professionally produced, Lessig feels “it is very hard not to conclude” that those fears were justified, and that the twentieth century did corral cultural creativity into narrowly professional forms (2011, 111).

In the following chapters I will generally be on Lessig's side regarding arguments against sweeping definitions of copyright, and over the need to have legal systems that respond to the changing culture of the present, but here I will express a reservation. Rather than pursuing this argument that the recorded-music industry has reduced people's everyday creative engagement in musical culture, Lessig focuses on threats to musical creativity in the present, most directly through his discussion of legal actions against hip-hop sampling (for example, Lessig 2004, 106-107, 270-271, 285). The claim about mass production limiting musical creativity has certainly been made by others with similar concerns (for example, see Adorno 2004), but if this argument is not generalizable to other industries no "content industry" is outside mechanical reproduction. As Striplhas (2011) points out, to summarize a complex argument, it is books that mark a shift from direct cultural communication to the culture of the copy, and that raise the questions Lessig's read/write but also Jenkins' participatory culture try to answer.

This is also a place in which, despite questioning some of the arguments associated with the term "convergence culture" (see my introduction), the arguments of the writers usually associated with that label undeniably overlap with discourse on online media piracy. Here I want to turn to the concept of the "prosumer" (see also Ritzer and Jurgenson 2010). While prosumer is a term originally coined by Alvin Toffler (1980), Jenkins and Joshua Green acknowledge that there are many ways of naming the idea that the lines between consumers and producers have been blurred by contemporary mass media. Prosumers, "loyals", "media-actives", "inspirational consumers", "connectors", "influencers", or "multipliers,"

Each label describes audience practices related to, but significantly different from, the construction of the active audience within media and cultural studies' discussions in the 1970s and 1980s. To talk about participatory audiences now is to talk about how differently-abled, differently resourced, and differently motivated media producers work in the same space. Consumption in a networked culture is a social rather than individualized practice. (Jenkins and Green 2008)

Clearly Toffler was not talking about the Internet, but across a large number of publications Jenkins and others use this term to describe the key actors in the “participatory culture” enabled by the Internet.

Jenkins and Green see it as characteristic of “web 2.0” that “consumers produce and circulate media” and blur the line “between amateur and professional” (Jenkins and Green 2008). The fact that Jenkins, like Lessig, is invested in the importance of amateurism, and of cultural participation, is just one element of the ways in which online media piracy practices intersect with what the “prosumer” idea aims to describe. And although “web 2.0” follows after online media piracy, it is another name for the transformation of the Internet marked by the emergence of peer-to-peer networks. The small histories above clearly show why those who engage in online media piracy might be thought of as examples of the engaged participants in the circulation of culture that center the “convergence” story.

Shirky is also associated with the convergence culture label (Hay and Couldry 2011), and his version of the prosumer argument is sometimes as idealized and sweeping as anything in Jenkins’s *Convergence Culture* (2006a). “The rise of the Internet undermines the existence of the consumer,” Shirky claims in a eulogy for the very idea of consumers, “because it

undermines the role of mass media. In the age of the Internet, no one is a passive consumer anymore because everyone is a media outlet.” (Shirky 2000). Hyperbole aside, a changed attitude to “consumers”, or at least to what they expect, is apparent between the interviews with Robertson and Bronfman above. Robertson’s defense of my.MP3.com sounds a lot like Shirky’s recommendations to the music industry around the same time.

Robertson also claims that the recording companies and the RIAA were too

slow in realizing what these digital media companies like Liquid Audio and Launch.com [and my.MP3.com] are bringing to the plate. They’ve discounted them because in the music industry’s world, content is king. In my world, the consumer is king. The customer drives the process. (Wired Staff 2000)

This consumer-king is obviously still not a producer, and Shirky’s work also offers another term. Elsewhere, Shirky calls this shift “the rise of the end user as information provider” (2001, 36). While both nouns imply an active role, the difference between *prosumer* and *user* is not merely semantic. The question of what *productive* relation online media pirates have to the media they circulate runs through much scholarship on the topic. If it makes little literal sense to describe online media pirates as producers of the media they circulate, they clearly do *use* that media. Like computers in a peer-to-peer network they are nodes in a chain of circulation that is never necessarily finally closed, rather than “end users”.¹³ Nevertheless they may be, as Shirky says of the user who is more than a consumer, “providers” (2001, 35). Or, at least – and in my case especially because those using online media piracy resources do not all equally “share” (or keep the chain of circulation open) –

¹³ This argument resembles Schwarz’s use of the figure of the circulation of blood to describe the circuits of online media piracy (2013).

“enough consumers” might become “providers as well to blur present distinctions between producer and consumer” (37).

Another version of this argument is offered by Axel Bruns, who coined the term “produser” to name the hybrid role of the users in user-led content creation. Bruns’ central examples, like blogging platforms and wikis, are online spaces where “users” are clearly the central producers of the content they use, as is not the case in online media piracy. However, Bruns’s definition of “produsage”, or “the collaborative and continuous building and extending of existing content in pursuit of further improvement” (Bruns 2008), does not clearly exclude piracy. For Bruns, produsers

are not producers in a conventional, industrial sense, as that term implies a distinction between producers and consumers which no longer exists; the artefacts of their work are not products existing as discrete, complete packages; and their activities are not a form of production because they proceed based on a set of preconditions and principles that are markedly at odds with the conventional industrial model. (21)

This is a “commons-based, peer-to-peer” production of “real outcomes” from the use of content – outcomes which change the content being used. It also resembles what William Uricchio discussed, in 2004, as the “social and political potentials of digital piratical technologies... not only present[ing] a new way for individuals to interact with commodities, but also to interact with each other and with society as a whole” (in Arvanitakis and Fredriksson 2014, 1).

The relevance of this argument is not merely that produsage also describes the new forms of development and interaction that have arisen in response to the decentralized peer-to-peer operations of the Internet, or even “web 2.0” (also the term Bruns uses). While I agree with S. Elizabeth Bird that “it is very clear that the majority of people, whether by choice or access to time and resources, are not producers” (Bird 2011, 504), it is nevertheless significant that the mechanics of online media piracy match many of the characteristics of produsage. This includes in its reliance on “reputation accreditation systems” to maximize the effectiveness of “produsage networks and environments” (see Bruns 2008, 330-332). James Meese has thus taken up the “producer” figure to argue that “intellectual property law needs to be reoriented” around a new concept of authorship responsive to the “negotiations the Internet engenders” (Meese 2010, 167). I will turn to the many debates around this question in later chapters, including the difficulty of trying to apply ideas about digital “creativity” to online media pirates based on the productivity of the networks they produce, but it is important to note that Meese’s object here is Australian legislation designed to render copyright “fairer for users and tougher for pirates” (Ruddock quoted in Meese 2010, 172).

Bruns’ own references to online media piracy swiftly shift to examples about creators (see Bruns 2008, 236) or to groups which “take great pains” to “avoid being implicated in... a narrow definition” of piracy by, for example, removing broadcast television “torrents if and when official DVD and other commercial releases are published” (248), a practice Jenkins also notes in anime pirates (Jenkins 2006a). But Bruns also suggests that more clearly unauthorized media circulation has played a productive role. Remembering that Bruns is writing in 2008 is useful when noting his comment that iTunes “clearly demonstrates that

commercial models for the distribution of digital content are possible and economically viable” and that “some industry players have begun to explore alternative models for the distribution of their content, and they are increasingly beginning to harness the distribution tools provided by produsage communities” (263). Having thus indirectly positioned overt piracy developments and groups as producers, Bruns refers to them as “perhaps” “producers of both content and the means of distribution for content” (263).

This brings me to the “media content” produced and distributed by “content industries” and circulated or used by online media pirates who may at least be seen as creating new networks and modes of circulation. What content means in these phrases is not simply the field of media texts – images/pictures, stories/books, songs/albums, films, episodes/programs/series, games, apps, etc. – that agents of various kinds are continually adding to, organizing, or moving around. Calling that field “content” draws in several connotations that are important to the practices of online media piracy and its impact. I will briefly identify three meanings of content here, which I think make the choice of this term more significant than it might appear and will return in the following chapters.

The first might be loosely called Aristotelian. When we ask about the “content” of a proposal text or idea we ask about its *substance*: about the meaning embodied in its form, or about why it matters. This approach is often used in discussion of aesthetics where form is defined against content. It has also been adapted to communication studies where, under the heading of “content analysis”, it defines data for the observation of patterns in, counterintuitively, the form rather than the content of communication. More importantly for my purposes, this idea of content (distinguished from form), it is also pivotal to the

premise that U.S. copyright law protects particular expressions rather than ideas – it protects particular texts/forms, but not content understood in this way (see Lessig 2004).

The second version of “content” is probably most familiar from Marshall McLuhan’s 1964 aphorism “the medium is the message” (McLuhan 1994). It is also, although differently, familiar in communications or media studies work that inspired or has followed from Stuart Hall’s “Decoding/Encoding” model (2001). Here, content refers to a message, which includes two kinds of form – the contents of the message that must be deciphered, and the form of its transmission. For Hall, what a television audience receives is the program as a material form bound to the means of its communication, even if the “contents” of the received message cannot be entirely predetermined. This version of content can be a catalyst for media change, as new forms of technology make possible new kinds of content to be received in new ways. Raymond Williams suggests as much in his study of television (1974), arguing that the delay in utilizing television technology reveals the importance of the social formations that made television a desirable media revolution. While tied to its medium such content is distinct from the technology of communication itself. As Williams notes, for example, broadcasting was “primarily designed for transmission and reception as abstract processes, with little or no definition of preceding content” (1974, 25). This recognition is significant for contextualizing the selection and further development of technologies for piracy.

The third version of content is as information, or data, probably best known via the 1980s hacker slogan “Information wants to be free”.¹⁴ In its original form, however, this aphorism belonged to a story about economic and legal tensions over how value is derived from content. As Stewart Brand refined his point:

Information wants to be free because it has become so cheap to distribute, copy, and recombine – too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient. That tension will not go away. It leads to endless wrenching debate about price, copyright, “intellectual property,” and the moral rightness of casual distribution, because each round of new devices makes the tension worse, not better. (1987, 202)

Here, content is the form communicated, not what meaning it conveys. The value it might have to any recipient might be quantified but not otherwise evaluated. As Brand suggests, this is the content at the heart of copyright wars. It involves only the material form of, for example, The Clash’s song “This is Radio Clash” (1981), however it is circulated – whether or not, by any specific utilized form, it returns value to the creators or to the rights holder Sony BMG Music Entertainment, and whatever listeners might make of the specific idea of “Radio Clash on pirate satellite”.

Content acquisition

Undoubtedly the peer-to-peer trials had an effect, but it was not a return to the status quo.

Napster and the services that followed it “imposed forced institutional change” on the

¹⁴ Striphas also offers an account of information, from early modernity through to information theorist Norbert Wiener’s quip that “the natural world consists of ‘a myriad of To Whom It May Concern Messages’” (Striphas 2015, 399). This formulation came to include machines that also had “an appetite for information”, like automatic doors which, unlike simpler machines, must obtain information to be attuned to the environment around them and function properly.

dominant form of the music industry, when the “imagined high costs of industry-wide digital transformation did not provide much incentive for change” (Jie 2014, 203). Rather than just being a disruption of the dominant forms of media distribution, and presenting a problem for intellectual property activism or law to solve, online media piracy is most important as a trigger for changes in early twenty-first century relationships between consumers and media content.

This proposition recalls a story Lawrence Liang uses to represent the challenge to the status quo posed by “piracy”. In this aptly maritime allegory borrowed from Peter Linebaugh, a ship captain and the sailors working under his command come together under the threat of a lethal storm, breaking open the stored rum and wine to which the sailors have little and limited access. They drink together that night, but find in the morning that the ship hasn’t sank after all and they have to return to normalcy, despite “suspending ... the logic of private property” the night before (King 2011). The impact of the late 1990s peer-to-peer file-sharing tool Napster, which existed for less than two years but managed to completely overturn many consumers’ understanding of what it meant to acquire music, is comparable to this story. What had been the dominant system of music distribution before this, as Logie discusses – the one in which people had come to accept paying USD\$15-20 for 30-75 minutes of music – seemed newly undesirable after Napster, much as it was hard in Liang’s story for the sailors to return to a life where “property determined social relations”. The expanding capacity of technology to deliver products over online networks in increasingly sophisticated ways came to meet consumer demand in new ways, and the legal conflict that ensued made the question of how to consume music a newly visible open question.

Eventually, the music industry was incapable of returning things to the way they were, a moment captured by the title of Logie's introduction, "The Cat Is Out of the Bag".

The apparent mainstreaming of online media piracy – making it normal, ordinary, and everyday in Lefebvre's sense, or perhaps even "boring" (da Rimini and Marshall 2014) – has both depended on and helped the dramatically new technologies I discussed above, but it also depended on and helped produce new attitudes to media content and changed relations between content industries and the people amongst whom (and now by whom) their content was circulated. I want to discuss this reconfiguring of media distribution networks with a focus on what I call "content acquisition". Content acquisition stresses that the consumer seeks out and acquires the media they want, without necessarily adhering to models of content distribution preferred by rights holders. It involves intentional activity, as the "user" narrative does, and as the idea of "circulation" also can, and not merely in the interpretative sense usually implied by theories of "active audiences" or the fan studies version of "participatory culture" (see also chapter two). Shifting the register from either "consuming" or "pirating" to "acquisition" is also an attempt to shed some value-laden assumptions built into discourse on both consumers and pirates, and also to discuss online media piracy without presupposing particular social relations. Acquisition, for the time being, is a term that sits on neither side of political economic arguments about whether these practices are forms of gifting/sharing or forms of stealing/theft.

Within this discussion of content acquisition, I also want to flag convenience as the driving force behind the mainstreaming of media piracy, and as specially characterizing contemporary online media piracy. In each of the following three chapters I will emphasize

the importance of convenience – in the (new) television audiences, in response to copyright restrictions, and in the cultural practices of online media piracy. What I will come to call a “convenience calculus” is central to the processes of content acquisition. The ways in which media change has been increasingly oriented towards this convenience calculus, with evident impact on the frequency of media piracy, moreover suggests that online media piracy was never wholly about avoiding paying for media content, though this may of course be a factor in any consumer decision. As this chapter has already suggested in various ways, the “theft” narrative employed by music content industries and their representatives clearly mistook the problem online piracy involved, given that the strategies that have largely resolved that problem in countries like the U.S. and Australia were not centrally litigation, but rather industrial restructuring. Online music piracy offered a number of advantages over the traditional system, which the music streaming services like Spotify and Apple Music have largely matched.

“Free” is not the only price point at which the forms of acquisition enabled by online media piracy are attractive. While Netflix and its rivals, or their peers in other content industries, have not wholly supplanted piracy, the historical context in which my thesis appears is one where online media piracy, as it was pre-eminently visible in the 2000s, seems to have peaked and begun to decline, and this matches fairly closely with a period in which services like Spotify, Apple Music, Netflix, Hulu, Amazon Prime, Steam and so on, which I argue rely on the kinds of acquisition methods popularized by online media piracy, have taken significant shares in marketplaces from traditional distributors. As Jie notes, by 2010 the global music industry had developed “an amazing variety of established business models including downloading, ISP and mobile partnering, music subscriptions bundled with device,

streaming, ad-supported distribution of professional music videos online and direct-to-consumer sales of music, merchandising and concert tickets” (2014, 202). The widely documented popularity of these new, legal services is both indebted to *and* works against piracy. A great deal of online media piracy still exists, but much less of it is focused on products that are, for instance, available on Netflix. Uptake of these legitimate, paid subscription services has been spectacular, and indicates the willingness of content acquirers to pay as long as the price is low, flexibility is high, and convenience matches online media piracy. In fact in some cases, Netflix not only matches much of online media piracy’s ability to offer on-demand, flexible access to products, it can be an improvement in several respects. Streaming rather than downloading requires no permanent storage, although with the countervailing disadvantage of Netflix being able to choose and change the range of what’s available, however broad that is. Less equivocally, there are no issues with authenticity, unwanted advertising, or access once the hurdles of subscription and connection have passed, and the algorithmic organization of the catalogue better serves the user who doesn’t have a specific object in mind to search for, and would benefit from the array of associations and recommendations built in to these media platforms. Where there are content industries still rife with online media piracy – video games (on PC) and live sport piracy are two examples – their difference clearly involves media-specific limitations on their flexibility. Media coverage of these companies that provide on-demand, flexible access to media often discusses the potential for convenience to be an answer to the prevalence of piracy, as do the companies themselves. Gabe Newell of Valve, the company behind the game-downloading service Steam, argued in 2011 that piracy was a “service problem and not a pricing problem”, in the process suggesting that Steam was an answer to the widespread piracy of PC games. He argued that the service offered through piracy was

simply “more valuable” to consumers when it provided flexible, on-demand access, compared to a legal provider whose product might be region-locked, released late in some parts of the world, or only available from a brick and mortar store (Tito 2011). Steam, by comparison, solves some of these “service” problems.

Digitalization impacts flexibility, moving media in general from an array of particular, discrete forms to the more fluid idea of “content”. Rather than buying a CD of a single artist, you might collect a hundred individual tracks from many different artists and play them in whatever arrangement you choose, without the need to worry about managing physical objects or necessarily changing devices in order to consume this music in different places. You can also switch fluidly from listening to music to watching television or film, or browsing the Internet, without changing devices. The apparent necessity and consequences of specialized forms of consumption – the cinema, the television receiver, albums and their playing devices – were all changed by digitalization, and if some content creators have questioned the benefits of this for their own practice many others have embraced new forms of practice, and for consumers the convenience of mobility and flexibility have generally triumphed. While an argument might be made that this convenience is its own kind of sales pitch by content industries peddling new kinds of distribution devices, these changes have given the people usually referred to as media consumers new opportunities to choose from a wider range of content and choose how they access, organize, or even (re-)distribute it. I want to highlight the difference introduced by the concept of content acquisition.

One of my key arguments in this thesis should thus already seem relatively well supported – that online media piracy has led to major changes in media production as well as methods of content acquisition. Netflix’s intervention is not limited to just distribution but also content creation, and that content tends to mirror the highest levels of television production values, all streamed on demand on a platform that also contains a wide range of cinema. As I will argue in chapter two, the rise of “quality” or “prestige” television, including the movement of major Hollywood stars and directors into television and its associated increase in cultural significance (or “cultural capital”), is itself largely propelled by the blurring of boundaries between previously distinct content industries. This is facilitated by digitalization and the practices of acquisition that prioritized digital distribution over those boundaries. One reason for highlighting the example of sports piracy (in chapter four), is that it has not (yet) been as easily folded into these new distribution networks, though some recent changes within sports broadcasting may yet take advantage of new consumer digital viewing practices.

Contemporary music and video streaming services, like Spotify, Apple Music, Netflix, Hulu and so on have clearly taken on the promise that Logie notes in Napster: “for a brief moment, Napster users had a glimpse of the kind of expansive electronic library that copyright laws typically preclude. . . everything in no particular order, all day, all night, and in stereo.” (Logie 2006, 4). This promise is more amorphously distributed across the Internet in general, pervading sites and inflecting tools that are not specifically designed for media piracy, and even that seek to exclude it while that kind of use may be part of their success. Video upload services, for example, certainly can be and are used for media piracy even while some, like YouTube have built a business model on copyright agreements that

aggressively pursue unauthorized content from the content rights holders subject to those agreements (Burgess and Green 2009, 23-42).

Across the following chapters I want to outline the consequences of shifting how we discuss digital copyright circumvention: from “piracy”, when it refers to questions about copyright, to a distinction between authorized or *unauthorized* access: from “piracy”, when used to talk about people, to a distinction between consumption in general and *content acquisition* as the necessarily active process of selection I describe above, and thus to *acquirers* or the *users* of content acquisition tools; and when the focus is on the contestations over access to popular media, from media content or entertainment media, to the more precise term that exposes the importance of active demand, *popular media content*. Whether the focus for asking why online media piracy matters is on law or government, economics or creative/content industries, consumer practices, or individual or collective creativity, the answer will be that it offers more on-demand and more flexible digital access to cultural forms. The word “more” is important here. Available evidence concerning which forms of media piracy decline and which persist in the face of legal challenges, industrial measures to curb copyright circumvention, and changing technologies, indicates that media piracy will only continue if it is offering *more access* than is offered by industrially dominant modes of distribution. This does not just mean *more free* access, as demonstrated by the success of paid music and video streaming services at reducing the use of forms of media piracy that are still available and still free.

Costs are one of the prohibitive (inconvenient) elements that drive content acquirers towards media piracy, but they are not the only nor even the primary one. The apparent

tendency for online media pirates to be younger content acquirers, for example (which I will discuss in later chapters), might clearly be related to lower levels of disposable income, especially relative to overall media consumption habits, even while it might also be driven by technological literacy that makes utilizing online media piracy tools less of an inconvenience. Platforms like Spotify or Apple Music do not only strategically mimic the workings of online piracy, they are also paid services that match its convenience of piracy for a low price without the need for the kind of technological know-how demonstrated by their creators.

The rise of such music streaming services has not answered all the questions posed by online media piracy, not even those specific to record music. I have chosen recorded music as my central example in this chapter because of the dramatic decline in piracy that can be narrated in that case, along with the significant portion of the music industry that is now made up of authorized, paid streaming services like Spotify. Different but significantly overlapping stories could be told about other types of content, including film, television, and games. In these other cases the online piracy story seems less finished. Television events or series, for example, now not only compete with other broadcast or narrowcast options for the attention of viewers, but have to contend with a broad cultural awareness that television “users” can access existing content and even live-time event television while bypassing the television as a device (see chapter two). The increased visibility and availability of online media piracy has fueled audience expectations of more flexible acquisition options, and these have helped build the massive popularity of VOD subscription services as well as expectations about ease of access. Even in the case of music, however, the expectation of acquisition generally trumps commitment to any single point of access.

Online media piracy remains one of a range of content acquisition options available, and it now broadly sits alongside other ostensibly “legal” forms of consumption that might share a great many of its characteristics. Such expectations form a changing horizon, and one affected by an array of actors both within but also at the margins of content industries, legal regimes, and technological developments.

Convenience, of course, is a cultural value specific to advanced consumer societies, predicated on a particular kind of everyday life. Although the most convenient way of accessing restricted cultural resources is generally a powerful motive, this may be especially true in the context of liberal democracies. Elsewhere, people may circumvent to communicate in broader ways than access to media content. To specify what I mean by convenience, then, I need to consider the kind of everyday life that generates “convenience” as a value. This is one in which all time has a value, and my attention to convenience might well sound like one of Henri Lefebvre’s “techniques” of leisure that force a distinction between the different components of the everyday: work, family, leisure (Lefebvre 1991, 30-31).

The tools for online media piracy might thus be another of his “leisure machines” (Lefebvre 1991, 33). Convenience, moreover, might not only affirm the way in which all time was anchored to production – here efficiently producing work, there efficiently producing leisure – but another mode of distraction from the actual difficulties of the world:

the most striking imperative as far as the needs of leisure among the masses are concerned is that it must produce a break.... rather than bringing any new worries,

obligations, or necessities, leisure should offer liberation from worry and necessity
(33)

The activity that is integral to content acquisition would probably not be much of a reply to this, given Lefebvre's argument, in *The Critique of Everyday Life*, that the transformations of capital in the twentieth century had obscured everyday life with modes of consumption.

At the same time, Lefebvre also stresses that "critique of the everyday plays an integral part in the everyday: it is achieved in and by leisure activities. The relation between leisure and the everyday is not a simple one" (1991, 29).¹⁵ Leisure encompasses various distinctive activities. Some are inseparable from the everyday, some commodified, and some requiring active reflection on the world, and all can involve different degrees of activity or passivity (1991, 32). The way in which the practices of piracy becoming "everyday" disrupted the continuity of leisure commodities – if not permanently, and if in unevenly distributed ways – together suggest that online media piracy is an interesting space for a reflection on today's nexus of leisure time, everyday life, technicity, and interrogation of how content industries are working. Most of all, the way in which they have impelled change invests the practices of online media piracy with some residual interest, even if many have been folded anew into the workings of content industries.

¹⁵ Leisure, for Lefebvre, "cannot be reduced to the simple relation in time between 'Sunday' and 'weekdays', represented as external and merely different. Leisure – to accept the concept uncritically for the moment – cannot be separated from work. After his work is over, when resting or relaxing or occupying himself in his own particular way, a man is still the same man.... We must therefore imagine a 'workleisure' unity, for this unity exists, and everyone tries to programme the amount of time at his disposal according to what his work is – and what it is not." (1991, 29-30) This is a concept to which I will return in chapter four.

As Meaghan Morris argues, “Western Anglophone accounts of new media use presume a symbolically American context in which modern middle class urban virtues such as sociability and a busy diary are, as Taylor notes, idealized as good for all.” (Morris 2016, 433) The balancing of time for leisure, or seeking leisure, is neither uniformly an indulgence nor uniformly just another colonization of life by capital. Such analysis must be situated and specific. We can see a parallel image of what to avoid in Morris’s description of “the gamer of Anglophone imaginaries”, who inhabits a

specific architecture of daily life... in a computer-equipped “home” that is spatially distinct from a workplace or school, unlike the millions of people worldwide who work or study where they live, using a phone or a café to play (Lai 2014). He/she also has a private bathroom to forgo using (extra space that is not a given even in European cities) and a “weekend” free as a norm. Most workers of the world do not have two days off and those working online anywhere may have none at all. (433)

To argue that convenience is a motivating factor in content acquisition is not to standardize what inconveniences are being faced, and it does not require that everyone is resourced and equipped in the same way.

The ongoing and active struggle of industry representatives, legal authorities, and some content creators against copyright infringement indicates a range of still pressing concerns on their part. Understanding how online media piracy persists despite the conjunction of interests long organizing against it cannot only focus on legal actions and mechanisms. However, it should consider not only litigation against developers and acquirers but against select new technologies that look difficult to incorporate into existing profit models. This was the case with Video Cassette Recording (VCRs) – in a benchmark case in the early 1980s

that the content industries lost (see Appendix) – but also in other cases they have won in an ongoing effort to block technologies that might offer troubling new versions of convenient acquisition. An example is the outlawing of “Aereo” by the US Supreme Court in 2014 (*WNET v. Aereo Ltd.* 134 S. Ct. 2498, 2014), a virtual OTT service that provided the same basic recording functionality as VCRs and DVRs, but on the Internet. Essentially, Aereo allowed recording from a television to a digital file. This is of course technically possible already – it is how a television episode goes from HBO to The Pirate Bay – but the Aereo made it a conveniently accessible activity for viewers with less equipment and technical expertise.¹⁶

While online piracy is the dominant form of media piracy today, this needs to be inserted into a history of appropriating media content attentive to both media technologies and consumer culture. This history includes bootlegging, unauthorized copying or resale, and cable stealing – all before the changes associated with the expansion of the Internet – and an even longer history of unauthorized appropriation and redistribution, both for profit and otherwise. Such a history is simultaneously technological, economic, legal, and cultural, as was the history of video recording. But the Internet has changed how media piracy works and has helped establish “mainstream” forms of piracy. This thesis will not often consider how piracy operated before the Internet or how it still operates offline, and I will not spend much time considering the early online incarnations of media piracy before peer-to-peer,

¹⁶ In a fascinating essay on the way innovation is encouraged and policed by copyright battles, Dan Burk notes that in this case a majority of the appeals court “agreed that Aereo’s set-up provided a private transmission, effectively skirting the statutory exclusive right for public performances” but the Supreme Court concurred with the dissenting opinion instead, and held that Aereo’s design only made sense as an attempt to avoid a technical definition of infringement: “there was no particular reason to design the system with tiny individual receiving antennae except as a dodge around the public performance right, and found it infringed in intent if not by design (Burk 2014). See chapter three and Appendix.

torrent, and streaming sites and tools massified how it works and what it meant. But this is not a static picture. As the work of groups like the Sarai Network, of which Liang is a member, demonstrates (see <http://archive.sarai.net/>), for example, practices like bootlegging continue, and they remain an important industry in many parts of the world. Some points about what this continuity represents are useful for contextualizing online media piracy.

While content industry strategies attempt to match piracy for convenience without its visible unacceptability, they are continually under pressure from the possibility of change in what I will refer to in chapter four as a set of “informal economies” (Lobato and Thomas 2012a). Online media piracy networks and spaces are situated within and often work as such informal economies and this builds a link between contemporary modes of online media piracy and older modes of media piracy. Tristan Mattelart notes that the now “extensive literature” on media piracy is overwhelmingly interested in “free downloading of audio or video files” (Mattelart 2012, 735), and it ignores the “physical piracy of audiovisual products” (735), which would once have been a primary concern of industry and analysts. Comparisons across this gulf can also speak to the significance of the cultural access that media piracy can seem to promise.

In 2000, at the same time as the Napster trial was on the cover of *Newsweek* (Figure 4), Logie describes the media environment in the Ukraine as featuring dialup speed Internet, pirated copies of Microsoft Windows, and a thriving local industry in pirated music on CDs (Logie 2006, 10). “For a significant percentage of music consumers”, Logie notes, these compilation CDs “would be perceived as better and more useful than the legitimate

releases” (11). Whatever challenges online media piracy propelled elsewhere, media transitions are never really global. James Arvanitakis and Martin Fredriksson want to “challenge” the dominance in piracy studies of the focus on “how piracy affects American copyright holders” to the exclusion of other considerations. Instead, their anthology approaches “piracy not as an abnormality that needs to be rectified or a problem that needs to be solved, but as something inherent to modern, capitalist society” (2014, 4). Even for my own focus on online media piracy, a broader international geography needs to be considered and the dominance of American copyright debates needs to be questioned.

Laikwan Pang’s account of media piracy in China (2012) directly addresses the tensions between the internationalization of intellectual property agreements and local culture. It nevertheless overlaps in many respects with Logie’s story about the Ukraine. Pang argues that this piracy market flourishes for a range of reasons that cannot be reduced to economic, political and legal differences. They also include cultural factors:

Piracy and counterfeiting have helped to enrich people’s cultural and social lives at low cost and allow people to stay current with the latest popular culture and fashion around the world; piracy activities have also provided employment for a large number of Chinese people.... In China and many other developing countries, piracy has become a substantial part of people’s material lives. (Pang 2012, 100)

Much of the content distributed on these pirated CDs in the Ukraine and pirated DVDs in China is the product of western content industries.¹⁷ Online media piracy might, in fact,

¹⁷ On the Chinese case see also Jie (2014, 204). Logie acknowledges that the Ukrainian CDs are a product of “Western copyright” (2006, 13) and Pang discusses the tensions between the compliance with international intellectual property rights at the level of the state, the obstacles to litigation, and local cultural practices (2012, 89-112). See chapter three.

encourage overall effects that resemble the cultural aspects of globalization, despite uneven distribution, and despite the fact that such acquisition is removed from the dominant profit models of global industries. Setting this particular issue aside until chapter four, the content acquisition focus also offers a way of seeing in piracy forms of alternative popular cultural activity. In this respect online, media piracy might even offer a space for rethinking now long-established arguments about mass culture.

In assessing the practices of content acquirers we should bear in mind that what governments and industry bodies refer often to as “entertainment media” is, however massively industrialized, “popular culture”. Online media piracy is popular culture too and very clearly one of the fields of popular culture where, to paraphrase Hall’s famous essay on that subject (1998), the struggle between differently invested and resourced social groups can be seen. Hall saw popular culture as “the arena of consent and resistance”, and as “where hegemony arises and where it is secured” (1998, 453). In that essay, Hall also claims that popular culture matters as “one of the places where socialism might be constituted” (453), and whether that is what happens in online media piracy has occupied a great deal of scholarship on the subject as well as much debate among “pirates” themselves. For now, I want to stake the more certain claim that the broadest impact of online media piracy has been encouraging new expectations of *access* to media content, whatever users then do with that content, and whatever their motivations for choosing what rights holders would tell them is “piracy”.

Chapter 2 – Convergence: Television and the Internet

I have chosen television as a primary case study for thinking about the emergence and impact of online media piracy in part to avoid generalization; piracy in practice is shaped by specific histories of economic, industrial and cultural change. In addition, television was a particularly popular object for online piracy during a period of increasing visibility. Television piracy exemplifies the post-Napster period in which torrenting appeared and expanded. Finally, as I want to stress the role that online piracy plays in everyday media access, television is a useful focus, given its long association with the everyday. To these ends, this chapter focuses on the impact of the Internet and digital media on the distribution of television. It also makes a case for the impact of online media piracy on these changes. Insofar as it foregrounds changes that assemble television with the Internet in diverse ways, this chapter also situates my discussion of piracy in the field of contemporary television studies and thus returns to debates about media convergence.

These arguments require that I draw on the history of television, and particularly on what is, for television studies, a now relatively familiar account of ages of television production: progressing from public broadcast, through paid “cable”, to “over-the-top” (OTT) services such as VOD streaming. This history is far more applicable to some parts of the world than others where, for example, satellite television may cross geographical boundaries in ways that are not easily distinguished as public/paid or broadcast/narrowcast (see Turner and Tay 2009). However, despite the fact that the Internet adds additional economic and literacy requirements, the impact of the Internet may be more internationally relevant than many other components of recent television history. More important still, adapting a history of television’s transformations to discussion of

online media piracy allows me to elaborate on the shift from collective television “viewing” to “content acquisition” I sketched in chapter one.

The backstory of televisual “flow”

This first section overviews key changes in recent modes of distributing and organizing television, and the emergence of a televisual field that combines different forms of access, including downloading and online viewing. From a viewing perspective, we can broadly understand the major changes to television as progressively adding new forms of distribution, principally in the following formats: broadcast television channels (free-to-air or licensed), off-air video (commercially purchased or self-recorded), subscription-funded “narrowcast” television channels (usually cable), online viewing and downloading, and streaming VOD services. None of these forms has entirely disappeared, which is a topic I will discuss in detail in chapter five. And as I will elaborate below, each raises the possibility of changes to how television is watched – with what devices, in what spaces, and in what temporal relations to other viewers. It also involves changes to how television programming is organized, and how genres are identified and addressed to particular audiences.

Despite my caveats above, the dominant narrative in available Anglophone histories of television tells a story largely modelled on the U.S., with some room made for contexts where public broadcasting takes a central role, including the U.K. and Australia.¹⁸ This story is important because – given the rapid growth in U.S. production and the prior success of film exports (see Hoskins and Mirus 1988) – the U.S. soon became the dominant exporter of television content, including across

¹⁸ For example, Gunn Enli and Trine Syvertsen emphasize the pressures that expectations about a public domain (including public service broadcasting and the welfare state) place on the forces tending towards disaggregation in television in the European context (2016, 149).

many language barriers.¹⁹ Content designed for the U.S. market incorporated relevant assumptions about viewers and even time-slots. Critics like Amanda D. Lotz have explained this history as beginning with the network era and shifting to a “post-network” era enabled by cable, the VCR, and so on (Lotz 2014). The changes to television that interest me are newer, but cannot be separated from that history. This first section thus overviews the changes to television implied by the terms “network”, “post-network” and “post-broadcast”, before focusing on recent changes to television propelled by digital technologies and forms of digital culture that are not fully captured by that list of terms.

No overview of changes to how television is watched can avoid the attempt to catalogue these changes in terms of changing viewing patterns.²⁰ Given that relevant national reports support arguments about the continued transformation of the television audience in the direction of mobile on-demand viewing, but also stress the continued importance of traditional television networks, it is worth returning to well-known literature on television and domestic spaces and audiences before considering the contemporary interface between television and digital culture. Feminist historians of television like Lynn Spigel (1992) and Charlotte Brunsdon (Brunsdon 2000) have stressed how the discourse on family viewing was incorporated into early television programming and production. Brunsdon reflects on how such feminist scholarship “opened up discussion of domestic space and the social relations of viewing” (2000, 32), noting also Raymond Williams’s comments on “the

¹⁹ The dominance of U.S. *content* does not mean the U.S. dominates the production of television genres or formats, which are also crucial ways of thinking about the global television market. In *Copycat Television* (1998), Albert Moran focuses the rise to prominence of “format” television. The U.S. is in fact a major importer of television formats, as distinct from individual series. In format television studies the ratings dominance of reality television I discuss below is particularly important (see also Moran 2009; Oren and Shahaf 2012), but Moran’s discussion of the problems formats pose for televisual intellectual property (Moran 1998, 14) is also pertinent for my broader argument.

²⁰ Across this chapter, my understanding of viewing habits draws on reports from Nielsen in the U.S. (<http://www.nielsen.com/us/en/insights.html>); Ofcom in the U.K. (<https://www.ofcom.org.uk/research-and-data>); and OzTam (<http://www.oztam.com.au/LatestAvailableReports.aspx>) in Australia. This means my discussion has primarily Anglophone reference points that I will try to acknowledge where appropriate.

significance of [television's] 'essentially new form' which engaged with 'the run of ordinary experiences' (Brunsdon 2000, 2, quoting Williams 1974, 55-56). Spigel records that NBC research reveals "promotional strategies designed to maintain systems of flow, as each program ideally would form a 'lead in' for the next, tailored to punctuate intervals of the family's daily routine" (Spigel 1992, 85). John Ellis and David Morley similarly saw family structures reflected in how television was viewed (Ellis 1982; Morley 1986). Morley's audience research focused on how familial power relations governed television viewing in negotiation with the daily schedule of programming integrated with everyday life. Stuart Hall's introduction to Morley's book representatively claims that television viewing in the U.K. in the 1980s, as much as Spigel's 1950s America, primarily "takes place in families (or whatever intimate social group now substitutes for them)" (Hall 1986, vi). Ellis also describes it as "intimate and everyday, a part of home life rather than any special event" (1982, 113).

There have long been arguments that complicate this idea about television's uniform banality, notably Meaghan Morris's (1990) discussion of various ways the spectacular and eventful are woven into television viewing. For my purposes, however, the characterization of television's distinctiveness through its familial domesticity is important. As James Hay and Nick Couldry note, the kind of audience studies I cited above "sought to make visible and knowable a medium that was so taken for granted, so embedded in daily life, as to require critical strategies for seeing the medium as medium, paradigm, and language" (2011, 478). Ellis's observations on television's domesticity were part of his broader argument that cinema and broadcast television were "divergent and complementary, having developed distinctive aesthetic and commodity forms... and divergent forms of narration and representation of events and people. These divergent products are marketed differently and ask their spectators to treat them differently." (Ellis 1982, 1). Such divergence between media forms is central to what "media convergence" is supposed to have overcome. But

that mode of television studies has also laid claim to a gradual displacement of the equation between the family and television, from Gary Needham's critical analysis of how the scheduling expectations organized around shared family viewing were disrupted, along with content expectations around normative sexuality (Needham 2009), to Donell Holloway, Lelia Green and Sonia Livingstone's work on children's digital viewing in Europe (2013). But studies of "television in the age of media convergence" (Kackman et al. 2010) focus on the relations between television receivers and an array of other devices, tools and platforms, linking these not just to changed modes of production but changed "relationships with technologies, the built environment, and each other" (Kackman et al. 2010, 12).

The strongest critics of the convergence narrative would agree that people increasingly watch television on non-traditional television devices – the technical dimension of changes in new media that I called interoperability in the introduction. Morley for instance, in an article calling for a more cautious, "contextualist" approach to considering the relationship between technology and culture, acknowledges that "television viewing in the United Kingdom is slowly evolving... to incorporate a variety of new modes of consumption", even if the total numbers remain low compared to more traditional practices (Morley 2012, 82). Phones, tablets, desktop and laptop computers, and "smart TVs" that incorporate Internet practices into traditional television function, are all displacing the dominance of the traditional television set, particularly among the youngest viewers. In 2013, 45% of new television sales in the U.K. were smart TVs, with built in Internet connectivity. By 2017, Ofcom's report on the U.K. communications market indicates that

The time spent watching broadcast TV continued to decline in 2016, although to a lesser extent than in previous years, decreasing by four minutes since 2015 to an average of 3 hours 32 minutes a day across all individuals aged 4+.

Within that overall decline, there is a widening gap between the viewing activities of the youngest and oldest audiences. The steepest decline in average viewing of broadcast TV was among children (4-15) and adults aged 16-24, while average viewing for over-64s increased slightly. Furthermore, new research from Ofcom found that 66% of teens use YouTube to watch TV programmes/films compared to 38% of all adults in 2017. (Ofcom 2017)

With this comes significant changes to television's meaning as a medium, even if their significance can be dramatically overstated at times. As the *Los Angeles Times* put it in 2012, "the TV people figured out nobody's just watching TV anymore. They're watching TV with a tablet or a smartphone or a laptop in their hands. They've completely lost control." (Chmielewski 2012). The displacement of the television receiver is often represented in terms of the decay of "broadcasting". We need to avoid misusing this statement or overstating its disappearance, but broadcasting in the sense of publicly distributed, universally viewable, television generally designed for a broad audience is now significantly less important than in the days of what was previously known as network "flow".

Television's "flow" was influentially defined by Williams, who argued that "planned flow" – or the "serial assembly' of a variety of units" – is "perhaps the defining characteristic of broadcasting, both as a technology and as a cultural form" (1974, 86). Williams argues that broadcasting and television are different from other artistic mediums because "the real programme that is offered is a sequence or set of alternative sequences of these and other similar events" (87). This model presumes that viewers cannot watch a television program without watching a network, and that network television thus controls much more than just program content. That is, through the incorporation of advertising and the scheduling of viewing, the economic foundations of television are part of its flow, and pivotal to television as a technological and cultural form. Needham describes the influence of this argument: "it was Williams's attention to the flow of programming and his experience of US television that ushered in the ongoing theorization of time's mediation and management through

audio-visual technologies” (2009, 144). Williams wrote his *Television* text in 1974, and clearly much television no longer works through flow in this way. Network broadcasting has changed, and new off-air viewing practices have emerged, including home video, Digital Video Discs (DVDs), and streaming, that profoundly impact both revenue streams for television, and the practices associated with television viewing. As broadcast and cable television channels are still both highly popular and organized around flow, this model still describes key elements of integration between television texts and their distribution, and Williams’s discussion of television remains useful even for the nexus of television and online media piracy because of his insistence on thinking about television as simultaneously a technology and a cultural form.

As the Ofcom statistics cited above also suggest, the movement away from traditional television viewing is particularly pronounced among certain demographics. If television viewing is increasingly oriented around the Internet, it is not equally so for all viewers, representing neither a blanket nor a linear transformation. Recalling Williams’s comments on the way television broadcasting developed within the parameters for radio (1974, 16), having long existed as an exhibition novelty before it became a popular medium, it is important to notice how such developments often come in the wake of audience demand, rather than bringing it about from nothing. The smart TV, for example, was patented in 1994 and yet has only recently begun to dominate new television purchases, fitting best with consumer viewing practices that are pervasively integrated with the Internet. Dealing with such unevenly overlapping changes – in technology, industry, and audience demand – means an account of television can never be linear, or globally comprehensive. I can only select the moments with now apparent impact, and on this basis I want to turn to the shift from “network” to what Lotz calls “post-network” television.

The same processes have transformed the industrial profit model by which television had long operated: “Viewers first gained the convenience of defying networks’ schedules with the VCR, which established a modest beginning that since has been expanded by DVRs and digital devices that integrate Internet and television to vastly expand consumer control.” (Lotz 2014, 64). Just as television undermined the previously dominant industrial organization of cinema, home video challenged the tie between television content and advertising that “flow” explained, paving the way for subscription television. But when Williams’s flow narrative is now set aside in studies of television it is not only due to such changes, but also because of the ideological connotations of flow, which for Williams allowed television to “come to serve, or seem to serve, as a form of *unified* social intake, at the most general levels” (1974, 21). While “seem to serve” is a very important caveat, this claim seems hardly worth debating when unification is anything but the dominant shape of television today.

While stressing that television networks (both broadcast and cable) remain relevant as “sites of program aggregation” (Lotz 2014, 28), Lotz influentially argues that by the mid-2000s television has moved beyond its broadcast form. This was not just a matter of replacing broadcast with cable programming. Rather, Lotz stresses the technological dimensions of the post-network revolution by which niche cable channels, video players, video/DVD box sets, online viewing, and DVR devices decentered the television experience:

“post-network” acknowledges the break from a dominant network-era experience in which viewers lacked much control over when and where to view and chose among a limited selection of externally determined linear viewing options – in other words, programs available at a certain time on a certain channel. Such constraints are not part of the post-network television experience in which viewers now increasingly select what, when, and where to view from abundant options. (Lotz 2014, 28)

In the first version of *The Television will be Revolutionized* (2007), Lotz concludes that “five Cs” dominate the world of post-network television: choice, control, convenience, customization, and community (245).²¹ This is not an analysis she offers in the second edition (2014). As Jock Given puts it, “Lotz initially envisaged the Post Network Era as ‘an erosion of network and channel control’, but came to imagine a primarily non-linear future ‘devoid of net-works or channels’” (Given 2016, 110). It is not entirely clear why those five Cs are displaced by Lotz’s new conclusion that we “may keep watching television” (2014, 263), as if that list of terms could not characterize “television” we keep watching, and in fact convenience recurs throughout Lotz’s later edition in ways I have found useful.

Joshua Green’s *Why Do They Call It TV When It’s Not on the Box?* (2008) similarly catalogues a raft of inter-related changes to television represented by the term “post-network”. Green indicates several aspects of this shift that are particularly notable for me here. First, he suggests the importance of television’s transformed physical form. As Green puts it:

The medium of broadcast television responded to the VCR and the cable revolution by wrapping cable into its operating definition, balancing niche broadcasting strategies and rolling, off-season series premieres, making use of the DVD as a viable platform for post-broadcast sales and (slowly) extending the site of narrative construction and television branding beyond the television set. (2008, 96)

This shift made room for series worth owning; for series that offered return on investment long after they were initially screened. “Most significantly,” Green argues:

²¹ Reading the original analysis, Alexander Dhoest and Nele Simons argue that their own “participants’ engagement is rather characterized by convenience, divergence, and community” (2016, 82).

these new television services dis-embed content from the broadcast schedule and re-embed it within different contexts, providing opportunities to explore questions of audiencehood and the community-forming roles broadcast television has traditionally played. (95)

Scholars of television, media commentators, and government bodies have continued to recognize the scope and significance of these changes, with concepts such as “binge viewing” entering common parlance, and policy documents such as the “2009 Report on Digital Britain” predicting a move from “linear” scheduling to a situation where “content is consumed actively through search and on-demand procedures” (Morley 2012, 82). It is possible to overstate the significance of these changes, as Morley has pointed out (82), and most authors offer their own caveats regarding how great a shift in consumption practices has occurred.

Television programming, disconnected from the single television receiver, can target niche audiences with interests in specific genres, whether distributed on networks specifically tailored to certain sorts of viewers and appearing at any time of day with a reasonable chance of finding an audience, or, as with streaming or torrenting, almost entirely decoupled from networks and circulating as independent units with no relation to timeslot programming. For broadcast television the timeslot is no longer the only consideration for establishing or assessing the success or the content of a television show. Even viewer “ratings” assessments (such as the famous Nielsen system) acknowledge that a significant portion of all broadcast viewing is delayed, a situation that has been furthered in the digital post-broadcast context by DVR, and other delayed-viewing devices, VOD online viewing, and authorized and unauthorized downloading. The increase of network repeats that arrived with the cable revolution, organized around 24-hour networks with less time proportionately dedicated to original programming, means that most television programming is no longer rigidly tailored to a specific idea of the viewer most likely to watch it at a particular air-time.

How this situation should be understood has nevertheless generated extensive disagreement. In a special 2016 issue of *Media and Communication* titled “(Not Yet) the End of Television”, a range of writers interrogate the claims of the “Post-TV” era. This is far from the first such endeavor. In 2009, a special issue of *The Annals of the American Academy of Political and Social Science* attempted to “cope with” the problems raised by “Post-TV”:

Let’s ask first what television is, or was. Second, let’s make sure that its really ending. Third, we should ask where to look for its impact, or, in other words, what hypotheses there are to guide us in our search for its major effects. And finally, how should we go about verifying those effects? (Katz 2009, 3)²²

One of the harshest critics of the general tenor of the convergence culture thesis is Morley, who borrows the term “cyberbole” from Vincent Mosco to argue against “the imaginary of technological futurism”, and the recurring “ideology of redemption through networks” (2012, 87). I will come back to the “futurist” narrative in chapter five, but it is important here that Morley wants to counter what he calls “media-centrism” with a “contextualist” approach, abjuring both “overly credulous” hype and the tendency to “simply insist we have seen it all before” (2012, 80). Although acknowledging that in some cases “distinctively new communicative patterns are emerging” (81), Morley sees exaggeration as more damaging for cultural and media studies, and focuses much of his criticism on such approaches.

It is useful, in light of the familiarity of the media convergence story in contemporary media analysis, to note increasing “interest in the survival of television in the digital world” (Buonanno 2016, 97).

Examples of this argument include Morley (2012), Frances Bonner and Jason Jacobs (2017), and

²² William Uricchio objects to the broadcast phase of television ever having become a “conceptual default definition”. Calling it “dial television”, he describes it as an image of stasis obscuring the fact that television has always “demonstrated an unusually opportunistic potential with regard to technological platforms” (Uricchio 2009; see also Given 2016, 110).

Alexander Dhoest and Nele Simons (2016). Dhoest and Simons argue that engaged television viewing still follows similar lines as it ever did. After Milly Buonanno, they stress that “synchronicity plays a vital role in creating a sense of” the television audience and if “watching traditional linear television is ‘watching with’” (Dhoest and Simons 2016, 177) this is still, by whatever means, crucial to television. After Lotz, they stress dispersal in the post-broadcast era, emphasizing the “time-shifting” technology of the VCR (Dhoest and Simons 2016, 178), and in the “convergence era” they do see further challenges to what Katz called “the television of ‘sharedness’” (Katz 2009, 7; quoted in Dhoest and Simons 178), but in “actual audience practice” (179) they stress television “is still a shared and social experience” (180).

While, for Henry Jenkins, the producers’ desire for a single “black box” through which all media consumption would proceed is a powerful metaphor for their failure to understand the processes of media change (2006a, 15), the Internet is an actually existing form of digital technology which connects consumers to all other pieces of digital technology. As Green, Jenkins, Siegel, Kackman et al. and many other scholars indicate, the Internet has dramatically intervened in the ways v television is now watched. This is not necessarily at the expense of other ways of watching, but collective online viewing does work differently, including by different expectations of what access should be shared by an online viewing community. It changes, for example, the felt burden of being “behind” with series screened over many weeks, or of being blocked or distanced from the latest series because of international distribution agreements. I want to argue that some of the most important developments in this history are driven by piracy, among other on-demand content acquisition practices that match piracy for convenience without its visible unacceptability. Television series now not only compete with other series for the attention of viewers, but have to contend with audience knowledge that they can access existing content from a variety of competing sources. Recent research conducted by NBC suggests that “nearly half” of surveyed American viewers in 2016

said they won't watch a series until they've heard "good things" about it, that 54% of viewers say they won't pick up a new series unless they can "see [previous] stuff" before watching new episodes, and 72% say they were more likely to start watching a new series if they had access to all the past episodes on demand or online, to catch up. It's worth remembering here that NBC is the oldest major broadcast network in the U.S. with an average viewer age of 54 (Sternberg 2015), and so shouldn't be presumed to be catering to only the most cutting edge viewing practices. Audience expectations of more flexible access have fueled the massive popularity of VOD subscription services, and more of the network audience now expects the kind of access standard to services like Netflix and Amazon Video before they will consider picking up a new series. The impact of online media piracy on television is not, however, simply a reflection of consumer expectations.

The first step in Lotz's history is itself the center of a media piracy dispute. As the 1984 Sony trial attests, recording television not only makes it possible to avoid advertising, but to keep a permanent copy of a program for yourself, and this remains borderline "piracy" by contemporary definitions (see Appendix for a discussion of this trial). Moving media piracy online simply required putting copies of this kind into circulation. The following sections will focus on online media piracy as a television consumption practice, and its influence on new forms of television content. This raises important questions about how we distinguish between television and the Internet, and between television objects and their use, and as an entry point to these questions I want to turn to online television fan communities.

Internet communities and fan cultures

One of the aspects of debates about "convergence culture" which has become most contentious is Jenkins' use of fans as a model for the positive possibilities of audience engagement, and as a model

for the future of all consumption. For that reason alone it would be necessary for me to talk about fans. But in addition I want to test this modelling by opening up a comparison between fandom activities and piracy activities. In 1988, Jenkins published an essay critiquing the dominant image of popular media “fandom” as bizarre and obsessive behavior (Jenkins 2006c, 37-60). He dissects a 1986 *Newsweek* article on “Trekkies” as a “textbook example of the stereotyped representation of fandom found in both popular writing and academic criticism” with a “relentless focus on conspicuous consumption and ‘infantile’ behavior” and “patronizing language and smug superiority to all fan activity” (39). The alternative approach Jenkins proposes, via Michel de Certeau, positions fans as “‘poachers’ of textual meanings” rather than “cultural dupes, social misfits, or mindless consumers” (Jenkins 2006c, 40). Jenkins’ essay has become a central text for fan studies and seems an apt description of online fan communities, even if it has sometimes been used to see fan practices as, improbably, unrestricted creative freedom.²³ But arguments about poaching and rewriting are also key to the newer field of piracy studies, sometimes taking Certeau or even Jenkins as its reference points, but more often with recourse to legal scholar Lawrence Lessig’s argument about the importance of democratic access to a “read/write” rather than a “read only” culture (Lessig 2008).

In *Convergence Culture*, Jenkins notes that he has “watched fans move from the invisible margins of popular culture and into the center of current thinking about media production and consumption” (Jenkins 2006a, 12). In their introduction to a collection of critical essays on *Fandom*, now in its second edition, Jonathan Gray, Cornell Sandvoss, and C. Lee Harrington outline a “waves” model of fan studies in which pathologization has been left behind:

²³ As an example of the important counter-arguments, Christine Wooley sees in *X-Files* fan communities an example of collective cultural expression that exceeds images of passive consumption, as Jenkins suggests. But while these fans “attempt to make the show their own” through a range of creative and critical practices they also “frequently encounter the limits of their interpretive and creative position” (Wooley 2002, 37) in relation to the series’ creators and producers.

the public recognition and practice of being a fan has itself profoundly changed over the past several decades. As we have moved from an era of broadcasting to one of narrowcasting... the fan as a specialized yet dedicated consumer has become a centerpiece of media industries' marketing strategies. (Gray, Sandvoss, and Harrington 2007, 4)

Gray et al.'s use of television history to periodize fan history in this essay is not incidental because strategies to leverage fan investment have been crucial to the move between these types of television.

For discussions of online media piracy we need to draw attention to the overlap between Jenkins' earlier argument about fans who poach meaning from authorized texts and his later discussions of the way fans disrupt pre-established relations between producers, consumers, and distribution chains that materialize profit. Jenkins downplays, and at times outright denies, the possibility that fan creativity is a threat to content industries and creators, but as a wealth of cease and desist orders, lobbying groups, and litigators suggest, this is by no means an accepted matter of fact. Here I draw attention, in Jenkins but also in practice, to the overlap between fans metaphorically poaching meaning and fans who may be literally poaching sales.

As Jenkins suggests, fans seek out the media they appreciate more actively than most consumers, modelling how dedicated audiences experiment and innovate to maximize their access to both preferred content and to other fans who will recognize and support their appreciation. While events like Comic-Con are still visibly distinct activities, collecting fans from a disparate range of locations into a space outside their ordinary lives that elevates their fandom into a powerful public statement of identification, such events now make up only a small portion of "fan" activities. Fandom has more broadly become entangled in the everyday, and "the Internet has been joined by

a host of other technologies that extend both fandom and the prospects for engaging in fan activities into multiple pockets of everyday life (Gray, Sandvoss, and Harrington 2007, 8). As Gray et al. note, digital mobile devices “contribute to and reflect the increasing entrenchment of fan consumption in the structure of our everyday life” (8).

For the revised introduction of the second edition of *Fandom* (Gray, Sandvoss, and Harrington 2017), Gray et al. drop their list of digital devices that allowed fans to take their fandom out into the world. They also no longer discuss this move into the everyday in the same explicit terms, instead taking the fan’s everydayness for granted. The new introduction opens by noting the mainstream relevance of fandom, from electoral politics to popular media, and invoking a story about ongoing media change:

In the world of entertainment, streaming is now a commonplace route to access music, television, and film for many households across the world. The acceleration of the shift from physical media to digital distribution channels has created new incentives for telecommunication providers and online retailers to gain controlling stakes in content rights and production (1).

The Internet has been crucial to new forms of fan visibility but is also a site for new engagement between producers and all kinds of audiences, including fans and pirates.

Over the decades between the 1990s and 2010s, most fandoms have become predominantly online formations, with most online fan interactions converging on forms of interpretation that resemble what was once meant by “water-cooler” discussion. The “water-cooler effect” was famously coined by an ABC executive in the early 1990s to describe the word-of-mouth distribution of the series *Twin*

Peaks (1990-91, 2017-).²⁴ Such conversations were not thought of as specialized fandom in the dressing up at Comic-Con sense, and Jenkins is thus right to stress that most fandom was always continuous with the everyday (Jenkins 2006a, 21-22). Nevertheless, today, even such apparently physically interpersonal versions of fandom as “cosplay” can be performed online (however differently than at fan conventions, cosplay images populate Instagram, Tumblr, reddit and YouTube, for example).

A *Star Trek* fan in the 1980s might discuss the series and its spin-off texts with like-minded friends, might join a fan club, might produce tribute materials for and with these groups, and might even attend fan conventions just as current fans would. But for contemporary television fandoms there are online spaces that provide easy access to all these forms of fan engagement. An online fan of *Star Trek* wanting to discuss the current series (*Star Trek: Discovery*, 2017--) on reddit can do so in a dedicated subreddit (<https://www.reddit.com/r/StarTrekDiscovery/>), or in the one dedicated to the whole franchise, with over 150,000 subscribers (<https://www.reddit.com/r/startrek/>).²⁵ They can do so while discussing politics, video games or other interests in other online spaces, interacting with or helping produce more niche *Star Trek* fan material in another browser tab (such as <https://www.tumblr.com/tagged/star-trek-cosplay>). This interaction doesn't require them to leaving

²⁴ In 1990, when *Newsweek* was reporting the decline of *Twin Peaks*' water-cooler power, this phrase was quite literally meant: “Last spring ‘Twin Peaks’ may have rivaled Donald Trump as the most-talked-about subject at the office water cooler. Now the show is sinking fast. The most recent Nielsen ratings ranked ‘Peaks’ a dismal 75th place for the year out of 101 prime-time programs.” (Newsweek Staff 1990). But by the time Jennifer Thackaberry (2003) was using the water-cooler trope to discuss *Survivor* fan reception in 2000 it had become a story about the way fans make a show succeed.

²⁵ Reddit encourages specialization, although it still ranks consistently within the top ten most trafficked websites in the world. It defines itself as “a source for what’s new and popular on the web. Users like you provide all of the content and decide, through voting, what’s good and what’s junk. Links that receive community approval bubble up towards #1, so the front page is constantly in motion and (hopefully) filled with fresh, interesting links.” (<http://www.reddit.com/wiki/fag>) While the front page (www.reddit.com) has the newest and most “upvoted” content for the whole of reddit, the site is divided into “subreddits” dedicated to particular subjects. When people post to reddit they contribute to a relevant subreddit of their choice. The *Star Trek: Discovery* and broader *Star Trek* subreddits thus only have posts about those topics.

the spaces of their ordinary lives, including Internet-connected spaces for paid work (see Driscoll and Gregg 2008).

Brian Longhurst, Gaynor Bagnall and Mike Savage argue that, like all audience research, fan studies “should begin from the localities where people live” (2007, 125), and attend to how “place” remains important to media experiences. However, “where people live” for the sites I am discussing is, at one important level, online. Borders between spaces can be apparent but nevertheless not work the same way as offline borders. For example, only someone with significant interest in video games would be likely to find the *Game of Thrones* thread on dedicated StarCraft fansite “Team Liquid” by accident. It nevertheless has tens-of-thousands of posts and millions of views, and is used by many people who don’t frequently visit the site for any other reason. This one thread draws in new fans among users who came to the site as gamers, attracted by the popularity of the thread among people who clearly shared their taste in gaming, but dedicated fans of the series with only a passing interest in gaming clearly also find this thread through links in other discussion fora.

There is already extensive scholarly material working towards a history of Internet fan communities, including material by writers like Jenkins and Nancy Baym on how these communities have changed as the Internet became a more dominant media form (see Baym 2000; Jenkins 2006b). This history cannot be a linear story of redundancies despite the move online that I referred to above. Both Baym’s and Jenkins’ work begins with UseNet groups for television fans,²⁶ and they still exist. Jenkins’ afterword to Jean Burgess and Joshua Green’s book on YouTube acknowledges that it remains continuous with many older fan practices (Jenkins 2009). It is not only that influential

²⁶ Any given UseNet group is one of “thousands of primarily recreational discussion forums” that evolved out of the Usenet computer network developed in the 1970s to “piggyback onto the Internet” (the literal meaning of OTT) and enable scientists to share information (Baym 2000, 5). Many are still accessible, but the system has been largely displaced by communication in other forums.

Internet spaces and social media sites like Facebook, reddit, Tumblr, Twitter or YouTube can be turned to the purposes of fandom without giving up other uses. Representations of fandom are more broadly integrated into other kinds of communication. Hashtags on Twitter, subscription channels on YouTube, and similar online practices, are all often turned to fan practices.

As examples, I want to single out two television fan forums. The first is the *Breaking Bad* (2008-2013) “subreddit” (Figure 5), and the second is the *Game of Thrones* (2011--) discussion thread on the “Team Liquid” gaming site (Figure 6).²⁷

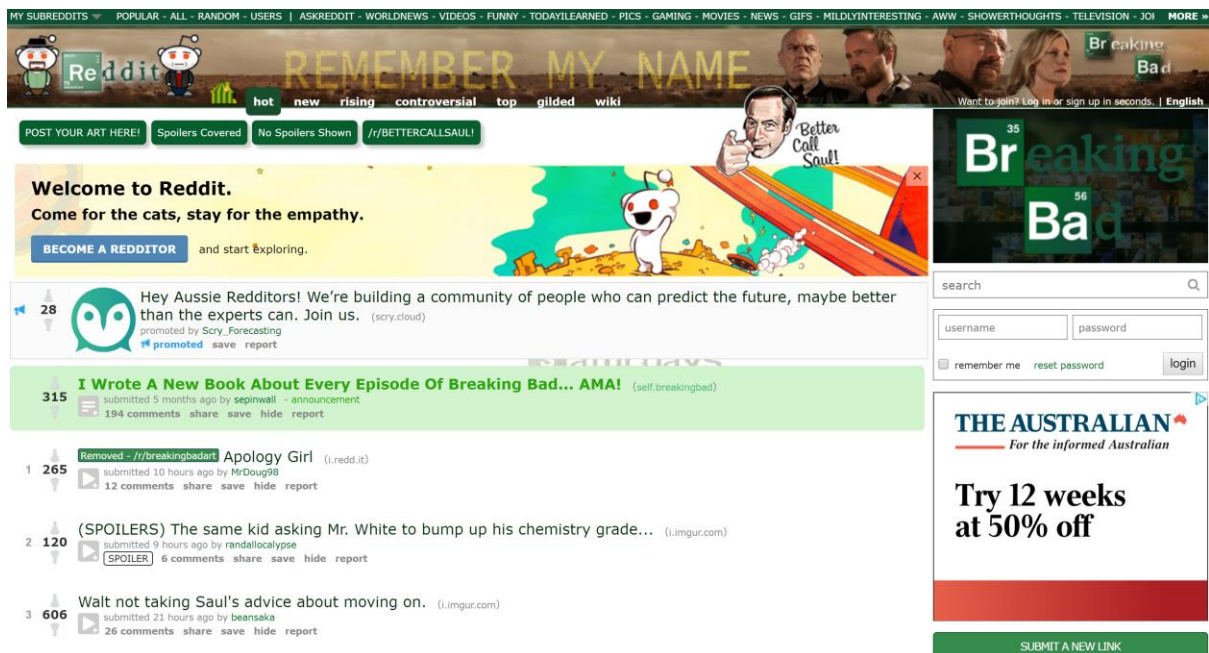


Figure 5: The Breaking Bad subreddit: <http://www.reddit.com/r/breakingbad> 10/03/18

²⁷ This is a thread within the “media & entertainment” subforum of Team Liquid, a gaming discussion site focused mainly on the game *StarCraft*. *Game of Thrones* is historically the third most popular thread in this subforum, behind “Korean Music Discussion” and “Anime Discussion”, loosely reflecting the shared interests of *StarCraft* fans.

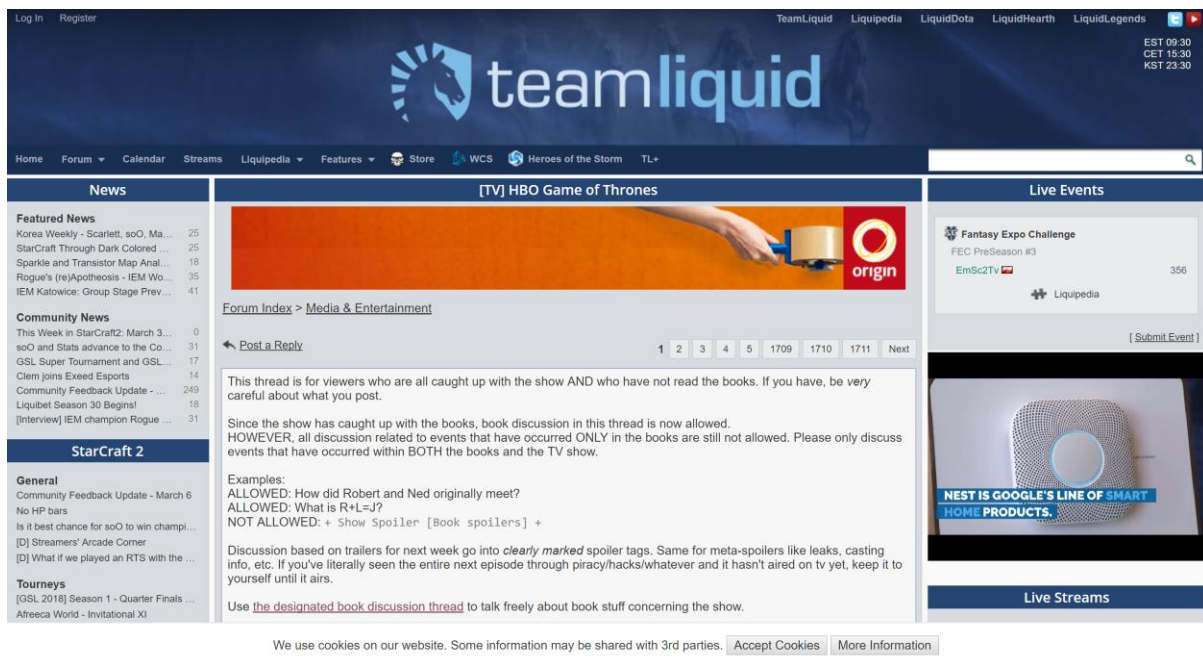


Figure 6: The Team Liquid GoT thread: http://www.teamliquid.net/forum/viewmessage.php?topic_id=82188 10/03/18

Arguments about the depth of community engagement online interaction facilitates are not only typical of “convergence culture” arguments but have also been key to countering the narrative in which media piracy is just theft. For these reasons, comparisons to the operations of online fan spaces, forums, and communities are particularly useful, and not only because “fan” and “pirate” groups and practices often overlap. If the cultural form of fan communities pre-exists the specific sites or tools now available to them, some online spaces clearly generate community because they offer a new level of integrated space and practice. The central criteria for online fan community may still be the one Baym identifies in her own participation in UseNet groups: a collective “of people with unique voices, distinctive traditions, and enjoyable relationships” which directly affect how television is viewed (2000, 1). This includes sites like reddit that people frequent for the purposes of collective identification with a fan object. For Baym, the question of whether these interactions are communities comes down to whether a given “social world” constructed online *feels like* a community for its participants (2). Perhaps no more precise definition would capture how communities form and work, but this also suggests that considering the social meaningfulness of

online media piracy in these terms requires the kind of close analysis that is at present more apparent in work on fan communities.

Online fan spaces can produce more dense and intimate relations between people than the water-cooler level of commentary on television requires. Grounded in shared interests, such spaces can locate the formation and negotiation of identities and of shared belonging and thus shared responsibilities for maintenance of the space. Within online interaction, options for anonymity (nobody needs to know who you are) often combine with options for public visibility (anyone can read what you say), and regular users of online communities inevitably build up visible personas sustained by engagement with that space. Recognizing this does not resolve the question of whether online communities have the same significance as offline communities. They certainly are not compulsory in the same way as some forms of social belonging, but they are clearly often spaces of personal and interpersonal significance.

In Jenkins' discussion of *Twin Peaks* fans on UseNet, he suggests that their communities were fairly isolated. They were intentional groups attracting already dedicated fans. *Twin Peaks*, as one of the earliest shows to have an online fanbase, might be usefully compared in this respect to *Game of Thrones*, regularly named as the most pirated television program in the world.²⁸ According to Jenkins, *Twin Peaks* fan discussion often focused on access to the series, by sharing videotaped episodes, for example, as well as involving other kinds of fan discussion, such as interpreting the

²⁸ Since 2012, coverage has reported *Game of Thrones*' success on torrent sites. See, for example: *Screenrant* in 2012 (<http://screenrant.com/most-pirated-tv-shows-game-of-thrones-2012/>); *Torrentfreak* in June 2013, which estimates 5 million downloads per episode (<http://torrentfreak.com/top-10-most-pirated-tv-shows-of-the-season-130622/>), and claims that its season three finale (s03e12 "Mhysa") was downloaded over 1 million times in a single day and shared by over 170,000 people at once, both of which it claims as records (<http://torrentfreak.com/games-of-thrones-season-finale-sets-new-piracy-record-130610/>); and *Indiewire* in 2017, which specifies *Game of Thrones* was "the most pirated television series for the sixth year in a row" (<http://www.indiewire.com/2017/12/most-pirated-television-shows-2017-game-of-thrones-1201911688/>).

narrative and debating the future of the series. But the relatively private, dedicated, fan space in which these activities took place make them very different than *Game of Thrones* discussion in a space visible to and used by not only fans but also non-fans and non-dedicated fans, and in much larger numbers.

Although anyone can visit the *Breaking Bad* subreddit it is nevertheless an intentionally built community setting that resembles the *Twin Peaks* UseNet board discussed by Jenkins more than the less-targeted forum provided by the Team Liquid thread. Although the latter is more difficult to find and access, being embedded in a gaming community, it is rhetorically open to members who are not fans, as the *Breaking Bad* subreddit is not. But neither relative rhetorical closure nor inaccessibility make these forums more or less significant versions of an online fan community. Among the “interpretive strategies” Jenkins saw on alt.tv.twinpeaks, he positions “their fixation on resolving narrative enigmas, their development of multiple alternative restagings of the core plotlines, their complex relationship to Lynch as an author, their appeal to extratextual discourse and intertextual linkages” as central to fan engagement (Jenkins 2006b, 119). These are core elements of both my selected sites. The usefulness of the Internet for fan activity is evident in the fact that “extratextual discourse and intertextual linkages” are central mechanisms of not only cross-posting within fan spaces but also more generally of the “liking”, link-sharing, “retweeting” that enable online engagement on sites like reddit.



Figure 7: image series <http://imgur.com/a/T9ZWu>: 08/11/13

Physical location has little influence on such engagement, since all users are fairly equally immediate to the scene of fan engagement. This involves regular use of external tools and sites to create and host fan-made content. Image-hosting site imgur as well as YouTube, for example, are widely used by *Breaking Bad* fans on reddit, but are themselves tools rather than sites of community interaction. Figure 7 is an example of fan imgur productions, in this case a series of composite images suggesting that *Breaking Bad* intertextually incorporates a homage to the film *Pulp Fiction* (Tarantino 1994). This was posted with the note “x-posted to /r/movies”; a blunt example of how sites like reddit allow crossover between different kinds of fan communities and different kinds of online tools.

Fans can now easily choose between very different kinds of online fan sites, including those that predominantly compile links, those that host general discussions specialized only by the fandom, those that focus on specific fan practices to the exclusion of others (like cosplay or fan fiction), those with more or less official/authorized relationships to their object, and piracy sites. The degree to which a sense of “community” is present across this range is not determined by distance from authorized distribution. On Twitter, the overlapping running commentary about popular broadcast television series as each episode airs increasingly includes an authorized feed among the fan feeds, but tight relations between some users form as subsets of the whole feed of Twitter responses, and these subsets can have very different relations to that authorized feed (see Cameron and Geidner 2014; Yang and Coffey 2014).²⁹ A tweet about how much the poster loved the last episode of *Game of Thrones*, or a particular character, is fan engagement blended with whatever groups have been assigned to that Twitter account. However, hashtagging this tweet with the sanctioned tag (#gameofthrones) asks for connection to a collective of fans who are largely unknown, while posting the very same comment to a community of people with whom the user regularly discusses *Game of Thrones* is something very different again, identifying that site as the space in which their own *Game of Thrones* happens with the people who use it.

On the Team Liquid *Game of Thrones* thread, a clear majority of the posts are from people who are watching or have just finished watching each episode. Such collective social watching takes place both on and off social media sites, but choosing between forums is to choose a style of interaction as well as choose between particular rules of engagement. Team Liquid tends to involve discussing *Game of Thrones* with people who are also fans of *StarCraft*, and discussion is relatively unstructured – it all occurs within one thread, given that the main focus of the site is not *Game of Thrones*. But a

²⁹ An example here would be the “Red Wedding reactions” compilations users made of Twitter responses to the dramatically violent *Game of Thrones* episode “The Rains of Castamere” (s03 e09), in which a number of central characters were killed.

subreddit may offer a more expert-oriented forum for discussion of episode content. *Game of Thrones* discussion in the official subreddit involves single threads for new episodes, although most posts analyze the series more broadly, making predictions and inviting discussion about broad topics, posting images, celebrating favorite moments, or slating “AMA”s with people associated with the series (and, of course, making predictions for series still in process).³⁰ But there is also expert commentary in the *Breaking Bad* subreddit, as indicated by the “flair” (the subtitle appearing in the browser for visitors to the page). As the last episodes of the final season were airing in 2013, this flair was changed to read “Nothing beside remains: round the decay”. This references Percy Bysshe Shelley’s poem “Ozymandias” (1818) and also the title of one of the series’ final episodes, an intertextual reference that only dedicated (and properly knowing) fans were likely to understand.

Such congregations of experts breed schism and critique (see Johnson on “Fantagonism”, 2007). Fans of the *Game of Thrones* book series might congregate around the dedicated subreddit for the book series (www.reddit.com/r/asoiaf), even while still engaging with the series as discussed in the main *Game of Thrones* television show subreddit, where book discussion is banned to avoid spoilers. Such specific fan contexts can seem like rival groups, celebrating different kinds of fandom and criticizing the behavior or approaches of fans in other groups. Posts will also often link offsite, particularly to popular commentators with extensive followings who analyze the books or series on places like YouTube. Other subreddits pop up to make fun of community trends. The subreddit [/r/asoiafcirclejerk](http://www.reddit.com/r/asoiafcirclejerk) centers on mocking book fans who are perceived as endlessly obsessing over the same small details, and presenting repetitive, weak criticisms of the television series. And the [/r/freefolk](http://www.reddit.com/r/freefolk) subreddit is a place for jokes, images and memes about *Game of Thrones* that can’t be

³⁰ AMA stands for “ask me anything”, a reddit-specific tradition where famous or interesting people offer to, or are asked to, answer questions from users on the site for a fixed period of time. It originated from the subreddit <http://www.reddit.com/r/IAMa/> where a schedule of upcoming celebrity AMAs is available so that interested users can come to the site to ask questions.

posted on the main subreddit, which forbids “silly posts, external funny links, memes”.³¹ There are layers of fan engagement expressed by a selection of tools, sites, and modes of interaction.

As Jenkins and others recognize, online fan communities form a significant part of the cultural “buzz” required for promotion of popular media today, perhaps especially television. If less overtly than UseNet and similar online groups, even peer-to-peer services like Napster exposed people to new content and facilitated and connected fandoms. Spigel declares that “if TV used to be a subject for armchair critics, water cooler friendships, or dinnertime banter, today it has become part of the grammar of online conversations” (2009, 149). In building a comparison between online media fandom and online media piracy, it matters that the water cooler was always a metaphor for a space both within and without the everyday life of viewers: the water cooler was a break that is still part of the routine. Like the water cooler, most online opportunities for expressing fandom bring these practices very close to everyday life while leaving dedicated fan communities still somehow distinct. The same is true of online media piracy practices.

The points I have made here about online fan communities do not only overlap because, as I will discuss below, fans may also be pirates. They overlap through these questions about degrees of community formation, and through questions about creativity. While it may seem that fan creations are different from the blunt acquisitiveness of “piracy”, this distinction is not straightforward. What Jenkins calls, with reference to Lessig as much as de Certeau, the “rewriting” and “rereading” practices of fan communities continue to dominate (Jenkins 2006b, 39). While even YouTube fan videos and imgur image compilations, for example, are more likely to be interpretations than simply

³¹ /r/freefolk takes its name from a group within the *Game of Thrones* world, who live beyond the borders of any state and call themselves “free folk”, and everyone else “kneelers”.

celebrations (as in Figure 7), they are also likely to infringe in multiple ways on a literal interpretation of copyright.

Un-domesticating Television: What to pirate

Michael Strangelove makes one of the strongest connections between convergence television and online media piracy across two books, *The Empire of Mind: Digital Piracy and the Anti-Capitalist Movement* (2005), and *Post-TV: Piracy, Cord-Cutting and the Future of TV* (2015), in the latter singling out “digital piracy” as a force shaping contemporary television. While discussing post-TV as “the end of a particular way in which broadcast television structured viewing and the beginning of new ways of participating in television” (2015, 6) in expected ways, Strangelove sees online media piracy as a way of asking “can there be anything more to television than what is offered to us by the current variations of commercial and state-run media?” (2015, 242). More bluntly than Jenkins, Strangelove sees the efforts of content industries to contain piracy as a doomed attempt to maintain “a twentieth-century mentality of control” (2015, 47), but I am more interested in the successes of efforts to transform television to meet the expectations of audiences who might otherwise pirate. Strangelove argues that the “primary movers” in the “convergence” transformation are “not television and film industries but the consumer electronics industry, the Internet, and the online audience” (2015, 9–10). Mike van Esler agrees, but also argues that “the ways that legacy television companies have adapted to new technologies and cultural practices suggests that rather than traditional television going the way of radio,” via platforms like Spotify and podcast technologies, “television as a medium is actually not terribly different, at least not enough to conclude that we have entered a new era.” (van Esler 2016, 131).

Strangelove's story about the end of television thus does not just seem premature – I see no immanent sign that television will become, let alone now is, “a virtual domain that does not readily comply with established rules for the regulation of time place, and property rights” (2015, 187) – but it also seems to conflate a range of quite different changes. His claims that television now offers “more control, access to more content and more types of entrainment, lower prices, and the ability to act as a creator, producer, and distributor of content” (2015, 123), both seem correct and yet to go too far, to be too sweepingly willing to incorporate the increasing prominence of user-generated content into the power that convenience has over television consumption today. While these are related through the changes to television in recent decades, they are far from the same thing.

Many kinds of television are heavily invested in trying to generate and exploit the clustering of interpretation, taste, and socialization which fan communities support. Television producers arrange promotional events online like AMAs, or promote mandated hashtags to encourage viewers using tools like Twitter and Instagram that assemble their responses in collectively accessible ways. The opening scenes of the final episode of *Breaking Bad*, for example, had #GoodbyeBreakingBad superimposed next to the AMC logo on the bottom right-hand corner of the screen and a final message screened during the credits encouraging people to leave their comments and best wishes on the AMC website. Using such channeling labels, content producers aim to channel fan activity to inspire potential dedicated fans. These are all aspects of the consumer-producer “convergence” on which Jenkins focuses. But fans may also express this dedication by “pirating” their favorite texts. When television's “prosumers” are engaged in “produsage”, to return to the terms I introduced in chapter one, they are often not using a television set, but there is also no guarantee that they are financially supporting the television industry.

As James Meese suggests, “rather than situating piracy as a generative or even as a passive form of consumption, content industries have historically tended to see piracy as opposed to these two modes of engagement” (2014, 24), but in fact piracy has shaped television content acquisition in ways consistent with my discussion of music in chapter one. Whether by DVR playback, streaming, DVD, or torrenting, the contemporary television viewer tends to acquire television themselves by selecting across a range of sources rather than relying on television airtime schedules or even authorized off-air release dates. Amid the not-on-the-box transformations of television discussed above, various forms of what legally count – or might count – as “piracy” have come to seem like viable options on the television acquisition menu. Fan investment is an important factor here because choosing not to wait for or depend on network contracts requires making additional individual effort to acquire the show and committing resources of time, bandwidth, or money to television in recognition of the value it offers in return.

Convergence, Jenkins is at pains to stress, does not mean the integration of all media into one media feed – that imagined single “black box” (2006a, 14-15). As Green puts this, Jenkins “constructs convergence as an unfolding series of cultural, social and business practices resulting from the repeated intersections of new and old media rather than as a coming singularity brought about by the construction of ever more fantastical black boxes” (Green 2008, 96). Instead, this convergence “occurs within the brains of individual consumers and through their social interactions with others” (Jenkins 2006a, 3). Although I am dubious about the claim that new tendencies in media consumption have created new kinds of consumers, any evaluation of this claim requires that media piracy be inserted into the convergence culture argument. Piracy sites and links are exchanged between fans, including on the sites I discussed above, and are used to build or reinforce communities across an international terrain when community members might otherwise have different kinds of access to the form that brings them together. At the same time, media piracy and

media fandom cannot be equated. Piracy might be a sign of fan commitment but is often far more casual. That is, it does not necessarily involve expressions of fandom within or outside fan communities even while it might be developed through the same channels. The question of whether piracy forms or expresses a taste community is thus one approach to the relations between pirates and fans.

In fans collective negotiation of what is or is not valued about a series, what it does or does not communicate, and so on, shared interpretative and taste formations are as important to community-building as interpersonal dynamics. In this respect it matters that they are rarely entirely limited to a single object. A common topic on the *Breaking Bad* subreddit, for example, particularly after the series ended, is recommendations for other shows that a *Breaking Bad* fan might like, drawing out recommendations for series like *The Sopranos* (1999-2007), *The Shield* (2002-2008) and *The Wire* (2002-2008). Fans thus place their favorite series in the context of other works, shaping an interpretative community into a taste community. Similarly, YouTube channels providing analysis of *Game of Thrones* which were regularly shared on the major subreddits also produced content related to the HBO series *Westworld* (2016--), indicating that the detailed analysis of hidden meanings and complex plots and mysteries that defined their versions of *Game of Thrones* fandom were also relevant to that series, and would be of interest to their subscribers.³²

In September 2014, *Cablefax Daily* reported that

³² For example, Preston Jacobs (https://www.youtube.com/channel/UCXU7XVK_2Wd6tAHYO8g9vAA/videos), with over 150,000 subscribers, or Alt Shift X (<https://www.youtube.com/user/JaiWbio/videos>), with over 750,000, who both almost exclusively analyze the Martin book series *A Song of Ice and Fire*, drawing from discussions on sites like reddit and also drawing funding via Patreon from fans of their work – work these fans then share back on reddit and similar fan spaces.

Illegal downloads surged more than 340% within a day of the Emmy awards show for AMC's "Breaking Bad," HBO's "True Detective" and "The Newsroom," Netflix original series "House of Cards" and Showtime's "Homeland".... Most notable was Breaking Bad. The rate of illegal peer-to-peer file sharing jumped 412% the day after the Emmys broadcast, making it as the 2nd most-pirated show both worldwide and in the US. (Cablefax Staff 2014)

In Jenkins' discussion of *Twin Peaks* fans, their shared narrative about loving *Twin Peaks* was often expressed as contempt for the generality of television (Jenkins 2006b, 131), overlapping with what Jane Feuer, Paul Kerr, and Tise Vahimagi calls "the quality audience" (Feuer, Kerr, and Vahimagi 1984, 56). Jenkins sees this attention to quality as characteristic of fan communities more broadly: "If *Twin Peaks* was an exceptional television series, then" its dedicated fans perceived themselves as "an exceptional audience who possessed all the cultural competencies necessary to fully appreciate its greatness" (2006b, 132).

Breaking Bad and *Game of Thrones* might also be understood as "quality" series, as I will discuss below, but as Matt Hills argues in *Fan Cultures* (2004), fan attachment and expertise can be generated around shared texts that are not widely thought to accrue "cultural capital".³³ At least, some forms of social capital can be generated by collective fan appreciation or by facilitating the ways others are resources with the kinds of cultural access they desire. Wherever a community of television fans assembles they authorize particular kinds of expertise and value as appropriate to that community. Discussing fans of the (not at all culturally esteemed) reality series *Survivor* (2000--), Jenkins argues that "these communities... are held together through the mutual production and reciprocal exchange of knowledge" (2006a, 27). At this point I want to raise questions that will

³³ The applicability of Pierre Bourdieu's concept of cultural capital to fan knowledge should not be taken for granted, but is beyond my scope here. Certainly some kind of authority accrues to fan expertise within and across fan communities and even outside them, and television is no longer outside the field of creative works that allow for aesthetic expertise. See Bourdieu (1986) and also John Fiske's counter-argument (1987).

return often in the discussion that follows, considering whether and to what degree online media piracy, whatever its evident attachment to acquiring media content, involves either significant attachment to that content or significant commitment to mutual production and reciprocal exchange.

Forms of media piracy do appear in Jenkins' accounts of media convergence, always through fan practices and generally in what writers on piracy might call "grey" areas: fan fiction authors contesting claims they have breached the rights of authorized creators to control use of their texts (2006a: 169-205), or fans spoiling the production strategies by which series creators maintain audience suspense (25-58). But he stresses an overlap nevertheless. For example, in accounting for the popularity of anime in the U.S., Jenkins argues that this "shift occurred not through some concerted push by Japanese media companies, but rather in response to the pull of American fans" (2006a, 157), who utilized VCRs to pirate Japanese television, aided by the fact that "both Japan and the United States used the same NTSC format" (167). Japanese media companies, he claims, were "tolerant of the kinds of grassroots activities that American media companies seem so determined to shut down" (156). Utilizing both piracy and tolerance of piracy, U.S. anime fans built libraries of "both legal and pirated material" (158), established fan-subbing networks, and developed a fan-base for "large-scale anime conventions", which brought in Japanese creators/distributors, "astonished to see a thriving culture surrounding content they had never actually marketed overseas" (179).

Jenkins notes, however, that "for every franchise that has reached out to court its fan base, there are others who have fired out cease and desist letters" (2006a, 166). He views this "prohibitionist position" as doomed to failure on anything beyond "the most local level", given a lack of "popular consent". It is by no means clear that content industries and their legal representatives in general agree that clear lines can be drawn between fan piracy and other kinds of piracy. It is part of Jenkins'

optimism on behalf of the fan project that he believes that “whatever lines” content industries draw, they “are going to have to respect the growing public consensus about what constitutes fair use of media content” (2006a, 167). This is also consistent with his argument that fans, including as pirates, are the model of the convergence prosumer. Online media piracy must thus be factored into accounts of the changing media environment in which television production, distribution and consumption have been shifted by various new factors – not just an emphasis on fan influence, but also “auteur”, “quality” or “prestige” television, network drift, and binge/block television content, all of which belong to the context in which online media piracy of television also emerged. I want to connect the divergence of devices that play television content with changes in the types of television content afforded by such technological changes considered above, but through piracy rather than through “produsage”.

The idea of quality or prestige television is notable in this history. There are several earlier histories of the production and content values that shape “quality television” (Feuer, Kerr, and Vahimagi 1984; Thompson 1997), but accounts of quality/prestige television expanded in the 2010s, usually focusing on the same set of touchstones series, including *Twin Peaks*, *The X-Files* (1993-2002, 2016-), *The Sopranos*, *The Wire*, *Breaking Bad* and *Game of Thrones*. These series mark a particular phase in U.S. television history, the point at which cable television commenced original high-production-value narrative programming, reshaping the expectations of television as an industrial and artistic medium. Exemplarily for this literature, Sarah Cardwell defines quality television by “high production values, weighty themes and careful characterization and performances”; the deployment of an “author-function” that “adds prestige and a sense of artistic integrity”; and the expectation of a “higher level of engagement from the audience” (Cardwell 2007, 26-28). Assessing the quality of television in this sense is thus not a matter of personal taste, nor entirely a marketing strategy. Catherine Johnson argues that, in addition to “sophisticated scripts, complex multi-layered

narratives, and visually expressive cinematography,” quality television must also explore “contemporary anxieties” (Johnson 2005, 61).³⁴

Among the many ways the Internet is utilized to promote and extend the success of a television text, one strategy for flagging a series as quality (or cult) is invoking an “auteur” figure, where, as with *Twin Peaks*, an authorial status is attributed to a “creator”. The status of the creator depends on an active fan base in ways that can survive cancellation, as with Joss Whedon’s cult hits *Buffy the Vampire Slayer* and *Firefly*, or David Lynch’s *Twin Peaks*. *Twin Peaks*, which began very successfully but suffered a significant drop in ratings across its first season in 1990, is a telling example of the quality/fan/pirate nexus. Linda Ruth Williams argues that

The series’ reliance on its Thursday slot to capitalise on its sheer “talkability” is evidenced by the dramatic impact a slot change had on *Twin Peaks*’ fortunes. Chasing ever higher ratings, ABC shifted the show to Saturday nights, a far less water-cooler friendly slot: it’s hard to remember something you saw on Saturday when you get into work the following Monday. Subsequently, *Twin Peaks* began to lose its “buzz”, and ratings dropped. (Williams 2005, 52)

The network demanded format changes, shifted its timeslot multiple times, and eventually cancelled the series during its second season. The fan dynamics of this period hinged on broadcast times and then repeat viewing. However, *Twin Peaks* has maintained its reputation as a stand out series, spawning the kinds of audience follow-through that led to box-set releases, a movie, and many scholarly publications. Across this longer history, online exchanges for pirate tapes, and then pirate downloading, became vital and much discussed ways of maintaining and assessing its audience. As

³⁴ As I argue with Catherine Driscoll, with reference to the outlier series *Girls* (2012-2017), “quality series must stay ahead of current genre norms *and* make relevant interventions in contemporary social concerns. HBO drama has become a benchmark for quality of this kind. Striving to avoid comfortable integration among available television texts, HBO quality series seek *discomfort*, both by hybridizing disparate genres and by producing ‘edgy’ controversy. They thus necessarily foreground some of the most telling myths of a moment” (Fuller and Driscoll 2015, 258).

David Choi and Arturo Perez note, “by researching pirate communities, perceptive businesses and entrepreneurs have been successful in identifying needs that legacy businesses were not adequately addressing.” (2007, 169).

A much-hyped third season, *Twin Peaks: The Return*, was released on U.S. cable channel Showtime in 2017, and distributed by various streaming and cable options in other countries. This is only one among many television series that have “returned” in the years since torrenting made audiovisual piracy more accessible, including the *X-Files*, 24 (2001-2010, 2014), *Prison Break* (2005-2009, 2017), *Arrested Development* (2003-2006, 2013, 2018), and *Doctor Who* (1963-1985, 2005--). This somewhat mirrors contemporary Hollywood’s use of remakes habits, but a renewal is different from a remake, and often seems to be more celebrated by fans. These renewals depend on the visibility of a fan base, which is why they are a mix of “quality” and “cult” hits (see Hills 2010), or what Jason Mittell calls “drillable” media, that encourage “viewer engagement with narrative complexity (quoted in Jenkins, Ford, and Green 2013, 135).³⁵ *Twin Peaks* creators David Lynch and Mark Frost have stressed that a mooted fourth season would likely another take four and a half years, as did season three (Hughes 2017), and this movie-scale production timeline says a lot about the expectations of contemporary quality television, as does the sustained social media buzz that preceded and followed season three. Such renewals are evidently meeting fan demand, as Hills argues, and, as Jenkins anticipated (2006a 251-252), online media piracy is one of the ways in which such demand can now be assessed.³⁶

³⁵ Although it certainly is possible to discuss *Game of Thrones* as “cult” television and as a “cult” hit (see, for example, <http://www.dailymail.co.uk/tvshowbiz/article-2316246/Why-Game-Of-Thrones-latest-American-cult-classic-see.html>), this discourse seems far less appropriate to most of the series cited as “quality” or “prestige” television. The quality/cult distinction thus seems worth maintaining.

³⁶ Perhaps Jenkins’s speculations on media convergence most clearly anticipates the rise of crowd-sourced funding for content production (on sites like Patreon, Kickstarter, or Gofundme). While fans have campaigned to save or renew television series over many years – *Star Trek* is possibly the first example – Jenkins highlights the example of the comic *Global Frequency*, where a pilot for a television adaptation on that had never been picked up “was leaked on the Internet, circulating as an illegal download on BitTorrent, where it became the focus of a grassroots effort to get the series back into production” (2006a, 251). While Jenkins represents this

Prison Break also offers an example of fan-based media piracy success. As You Jie and Jenkins both separately recount, *Prison Break* was “never legally introduced” to the Chinese television market “due to concerns about its anti-law enforcement theme and explicit violence” (Jie 2014, 205). Despite this, it became “the most popular American TV drama” in China, generating fan sites, merchandise sales, and stardom for lead actor Wentworth Miller, who visited Shanghai in 2008 and created “a sensation at every public appearance” (Jie 2014, 207). When the series ended its first run in May 2009, “more than 2 million posts were added to the ‘*Prison Break* Forum’ on Baidu.com, the most used search engine in mainland China, lamenting ‘the end of *Prison Break* as the end of everything” (Jie 2014, 206-207; see also Jenkins, Ford, and Green 2013, 270-272).

The means – technical, social, and generic – by which a television series is acquired affects whether or not it will be conceived as cult or quality. Jonathan Bignell (2012) concludes a discussion of “Quality and Television” with a discussion of *The Wire*, noting that it took a long time to appear on British television and was then on the satellite channel FX rather than a terrestrial network. He adds that FX was trying “to achieve something like the same significance as HBO as a niche channel” (2012, 187), but *The Wire*’s reputation had long preceded its appearance on FX. The end result was that relatively few British viewers saw it on “television” at all: it was mostly viewed as a DVD box set and then re-watched as a repeat on (mostly subscription) television.³⁷ However, Bignell doesn’t

as “giving the producers leverage” and inviting us “to imagine a time when small niches of consumers who were willing to commit their money to a cause might ensure the production of a minority-interest program” (252), the story is also murkier. The same piracy was cited by the comic’s author, Warren Ellis, as rendering the series “as dead as dead can get” (Ellis in Tabu 2005).

³⁷ This is related to what *Wired* editor Chris Anderson called “The Long Tail” of media content, positing that “Unlimited selection” would encourage consumers to “discover their taste is not as mainstream as they... had been led to believe by marketing, a lack of alternatives, and a hit-driven culture” (Anderson 2004). For Jenkins, this highlights the value of consumers who are not attracted only to heavily promoted new attractions but “will actively seek out content of interest and who will take pride in being able to recommend that content to friends” (2006a, 252). However, as Philip Napoli records (2016), subsequent studies have questioned the extent and significance of any diversification of taste and consumption related to increased content.

mention that *The Wire* was also widely downloaded rather than purchased, or that much of the cultural capital attached to this series resulted from buzz around piracy consumption as well as from Internet fan communities.

For many years now, ratings themselves have taken many modes of consumption into account. As Josef Adalian explains, in the case of HBO ratings, the old air-time standards have been significantly shifted as networks like HBO assess their ratings as all unique viewers of all broadcasts during the week, including DVR recordings, HBO Go viewers, and re-runs after the initial broadcast (Adalian 2013). By this metric, less than half of HBO's recorded viewers of the series watch *Game of Thrones* when it airs at 9pm on Sunday nights. When *The Wire's* ratings were being debated, however, the measures had not yet adjusted in this way; and even after this shift they still would not directly incorporate "pirate" viewing, any more than clips and links disseminated through social media, or even the future impact of DVD and other off-air sales. In fact, *The Wire's* status as underappreciated work of genius is part of its significance. Cult series raise similar issues with assessing success. Jenkins et al. refer to Mittell's (2005) account of the way he watched the first season of *Veronica Mars* (2004-2007). Beyond simply saying that it was "either black market or no market" for him as a viewer, since he missed the original launch of the show on UPN, Mittell asks "what value would have been gained" by the industry if he had in fact have picked the show up from the beginning and watched it on television. Mittell concludes that file-sharing "actually offered more value to the industry" than if he'd watched on the network. If he had watched it on UPN he would have skipped commercials using his TiVo, and his viewing habits were in any case not being tracked by ratings. Hence no value was lost. While file-sharing, though, he not only "encouraged others to watch and even re-watched the series to 'hook' his wife", but his "viewing through torrenting could actually have been tracked as an indicator" of the show's popularity, through less official ratings systems.

Later, he “also converted to a legal viewer” and “used the show in his classes, requesting that his university library buy *Veronica Mars* on DVD” (Mittell 2005, in Jenkins, Ford, and Green 2013, 115).

As Mittell, Choi and Perez, and Jenkins all suggest, online piracy can indicate fan potential, but the overlap between fan communities and critical appreciation is also often a pointer to high rates of piracy. While mainstream ratings hits do feature prominently in lists of the most pirated series, those lists also feature cult fantasy and science fiction series, and the “quality” genre. After *Game of Thrones*, in 2017 the most torrented series conform to this mix of narrative genres: numbers two to ten were *The Walking Dead* (2010--), *The Flash* (2014--), *The Big Bang Theory* (2007--), *Rick and Morty* (2013--), *Prison Break*, *Sherlock* (2010--), *Vikings* (2013--), *Suits* (2011--), and *Arrow* (2012--) (Ernesto 2017). All are current series, but produced and distributed in a range of ways. They are not, however, all top-rating series. Taking U.S. ratings as a guide, the top series, including free-to-air, cable and delayed viewing, were *Bull* (2016--), *America’s Got Talent* Wednesday (2016--), *The Walking Dead*, *America’s Got Talent* Tuesday, *This is Us* (2016--), *NCIS* (2003--), *Young Sheldon* (2017--), *The Good Doctor* (2017--), *The Big Bang Theory*, and *Sunday Night Football*. Because I am writing from Australia, and given the often reiterated statements about the prevalence of online media piracy in Australia, it is worth noting that the top-rated programs were all either event sport – Australian Rules football, Australian Open Tennis, Rugby League State of Origin and Grand Final, and the Melbourne Cup horse race – or reality television – *The Block* (2003--), *Australian Ninja Warrior* (2017--) and *The Bachelorette* (2015--). These patterns, in which only some genres of top-rating television also attracted piracy, have been relatively consistent across the years I have been writing this thesis.

This non-differentiation in online piracy circulation between series that are strongly differentiated in their authorized distribution audience indicates that online media piracy is used for particular kinds

of acquisition – whether or not these users also watch television by authorized means. The most watched Netflix series for the same year (internationally) did not overlap at all with the most torrented series, indicating that streaming services are not challenged by piracy via torrenting in the same way (although they may be subject to evasion of geoblocking or circumvention via configured “set-top box” for streaming access). While news broadcasts also rate highly, along with reality television they are rarely pirated, although the special event sports broadcast tends to inspire piracy in the real-time streaming format (see chapter four). Most online media piracy targets fictional narrative series with a strong dedicated fan bases which, via fan activities including piracy, have contributed to the strong audiences for both quality television and fantasy and science fiction television in the years since torrenting began. In these respects, online media piracy rates also resemble, more than anything else, DVD sales (see Jenkins, Ford, and Green 2013), which they significantly impacted prior to the broad availability of streaming as a mode of accessing a television collection.

In *Spreadable Media*, Jenkins et al. note that “many cult shows – *Heroes* and *Dexter* among them – attracted as many or more illegal downloads as television viewers, at least as counted by Nielsen.” (Jenkins, Ford, and Green 2013, 113) Moreover, as there are other “possible mechanisms by which someone might illegally access television content”, torrent numbers may not do the traffic justice. They also find it striking that “almost all of these torrent ‘hits’ were ‘cult shows’ that rely on dedicated niche audiences and serial structures to attract ‘engaged’ audiences”, and rely on “regular viewership in order to be comprehensible” (113). Speculating on reasons for the popularity of torrenting they acknowledge that “many illegal viewers come from countries where a series is shown on a delayed schedule” (113) or even on no schedule at all (114), and that viewers “want to sync their viewing schedule with international online discussions about shows” (113). Other viewers, however, “want to skip advertisements, view shows on their own schedules, watch video on their

preferred platform, and/or avoid policies of legal streaming television sites they find frustrating” (114). That is, “these ‘pirates’ are not taking content because they refuse to pay for it... they are seeking to change the conditions under which they view it” (114). Advocating as well as describing “spreadable media”, Jenkins et al. believe current content industries are “not yet able” to meet the demand for the kinds of consumption they have been describing and this, they suggest, is “what we mean... when we suggest that ‘piracy’ is more often a product of market failures... than of moral failures” (117). The television industry has now long been attempting to meet this demand without conceding ground to media piracy.

The Netflix Moment

If, as I quoted Dan Fleming saying in the last chapter, “the first decade of the twenty-first century began with Napster and ended with The Pirate Bay” (Fleming 2012, 674), streaming Netflix might well be *this* decade’s new face of online media consumption. While forms of online television piracy are not new, torrenting dramatically increased its prevalence and visibility. In this section I want to propose a “Netflix moment” to rival the “Napster moment”, inspired by a confluence of factors in which the combination of piracy and television fandom was crucial. There is not one trigger for this Netflix moment, given that Netflix is a name for the content industry response rather than what it responds to. To have chosen a torrent index like TPB would misrepresent this situation, as the importance of a new era of quality television, the Internet’s multiplication of fan interactions, as well as the contemporary example of streaming music services and the rise of YouTube and its peers, are all also crucial factors. But the collective mass of torrenting that surrounded Netflix when it launched streaming video in 2007, and as it expanded its services (while reducing its catalogue – see Napoli 2016), is inextricable from its success.³⁸

³⁸ As Given stresses, “Netflix was not the long-promised digital fantasy, Paul Goldstein’s ‘celestial jukebox’ [see chapter three], offering all the video content ever made, but a carefully chosen collection. The collection was

The “Netflix moment” would refer not only to the success of Netflix video streaming, however, but marks a broader shift in the relations between online media piracy and television. The capacities of file-sharing services expanded rapidly after Napster, and when the *New York Times* published a story on increased levels of video piracy using the example of Morpheus, MPAA President Jack Valenti declared “the great moat that protects us [from piracy], and it is only temporary, is lack of broadband access” (Harmon 2002). However, the BitTorrent file-sharing protocol furthered this increase dramatically and, from around 2003 (with the launch of isohunt and Demonoid), outstripped all previous peer-to-peer technologies in facilitating the sharing of audiovisual files. In the case of Napster, paid downloads were the first functional industry response to the demand for online digitized music, later replaced by paid streaming services like Apple Music and Spotify. By the time downloading television (or movies) was technically feasible for most viewers, the market had already moved on to the “streaming” option. Thus, there was never a successful iTunes-style television store, although there were several attempts, including by iTunes.³⁹ Instead, when online audio-visual piracy was replicated as a commercial enterprise, it went straight to Netflix, the equivalent of Spotify.

In a 2005 article on BitTorrent in *Wired*, Clive Thompson speculated on the consequences torrenting would have for television. He quoted the founder of *Entertainment Weekly* comparing it to the impact of the Internet on newspapers: “Blogs reduced the newspaper to the post,” Thompson

large, certainly, but just as important were the company’s skills at directing subscribers around it and learning from their choices.” (2016, 113)

³⁹ In 2005, when Apple and the U.S. free-to-air network ABC reached an agreement to sell “selected ABC-Disney television programs via iTunes”, Ivan Askwith to some degree predicted the disaggregated form of Netflix, although imagining it as a pay-per-download model which resembles iTunes, rather than Apple Music or Netflix, and as a way to save network television. The use of streaming by free-to-air networks has not yet countered the appeal of cable and streaming. Jenkins (2006a, 253) quotes Askwith to support arguments about the promise of fan-based crowd-sourcing (below), but his argument certainly questions “an assumption that if a show is good enough, a sizable audience will be sitting in front of the television when it airs” even in “an age of DVD boxed sets and TiVo” (Askwith 2005).

wrote. “In TV, it’ll go from the network to the show.” He also suggested torrenting could transform “the whole concept of must-see TV... from being something you stop and watch every Thursday to something you gotta check out right now, dude. Just click here” (Thompson 2005). If the former idea has not (yet) eventuated, with series still centering how narrative television is discussed and consumed, the latter is key to television today. One of Thompson’s examples is the appearance by U.S. comedian Jon Stewart on CNN’s *Crossfire*. This was a notable event, given Stewart’s iconic place in U.S. liberal media commentary at the time and *Crossfire*’s design, centered on pitting political opponents against each other (THR Staff 2017). Thompson notes that at least 4,000 torrent servers were hosting the clip within a day of it airing:

No one knows exactly how many people got the clip through BitTorrent, but this kind of traffic on the very first day suggests a number in the hundreds of thousands – and probably much higher. Another 2.3 million people streamed it from iFilm.com over the next few weeks. By contrast, CNN’s audience for *Crossfire* was only 867,000. Three times as many people saw Stewart’s appearance online as on CNN itself.

What, then, Thompson speculates:

would a next-generation broadcaster look like? The VCs at Union Square Ventures don’t know, though they’d love to invest in one. They suspect the network of the future will resemble Yahoo! Or Amazon.com – an aggregator that finds shows, distributes them in P2P video torrents, and sells ads or subscriptions to its portal. (Thompson 2005)

One answer to the next-generation would now be YouTube, which is itself part of the media landscape emerging around the Netflix moment and is where such material, in segments rather than episodes or series, would now first be distributed (see Burgess and Green 2009).

The main innovation of Netflix that allowed it to rival torrenting, even though streaming requires more and more stable bandwidth, was its subscription model for access to a large library. Network television is a sponsored flow, and a broadcaster aims to own the most attractive flow and thus attract sponsors seeking their audience. Post-network television in the cable form involves ownership of clusters of television content; people buy access to that cluster, expecting that it will continue to appeal to them. With torrenting, viewers acquire specific pieces of television content that can be owned in a variety of ways (sometimes series and sometimes episodes, sometimes stored and sometimes deleted immediately). With streaming, however, they acquire content in a temporary format from an extensive but still finite menu – a license to *use* content rather than a purchase, to recall the terms of the music downloading debates in chapter one.

By 2007, a number of major broadcasting companies were already trialing VOD systems or partnering with VOD companies to develop platforms, including the BBC's iMP, and NBC and CBS partnerships with YouTube; companies providing web search engines were also striving "to adapt to the rise in demand for online videos"; and Amazon and Apple were launching their first "movie services" (Choi and Perez 2007, 176). Enter Netflix. In 2005 Netflix was an online DVD-hire company (founded in 1997) which mailed discs to subscribers, but by 2009 it was responsible for producing original content, and by 2013 it was a streaming VOD version of "must see TV" (see Given 2016, 109). Netflix was founded in the U.S. as an online DVD-hire service in 1997 but is best known in its contemporary form, as a VOD streaming service available across many countries. The gradual roll-out to other countries of the successful U.S. business model has impacted the various media environments into which it moved, and not just in furthering the collapse of the "home video" industry (multi-format videocassette and DVD sales and rentals) already undermined by both online piracy and the emergence of cable movie channels. If anything, Thompson's predictions about the

impact of BitTorrent on television were not ambitious enough to describe Netflix today, which uses streaming rather than BitTorrent although it does work as a content aggregator.

The Netflix moment is captured by a keynote address given to the 2013 Edinburgh Television Festival by actor Kevin Spacey, at the time widely praised for his starring role as Francis Underwood on the Netflix original series *House of Cards*. Discussing the success and importance of *House of Cards*, which he also co-produced, Spacey insisted that Netflix was preferable for this series than more traditional television networks because it didn't require them to make a pilot: "we wanted to tell a story that would take a long time to tell", and making a pilot obstructs this with the requirement to establish characters, "create arbitrary cliffhangers, and basically prove that what you're setting out to do is going to work" (Spacey 2013). He also praised the Netflix model of releasing a whole season at once for download instead of weekly episodes. In the contemporary media environment, Spacey insisted, "the audience wants control" and Netflix had learned the lesson "that the music industry didn't learn" regarding "piracy": "give people what they want, when they want it, in the form they want it in, at a reasonable price, and they'll more likely pay for it rather than steal it."

House of Cards' co-producer and sometime director Fincher also takes this tone. As Robert Abele reported, when it comes to "small screen episodic storytelling, or, as it has mostly been known, TV-viewing", Fincher believes "the world of 7:30 on Tuesday nights, that's dead... The captive audience is gone." (Fincher in Abele 2013). Spacey suggested that the Netflix model questions the very definition of television, asking whether "13 hours watched as one cinematic whole" is "really different from a film?" "If you're watching a film on your television is it no longer a film?"; "If you watch a TV show on your iPad is it no longer a TV show?" "For "kids" today, he claimed, "there's no difference watching *Avatar* on an iPad or watching YouTube on a television and watching *Game of Thrones* on their computer. It's all content. It's all story. The device and length are irrelevant." Such

categories, he says, are now “useless... except perhaps to agents and managers and lawyers who use these labels to conduct business deals.” Spacey’s speech predicts more transformation to come. Ongoing online media piracy rates suggest that the content-acquiring audience is not necessarily always willing to pay for television content, but the impact of Netflix on television piracy rates nevertheless seems clear.

According to the Sandvine Report, by 2014 Netflix made up almost 35% of North American Internet traffic, a larger share than file-sharing at its 2008 peak level, and more than double that of YouTube, which was at the time running a distant second (Sandvine 2014).⁴⁰ Netflix, like online media piracy, provides users with a wide variety of film and television in an on-demand mobile format – indeed, more instant and mobile than piracy. Netflix is legal and involves revenue for rights holders, but in its short history it has also been widely accessed in countries where rights deals make it illegal by using VPNs – services which are also widely used to hide and facilitate piracy. Even in areas where Netflix is legally available, VPN-users often access Netflix content designated for other regions. According to *GlobalWebIndex*, in January 2015 Netflix had more than 30 million active users in countries where the service is unavailable without the use of location-masking software, including 20 million in China (Spangler 2015).

The problem posed by online media piracy is clearly different in the case of bypassing geoblocking to pay for Netflix, or sharing paid Netflix accounts with friends, than in the case of downloading through a torrent site/index, but each of these practices is at least legally questionable. Given that legal remedies designed to limit piracy tend to target host websites more than individual consumers,

⁴⁰ In July 2015, based on subscriber numbers and account-sharing estimates, there were between 99 and 143 million individual Netflix users in the U.S. alone. This means almost half of Americans had access to a paid Netflix service. Indeed, Netflix is popular enough that these estimates were made by way of suggesting that it didn’t matter if people shared paid Netflix accounts with their friends, because its market share was so significant they only benefitted from the additional exposure (Stern 2015).

we should also ask about Netflix's complicity in such ostensibly unauthorized uses. Deals that pay rights holders whose content is hosted on Netflix may not cover all uses for which Netflix receives money through access that bypasses competing agreements. The Sony Pictures hack in 2013 revealed internal emails complaining that Netflix was unwilling to crack down on those using its service illegally to access Sony content (Hern 2015b).

While at least some of these users are paying customers, commentators at the time acknowledged that "Netflix can't welcome VPN users too openly... since the company's fraught relationship with content providers hinges on them enforcing international restrictions" (Hern 2015b). This led to a situation in which Netflix's statements on VPN access did not initially do much to dissuade the notion that as long as subscriptions were paid they were not concerned with blocking users infringing in this way. Netflix Chief Product Officer Diel Hunt came close to tacit approval in stating: "the claims that we have changed our policy on VPN are false. People who are using a VPN to access our service from outside of the area will find that it still works exactly as it has always done" (Hern 2015a). Such clear overlaps between Netflix and piracy as methods of obtaining content are significant, although it is important to acknowledge that Netflix's position has changed, and in 2017 they announced new policy development to combat piracy. At a certain point in their history, online streaming clients like Netflix, Amazon, and Hulu were the authorized forms of the mode of content acquisition once represented by torrenting, although only available to certain customers in certain locations. However, in addition to vastly improved functionality, streaming services have increasingly specialized in original productions in recent years, as broadcast networks have begun dealing more closely with digital rights for their own back catalogues. Netflix's most streamed series in 2017, like *Stranger Things* (2016--) and *Riverdale* (2017--), were Netflix originals, meaning that Netflix now largely resembles a new kind of network in its own right.

In recent years Netflix has also become a significant distributor of original films and documentaries, building on its success with original TV series. One feature of Netflix's transition into a legitimate distributor of films and a potential rival to the cinema industry has been the debate around the eligibility of Netflix's original films to win Oscars. Steven Spielberg, for instance, has argued that Netflix films should not be eligible for Academy Awards (Schaffstall 2018). In an early 2018 interview he suggested that films that were made primarily to be released on Netflix had committed to "a television format" over the cinema, and mostly just sought out brief, limited cinema releases to ensure eligibility for awards. He suggested that Netflix films should be eligible for an Emmy, rather than an Oscar, and worried that the trend towards Netflix films would discourage filmmakers from putting in the necessary effort to create films for cinema release, framing contemporary television as "a clear present danger to filmgoers". Following a number of nominations for other films, an original Netflix documentary, *Icarus*, won the Academy Award for Best Documentary Feature in 2018.

The content acquisition approach demands that, while discourse on quality television has emphasized fan viewing practices, through the concept of "cult viewing" but also through the transmedia circulation of texts as generating new value for television, "binge viewing" also needs to be put in this context. This might mean viewing through box-sets, through recording clients that accumulate episodes, or via torrent or streaming media sites. In choosing between these options, legality may be a relatively minor factor. What once were accessory forms of television consumption are now so prominent that series are produced with release-for-convenience in mind as clearly as premiere screenings and on-air repeats, and this has none of the stigma that direct-to-video or direct-to-DVD once had. Binge viewing as a standard viewing method is factored, for example, not

only into Netflix viewing reports but also such industry documents as the annual “video viewing” report by OzTam.⁴¹

This divergence of screens and convergence of viewing culture belongs to the new ways of tying television to the Internet. As I discussed above, television producers, and television viewing practices, often strive to incorporate online communication and social media. New post-broadcast viewing practices are presently popular topics in academic writing about television, and sometimes discussed under the telling label “social TV” (Blake 2017; Doughty, Rowland, and Lawson 2012; Prouix and Shepatin 2012), a term that comes from systems designers (Cesar and Geerts 2011; Ducheneaut et al. 2008), initially, but which implies that television assembled with the Internet is more or differently social than it was before. “Social television” shifts and highlights the variety of ways people interact with television, and especially the broad array of interactions between television and social media. These social dimensions, however, are also networks that facilitate communication about content acquisition, including piracy. “reddit” and “Twitter” are examples of crucial online spaces in which authorized and unauthorized kinds of “social television” overlap and interact, with concrete piracy resources running alongside authorized channels.

As convergence studies suggest, the Internet now offers a theoretically ever-present set of overlapping spaces for engagement with television texts, and these functions cannot be easily separated from the way it also offers alternative channels for acquiring television content. There’s now a tension between television as an industry seeking to harness the Internet in expanding audiences and encouraging dedicated fandom, and the Internet as a threat to television’s profit

⁴¹ See the Video Viewing Reports, up to 2017, on the *OzTam* site: <http://www.oztam.com.au/documents/Other/AVVR-Q4-2017-Med%20Res%20Final.pdf>. Also, in 2013 Harris Interactive produced a survey of television viewing habits that claims 62% of Americans are “binge” television viewers, with this tendency being more common the younger the demographic surveyed (<https://www.marketingcharts.com/television-28647>).

models. By overlapping, I mean to avoid any opposition between putatively new and old media, and also to stress that if the Internet is a constantly available space for *doing* television consumption it is also a fragmented space. Television's new reliance on the Internet also compromises the legal status of a television text as copyrightable object and "social TV" compromises traditional legal conceptions of television content because of the very different legal status of forums and sites populated by content "authored" in diverse ways. It extends the challenge to television posed by existing precedents in "amateur" and "modified" television texts shared on sites like YouTube, Tumblr or reddit, and, of course, piracy.

As I will discuss in the next chapter, there is conflicting evidence about whether media piracy promotes or hinders purchases of the media in question. Media piracy thus also draws widely varying responses from producers themselves. With reference to *Game of Thrones*, HBO president Michael Lombardo, source author George R. R. Martin, and occasional episode director David Petrarca, have all commented on the role torrenting viewers played in creating a "buzz" around the program (The Sydney Morning Herald 2013). This closely conforms to Jenkins' sense that viral buzz "is increasingly valued by the media industry" (2006a, 4). Jenkins, Green and Sam Ford's book *Spreadable Media* also foregrounds positive industry responses to piracy, such as *Heroes* executive producer Tim Kring, whom they quote as saying "these are people who actively sought these shows out" and "actively pirated the show" and thus "should be embraced" (2013, 114), and *The Middleman*'s Javier Grillo-Marxuach, who sees "illegal viewers as part of the mechanism for generating awareness of, and interest in, his cult property" (114). However, Jenkins et al. also suggest that such producers are rarely "seeking ways to engage these torrenting viewers in legal practices, to recognize the potential of their engagement, or to understand what might motivate them to step outside the law to access content" (115). Jenkins et al. argue that the media convergence environment involves as "an ever-shifting configuration of platforms and financial

arrangements” from which audiences must “seek the content they want” (2013, 117). This clearly seems compatible with what I have called content acquisition. However, this could also be described as an environment of diverging devices and feeds rather than one of convergence. As Couldry notes, for example, high speed Internet access in the UK has been accompanied by “an increase in television consumption” without an increase in overall media consumption, indicating that “multiple media are increasingly consumed concurrently” (2011, 488), a situation that may not be best described as “convergence consumption” even if it indicates changed consumer habits.

Although my argument in this chapter has mapped fairly closely onto the “convergence culture” argument, and Jenkins’ work in particular, this is a point to return to caution. Couldry’s main objection to Jenkins’ work is its “claim that the habits of particular loyal media users will become... exemplary... of the wider media audience”. There are several parts to this objection. First, and I will return to this in the next chapter, Couldry objects to the suggestion that “positive consequences” for politics and public culture flow from this (2011, 489). Second, he also objects to the historical claims about transformation, arguing that history suggests “media... develop more often through overlaps and connections between old and new than through simple substitutions” (490), and I will return to this point in chapter five. In his work with Green and Ford, Jenkins concedes that older models of television distribution continue to be dominant, while still stressing the variety of audience activities that suggests something else is wanted. The third part of Couldry’s critique of Jenkins is the generalizability of “loyals” or “fans”. Couldry asks why Jenkins focuses so much on fans. If it is true, Couldry asks, that “consumers must assume the role of hunter gatherers” to “fully experience any fictional world”, why would this “be a particularly good guide” to more general trends? (2011, 491). While finding the claim that media industries are disposed due to economic interests to “weight their product development towards users who are heavily engaged in their products” (491) entirely “plausible”, Couldry suggests that these “high-intensity” consumers “may, or may not, involve high

transaction value” as “both casual... and intense fans may buy the same DVD once” (492).

“Arguments against such generalization” are easy to find, Couldry claims, and some are “suggested by Jenkins himself” (492), including that “the most intense fans are highly untypical of the general audience in terms of their level of emotional investment”, that they are also not demographically representative, and that more intense fans also have higher levels of “disposable time” than the general population (492).

Television never emerged in isolation from other media and it has not changed in isolation either. It is integral to the apparently dramatic appearance of online media piracy, as well to the form of fan communities and the visible forms of representing and appreciating some television as quality television, that the Internet has been a crucial force in shaping television production, distribution and consumption over the last 25 years. Thus, at the time of writing, Sandvine’s focus report was on *Subscription Television Piracy* (Sandvine 2017), flagging a new set of concerns. While this is not specific to the U.S. it is a practice more common there, where the cable television market has such saturation, and represents in telling ways the continuity of “post-network” questions in a period apparently dominated by “post-broadcast” debates. Thus in 2017, Sandvine indicates that 6.5% of North American households were accessing “known subscription television services” through unauthorized code-breaking set-top boxes. As a bridge to the concerns of chapter three, however, I want to finish by including an image (Figure 8) that Sandvine offer to explain a contemporary television “piracy ecosystem” – one in which the characterization of online media piracy is on the one hand comically stark and on the other hand indirectly suggestive of why such practices are hard to counter by either education or litigation. While this images conveys very specific judgements about the people who engage in online media piracy, both its prevalence and its influence over the past two decades indicate that, as Jessica Reyman puts it, “a gap has emerged between the reality prescribed by the law and the social reality of Internet users’ everyday lives” (2010, 4).

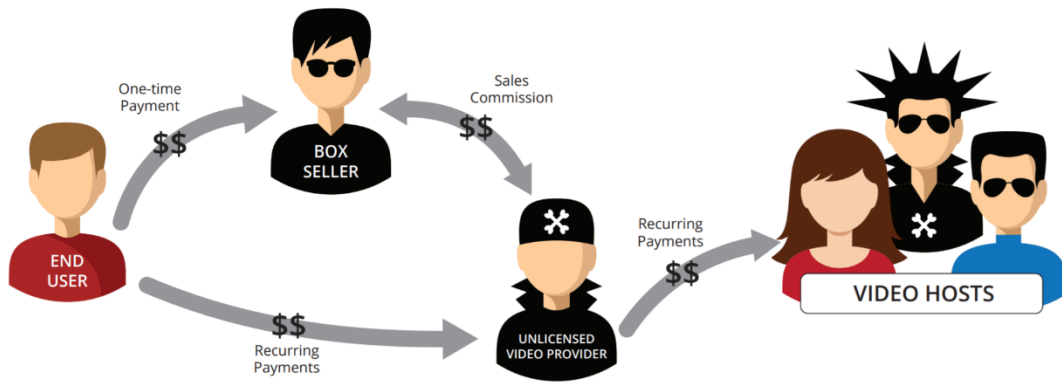


Figure 1 - Today's Television and Video Piracy Ecosystem: note the complete absence of the content developer and content licensee from the revenue streams

Figure 8: Sandvine 2017 Global Internet Phenomena – Subscription Television Piracy, p3

Chapter 3 – Copyright Wars



Figure 9: The Pirate Bay Hollybay logo.svg (31/05/06)

On the 31st of May, 2006, torrenting index site The Pirate Bay relaunched, for the first but not the last time, with a provocative graphical sally (Figure 9). The Wikimedia Commons page for this image still stakes its claim:

This is the logo shown in The Pirate Bay homepage after the failed attempt to shutdown their servers by the means of a police raid which was the result of pressure from the MPAA among others. This happened 2006-05-31. The logo design is a mockery at MPAA, which announced a few days before that they had “sunk ThePirateBay”. People at The Pirate Bay forums, IRC and other discussion channels have made the humorous comment that at the end, they might, with due effort, be able to sink a ship, but they definitely cannot sink a bay (“The Pirate Bay” 2006).

The image sets a scene for this chapter, particularly because it is accompanied by the green (rather than black or red) copyright notice indicating anyone is allowed “to use it for any purpose including unrestricted redistribution, commercial use, and modification”. This green C in a green circle is one of many tactics devised to protest the use of copyright to limit the online circulation of media content. These tactics are linked to a history of litigation and legal activism that long precedes the launch of the Hollybay and didn’t end with it. Well known to writers in piracy studies, this history is also often summarized in intellectual property (henceforth, IP) textbooks.⁴² Although, as James Meese argues, courts offer a “valuable space” from which to analyze how piracy is defined, because “specificity” is “all important” at trial (Meese 2014, 27), I have elected to focus here on the historical and discursive contexts of these trials. I have, however, included an Appendix outlining some important test cases for the definition of online media piracy, spanning the period from 1984 to 2014.

This chapter focuses on copyright circumvention, which can include any method of obtaining content that avoids copyright restrictions. I will focus here on the legal and economic dimensions of online media piracy, focusing on three themes: how legal and quasi-legal responses to online media piracy seek to redefine it, how collaborative legal and industrial efforts to curb the circumvention of copyright shape new forms of piracy, and the politics of such piracy as framed by both its critics and its advocates. I will begin with legislation designed to prevent online media piracy, but a wider range of anti-circumvention

⁴² While I have generally not abbreviated this term, it is notable that the abbreviation “IP” is widely used in legal, business and economic contexts to designate media content – so that a new videogame is “new IP”, for example – as well as to refer to the legal system subtending that word. In this chapter it is therefore appropriate to write of IP.

strategies need to be considered to contextualize the extraordinary situation in which people so often and so ordinarily participate in the forms of online circulation of media legal labelled as “piracy”, even when they agree it is against the law.

The landmark legislation to which most studies refer when discussing online piracy is the U.S. *Digital Millennium Copyright Act* (1998, henceforth DMCA). The importance of the DMCA is its historical and global location – after the massive international popularization of the World Wide Web and in the U.S. as the source of so much of the media content seeking new protections at this time. The DMCA transformed the standards for applying “fair use” to copying technologies through the concept of Digital Rights Management (DRM). Nathaniel Poor argues that the importance of the DMCA lies in the gulf it exposes between two attitudes to piracy: “For the anticopying forces this is an economic battle, while for those who see the need to permit some forms of copying it is about culture” (Poor 2012, 692). This is a gulf often described by scholars on piracy, including by Lawrence Lessig (2001, 2004, 2008, 2011), Lawrence Liang (2006; Liang, Mazmdar and Suresh 2005), Jessica Litman (2001), Ravi Sundaram (2010), and Siva Vaidhyanathan (2001, 2004, 2005), whose collective writings on the cultural problem of copyright have influenced many studies of online media piracy.

In 2013, a U.S. House Judiciary Subcommittee examining the role of voluntary IP agreements claimed that, in January alone, 432 million unique Internet users had explicitly sought content that violated IP laws, mostly across North America, Europe and the Asia-Pacific region. This traffic made up 23.8% of bandwidth use in the areas assessed (Cablefax Staff 2013). Investigations and legislative interventions into this extensive field of online media

piracy generally focuses on “rights” rather than on the practices themselves. But contesting IP rights involves not only asking if, or how, rights holders should be able to protect their intellectual property from piracy, but also questioning piracy’s social significance, analyzing its economic impact, and debating media pirate’s right to resist attempts at limiting communication.

The set of international acts, agreements, and other instruments defining copyright circumvention for the digital age to which I will refer here – spanning the DMCA and the Australian *Copyright Amendment (Online Infringement) Bill* in 2015 (henceforth CAB), the contexts from which they emerged, and their effects – is one example of what I referred to as the historical “conjuncture” articulated by online media piracy. Situated amongst, as well as seeking to organize, a set of highly contingent encounters between law, content industries, and popular culture, these instruments are “a condensation of multiple determinations and effects” (Grossberg 2010, 20). They link continually changing forms of media consumption and their broad cultural impact to international law and international trade in equal measure, but, importantly, they always prioritize the nation-state. Copyright circumvention and anti-circumvention strategies together offer a snapshot of the current state of international economic and legal systems but also, together, represent the ongoing significance of nation-states to both of these and thus also to media consumption. As Vaidhyathan claims, the copyright debates at the end of the 1990s soon “puncture[d] the bubble of public consciousness [to] become important global policy questions” (2004). Most of my central examples in this chapter will be from the U.S. and Australia. This choice doesn’t only reflect my location and the weight of the U.S. in piracy studies but also the international significance of particular laws and cases (see Appendix). While the U.S. has

taken an increasingly prominent international role in copyright regulation, as I will outline below, Australia has both a demonstrably high rate of online media piracy and has developed a tough stance on such piracy at the same time.

The Digital Millennium in Australia

Many commentators have overviewed the key role played by copyright-based industries in lobbying the U.S. government through organizations like the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) to press for a more “binding international legal framework” for copyright than the less stringent or homogenous Berne Convention (Mattelart 2012, 742). At the center of such lobbying, the DMCA’s provisions included prohibition of “the circumvention of a technological measure that effectively controlled access to a copyright work and the manufacture, supply or sale of a device or service that enabled” that kind of circumvention, forming a model for provisions “replicated around the world” (Atkinson and Fitzgerald 2014, 117-118). This prohibition is a step towards what Vaidhyathan calls a “perfect”, leak-proof, digital rights system (2004), where copyright is automatically enforced at the point of distribution. But such legislation has not ended the problem it identifies.

Turning to the CAB, it is crucial that Australia has long been predominantly an importer, rather than producer, of entertainment media, making this legislation an example that forces some distance from assumptions about the protection of local industry. The CAB passed in June 2015, and its appearance at this point means that the content of this legislation, the practices it explicitly addressed, and the responses it inspired, indicate much of what has happened to online media piracy since the DMCA. Under this legislation, a court

does not have to find an ISP responsible for the copyright infringement of its users by judging that they could have identified a potential or in process infringement and acted to prevent it. Instead, the court only has to decide that a particular *site* is primarily a source of infringing content and that blocking it is in the public interest, and can thus require ISPs to block access to it (Australian Government 2014).

The CAB was celebrated as a triumph for the federal Liberal-National coalition government led by Prime Minister Tony Abbott, and as a crucial move in fighting what it framed as a piracy epidemic (Bodey 2013); (Bingemann 2014). It was passed with broad support from both major parties (Grubb 2015b).⁴³ This bill was primarily spearheaded by then Attorney General, George Brandis, who was particularly vocal on the subject of the damage done by online media piracy:

An effective legal framework of protection and enforcement of copyright is fundamental to sustaining today's creative content industry and importantly, the cultural development of our nation. (Brandis in Bodey 2013)

The illegal downloading of Australian films online is a form of theft. I say Australian films, but of course the illegal downloading of any protected content is a form of theft. (Brandis in Bingemann 2014)

Richard Freudenstein, Chief Executive of Australian cable television company Foxtel, supported these measures by stressing that:

⁴³ Australia's main political parties are the Liberal Party and the Australian Labor Party, with other prominent parties including the National Party and the Greens. At the time of writing, and during the passing of the CAB, the government was formed by the long-standing Liberal-National coalition, with the Labor Party in opposition. Most government figures quoted in this thesis will either be members of the Liberal Party (if in government) or the Labor Party (if in opposition), and "both major parties" here refers to both the Liberal/National coalition, and the Labor Party.

Not only is piracy theft and therefore morally wrong, it is harmful to Australia's creative communities and to businesses that employ hundreds of thousands of Australians. These offshore sites are not operated by noble spirits fighting for the freedom of the Internet, they are run by criminals who profit from stealing other people's creative endeavors. (Grubb 2015a)

And Simon Bush, speaking for the Australian Home Entertainment Distributors Association, described the bill as "a watershed moment. It's a fantastic day and a really positive sign for the creative content industry, who can invest more as a result." (in Grubb 2015a).

The debates around such legislation attract a wide array of interested parties, including numerous lobbyists, which partly explains the lack of dissenting opinions among elected representatives from major Australian political parties. Organizations like the Australian Federation Against Copyright Theft (henceforth AFACT, rebranded in 2015 as the Australian Screen Association, henceforth ASA), lobbied for this legislation, circulating claims about the impact of online media piracy based on their own studies, including that "film and TV piracy rips more than \$230 million out of the Australian economy each year" (Lobato and Thomas 2012b, 606).⁴⁴ A wide range of media corporations were also outspoken supporters of this legislative change, including cinema distributor Village Roadshow (an ASA member and litigiously active defender of its IP). These and other interested corporate parties are also financial supporters of both major political parties in Australia – just as comparable bodies support political allies in other countries. There were also active lobbyists and

⁴⁴ Other organizations lobbying in favor of this Australian legislation include: ADA – Australian Digital Alliance; AHEDA – Australian Home Entertainment Distributors Association; IIPA – International Intellectual Property Association; MPAA – Motion Picture Association of America; WIPO – World Intellectual Property Organization; and WTO – World Trade Organization.

commentators critical of the bill, including legal scholars like Matthew Rimmer, who objected to the precedent it set (Grubb 2015a). Consumer advocacy group Choice supported amendments proposed by the Greens, and opposed the bill (Choice 2015)(Choice 2015). Piracy advocates like Peter Sunde (co-founder of TPB) predictably ridiculed the legislation in a television interview prior to its passing, suggesting it would be ineffective and that it ignored the central problem, a lack of direct consumer access to content people want in a digital format (Sveen 2015).

This sense that the legislation simply would not work raises simultaneously technological and cultural problems with restricting online media piracy. Jonas Andersson Schwarz explains the “resilience” of piracy groups as due to the “elusive nature of Web distribution, the “ease of bypassing local filters”, and the “difficulty of shutting down file-sharing hubs” (Schwarz 2012, 586). While other writers in the 2012 special issue of the *International Journal of Communication* in which this essay by Schwarz appears discuss actions that are relatively effective, just as many scholars argue that, over the decade of anti-piracy measures spanning from action against Napster to raids on TPB, there have been, as Dan Fleming puts it, no effective “mass deterrents” against online media piracy (2012, 674).

The central problem is that as one piracy medium is shut down, another takes its place. For example, a later TPB shut down that sometimes seemed to have been effective between December 2014 and February 2015 resulted in no clear decrease in piracy, and the site quickly returned to its place among the most trafficked piracy sites after its re-launch.⁴⁵

⁴⁵ On the resilience of The Pirate Bay see: “Why The Pirate Bay Can’t Be Shut Down” in January 2015 (<https://www.technollama.co.uk/why-the-pirate-bay-cant-be-shut-down/>); “Pirate Bay is King of the Torrents Once Again” in August 2016 (<https://torrentfreak.com/pirate-bay-king-torrents-160814/>); and “The Pirate Bay

There is also no clear indication that levels of piracy dropped in the period it was unavailable (Spangler 2014), and when it returned three days after the December 2014 shutdown, it was actually “more popular than ever thanks to a swell of mainstream media coverage” (Seppala 2014). Local attempts to block sites like TPB also produce unclear results. On the basis of a 2014 site-blocking efficacy study in the U.K., the ASA commissioned Incopro to report on the effects of blocking five piracy sites by court injunction in Australia in 2016.⁴⁶ Using Alexa data, Incopro found that Australian traffic to these sites reduced by just over 70%, or just under 60% when proxy access was included, and claimed that “the usage of the top 50 [piracy] sites in Australia has decreased by 7.7%” (Incopro 2017, 3). However, while Australian use of the top 250 piracy sites also declined by 4% in this period, it declined by 13% internationally (4), suggesting the overall Australian decline is not linked to the blocks at all, even if blocking specific websites might redirect traffic to other places. Blocking TPB has been particularly difficult because of its design. The Incopro report flags the main problems as decentralization through shared IP addresses, https encryption, and proxy masking (7). While Incopro’s research design included tracking of mirrors and multi-site proxies to access TPB, it did not include “General purpose VPN or proxy services which offer access to any site” (8), meaning any claimed drop would be very imperfectly measured. The fact also remains that information about how to bypass website blocking is readily available online, and the process is fairly simple, so website blocking simply serves to make piracy less convenient for a consumer who is interested in engaging in it, rather than impossible.

Remains on Top 11 Years After the Raid” in May 2017 (<https://torrentfreak.com/the-pirate-bay-remains-on-top-11-years-after-the-raid-170531/>).

⁴⁶ The five sites blocked from December 2016 were isohunt.to, solarmovie.ph, torrenthound.com, torrentz.eu, and thepiratebay.org (Incopro 2017, 6) and designated proxies. Although a reduction in traffic to these sites was unavoidable given that, “before the block was implemented” the first three of these “sites shut down or otherwise removed their infringing functionality”, TPB’s dominance was felt to make the study valid in any case (6-7).

Beyond the use of VPNs and other services that normally work to bypass geoblocking, social media hubs like reddit and websites such as Lifehacker AU provide easily found step-by-step guides to circumvent the DNS-level blocking used by many ISPs to comply with Australia's anti-piracy legislation. Spandas Lui's article "How to Bypass ISP Blocking of The Pirate Bay and Other Torrent Sites for Free" (2018) notes that despite the blocks in Australia, "Torrenting itself is completely legal", and offers a short step-by-step guide to bypassing DNS-level blocking, reassuring readers that it is "extremely easy", and even speculating that DNS blocking might have been chosen by Telstra "so that users can easily bypass it".

While injunctive orders clearly make it less convenient to access piracy resources, requiring users to search for new sites or tools, the omission of VPN usage is particularly important in the Australian case, and explaining why stresses the importance of understanding copyright circumvention in a simultaneously national and international context. I will draw here on Ramon Lobato and James Meese's 2016 essay, "Australia: Circumvention Goes Mainstream" (Lobato and Meese 2016a). If Australia is a leading country in rates of Internet piracy, as the debate over CAB suggested, before attributing this to any nationalized cultural orientation it is important to recognize Australia's relative lack of access to international media content via legal means. The use of geoblocking circumvention to access Netflix catalogues that IP agreements restrict to particular geographical areas, discussed in chapter two, has been especially noticeable in Australia because Australia has been particularly subject to restriction and delay under such agreements (Beirne 2015).

When I began this thesis in 2015, much of the most widely pirated television content in Australia could only be acquired legally by a subscription to Foxtel. Cable television has

never been as prevalent in Australia as in many other countries. In 2015, just 30% of viewers accessed subscription television in Australia, compared to over 80% in the U.S. (Goldsmith 2015; Lobato and Meese 2016a, 121). Lobato and Meese point out that Australians have “taken to offshore streaming with a singular enthusiasm”, “frustrated by the high cost and slow delivery” of TV and films from other places (often the U.S.), and by Australia’s “self-perceived status as ‘second class’ media citizens” (120). As Jock Given puts it, in Australia:

Netflix was often represented as a liberator for far-away consumers. “It is remarkable that a service which is officially blocked to Australians... and doesn’t spend a cent on local marketing... is the biggest single driver of competition in our entertainment market”, said a spokesperson for CHOICE. “It’s a perfect case study of how competition from international markets can shake up protected industries and deliver benefits for Australian consumers” (Given 2016, 111).

As Given discusses at length, there were numerous adjustments to the Australian television industry in anticipation of Netflix’s legal arrival, including the launch of several local streaming options. By the time Netflix arrived legally in Australia it had two main local competitors, Presto and Stan, flanked by a range of free-to-air network-specific streaming options and Foxtel’s own streaming service. Despite extant international agreements with these other services dramatically reducing the Netflix catalogue in Australia, its success was immediate.

The transformed television landscape in Australia also dramatically reduced the cost of such access. In 2016, the dominant pay TV subscription option, Foxtel, cost between \$25 and \$134 per month in Australia, while a U.S. Netflix subscription plus a VPN to bypass the geoblocking that restricted it to the U.S. together cost around \$15-\$20 (see Lobato and

Meese 2016a, 120). While Internet access itself might be an additional cost, Australia's Internet access rates were already very high and used for many other purposes than television. Thus, the immense popularity of series like *Game of Thrones* and *House of Cards*, did not mean Australians viewed these series through the authorized channels, a situation Lobato and Meese attribute to a "boom in popular circumvention" and even a "national fondness for BitTorrent" (2016a, 120-21). They detect this fondness in the local dissemination of "tips and tricks on how to evade geoblocks; DNS routing services like Getflix and UnblockUS [that] attracted many Australian subscribers; and VPN brands like HideMyAss and Witopia [that] have almost become household names" (121). In late 2014, there were an estimated 200,000 unauthorized Netflix subscribers in Australia (C-Scott 2015), and a range of studies assessed Australian use of VPNs or proxies to access the Internet at around 16-18% (see also Lobato and Meese 2016a, 124-125). To explain how mainstream such ostensibly pirate knowledges became in Australia, Lobato and Meese emphasize the "brazen" attitude of early adopters of circumvention tools as part of an "Australian conversation on circumvention [which] has been firmly grounded in this discourse of audience rights" (2016a, 121).

The Australian free-to-air broadcasting system always relied heavily on local content, still federally mandated at 55% during prime time, with the aim of protecting both Australian content industries and a national identity often represented as imperiled by distance from the hubs of cultural production (see O'Regan 1993). Cinema, on the other hand, has always been overwhelmingly imported, despite also being framed by fraught discourse on national identity (see Dermody and Jacka 1988; Morris 2006). Across both media forms, however, Australians have traditionally waited a long time to receive influential and popular content

produced in Europe or America. Lobato and Meese note that “the Internet has changed” this: “local audiences are now hooked into global TV fandom in real-time through Twitter, Internet forums and fan websites. They know what is happening in the US and refuse to wait for the latest episodes” (2016a, 122). This situation was explicitly recognized in debates around online media piracy and the CAB.

In a letter to content industry representatives and corporations outlining their plans for the above action on piracy, Brandis and then Minister for Communications, Malcolm Turnbull, stated that:

The issue of price and availability of legitimate content in Australia was a key factor raised in the majority of submissions to the Online Copyright Infringement Discussion Paper. The Government notes recent efforts by the industry in this area, and expects industry to continue to respond to this demand from consumers in the digital market. (Brandis and Turnbull 2014)

ASA’s webpage on the “injunctive relief” mandated by Australian courts in 2016 – clearly aimed at explaining why it is not a “war” on consumers of the kind discussed in chapter one – quotes this letter and stresses that the strategy of blocking piracy websites will be accompanied by industry efforts to address this problem. However, not only availability but price is part of the situation by which many Australians, as discussion around the white paper (see Australian Government 2014) indicated, felt piracy was justified by the content industry’s systematic injustice.

The commercial viability of charging more to Australian consumers with fewer acquisition options has often been referred to as an “Australia tax”, fueling consumer dissatisfaction

and “rhetorical justification for piracy and geo-hacking” (Lobato and Meese 2016a, 122). Lobato and Meese note that an earlier parliamentary inquiry in 2012 made such “remarkable recommendations” as “amending the 1968 Copyright Act to allow lawful circumvention of geoblocking, and educating consumers about how to use VPNs effectively”, or as a last resort even an “outright ban on geoblocking” for content distributors importing media, although none of these recommendations were implemented (Lobato and Meese 2016a, 123). One of the “framing principles” of this earlier inquiry was “promoting fair access to, and wide dissemination of, content” (Nielsen 2013). The putative Australia tax, enabled by geographic isolation and an import-dominated media culture, has thus allowed circumvention practices to be “quasi-sanctioned”. As Lobato and Meese put this central point, “A politics of resentment has taken hold, tinged with nationalist overtones. Its central figure: the ripped off Aussie consumer” (124).

Lobato and Meese published the essay I have been discussing here early in 2016, when the CAB was only newly in effect. Its passing indicates a range of challenges to this tolerance. Netflix soon began attempting to limit the effectiveness of VPNs and DNS routing services at bypassing geoblocks on their content (Greenberg 2016), and the same tech websites Lobato and Meese describe as “abuzz with tips and tricks on how to evade geoblocks” (2016a, 121) instead began publishing articles banking on the failure of this crackdown.⁴⁷ But the number of Australian Netflix users continued to increase, and by October technology journalist

⁴⁷ See: “Netflix will never win in the battle against VPNs” (*tripwire* 19/07/16: <https://www.tripwire.com/state-of-security/featured/netflix-never-win-battle-vpn/>); “Netflix Makes Good On Promises To Crack Down on VPNs, But Blocks Are Short Lived” (TechCrunch 22/01/16: <https://techcrunch.com/2016/01/22/netflix-makes-good-on-promises-to-crack-down-on-vpns-but-blocks-are-short-lived/>); and “Could Blocking VPNs Eventually Be Netflix’s Downfall?” (Gizmodo 22/07/16: <https://www.gizmodo.com.au/2016/07/could-blocking-vpns-be-netflixs-downfall/>).

Adam Turner was reporting that “talk of a customer revolt has fizzled” (Turner 2016). While ways to evade Netflix’s geoblocking and access the more comprehensive U.S. version still existed, they were “becoming harder to find and less reliable” (Turner 2016).⁴⁸ Local streaming options continue to be dominated by Netflix (Presto was bought out by Foxtel in late 2016 and shut down), and both the Australia tax and restrictions on legal available content continue (see Suzor et al. 2017; Reilly 2017).

There are several aspects of the Australian situation that make this more than a local complaint, and each of them leads to the problem of what copyright means. To begin with, there is no clear consensus on the legality (or otherwise) of Australian consumers choosing to circumvent geoblocking to access the U.S. Netflix library. As Turnbull specifically stated in the debates around CAB, circumventing geoblocking is not illegal under the Australian Copyright Act, although rights-holder groups tend to disagree (Grubb 2015c). Nicolas Suzor contends that this is a “grey area of the law” (in Lobato and Meese 2016a, 125), despite the fact that VPNs are also used for other circumvention practices, such as bypassing metadata laws and website blocks. If the right to access more media content in places like Australia seems less socially significant than, for example, the desire for firewall-crossing in China, where VPNs and other anonymizers are widely used (see Li 2016), these different goals are in fact not easily dissociated. The arguments often used by pirates to justify their circumvention practices, like the figure of the Hollybay firing canons at the Hollywood sign, focus on the right to free circulation of information, with *information* being one meaning, as I indicated in chapter one, of “media content”. This association between media content and

⁴⁸ In March 2015 Netflix in the U.S. offered over 8500 titles, while Australian Netflix offered 1116 (Salmon 2015). While these numbers have changed they are still far from equitable (see Suzor et al. 2017).

the right to free access to information raises the questions Lessig describes as the focus of his book *Free Culture* (2004), a treatise on the importance of “the forms of creative expression and freedom that get trampled by the extremism of defending a regime of copyright built for a radically different technological age” (Lessig 2008, xvi).

The (Digital) Commons

The regime of copyright Lessig refers to here, and the legal ambiguities of geoblocking, depend on a long history of making intangible property rights legally tangible. For this reason, some of the most effective critiques of DRM rely on defining a “digital commons”.⁴⁹ “The commons” originally meant shared resources, such as shared land, owned by a community. The terms commons, community, and common law all come from the same root idea, which is that people have certain shared rights, interests, and knowledges defined simultaneously by location and social bonds. The idea that some resources should be communally shared is often invoked, for example in environmental discourse, even as the once common lands of countries like England and Germany have been overwhelmed by new kinds of economic and legal arrangements. The concept of the commons was repopularized from 1968 by Garret Hardin’s discussion of “the tragedy of the commons”, a term he borrowed from the nineteenth-century economist William Forster Lloyd. Lloyd’s tragedy of the commons was hypothetical over-grazing by cattle herders (Lloyd 1832). Hardin (1968) repurposed this idea to discuss issues like overpopulation and overuse of natural resources. The “tragedy of the commons” occurs when rational individual choices made by free actors benefit them but inadvertently disadvantage the broader community.

⁴⁹ This argument may use other names and James Boyle (2008), for example, refers to the “informational commons”.

There are many critiques of Hardin's ideas about the commons.⁵⁰ One key counter-argument is that many commons work because people do not only think individually or about short-term self-interest. They also think collectively at times, and take a longer view regarding resource management, taking diverse conditions and variables into account, or collectively finding solutions. Today, one of the most significant uses of the commons idea is in discussions of "the digital commons". As a rule this commons is invoked in order to stress the inexhaustibility of the Internet, and to stress that it is unnecessary to set borders around digital goods to protect them from overuse.⁵¹ Scholars including Litman (2001), Lessig (2001, 2004, 2008, 2011), Vaidhyanathan (2001, 2004), and John Logie (2006) all point out that the new U.S. legislative regimes of the 1990s sought exactly such borders through the No Electronic Theft (NET) Act (1997), the DCMA, and a raft of related instruments and amendments.

The digital era has involved a number of challenges to the standard understanding of goods for consumption or use (and here it is worth recalling how consumption implies exhaustion of the product, as use does not). To begin with it has involved the emergence of a range of significant new forms of consumption, some of which can be related to the commons principle. Examples include open access information sources, such as Wikipedia and other goods produced and refined by the ongoing effort of individuals but circulating freely on

⁵⁰ For an overview of some post-Hardin scholarship on the commons, including critiques of his proposition, see: Araral (2014), Burke (2001), Feeny, Berkes, and McCay (1990), Gardiner (2001), McCay and Acheson (1990). Hardin has replied to such criticisms a number of times (for example, Hardin 1998).

⁵¹ However, a comparable risk of "tragedy" has sometimes been proposed that takes not the Internet but online connectivity as "a bounded environment, whose resources are exhaustible, that is, finite, not immediately renewable and not totally resilient" (Greco and Floridi 2004, 73).

digital platforms without a proprietary owner. In important respects, much of the Internet itself is open access (everything not behind a paywall) and this image of free access (once you are able to get online) is crucial to the idea of the digital commons. However, there are not only free and fee sites online. While the Internet itself may be free, the World Wide Web was always designed to allow commercialization. Domain ownership allows website operators to establish proprietary barriers and sell advertising presence. Many sites use profiles or logins to differentiate users and commercialize forms of added value, or draw value from the users themselves. Sites like Facebook and Twitter thus become public companies with share-holders and significant profits, even though access to their content is free.

Proprietary content on the Internet depends on control over code, and a key text in this respect is Lessig's *Code 2.0* (2006), itself an activist text, collaboratively authored by wiki (<http://codev2.cc/>) with royalties assigned to Creative Commons, an organization that "provides free, easy-to-use copyright licenses to make a simple and standardized way to give the public permission to share and use your creative work" (Creative Commons 2018). Creative Commons, founded by Lessig, foregrounds the possibility of content production avoiding or using very limited forms of copyright. Another important model in this respect is "open source" software, meaning any software where the source code is freely available to all. Famous and still current examples are the operating system Linux and the Firefox web-browser although, as Adrian Johns points out (2009), contestations over open source are actually fundamental in the expansion of software industries. David Choi and Arturo Perez note that "when companies like Microsoft and Novell started charging for their software," in the 1970s and 80s, "many technologists... were surprised and displeased" (Choi and Perez

2007, 170). Open source began not just as a type of digital good but as a movement based on principles of free distribution and transparency, opposed to extant systems of IP and rights management. In 2001, Microsoft executive Jim Allchin described the open source Linux operating system as an “intellectual property destroyer” (in Cooper 2014). However, as Ronald Mann predicted in 2006, entangled relationships have since emerged between companies that blend proprietary and open-source development (see Cooper 2014), and “the rise of commercial open source” has resulted in effects “far different from the vision of open source’s creators” (Mann 2006, 44).

Open source is both a mode of production and a mode of use, but it also sets one of the parameters by which online media piracy is justified. The second, related through the concept of the digital commons, is digital copying. This grounds the most fundamental difference between online media piracy and other forms of piracy. A digital object has no physical form that would be depleted by copying it; the source file is not reduced like the grass in Hardin’s tragic commons. If the Internet itself functions as what John Howkins called “a massive copying machine” (2008, 6), it is also notable that for most digital media circulated online today you do not need to make use of any particular device for playing or storing files beyond the one you use to access it. A contemporary Internet-connected computer accesses, plays, and stores media content all at once, and can also put that content back into circulation. The gradual development of computers that perform all these functions in relation to media content also, as I discussed in chapter one, allows content acquirers to position themselves as recirculation nodes rather than end-users.

With written text, Lessig argues, the freedom to quote with proper attribution is taken for granted. He gives the example of a college student quoting Ernest Hemingway for an essay without contacting his estate for permission. But with other media, twentieth-century norms and laws assume the need to ask for permission first (2011, 117). The technical reason for this contradiction is that the “architecture of copyright law triggers its regulation on the production of... ‘a copy’” and with digital technology “every single time you use culture you produce a copy” (117). For Lessig, this marks “a radical change in the scope and reach of copyright law, for copyright law never purported to regulate every use of culture” (117). The “openness” of digital material to easy reproducibility thus challenges existing methods of making profit from IP, given that theft of a digital file does not need to deprive the original owner of that object.

The academic literature on copyright and on piracy thus often situates online media piracy in relation to economic terms distinguishing between different kinds of goods. James Boyle discusses *rivalness* and *excludability* as terms coined by economists to describe the social characteristics – centrally “the reasons of both practicality and natural justice” – which require that property rights extend beyond “mere occupancy” (2008, 19). Because these concepts have such purchase in the literature, and because online media piracy understood through these terms is also the basis for defending or even attributing social benefit to it, I should explain them myself. Rivalness and excludability could be called *axes* in relation to which, in theory, anything we consume can be positioned (for alternative overviews see Cornes and Sandler 1999, 8ff; Boyle 2008, 2ff).

In an interview for the documentary *Steal this Film* (King 2011), a project which as a whole alludes to the well-known MPAA video known as “You Wouldn’t Steal a Car” (2004),⁵² Liang argues that all information (and thus all digital objects) is a form of “non-rival good”. If information cannot “be considered property in the same sense that a house or a car is considered property”, Liang et al. go on to argue, “assumptions of depletion, scarcity etc., that are used while analyzing classical theories of property do not quite fit” (Liang, Mazmdar, and Suresh 2005). Rival goods are those which can only be used by a single user at any given time; where your use prevents others from using it, or actively restricts their ability to use it. This applies to basically any privately-owned physical object, and the “physical” element is crucial. A non-rival good is one which can be used by many people at once. Television programs and movies, for example, can all be watched by many people without depleting the value or restricting the ability of any other single individual to make use of them. However, a DVD containing a copy of a film or television series can only be the property of one person at a time.

What is technically required for a good to be non-rival is that there are no significant changes to cost or effectiveness when more users are added. Classic examples of non-rival goods are public goods funded by tax dollars, such as national security institutions, where the cost changes only a small amount with increased user numbers. In pre-digital discourse on copyright, ordinary private consumer goods were generally considered rival goods. Logie

⁵² This video, produced by the MPAA and the Intellectual Property Association of Singapore, appeared at the beginning of many DVD releases distributed in a range of countries. A copy can be found here: <https://www.youtube.com/watch?v=HmZm8vNHBSU>. With the punchline “you wouldn’t steal a car so don’t copy a film”, it sought to instill a popular sense that downloading film copies was theft. As Sophia Harris suggests, this “Piracy. It’s a Crime.” campaign “became a source of ridicule. ‘It’s almost a joke line now,’ says [David] Fewer [director of the Canadian Internet Policy and Public Interest Clinic], referring to the phrase, ‘You wouldn’t steal a car.’” (Harris 2017).

stresses the difference of digital goods using an example generated by Metallica drummer Lars Ulrich in copyright hearings,⁵³ equating the downloading of a song to stealing a CD from a store (Logie 2006, 53), and noting how difficult it is to specify the kinds of economic harm that follow from sharing a digital file. This is especially the case because downloading a free unauthorized copy of a media object does not necessarily indicate one would have paid money for it. There may not even be an authorized version of the text in question available to purchase and there is no definite reason to believe that a download represents a lost sale.⁵⁴

As distinct from rivalness, excludability is defined by whether access to a good can be restricted, and to what degree. Non-excludable goods can be used by everyone, and benefits associated with them “are available to all once the good has been provided”, so non-excludability is “the crucial factor in determining which goods must be publicly provided” (Cornes and Sandler 1999, 9). Examples of non-excludable goods might include a public park, free-to-air television, or open-source software once the excluding hurdles of a receiver or computer are passed. And non-excludable goods can be rival. For example, food obtained from hunting or fishing is rival in the sense that you cannot use it at the same time

⁵³ “If you’re not fortunate enough to own a computer, there’s only one way to assemble a music collection the equivalent of a Napster user’s: theft. Walk into a record store, grab what you want and walk out. The difference is that the familiar phrase a computer user hears, ‘File’s done,’ is replaced by another familiar phrase – ‘You’re under arrest.’”

⁵⁴ Some research has found little economic impact following from online media piracy. The most widely cited example is Felix Oberholzer-Gee and Koleman Strumpf’s work on the impact of music file-sharing (2004, 2007, 2010), which finds that file-sharing does not cause declining spending on music. For a critique of this research see Stan Liebowitz (2016). Findings on these impacts are certainly mixed, with some studies even claiming industries impacted by file-sharing continued to grow. Oberholzer-Gee and Strumpf offer an overview of multiple studies (2010, 36-40), noting that “the majority of studies find that file sharing reduces sales, with estimated displacement rates ranging from 3.5% for movies... to rates as high as 30% for music” (35). Results may also be highly specific, so that Michael Smith and Rahul Telang are cited as arguing for no impact on DVD sales in 2006 and 2008 working papers (Oberholzer-Gee and Strumpf 2010, 35), but argue for a definite negative impact on film production (Smith and Telang 2012, 2016).

as someone else, but rely on natural resources accessed through a public domain. If you want to create excludability around a natural resource it requires an additional social constraint, like fishing and sailing licensing systems, or international treaties that set oceanic borders. Finally, there are excludable non-rival goods, which Richard Cornes and Todd Sandler (1999) call “club goods”, because not everyone has access to them but they can be used simultaneously with other users – a membership at any organization with fees or indeed a paid Netflix subscription are club goods.

In the framework generated by these terms, the “commons” refers to a field of non-excludable goods and this conception is often applied to the Internet. Despite its bluntness, this mapping of all goods along the axes of excludability and rivalness can be useful for thinking about the digital commons, because it requires attention to forces that limit non-excludability and non-rivalness. There are many laws that manage use of the oceans, for example, but while some protect against a potential tragedy (such as those restricting over-fishing), others create excludability and rivalness although no tragedy necessarily looms (such as international oceanic borders). Copyright similarly operates at the level of abstract boundaries applied to real things.

Ideas about the “commons” in the copyright and DRM debates thus emphasize the “nonrival” and “nonexcludable”, often arguing that online media piracy makes what may have once seemed like rival goods visibly non-rival, and what may have once seemed like excludable goods visibly non-excludable. Vaidhyanathan argues that thinking of downloading via peer-to-peer networks as theft is confused:

We make a grave mistake when we choose to engage in discussions of copyright in terms of “property”. Copyright is not about “property” as commonly understood. It is a specific state-managed monopoly issued for particular policy reasons. While, technically, it describes real property as well, it also describes a more fundamental public good that precedes specific policy choices the state may make about the regulation and dispensation of property. But we can’t win an argument as long as those who hold inordinate interest in copyright maximization can cry “theft” at any mention of fair use or users’ rights. You can’t argue for theft. (Vaidhyanathan 2002)

A digital file copy of a film is neither rival – you can make effectively infinite copies and people can use them independently or simultaneously – nor is it clearly excludable given that you can use it while making it available to any number of other users.

Citing Vincent Mosco and Mark Giese, Schwarz stresses the importance to discourse on media piracy of the idea that:

information is a resource that “can be used but not used up”. Thus if it is to retain its economic value it must be bounded and claimed – kept proprietary – by arbitrary regulatory impositions, copyrights, and patents as delineators of artificial scarcity and proprietary control (2012, 589).

Such regulations are anything but arbitrary. They are, as Liang, Lessig, and Boyle would all agree, clearly directed at generating profit. It is also the case, however, that:

The concerns in the informational commons have to do with a different kind of collective action problem: the problem of incentives to create the resource in the first place. The difficulty comes from the assumption that information goods are not only nonrival... but also nonexcludable (Boyle 2008, 48).

If media content transformed into data (information) are both these things, it is nevertheless not a naturally occurring resource to be managed. They must be produced, and produced at a cost, so that the question of whether online media piracy reduces cultural production (rather than the different question of whether it damages particular modes of production or particular content industries) does need to be considered. In fact, cultural products are never quite rival in the same way as a piece of land. At another level than making more money when purchased by more people, a widely circulated film also accumulates greater cultural value (though perhaps of different kinds for different films), and either more money or more cultural value may encourage the production or distribution of more films.

Finally, we should also acknowledge the importance of Boyle's query about this whole system of concepts, which by default accepts the importance of talking about social interaction and cultural practices in purely economic terms. As Boyle writes, in the introduction to *The Public Domain: Enclosing the Commons of the Mind* (2008):

It is important to pause at this point and inquire how closely reality hews to the economic story of "nonexcludable" and "nonrival" public goods. It turns out that the reality is much more complex. First, there may be motivations for creation that do not depend on the market mechanism. People sometimes create because they seek fame, or out of altruism, or because an inherent creative force will not let them do otherwise (3).

Overall, Boyle argues, "the economic model of pure public goods will track our reality well in some areas and poorly in others" (4).

The copyright debates circulating around and through studies of online media piracy are not always understood in these terms, although they do always ask what it costs for those whose proprietary work is acquired this way. Whether or not they use the above terms, other writers, like McKenzie Wark (2004) or Abigail De Kosnick (2012), are more interested in the cultural value of not only what is shared but of it being shared. I will explore this question in more detail in the next chapter, but it needs to be mentioned here. The proposition that online media piracy involves the circulation of *gifts*, rather than any kind of theft, generally cites the anthropologist Marcel Mauss to discuss online media piracy sites/groups as communities resurrecting older forms of sociality in which gifts and sharing built relationships and expressed common interests: “in which economic transaction is only one element, and in which the passing on of wealth is only one feature of a much more general and enduring contract” (Mauss 2002, 7-8). While this association with a gift economy has been criticized by others, including Schwarz (2012, 2013), it indicates the importance of the cultural value also associated with the commons and the public good such online media piracy might afford.

“Information Wants to Be Free”: Rights and Copyright

Liang, Lessig, Boyle, Litman, and Logie, like many others, seek to historicize the concept of copyright before asking if it is appropriate to digital culture. Representatively, Liang writes that copyright is:

a recent and by no means universal concept. Copyright laws originated in Western society in the Eighteenth century. During the Renaissance, printers throughout Europe would reprint popular books without obtaining permissions or paying royalties and copyright was created as a way to regulate the printing industry. With

the emergence of the concept of artistic genius, copyright became enmeshed with the general cultural understanding of authorship. Later, with globalized capitalism, control over copyrighted works became centered in the hands of media corporations instead of authors and artists. Even as the Internet and digital media rendered distinctions between original and copies largely obsolete, changes in the law tried to artificially maintain them. As a result, copyright laws over time have been transformed from their original purpose of regulating the publishing industry to instead regulating its customers, artists and audiences. (Liang 2006)

Coming to copyright law through work on piracy reveals a history of interleaving precedents that cross barriers between national jurisdictions, but also cross barriers between historical definitions of piracy.

Most American writers make reference to the *U.S. Constitution*, which defines the purpose of copyright as promoting: “the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (Article I, Section 8, Clause 8). As Lyman Ray Patterson and Boyle both point out, this clause is indebted to the 1710 British *Statute of Anne*, which replaced a conventional “stationer’s copyright” with “statutory copyright” (Patterson 1968, 67), and is thus “the foundation of modern copyright law” (12; see also Boyle 2008, 29-31). Accounts of copyright law then often distinguish between “natural rights” and “granted privileges” approaches as dividing European and U.S. models. Under the latter model, copyright is granted by the public in the interests of creative endeavor, while under the natural rights model, authors are the sole owner and source of their intellectual product.

Michael Foucault discusses the development of this natural rights framing of authorship, arguing that “discourse was not originally a thing, a product, or a possession, but an action” (Foucault 1977d, 124), and began to be considered such at a particular historical moment when the “system of ownership and strict copyright rules was established” (125). While he acknowledges the dominance of the idea of authorial ownership today, for Foucault this “author-function” is “far from immutable”, and he suggests that we imagine “a culture where discourse would circulate without any need for an author” (138). This idea of the “sovereignty of the author” (126) is dominant within particular framings of copyright, and Liang et al. credit it to a Lockean conception of individual rights (Liang, Mazmdar, and Suresh 2005). However, it should also be stressed that such framings have long been in dialogue with “utilitarian” positions on authorial rights, which emphasize the social or common good created by sharing ideas. Aside from the versions enshrined in legal documents outlining copyright provisions, such as the U.S Constitution, a much-cited example is Nicolas de Condorcet, who argued that literary property is not “derived from the natural order”, but rather “founded in society itself” (quoted in Guindon 2006, 157).

For the critics of copyright extension, these early ideas about copyright have been compromised by legislation in the digital era. Logie stresses the changes in U.S. copyright since Patterson’s account of its principles in the 1960s, as follows:

- 1) A copyright owner has a right against an economic competitor to the exclusive reproduction in its original or derivative form.
- 2) An author retains an inalienable right to protect the integrity of his work, and his reputation in connection therewith.

- 3) The right of individuals to the use of the copyrighted work for personal, private, or reasonable uses shall not be impaired. (Logie 2006, 45; Patterson 1968, 228)

Patterson refers to the first principle as “protecting the entrepreneur, not the work itself... not against the author or individual user, but against other publishers” (228). The second allows an author to pursue damages against those who undermine their reputation by what they do with the work, but the third prevents any control over what people do with copyrighted work as individuals. Significantly, it says nothing about the method of acquisition and does not require an economic transaction be involved (only specifying that if anyone is paid it should be the author).

Logie contrasts this with Paul Goldstein’s account in *Copyright’s Highway*, which represents copyright law in practice as “littered with exceptions and limitations” (Logie 2006, 46). Logie notes that even the clearest of the principles Goldstein identifies, including that “a copyright holder must often show that it has suffered economic harm”, internally defines a grey area through the caveat “must often” (Logie 2006, 46-47). The first edition of *Copyright’s Highway* was written in 1994, and Goldstein also acknowledges an environment of “increasingly aggressive copyright enforcement” (Logie 2006, 46). Gareth Locksley describes this change as a shift in the nature of capitalism, writing in 1986 that “the current phase of capitalist development is one characterized by the elevation of information and its associated technology into the first division of key resources and commodities. Information is a new form of capital” (quoted in Frow 1996, 89). Howkins suggests a further development since, which has centered the “creative industries” in national and international economic systems:

IP laws have moved centre stage of the global economy. In the 1980s, IP was a marginal factor in most economies and of little concern to most policy-makers. 20 years later, it is a central and important factor in almost all economic activity.... IP deals with the very stuff of politics: the boundary line between what is public and what is private. What is being fought over is how we live and work together, how we get access to knowledge and how we gain rewards. (5-6)

The Internet itself, and the problem of digital rights, this sequence of texts suggests, were not the only forces transforming copyright in the late twentieth century. As Ginette Verstraete, for example, argues, the emergence of digital culture, and its new modes of distribution and consumption, need to be historically located in the ongoing transformation of globalization and capitalist economic systems (Verstraete 2011).

The digital has nevertheless come to represent the new copyright regime for the reasons I outlined above. As Boyle suggests, in response to “the story line” about “the Internet Threat” (2008, 66), a series of legislative renegotiations of copyright indicate that “as copying costs approach zero, intellectual property rights must approach perfect control.” (2008, 61). In the 2003 revised edition of *Copyright’s Highway*, Goldstein is specifically interested in the aggressive testing and revision of copyright in response to file-sharing, but also in the pursuit of tighter copyright standards through international agreements and standards, such as the Berne Convention WIPO treaty (Goldstein 2003, 173). Although U.S. “policymakers in the mid-1990s were not yet ready to give up on the ability of traditional copyright doctrine to solve the Internet Problem” (171), by 1995 a Clinton administration White Paper was proposing the literal attribution of copyright to even the most ordinary

and temporary production of copies in computer use.⁵⁵ Unable to convince WIPO that this was compatible with “the reality of the digital world” (173), these policymakers then prioritized “legislation prohibiting the manufacture or sale of any device whose primary purpose is to circumvent a technical measure that prevents the infringement of copyright” (174). The same moves led to the RIAA-sponsored Secure Digital Music Initiative, which from 1998-2001 sought to introduce digital watermarks to audio files, even challenging hackers to crack the code and then threatening to sue those wanting to explain how they did so (175-181). The historical overlaps between these efforts, national and international, governmental and industrial, go a long way to explaining what Deborah Halbert has called “American Intellectual Property Hegemony” in the digital rights era (Halbert 2014).

Goldstein notes that both government and industry embraced the ideal of a “celestial jukebox”, a metaphor drawn from that government White Paper (2003, 163-186), to describe an “intertwined system of media and technology companies, their technical infrastructures and standards, and the deregulated legal system supporting [this] system” (Burkart 2015, 483). Goldstein sees that image as “still unrealized” by 2003:

its promise clouded in no small part by the fear of copyright owners – the Napster experience fresh in their minds – that they, and not consumers, would ultimately pay the price for putting copyrighted works on line.... Behind the clouds it was possible to discern the legal, institutional, and business structures that would in time restore stability to copyright markets even as it transformed them (2003, 185).

⁵⁵ Along the lines summarized by Guindon: “When you ‘access’ a page, you are really copying the code of that page along with all the images it contains”. Suggesting that “even the page as displayed on your screen” could be seen as another copy, Guindon highlights “the difficulty of judging what constitutes copying in a digital environment” (2006, 164).

Even if unrealized, the tighter integration of industrial and legislative endeavors implied by the celestial jukebox has dominated the intellectual property scene since.

Drawing on Roland Barthes' "The Death of the Author" (1977),⁵⁶ and Lessig (2004), Liang stresses the network of intertextual allusions that has long enabled art to argue that, particularly "since personal computers and the Internet", copyright has become a limit on creativity rather than a defense of it (Liang 2006). Liang's critique of copyright sometimes uses the slogan "copyleft", but copyleft is not the correct term for all critiques of the extension of copyright in the digital era. More precisely, "copyleft" describes an intentional variation on copyright claims, nominating a product as free to use and copy, with the attendant requirement that all products based on it will also be free in the same way (Gnu.org 2018). But Liang uses it more generally to describe what he sees as the colonization of creativity by capital. In "Copyright/Copyleft", Liang et al. argue that copyright has been elevated "to the status of myth through the constant rendering of certain familiar figures (the poor struggling author), arguments (people deserve to own the fruit of their labor) and rhetorical data (billions of dollars lost due to piracy)" (Liang, Mazmdar, and Suresh 2005). Against this "totalizing rhetoric" Liang et al. contend that contemporary forms of copyright rely on an ahistorical universalization of author's rights linked to "the theory of conversion propounded by John Locke, wherein an individual, through his/her labor, creates something of value out of nothing", adding that "it is important to note that this is also the theory that justifies the appropriation of the commons" (Liang, Mazmdar, and Suresh 2005).

⁵⁶ In this essay Barthes famously argues that, rather than being authored by a sovereign individual, "is a tissue of quotations drawn from the innumerable centers of culture" (1977, 146).

It is thus in relation to the commons that the political philosophy of opposing copyright is articulated in its best-known forms, especially through Lessig's scholarship and legal activism. Today we might best understand Lessig's work in relation to the defeat of the U.S. Stop Online Piracy Act (SOPA) in 2012, an influential example of academics and lawyers working together with other activists against an anti-piracy bill and, at least in Lessig's terms, for a digital commons. SOPA was designed to prevent copyright infringement but also served, in theory, to manage other kinds of online conduct. Accompanied closely by the Protect IP Act (PIPA), it included powers for website blocking via court order – the same powers enabled with the CAB in Australia – but also more broadly for “cease and desist” demands that did not require a court order but were issued as an “in good faith” declaration that a company believed its copyright was being infringed. Further, facilitating piracy by hosting infringing sites, disseminating information that supported piracy, allowing the dissemination of such information by users, or even advertising on such a site, were all also subject to penalties.

In early 2012, many websites, including Wikipedia, Google, and reddit, conducted an anti-SOPA protest in which they blacked out part of their site, symbolizing the control over content that they saw the bill as representing. Wikipedia claim over 150 million people viewed their blacked-out SOPA protest banner, and Google collected over seven million signatures on a petition against the bill (see Benkler et. al. 2015). The online protests had a direct impact on the bill's failure, with Congressman Lamar Smith, one of the bill's main backers, saying that the bill was being postponed until there was wider agreement (Weisman 2012). During the activism against SOPA, a number of sites and forums questioned why Lessig, the most prominent U.S. voice on digital communication law, had

not been actively involved. His response laid out a historical scene in which SOPA was neither new, nor, in its effective defeat, the end of a long struggle between copyright law and the freedom of information (Lessig 2012). Lessig understands the “copyright wars” as a “culture war” (2011, 114), within which he is not, in fact, opposed to all copyright. To understand this culture war, Lessig argues, we need to understand copyright as “an essential solution” (114) to a problem which is unavoidable given that most content producers rely on income from their work, but restrictions on the use of cultural materials just as clearly inhibit creativity.⁵⁷ This might mark an important point of distinction between a “copyleft” framing like Liang’s, and Lessig’s perspective. For Lessig, “copyright limits freedom, the freedom to unreservedly copy other people’s work, or compete with the original creator of creative work”, but it does so “in order to inspire more free speech” (114).

Lessig’s central point in *Remix* (2008) is that copyright law does not protect ideas, but specific expressions. Alex Guindon explains this distinction using a Louis Armstrong song, where what is copyrighted (not to Armstrong, in fact, but to the writers Douglas and Weiss) is the line “and I think to myself, what a wonderful world”, not the idea that the world is beautiful, or indeed the decision to write a song celebrating this fact (Guindon 2006, 158). This idea/expression dichotomy reflects the idea that science and art rely on the borrowing or sharing of ideas, while the profitability of creative works relies on protection of particular

⁵⁷ One of his examples, also highlighted by Liang (2006) and Rimmer (2007), is DJ Danger Mouse’s *The Grey Album* (2004), produced by inter-mixing The Beatles’ “The White Album” (1968) and Jay-Z’s *The Black Album* (2003). Like the producers mentioned in chapter two, artists have weighed in on both sides of online media piracy debates, including regarding Napster. Both Metallica and Dr. Dre weighed in on the side of content industries in the Napster trial, and Logie points out the interesting contrast between Dre’s opposition to piracy and his historical use of sampling, also a crucial site for the copyright wars. At the time of the legal battles over Napster in 2000-2001, Dre was also being sued by George Lucas for sampling the Dolby THX sound that precedes some films, without first securing permission (Logie 2006, 42).

expressions. The constant extension of copyright protection, both in duration and scope, is thus understood by many critics of copyright – both the liberal pragmatists and those opposed more categorically to copyright – to be a social issue. While the encouragement of progress associated with the granted privileges model of copyright is often represented as in peril, with the law moving from a balancing act between authorial rights and the public interest towards a version of moral rights, even under the moral rights model there might still be many variations on a shared idea, and the fact that copyright has a term limit is key. For Vaidhyanathan, this all means that “intellectual property” is the wrong way to think about copyright, and he proposes “intellectual policy” as a more apt concept: “Instead of trying to prevent ‘theft,’ we should try to generate a copyright policy that would encourage creative expression without limiting the prospects for future creators. We must seek a balance. Historically and philosophically, ‘intellectual property’ accomplishes neither.” (Vaidhyanathan 2005, 12).

The broader political context of these arguments could thus be summarized by that hacker slogan, “Information Wants to Be Free” discussed in chapter one. This slogan understands information as something that will innately spread unless it is limited, and yet can only be made valuable in specific ways if it *is* limited. For Liang, Lessig, and Boyle this paradox is being manipulated to serve particular interests. The distinction between IP and real property is thus crucial for these critics of copyright. Copyright is only a limited monopoly on reproduction, due to expire after a certain amount of time, and purchasing a copy of a copyrighted work makes you its owner, as long as you don’t violate copyright law in how you use it. When that “certain amount of time expires”, the work passes into the public domain. In fact, it is this domain which is a commons that can be depleted, bringing Boyle to

“argue that we need to make visible the invisible contributions of the public domain... the underappreciated but nevertheless vital reservoir of freedom in culture and science” (2008, 242). Boyle takes this problem to be an epistemic crisis, declaring, on Twitter:

Here are 2 points I wish people would understand. 1.) We are the first generation to deny our own culture to ourselves.

2.) No work created during your lifetime will, without conscious action by its creator, become available for you to build upon. (Boyle 2009a, b)

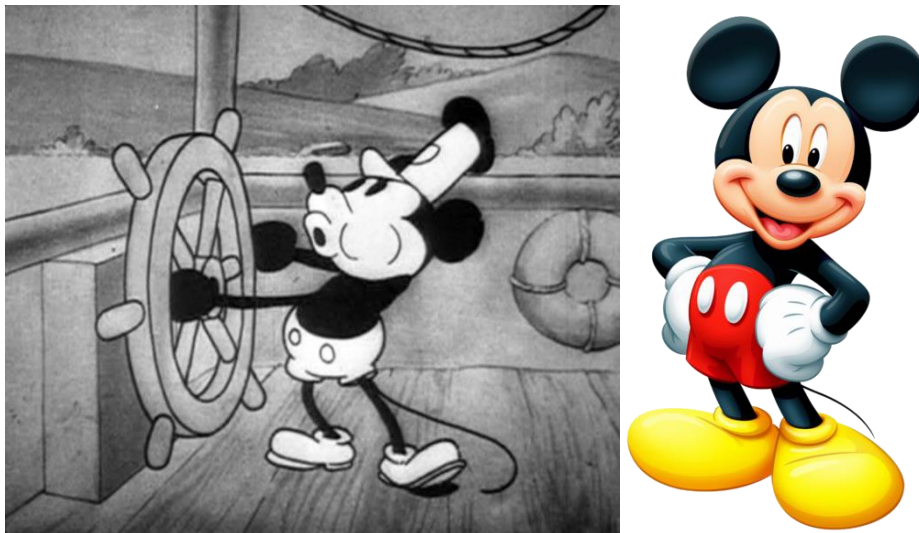


Figure 10: Steamboat Willie and Mickey Mouse © The Walt Disney Company

A much-cited example of this problem of copyright extension is Steamboat Willie, the Disney character that eventually morphed into Mickey Mouse (see Figure 10). In 1998, just as Steamboat Willie was about to enter the public domain, Disney supported the Sonny Bono Copyright Term Extension Act to extend all U.S. copyright (by up to 70 years depending on date and authorship).⁵⁸ Lessig lead, and lost, two legal challenge to the constitutionality of this Act (finally, in the Supreme Court, *Eldred v. Ashcroft*, 123 S. Ct. 769,

⁵⁸ The 1998 Copyright Extension Act extended copyright from the lifetime of the author plus 50 years, or else 75 years for works with corporate authors, to life plus 75 years and 95-120 years respectively. For works created or published before the 1978 Copyright Act the extension was for an additional 20 years.

2003), which extended copyright over Steamboat Willie to 2023. If this work does then enter the public domain without further change, anyone who attempts to use the character could still theoretically be subject to legal challenge based on further derivative works produced by Disney (or the rights-holder at the time, as works are sold with copyright intact). In other words, someone attempting to print Steamboat Willie on a t-shirt for sale in 2025 may need to survive legal challenges on the grounds that the character depicted was not copyrighted to 1928, but instead to many other years in which copyrighted works using that character, or a similar one, also appeared (see also Landes and Posner 2004, 14-17; Frow 2006, 124-125; Liang 2006; Jenkins 2006a, 137).

When the author is a corporation and not a person, original provisions around the death of any original creator become irrelevant. As William Landes and Richard Posner point out, “public and private interest in effective regulation of the patent process” are unlikely to coincide, “because of the persisting asymmetry with regard to the private benefits from recognizing versus denying intellectual property rights” (2004, 15). They explain this asymmetry, and its threat to a social good (16), with direct reference to the 2003 case, including:

the difficulty... Lessig encountered in finding a plaintiff to challenge the constitutionality of the act; and in the fact that the Disney company was the strongest supporter of the act even though many of its most successful characters and movies have been based on public domain works (16).

This public domain activity is highly valued by the critics of copyright as the realm of freely accessible information that can be considered a “public good” and which cannot be used up.

Anti-piracy Measures; Pro-Piracy Politics

The increased emphasis on the “moral” rights of copyright owners, even if they purchased rather than created the IP from which they hope to profit, discussed above, combined with the extension of ways in which the use of copyrighted goods once purchased can be defined as piracy (see the Appendix for a sequence of trials tracing that extension), have defined a field of contemporary IP law which is not just evaded by online media piracy but an enemy it opposes. The Hollybay representation of this confrontation (Figure 9) appears in an historical context when IP law is at the heart of international trade relations. This context might also be represented by a current map of the battle between TPB and international IP agreements. Figure 11 shows a Wikipedia map of “Pirate Bay Blocking” around the world that I will use as a jumping off point for two related discussions of this battle – first a discussion of anti-circumvention strategies outside the courts, and then a discussion of pirate politics.

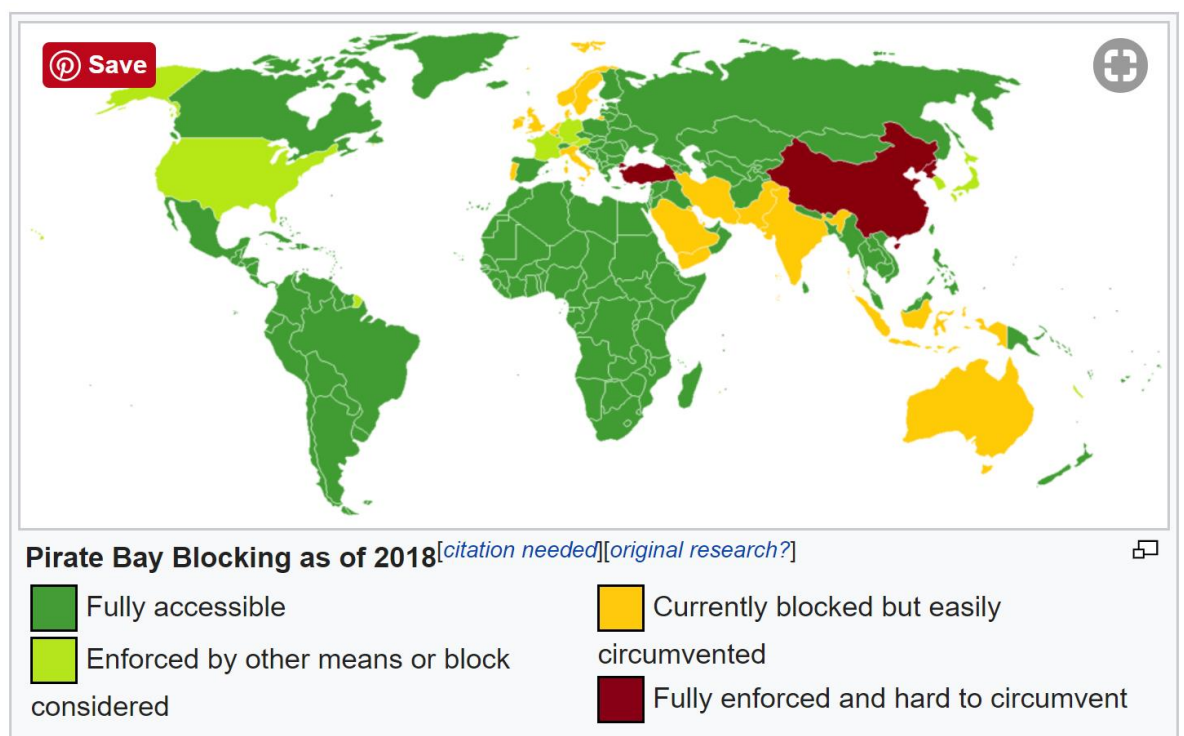


Figure 11: “Pirate Bay Blocking as of 2018”, https://en.wikipedia.org/wiki/The_Pirate_Bay, accessed 17/03/18.

The fact that VPNs can be used to evade such DRM restrictions as geoblocking is, as federal Communications Minister Turnbull indicated (see Grubb 2015c), entirely consistent with its legal uses, including companies wanting to protect proprietary interests. Like such VPN use, this final section moves beyond legislative questions and litigation to focus on online anti-piracy measures, including blocking, undermining and overloading torrents and streams, but also the extension of such anti-circumvention practices into offline user engagement, such as speculative invoicing (see Appendix). As Fleming argues, content industries are consistently engaged in a two-prong effort against file-sharing – first to criminalize the activity and then to obstruct it (2012, 671). As criminalization must be a social rather than purely individual process, both visibility and recognition are crucial elements of this effort, and anti-piracy litigation addresses both the means of circulation and its users, including in attempts to physically disrupt piracy as a dispersed system of circulation and enhance inconvenient aspects of downloading.

As I suggested above, a direct address to piracy users has been increasingly routinized in the actions of content producers according to the Electronic Frontier Foundation. “Between 2003 and 2008, the recording industry ‘filed, settled, or threatened legal action against at least 30,000 individuals’” (2008, para 1, quoted in De Kosnick 2012, 533).⁵⁹ Certainly they also work directly with governments, on behalf of sustaining the cultural and economic

⁵⁹ Fleming focuses on one such prosecution, when the Hong Kong (Special Administrative Region) government took action against Chan, an “unemployed Hong Kong resident”, for sharing three files over BitTorrent (Fleming 2012, 677-78). Fleming asks an interesting set of questions about what is being criminalized in Chan’s case, connecting this to legal precedents in other cases that allow for a loose interpretation of “any commercial gain” being actionable (680).

activity of content industries. In 2009 and 2010, De Kosnick notes, “France, the UK and South Korea enacted ‘graduated response’ laws”:

that deprive individuals of Internet access for a certain period after they are found to have infringed copyright laws a specified number of times (for example, the “three strikes” law in France results in a suspension of Internet access for an offender for two months to one year). (2012, 534)

However, I am more interested in this section in the ways that the user experience of online media piracy is addressed, and particularly in attempts to make it inconvenient that recognize convenience as a prime motivating factor for pirates.

In referring to “speculative invoicing” in his judgement in the *Dallas Buyers Club* test case (see Appendix), Justice Perram determined that the company was seeking to force users to admit they had engaged in an illegal practice by entering into negotiation over reparations. This “invoicing: attempts to accrue the largest possible amount of money from a set of infringing downloaders without ever taking anyone to court. Lobato and Julian Thomas note that:

In the last five years, a number of law firms specializing in speculative invoicing and mass/volume litigation of peer-to-peer pirates have emerged. This entrepreneurial anti-piracy business model – piggybacks on existing enforcement efforts, using the same rhetorical justifications while moving enforcement practice in an entirely different direction (Lobato and Thomas 2012b, 618)

According to this argument, the monetization of anti-piracy action has become its own form of private commercial enterprise. Lobato and Thomas’s table of anti-piracy business

activities (610) includes speculative invoicers as a type of business in the “policing and enforcement” sector of “Anti-Piracy Industries.

It is worth considering the speculative invoicing system more closely, because it interestingly disrupts the image of anti-piracy measures as the practices of content industry giants like the MPAA. For Lobato and Thomas, speculative invoicing has “developed at some distance from the mainstream content industries” (620). They distinguish its aim as being to monetize, rather than eradicate piracy, given that eradication “would mean the end of their business model” (619). Lobato and Thomas indicate that speculative invoicing has never resulted in successful damages claims or jail terms (619), but instead encourages recipients to recognize themselves as pirates and voluntarily pay penalties for their actions, without any trial and thus any meaningful opportunity to question that claim. In response, some piracy support resources have come to offer guidance for users subject to this practice.

Stage One: Put The Kettle On

So you've received a letter, you feel intruded upon and threatened. You're wondering if you even did what you've been accused of – well, at least, what your *connection*, has been accused of...



You're far from the first and you're *unlikely* to be the last to get one of these 'nastygrams'.

The first step to managing the situation you've been put in is to tackle it calmly. You have been invited to play a game. This particular game requires careful thought and rational, planned actions. It is not best played while emotions are running high; never do anything in haste.

You're reading this handbook so you've clearly used your head so far and are on the right track.

If you've not already done so, make yourself a cuppa and sit down to read the rest of this. Relax... you're among friends now. Welcome to the team.

Figure 12: *The Speculative Invoicing Handbook*, second edition (<https://acsore.files.wordpress.com/2012/12/115443516-the-speculative-invoicing-handbook-second-edition.pdf>), 2012

Figure 12 is an image from a *Speculative Invoicing Survival Handbook* distributed by a range of sites, including torrent news site Torrentfreak. While instructing users to remain calm in the face of this apparent threat, this guide frames the central form of defense as refusing to acknowledge fault. Deferring the accusation from the user to the connection is a step towards contesting that any crime has been committed, and socializing this defense through “the team” adds reassurance.

As much as generating a new possible revenue stream, speculative invoicing is a step towards making online media piracy less convenient. Raising the possibility of a legal penalty thus fits with other developments in online anti-piracy strategies. Torrent “poisoning” is one of these. When BitTorrent dominated Internet data transfers, Fleming notes, the traffic included substantial amounts of “upstreaming” as well as “downloading” (2012, 671-73). He makes this point in order to speculate that this upstream traffic was too extensive to represent those uploading (“seeding”) files (673). Instead, he claims, it records intentional obstruction – content industry employees injecting broken links into indexes and flooding torrents with corrupted files, all designed to making downloading more frustrating and difficult. Lobato and Thomas agree that such strategies are used to disrupt torrenting, and distinguish between the strategies of “spoofing” (fake files) and “spoiling” (damaged files) (Lobato and Thomas 2012b, 612). If torrent sites cannot easily be closed down, they can be made less convenient, and Lobato and Thomas name a further group of businesses that can be employed for such obstruction (612), even noting that it was piracy practices themselves that made such strategies workable and developed the expertise they require.

This is key to what Lobato and Thomas discuss as the “cycle” of piracy/anti-piracy innovation. Online media piracy practices are not clearly distinguished from ordinary Internet practices, as piracy innovations have permeated content distribution strategies, and pirate skills have been deployed to develop new Internet technologies, via the process Dan Burk calls “inventing around” (2014). Burk’s argument supports Lobato and Thomas’s critique of the “zero-sum” model of “economic redistribution between two camps – producers and pirates – with the latter cannibalizing the revenues of the former” (2012, 606). To disrupt this model, Lobato and Thomas focus on how piracy produces new anti-

piracy enterprises, which in turn produces new informal workarounds amongst and for pirates, with these generating new anti-circumvention responses, and so on. Lobato and Thomas stress that “the pattern here is not leakage,” as James Arvanitakis and Martin Fredriksson have suggested is characteristic of piracy, “but dispersal, with commercial opportunities produced in both the legal and extralegal spheres” (Lobato and Thomas 2012b, 607).

Such a circular model for understanding how anti-piracy efforts relate to piracy can also be found in Majid Yar’s essay “The Global ‘Epidemic’ of Movie Piracy”:

High figures put pressure on legislators to criminalize, and on enforcement agencies to police more rigorously; the tightening of copyright laws produces more “copyright theft” as previously legal or tolerated uses are prohibited, and the more intensive policing of “piracy” results in more seizures; these in turn produce new estimates suggesting that the “epidemic” continues to grow unabated; which then legitimates industry calls for even more vigorous action. (Yar 2005, 690; quoted in Lobato and Thomas 2012b, 613).

Lobato and Thomas emphasize how anti-piracy enterprises not only interact with or even emerge out of piracy, but depend on piracy, just as “the point of technologies like Google’s Content ID is to monetize, rather than eradicate, copyright infringement” (Lobato and Thomas 2012b, 616).

Lobato and Thomas’s version of the cycle of piracy/anti-piracy innovation interestingly reverses the idea that piracy continues because once it is pinned down and stopped

somewhere it just adapts and takes a new form. Instead they attribute such self-interested mutability to IP in general:

The history of copyright teaches us that this form of intellectual property is a partial and incomplete organization of what have been, since the invention of the printing press, diverse, unruly and piratical markets for information and knowledge.... More like a Mobius strip than a mutually exclusive relation, the distinction between piracy and legal distribution, between formality and informality, is changing as new kinds of commercial practice are invented, trialled, and incorporated (or not) into existing anti-piracy repertoires (2012b, 620).

The intimacy between formal and informal economies, and online media piracy and the legal distribution it depends on, is a theme I will take up again in chapter four. For now it is enough to note the dispersed field of anti-piracy strategies that combine political lobbying and litigation with technological adaptations that seek to make piracy harder, whether overtly, as with DRM, covertly, as with torrent poisoning, or through subtle but visible changes to business practices that seek to make authorized content acquisition more convenient than piracy.

Such critiques of contemporary copyright regimes overlaps with what is internationally popularly known as “pirate politics”, for example in a promotional film for the Australian Pirate Party which draws on the MPAA’s “you wouldn’t steal a car” video. Resilience is not all that makes The Pirate Bay stand out in the field of piracy resources. Its place as a politicized figurehead for online media piracy activism is key. TPB is quite aware of their contentious role as a figure of political and legal interest, and will often use the front page of their site as a platform for political messages supporting piracy, like campaigning for pro-

pirate candidates running for electoral office, or for advertising services (like VPNs) that users can utilize to avoid the potential legal consequences of their downloading habits.⁶⁰ The site occasionally features news, including promotions related to the legal issues it faces as a company, and calls for donations to support its founders facing action. It has been thus broadly associated with Pirate politics, and not just because some of the organizers of TPB helped establish the first Pirate Party in Sweden, around the same time as the 2006 raids.

Although Fredriksson (2014) is undoubtedly right to stress the Swedish origins of the pirate party movement, the opposition to a standardized moral rights version of international IP law is not confined any of those countries where a Pirate Party might operate. You Jie also focuses on clashing understandings of piracy in his discussion of the Chinese case – opposing its definition as “theft” by rights holders to a definition elsewhere as a force that “turns upside down the ‘there-is-no-free-lunch’ rationality at the base of economic theory, upon which the whole modern capitalist market economy is firmly based” (Jie 2014, 196). Jie notes that the “grassroots anti-capitalist dynamic sustained by digital citizens in wired nations seems to be well recognized both within academia and among ordinary digital pirates” (196-97), and this is consistent with Fredriksson’s argument that “Both activists and academics have criticized the current copyright regime for privatizing what was once public, cultural and natural resources” (Fredriksson 2014, 1037). But Jie finds this image of anti-capitalist activism “too simplistic” to account for the way media piracy relates to the strong adaptive capacity” of “the copyright industry” and its “skillful manipulation ... [of] ‘the acts

⁶⁰ “In many European countries, including England and the Netherlands, the courts have ordered ISPs to block access to” torrenting sites, specifically naming the Pirate Bay in those orders as “either a file sharing site for sharing of legitimate content or a haven of illegal activity” (Flint 2012, 185).

and spaces of consumption' (Jie 2014, 196-197, quoting Fairchild 2008, 23). Jie suggests that "both the rhetoric and the practice of piracy" might already "have been co-opted", and that the "anti-capitalist grassroots resistance" of piracy is an "illusionary" "accessory myth" (197).

There is very little room in Jie's account for the way, as Fredriksson records, Pirate Party activists often "see themselves as engaged in the same struggle as the protestors in Tunisia or Egypt" fighting oppressive regimes in what became known as "the Arab Spring" (Fredriksson 2016, 9). Even where pirate parties have broadened their social agenda beyond increased access to online content, in ways that vary across different countries and has changed over time (see Fredriksson 2016, 3-5), the extent to which online media piracy itself resists not just the goals of specific content providers but capital in general remains in doubt. The suggestion that such piracy carries with it a democratizing potential is grounded in the copyright and circumvention debates I have canvassed in this chapter, and so forms an apt conclusion here.

Jie makes his case against this association of media piracy and anti-capitalist revolution through examples that pair forms of piracy with corporate/capitalist entities that benefitted from them, even as their intellectual property was, in theory, "stolen". For Jie, overall, even if people who engage in piracy are trying to circumvent payment systems, and even if it presents a problem for some established systems of economic exchange, piracy is not fundamentally dangerous to capitalism. He takes each of his case studies to demonstrate how the products pirates "consume" are still "commodities", and argues that the people producing them, if they adapt appropriately, can still harness the various commodity culture

benefits of consumers wanting their products. Jie points to the widespread piracy of Microsoft software by Chinese consumers in the 1990s and early 2000s, which he argues had a beneficial “network effect” (2014, 197), as a “wider user base establishes the operating system as the de facto platform standard which forces secondary applications and services to be compatible with it” (197). Users are disinclined to change operating systems due to cost, familiarity, compatibility and other convenience issues, thus even pirated software can come to greatly benefit the producer of the software, especially in an emerging market with significant barriers to entry such as China (on this situation see also Pang 2012).⁶¹ While this example, and the example of movie piracy in China, are in important respects about the piracy of physical objects, and piracy for money, rather than free file-sharing, I have previously quoted Jie’s account of similar absorption of online music piracy tools and practices into commodity culture.

It will already be clear that I agree with Jie’s central argument that piracy has enabled the necessary “creative destruction” that content industries needed in the digital era. The introduction of “a robust and sustainable digital economy to at least supplement its analog counterpart” (Jie 2014, 207) might not have eventuated until far later, if at all, without the influence of piracy. However, I have two caveats. First, we cannot talk, as Jie does, about the “copyright industry” as a monolithic entity. Some aspects of entertainment media have

⁶¹ What Jie discusses as a viable “two-stage strategy” is captured in a 1988 statement by Bill Gates, CEO of Microsoft: “As long as they’re going to steal it, we want them to steal ours. They’ll get sort of addicted, and then we’ll somehow figure out how to collect sometime in the next decade” (in Jie 2014, 198). For products which require less specialization, moreover, piracy can offer advantages, and Jie quotes Gates as also admitting “It’s easier for our software to compete with Linux when there’s piracy than when there’s not” (in Jie 2014, 199).

suffered, while others have thrived or newly appeared. There has been nothing like a seamless co-option of piracy across all forms.

Jie is certainly correct to stress that much of the most popular media content today is still produced by a narrow range of large production networks. As Ginette Verstraete argues, digital media convergence has involved “more than simply delivering different formats and functions”, and “multiplying” the “portable tools with which we can do all these things” (2011, 535-536). It has also been accompanied by a different “convergence” in ownership, tending towards a “handful of conglomerates” dominating “all sectors of the communication, entertainment and recording industries” which importantly increases the likelihood “that content is made to flow across multiple formats” (536). In this situation, piracy does work as an irritant against the smooth flows of agreements between a smaller number of industrial players, circulating media outside agreements. While some of the networks formed around media content production have changed following the Napster and Netflix moments, as with the new massively popular streaming services this has not been uniformly a matter of allowing more access. Content has diversified in some areas, serving some more niche audiences, but for the most part media content is simply being distributed via new methods and, in some cases, circulated post-distribution in some new ways. This argument presents some difficulties for the critics of copyright and the pirate politicians, and I want to carry these difficulties into my discussion of “piracy culture” in the next chapter. Ultimately though, many significant distinctions need to be made about the kinds of impact online media piracy can have – for example, between the impact piracy has had on television in general, its impact on a store that might have sold physical music CDs in

the 1990s, the possible impact of VPNs on the flows of content across the Chinese firewall, and the potential for an encompassing content library inherent in a company like Netflix.

My second caveat concerns Jie's conclusion that his case-studies suggest a conspiracy on behalf of copyright industries, that they "cunningly" cultivate an "illusion of resistance among digital pirates" through anti-piracy rhetoric, while benefiting from piracy which "helps to ensnare" potential consumers (2014, 208). However many times ambassadors and the MPAA consult over how to encourage prosecutions in other countries (see Fredriksson 2014, 1033, concerning the raids on TPB), the field of online media and its piracy is too vast and multiple to be conspiratorially controlled. Jie does acknowledge that what looks like conspiracy to him might be unintentional, as the copyright industry "did try to launch an anti-piracy crusade", but then "came to notice the positive externality effects of digital piracy" later on (2014, 208). He concludes, however, that ultimately the "anti-capitalist resistance" involved in piracy is "doomed to be futile", because "the activity and rhetoric of the digital pirates are still entrapped within the very discursive hegemony of intellectual property they have been seeking to subvert". Ultimately, Jie shares the goal of the destruction of capital imputed to many online media pirates – he just doesn't think that destruction can proceed from the inside. He suggests, alongside Christine Harold, that if people really want to change the copyright industry, they should not "steal bits and pieces of the kingdom while leaving the monarchy intact" (Harold 2007, 131).

In 2008, Lessig was already arguing that the war on peer-to-peer media piracy had been a failure (xviii), and that a new approach was needed, since simply prohibiting piracy did not work. He noted that the current campaign to sue pirates had "given nothing of value to

artists”, and the money “simply funds further lawsuits” (2011, 121). Lessig’s proposal is that “the law must give up its obsession with the ‘copy’”. Given that a copy is a less meaningful thing in the digital age, law should instead focus on “meaningful activities”, and this means distinguishing between professionals and amateurs, and between copying and remixing. Copyright law is designed to protect professionals and give them the incentives they need to create their work, but it need not regulate the actions of amateur “remixers” in order to do this (119-120). Lessig argues that the law can be flexible enough to grant reasonable freedom of use, including sharing songs or remixing cultural objects, without allowing amateurs to share media with as many people as they like and deprive artists of livelihoods, and that it can give professionals the freedom to remix without allowing them to endlessly reproduce derivative work. Ultimately, he characterizes these necessary changes as a “fundamental deregulation” that is “libertarian” in nature (120).

It is in this respect that Lessig’s argument for the rights of “amateurs” is central to his remix thesis, but in ways that do not resolve the difficulty of how to balance those interests against those of creators. In response to a representative from the Australasian Music Publishers’ Association Limited, Lessig gives the following example:

if you think about a kid taking some videos, and remixing them, he could be engaging in that activity for purely non-commercial reasons. He uploads it to YouTube and YouTube’s use of it, in some sense, is deeply commercial. They are in the business of trying to make money. Yet the law says that what the kid does is illegal. But if YouTube takes the thing down within a certain number of days after having notice of the copyright violation, YouTube is immune from any responsibility. And I think that is exactly backwards. (2011, 130-131)

The standing of Lessig's work in discussion of copyright makes it especially important to note his emphases here. Indeed, he identifies the criminalizing of "kids'" everyday consumption as a key inspiration for *Remix*. Youth, everydayness and amateurism all function in Lessig's work to stress the inapplicability of received copyright conventions to contemporary digital media and also to downplay any threat piracy and other copyright violations might really pose to industry. If some of Lessig's advocacy now seems outdated, given changes in the entwined piracy/anti-piracy fields, these principles, as we shall see, remain deeply relevant.

Chapter 4 – Piracy Cultures

While chapter two was primarily concerned with changes to media distribution, and chapter three was primarily concerned with legal changes to the definition of piracy, this chapter focuses on the practice of online media piracy, including its significance for “pirates”. I focus here on how people *do* and *use* online media piracy. Strictly legal definitions of online media piracy will never be sufficient to understanding its impact or the contemporary practices it defines. In part this is because, as I suggested in the previous chapter (and is further exemplified in the Appendix), that definition has changed over time. Practices that were clearly legal have been reframed as illegal, and grey areas as different as fan fiction (Coombe 1998; Jenkins 2006a), home video collecting (Dawson 2007; Frow 1994), hip-hop mixing (Rimmer 2007; Lessig 2008), VPN usage (Lobato and Meese 2016; Danager, Smith and Telang 2017), and student reading packs (Logie 2006) appear or change position in relation to legal definitions. Moreover, on the contentious question of whether or not online media piracy is a problem demanding resolution, and in whose interests, *how* people engage in online media piracy is an important factor, and one that exceeds the basic question of whether or not they understand their practices to be either illegal or unethical. This chapter thus focuses on the ways people pirate, how different media genres as well as different cultural and geographical locations shape piracy practices, and what *content acquirers* want and expect from piracy. It thus also considers how the experiences and meanings of online media piracy are represented, both through recorded individual experiences of choosing to pirate, and in the communities that sometimes form around sites and tools facilitating or supporting piracy.

In the introduction to *Peers, Pirates and Persuasion* (2006, 2-4), John Logie offers an anecdote that supports some of my previous arguments about “content acquisition” and its relation to “convenience”. He recalls, in 2000, a conversation with a “roughly sixty-year-old” Costco worker who revealed they were a dedicated Napster fan. When Logie asked about copyright, he explained that Napster offered “him and like-minded sexagenarians an opportunity to exchange” old songs that “they won’t put out on CD”, and also that he “bought all these records back in the 60s, and if they reissue them on CD, I might buy them again”. Perhaps, he suggested, if record labels saw how many people still liked that music on Napster that they might “get going” on the task of releasing them on CD. As Logie notes, this may not be more than a rationalization for piracy, but this characterization of “another kind of Napster user” is nevertheless interesting for my argument.

An anecdote from the introduction to Lawrence Lessig’s *Remix* (2008, xvii-xxi) will hopefully help explain my redirection away from the question of *who* engages in online media piracy and towards *how* they do; or, better, how people *use* online media piracy. Lessig’s story recalls Jack Valenti, President of the MPAA, talking to students at Stanford University, and discovering that among his audience “90% of the students confessed to illegally downloading music from Napster”. When asked to defend this behavior, one student asked how it could be wrong when everyone does it. Valenti’s response was to ask his Stanford hosts what they were teaching their students, particularly “what kind of moral platform will sustain this young man in his later life?” Lessig recalls that his response to Valenti at the time “blathered on about the framers of our Constitution, about incentives, and about limiting monopolies”, but says that when writing *Remix* he returned, now more interested, to Valenti’s question. Lessig’s anecdote inflects Jessica Litman’s claim that “people don’t

obey laws that they don't believe in" (1996, 239) with a generational logic on which Lessig expands elsewhere. "In my country," Lessig told an Australian audience in 2010, "kids live in an age of prohibition, constantly living their life against the law. We need to recognize: that life is corrosive, and corrupting to the rule of law, at least the rule of law in a democracy" (Lessig 2011, 123).

I want to raise two points from these anecdotes. The first is that it is worth questioning the many records of online media pirates' own accounts of their motivations, which often sound like excuses or justifications that embrace the moral claims of copyright while pleading exceptions based on industrial failure or ignorance of consumer desires. The Costco worker is consistent with "a point often made on file-sharing forums" is that "there is... no loss" when a user could not actually purchase legal versions of certain products, such as "rare masters of albums, unreleased live tracks, old films, and so on" (da Rimini and Marshall 2014, 337). Another justification is legal barriers that do "not make sense to users", such as the disgruntled Australian consumer discussed in chapter three, or da Rimini and Marshall's interviewee who wanted to watch things on the BBC website but found this option blocked in Australia and so downloaded Tor for the access (2014, 330). Analyzing interviews with Australian file-sharers in 2011-2012, da Rimini and Marshall found piracy understood "not as theft, but as normal, commonplace, and unadventurous", and that this is consistent with other studies (da Ramini and Marshall 2014, 328).⁶²

⁶² A range of studies suggest that unauthorized file-sharing is not considered a serious crime by Internet users. Lloyd Harris and Alexia Dumas claim that "peer-to-peer file-sharers employ (often multiple) techniques of neutralization in order to pre-justify or post-event rationalize their activities, including: denial of victim; denial of injury; denial of responsibility; claim of normality; claim of relative acceptability; justification by comparison; and appeal to higher loyalties" (2009, 379; see also Fredriksson 2014; Schwarz and Larsson 2014; Peukert 2012).

The second concerns generational discourse. A concern for a generation of kids made criminals was a powerful discourse in the climate surrounding the file-sharing trials I've already referred to (see Appendix for further discussion). Litman even argued that "piracy" was a label more likely to be applied to "teenagers", including for entirely legal activities (2001, 85). Dan Fleming also cites "U.S. Senator Norm Coleman's widely reported remark in late 2003 that he 'doesn't want to make criminals out of 60 million kids'" as "an early signpost" to a crisis in attitudes around copyright protection (2012, 676). This is not to dispute that there may be a tendency for online media piracy to be undertaken by younger people. I have already suggested as much in chapter one, and You Jie claims that, in China, too, the "typical 'pirates' are young people living in the urban areas aged between 15-25 years" (201, 204). Outlier stories like the Costco worker do not entirely refute a broader agreement (Logie 2006; Lessig 2008; Witt 2015) that the majority of Napster users were younger – Martin Fredriksson (2014) refers to them as the "Napster generation" (2014). However, online demographics are hard to trace. Surveying available research in 2010, Jessica Reyman stresses that:

While it is clear that college and university students do engage in downloading music and movie files on university networks, the existing research is inconclusive: there is no consistent evidence that students are more likely to engage in illegal file sharing than the general population. (2010, 113)

It bears remembering that generational narratives serve a strong rhetorical purpose for various positions on online media piracy.

For both the above reasons I think a better understanding of how people use online media piracy needs to go beyond individual (or collected individual) narratives, and consideration of demographics. I want to focus on how piracy is done in ways that situate individual narratives in critical analysis of sites and tools, drawing such discussion towards consideration of the way piracy practices interact with authorized forms of content acquisition.

Content, Communication, Culture

While humanities and social science scholars have been exploring the practices and effects of online media piracy since the 1990s, especially in the fields of economics, legal studies, and media and communications, it is only more recently that cultural studies has been much engaged in this discussion, and that cultural theory more generally has become an important tool for analyzing piracy. There has been more cultural studies work on IP, understood more broadly. John Frow's analyses of the relations between culture and IP (including 1994, 1996, 2006, 2008) are exemplary, although principally concerned with law and trade agreements, and situating media piracy as only one possible concern in that field of relations even when considering the impact of digital reproducibility on copyright (for example, Frow 2008, 434). Another example is Jennifer Daryl Slack's *Communication Technologies and Society: Conceptions of Causality and the Politics of Technological Intervention* (Slack 1984), an analysis of technological change, patent law, and capital that was noticeably ahead of its time in terms of the interests of cultural studies.⁶³ Introducing a

⁶³ Striphas and McLeod claim that the "full significance" of Slack's argument "has only begun to be appreciated" (Striphas and McLeod 2006, 128) in 2006. For my thesis, Slack's approach here is most interesting for being written in a moment when it was not yet clear whether computer software would be governed by patents or by "copyright and trade secret law" (Slack 1984, 131). Much of Slack's discussion of technology,

special IP-focused issue of the journal *Cultural Studies* in 2006, Ted Striphas and Kembrew McLeod write that “cultural studies ought to be paying even more attention than it has to the politics of intellectual properties” (120).

In an essay for the same journal in 2014, Fredriksson is still suggesting that cultural studies has paid too little attention to law, which includes IP and piracy. He further argues that a critical “cultural studies heritage” is “prevalent in research about file sharing.... Even though few of them make direct references to the classics of British Cultural Studies, it is nevertheless striking” that many of these studies “address the very same questions that once underlined the ground breaking work of scholars like Stuart Hall and Angela McRobbie”. Moreover,

the recognition of the media user as an active participant in the construction of meaning that cultural studies scholars such as Janice Radway once put on the academic agenda, is now becoming increasingly relevant with the expansion of the read/write culture. (Fredriksson 2014, 1040)

One of the reasons for a delay in much close attention to online media piracy using a cultural studies perspective may be the particular activist tone of much scholarship on this topic. While employing concepts and terrains often preferred by cultural studies – such as the critique of capitalist exploitation of human endeavor and attention to the field of popular culture as a site of social struggle – this scholarship often elevates user participation to a goal in ways that could be subject to the criticisms directed at “convergence culture studies”. Striphas has summarized the position of copyright critics like Lessig and Siva

“progress” and temporality is translated into *Cultural and Technology: A Primer* (with J. Macgregor Wise), discussed below.

Vaidhyathan as calling for a “return to limited copyright terms” (2006, 250). He also questions whether such a return to “the social relations of ownership apparently... favorable to a majority of people in a previous historical moment” (251) could be either practicable or compatible with the “insurgent constellation of relations that... has challenged the relations of commodity ownership” that were themselves “both cause and effect of a historically specific (modern) political-economic project” (251).

An exception to the relative lack of early engagement with online media piracy is McKenzie Wark’s writing in and around *A Hacker Manifesto* (2004), including an essay for Striphas and McLeod’s special issue. Striphas and McLeod’s introduction is worth quoting at length:

The critical study of information must consist... of a commitment to theory – and not just of an obliging “detour” through theory, but rather of a deliberate and sustained confrontation with even our most sacrosanct theoretical precepts. Eva Hemmungs Wirtén... contends that some critically inclined scholars have appealed, more or less unreflexively, and with potentially detrimental consequences, to the notions “creativity” and “freedom”. We agree in principle, and would add that these terms belong to a larger inventory of tropes and dichotomies which, though they have helped to advance knowledge about the politics of intellectual properties, nevertheless deserve to be scrutinized even more vigorously. This list includes: culture and nature; individual and collective; corporate and indigenous; the West and the rest; rights and responsibilities, original and copy; difference and repetition; commodity and gift; enclosure and commons; property and propriety; appropriation and piracy; and certainly more.

These terms should sound familiar to most critical IP scholars; no doubt their

constant reiteration assures us that we think we know how the world works. Gift exchange embodies munificence and goodwill – doesn't it? – while commodity exchange manifests avarice and exploitation. Maybe. But for us, and as McKenzie Wark shows in his contribution that follows, the familiarity of these terms just as well might index intellectual and political complacency (2006, 137-38).

Although my own approach to online media piracy has not begun from any specific theoretical framework, I come to it grounded in cultural studies and aware that theoretical engagement can prise more than expected responses and reassurances out of cultural questions and situations. I say this not to be defensive, but for two reasons that underpin the rest of this chapter. First, in order to flag my attention to how cultural theory has been incorporated into recent studies of piracy, to complicate a narrative in which piracy in practice is equal to the copyleft platforms of some of its defenders. Second, to acknowledge the difficulty of incorporating the certainties that activism encourages into cultural analysis that begins with cultural practices (as well as that which begins with theory).

Striphas and McLeod's special issue includes a number of articles compatible with the kinds of arguments posed by writers like Lessig and Lawrence Liang. Wark's essay in fact makes its own broad claims for the "'creativity' and 'freedom'" produced by file-sharing, arguing it is:

a social movement in all but name. It rarely announces itself as a social movement, but then I don't think that is uncommon. Likewise, I think that the gift relation in culture and knowledge has been alive and well and resisting commodification for centuries. Only now it may finally have found an ally in the digital means for reproducing information, so that one's possession of it can be the possession of all. (2006, 175)

This is more or less the time that new attention was being paid to piracy practices by scholars in U.S. and European communications studies. The approaches brought together under this umbrella of “piracy studies” were more concerned with particular piracy practices, even while it referred heavily to the debates about intellectual property. In this literature, key cultural theorists often drawn into the backstory of contemporary cultural studies are prominent, including Raymond Williams, James Carey, Marcel Mauss, Theodor Adorno, and Walter Benjamin.

Hendrik Storstein Spilker credits the relatively new concept of “piracy cultures” to Gustavo Cardoso and Manuel Castells, claiming they “coined the term ... to denote the growing number of people building media relationships outside the institutionalized set of rules in the content industries” (Spilker 2012, 774). Around this time a range of publications, sometimes but not always citing Castells and Cardoso, have newly focused on the *relationships* involved in piracy, understanding them to constitute the cultural dimensions of piracy. Excellent examples of the arguments produced under this umbrella can be found in the special 2012 “Piracy Cultures” issue of the *International Journal of Communication* that Spilker refers to, or in a subsequent 2015 special issue with the title “Piracy and Social Change – Revisiting Piracy Cultures”.⁶⁴ A number of edited collections have followed, featuring many of the same authors but extending the field (including Arvanitakis and Fredriksson 2014; Lobato and Meese 2016). Despite the clear call for studies of piracy to move beyond the relations between IP and piracy, what counts as “culture” in the analysis

⁶⁴ Spilker references Cardoso and Castell’s email call for papers for the 2012 special issue I refer to here, edited and introduced by them, and then republished as a book titled *Piracy Cultures* in 2013. The second special issue, from 2015, was edited by Patrick Burkart and Jonas Andersson Schwarz and focused on “piracy and social change”.

produced under this label doesn't involve any specific definition. The question of what culture means for the critics of copyright calling for free access to culture, or for culture that is free to remix, or is public, is also not very clear.

The introduction of the label "piracy cultures" begs a number of questions, beginning with its plural form. Piracy has "cultures" rather than a "culture" here largely because the practices studied cross both national boundaries and intranational distinctions (culture in the national or sociological sense) and encompass many different media forms, including black markets for physical copies as well as online media piracy (culture as a field of aesthetic objects). This diversity is thus not largely about different communities or subcultures, although some studies make those kinds of arguments (Cooper and Harrison 2001; Tushnet 2007). At the same time, this work often does imply a singular definition of culture – either culture as communication itself (generally after writers like Carey), or culture as mass culture (after writers like Adorno), or culture as popular culture in the culture-of-the-people sense distinguished from mass culture. While the most common reference under the latter heading is Williams (see below), an adaptation of Benjamin is also often used to discuss the possible productivity of the popular.

Hall's work on popular culture as the terrain of struggle over social power is, as I mentioned in chapter one, clearly also relevant to understanding piracy, although rarely taken up. In "Notes on Deconstructing the Popular", Hall takes popular culture as a "battlefield" (1998, 451), which is consistent with the IP/pirate wars discussed in chapter three. However, he also discusses popular culture as an historical field, characterized not only by containment and resistance but by the interplay between them:

The important thing is to look at it dynamically: as an historical process. Emergent forces reappear in ancient historical disguise; emergent forces, pointing to the future, lose their anticipatory power, and become merely backwardlooking; today's cultural breaks can be recuperated as a support to tomorrow's dominant system of values and meanings. (450)

With this in mind, I want to return to Frow's work on culture and IP to suggest that this popular is the public domain. As Frow argues, culture as "the domain of values and practices that conveys meanings about the world to a group, thereby defining and demarcating for itself and others the group's coherence – has always been one of those areas of exemption from property relations" (2008, 431). However, "aesthetic objects, in particular, are almost archetypal objects of ownership" (431).⁶⁵ Books, newspapers, films and access to the World Wide Web are clearly all aspects of the cultural domain not only for sale (property alienable from any one person via market forces), but technological innovations channeled to the production of saleable goods/services. The question of whether "culture" can or should be alienable, or which parts of it should be, underpins debates about the public domain, as Lessig and James Boyle suggest, but they are also key to the literature on "piracy cultures", which often refers to "culture industry" style arguments about commodities (see the introduction).

Frow recounts a story about Chile attempting, at the WIPO 2006 meeting, to put "a human right of access to knowledge" "on the agenda of the next meeting" (2006, 123). The

⁶⁵ Books are a useful example because they locate the origins of copyright, and because Frow and Striphas focus on them. As books were defined by their reproducibility but also by a distinction "between their aesthetic or spiritual value and its material embodiment in 'copies'", the sale of books has not seemed to undermine the inalienable right to culture, creating neither "scarcity [nor] exclusivity, since – as with all information – any increase in use enhances, rather than diminishing, value" (Frow 2008, 431).

problems Frow identifies with this proposal are not only practical, with the “property rights that currently inhere in knowledge” unlikely to “be given up in the face of a general assertion of this kind” (123). More fundamentally, “the concept of ‘access’ does not preclude the charging of entrance fees, and thus the reinstatement of inequalities between those who can and those who cannot pay” (123). Frow also wants, referring to Boyle (2008), “to force the question of the *protection of the public domain* back on to the agenda” (Frow 2006, 124, emphasis in original). This involves asking about the content of the culture to which “the public” should have access:

Public domain rights are those rights that, rather than deriving from personhood, precede and enable it. They are rights to the raw materials of human life: language, ideas, an inherited culture, a “common heritage” of environmental resources, bodily integrity, civil entitlement. These are not “natural” rights, located in an originary contract or a state of nature, but customary social rights, developed and recognised as a provisional end state of the struggle for civilized conditions of life (and of course, whatever their recognition, always contested). Like all rights, they represent a balance between conflicting demands, and they carry with them a corresponding set of obligations to the common good. (Frow 2006, 125)

Frow further offers a translation of this common heritage “in terms that economists will understand [as] the notion of *intergenerational transfer*” (126), a formulation he says still gets “at that element of commonality, which is so crucial to the concept of the public domain” (126). It also helps explain the weight attributed to “kids” in discourse on online media piracy.

It might be useful to think of “piracy cultures” research more broadly than the specific essays and collections gathered under this precise label. Such research might focus on online communities, or on use of online tools to broaden access to “culture” as a public domain, and might consider how such factors as economy, language, or geography impact on piracy. The existing literature associated with this label often seeks to argue for the value of piracy itself, but not in a homogenous way, ranging from exculpatory essays on the rights of collectors (such as De Kosnick 2012) to critiques that suggest the lines between pirates and those they pirate from are often blurred (such as Lobato and Thomas 2012b, in the same volume). These approaches also collectively offer a response to the question of whether piracy should be defended against content industries’ attempts to curb it, by exploring what it might produce. What it might “‘hack’ from the abstraction” of copyright, to use Wark’s argument (2006, 166-67). Compared to some of the more explicitly activist literature, Wark’s work belongs to the piracy cultures research most of all because he integrates his theorization with a focus on specific individuals and social contexts.

Such emphasis offers the advantage, from a cultural studies perspective, of engaging with piracy and everyday life, which will be my focus below. First, however, something more should be said about the conception of culture in which “the people” are co-extensive with “public domain”. It is by this equation that Lessig’s democratizing Internet of “remixing” indirectly proposes a theory of culture, in which “remixes are conversations” (2011, 116), and in which tradition and belonging are in tension with contemporary culture. For cultural studies this “culture” most closely resembles Williams’s 1958 account of how “Culture is Ordinary”, and indeed Williams is Hall’s reference point for the quotation above about seeing culture dynamically (Hall 1998, 450). Williams’s account of culture is focused on

change, manifest in the active “finding of common meanings and directions, and its growth is an active debate and amendment under the pressures of experience, contact, and discovery” (2002, 93). Williams writes:

We use the word culture in these two senses: to mean a whole way of life – the common meanings; to mean the arts and learning – the special processes of discovery and creative effort. Some writers reserve the word for one or other of these senses; I insist on both, and on the significance of their conjunction. (2002, 93)

Although some writers, including Wark, dismiss “English cultural studies’ Marxism in the way that it has gradually stepped away from the problem of the relation of economic to political spheres” (Wark 2006, 168),⁶⁶ it is this model of culture, rather than the more straightforwardly Marxist “superstructure” (see Williams 1973), that informs the relation between “piracy”, “culture”, and “economy” in both the copyright arguments and the piracy cultures approach.

Williams’s insistence on discussing (sociological) ordinary life and a collectable/sharable common heritage together also suggests the importance of popular culture, to which the Internet is now crucial. Fleming describes piracy in terms of popular culture as “the complex interpenetration of technology, globalization, and individual behavior” (2012, 677), and draws on Williams to see in new forms of online relationality the potential for a new “structure of feeling”. Citing Williams (1983a), Fleming writes:

the relationships mediated by Internet-based filesharing were no less mediated by an ongoing enchantment with the stuff of commodified popular culture, which might

⁶⁶ Wark parenthetically names Williams and Hall here, but does not cite specific texts.

look like a distraction from the new medium's radical potential except that the "mere habits" of people are precisely where Williams' new structures of feeling develop; where new forms of relationship discover their potential irrespective of any content carried (2012, 674).

It is useful to remember that *culture* itself is neither entirely immediate nor abstract, neither entirely individual nor homogenized to the level of the social.

This is part of what Williams tries to capture with the "structure of feeling" concept, first proposed in *Culture and Society* (Williams 1960) developed in later texts like *Marxism and Literature* (1977). For Williams this stresses the importance of approaching culture as something always in process, rather than a concrete object (or field of objects). This emphasis on "forming and formative processes" and "living presence" rather than "formed wholes" and "fixed forms" (Williams 1977, 128) is echoed in a simpler form by Lessig's emphasis on culture as "remix" rather than "goods". In pursuit of this "living" culture, Williams stresses that we must consider "All the known complexities, the experienced tensions, shifts, and uncertainties, the intricate forms of unevenness and confusion" by which culture resists reduction to fixed forms (1977, 129). This is not to deny that there are fixed forms that demand analysis, just that these "become social consciousness only when they are lived, actively, in real relationships, and moreover in relationships which are more than systematic exchanges between fixed units" (130). This is a concept that occasionally turns up in piracy cultures literature, for example in Fredriksson's argument that young people resisting any claim that media piracy should be criminalized evidences a new structure of feeling in relation to authorship, economy and culture (2014, 1035-36).

For Williams any change in the structure of feeling is urgently historical – “a particular quality of social experience and relationship, historically distinct from other particular qualities, which gives the sense of a generation or of a period” (131) and that specially relates, in terms I will discuss in the next chapter, to “emergent” or “pre-emergent” social formations.⁶⁷ This sense that culture is a lived feeling of change in relation to shared social experience is consistent with other approaches to culture as practice, including Michel de Certeau, to whom I will turn below. It allows, I think, for a cultural studies approach to piracy that does not depend on deciding degrees or forms of loss or harm, and that can draw on specific individual examples while recognizing their relation to a broad field of visible expectations.

Piracy as sharing, gifting, collecting

While generally resisting the reduction of piracy practices to the simple issue of IP rights, the research on piracy cultures routinely returns to the variations on the opposition between theft and production. While sometimes talking about online communities, sometimes about the experiences or goals of pirates, and sometimes about the complex economic situation of piracy, this research is consistently interested in whether online media piracy involves “sharing” more than as a conventional name for these practices. It also often asks what the social significance of that sharing might be and whether the relations between the individuals engaged in online media piracy are significant or strong enough to merit being described as a discrete culture. For Jonas Andersson Schwarz (2012, 2013), who argues

⁶⁷ Williams coins the term “structure of feeling” (or of “experience”), he says, “to emphasize a distinction from more formal concepts of ‘world-view’ or ‘ideology’” in the interests of “meanings and values as they are actively lived and felt” but also “as a ‘structure’: as a set, with specific internal relations, at once interlocking and in tension.” (1977, 132)

strongly that they are not, his insistence on seeing online media piracy as “a backdrop for everyday life” (2012, 585) is a negative answer to the same question – it is a backdrop rather than significant social network. While taking up Williams’s theoretical framework allows me to see “culture” in processes and relations other than formed wholes, the question of significance remains.

Schwarz sees peer-to-peer file-sharing as shaped by users’ “perceived ‘need’ for culture and the assumed ‘right’ to access content” (2012, 585), but in terms of individuals accessing content from a general field of resources rather than from other individuals. In making this argument he raises and evaluates arguments that online media piracy is driven by a desire to “share”, or functions as a form of Mauss’s “gift” economy (Schwarz 2012, 585). As noted in chapter three, Mauss’s theory of the gift has been used to give a positive valency to how online media piracy circulates content. This proposition generally runs something like Wark’s account, reprised from *The Hacker Manifesto* in his essay for *Cultural Studies*:

There is, as Marcel Mauss observed a long time ago, a latent class instinct that all the products of science and culture really ought to belong to the people as something held in common, indeed as what is common. Mauss: “One likes to assert that they are the product of the collective mind as much as the individual mind. Everyone wishes them to fall into the public domain or join the general circulation of wealth as quickly as possible” (Mauss 1990, p. 67). The public is not “pirating” anyone else’s property. It simply does not recognize the new enclosures of information within private property as legitimate. (2006, 175)

Mauss's "gift" is here translated as the "social goods" of the commons. However, attempting to use Mauss's model to discuss people's actual piracy practices makes its applicability look very different.

Schwarz dissents from the gift economy argument by contending that online piracy involves "the exchange of resources" driven by social ties that are too "weak" to constitute an exchange of gifts (Schwarz 2012, 587). He stresses that peer-to-peer file-sharing is a mode of exchange that "takes place without users having to subscribe to, or even make contact with, communities or individuals in the online realm" (586). To support this, Schwarz discusses, and distinguishes between, three types of peer-to-peer sites: "open (public)", like a torrent index such as The Pirate Bay or eztv; "closed", such as torrent sites that are usable only by specific members and are usually invite-only; and "1CH sites", meaning one-click hosting sites, like MediaFire or RapidShare, where people navigate to the site and download files directly. In all, he argues, the technologies facilitating piracy are generally not being "used for close-knit, communal purposes" (586).

I agree, although as I discussed with reference to online fan sites in chapter two, it is also true that these are tools used by people who are often simultaneously online in other ways that might include far more communal interaction, and may frame piracy in more communal ways. The characteristic interactions on a site like reddit often encourage desire for particular media objects, and may be accompanied by information about how these objects might be obtained. If it is the "perceived 'need' for culture" (Schwarz 2012, 585) rather than community ties that prompts users to pirate, community is always involved in

identifying what culture is needed. Schwarz is right that peer-to-peer sites are not in themselves tight communities, but they do not exist in isolation, and have porous borders.

Schwarz is drawing here on the work of Andrew Leyshon, who, while seeing in software file-sharing groups “sociotechnical networks” that “have destabilized the regime of governance that supports... copyright capitalism by creating a series of gift economies where the products of those industries are given away” (Leyshon 2003, 533), also qualifies the kind of gifting involved. As Frow argues:

there is no single form of “the gift” and no pure type either of the gift economy or of the commodity economy... gift and commodity economies are always intertwined in various hybrid configurations and present a range of alternative possibilities for the use of objects; on the other, gift and commodity are not mutually exclusive modes of transaction as they tend to have in common certain forms of calculation, strategy and motivation. The gift therefore cannot and should not be conceived as an ethical category: it embodies no general principle of creativity, of generosity, of gratuitous reciprocity, or of sacrifice or loss. At best it is an ambivalent category, oscillating between the poles of generosity and calculation (Frow 1997, 124).

Leyshon also stresses “that gift exchange and commodity exchange” are not “necessarily oppositional or mutually exclusive” and “that gift giving is [not] a purely altruistic and innocent activity whereas the exchange of commodities is purely instrumental and calculative” (542). Considering the differences between gifts and commodities in terms of “alienability” (and the residue of relationships in the gift), temporality, and the type of capital accumulated (542), Leyshon argues that file-sharing produces “‘weak’ or ‘inverse’ gift

economies” through “communities [that] are relatively impersonal and anonymous” and circulate objects “more like quasi-commodities than like gifts” (554).⁶⁸

Schwarz uses Leyshon’s argument to stress the self-interestedness of file-sharing (2012, 588), though in the process rather downplays the way gifts generate crucial social status in Mauss’s analysis. However, Schwarz is focused on particular users rather than theory, and the pirates he is studying stress an “absence of sacrifice” (2012, 588) in their piracy practices. They didn’t feel they were giving up much of substance when uploading files. Leyshon agrees that while shared files are gifts in one sense, they are also experienced as “takes” in gift economies that require no giving-away (2003, 543). This is an important qualification, and I agree that no strong sense of obligation is generated for most users of piracy resources. Even the pirates that Francesca da Rimini and Jonathan Marshall interview, many of whom are “professional artists” and “workers in the cultural industries” (2014, 329) who “do seed back” out of a sense that they “owe it” (340), tend not to see peer-to-peer file-sharing spaces “as a social network”, just as a way to “get things” (340). The gift model as a whole therefore seems ill-suited to these spaces, even if it may have some applications to thinking about discussions of piracy within many online fan communities, where piracy may be only an accessory practice.

For understanding and contextualizing the “weak ties” involved in the majority of online media piracy today, the phenomenon of “leechers” or “free riders” is crucial. Most first-

⁶⁸ Analyzing Richard Barbrook’s characterization of the development of the Internet as indebted to “the academic gift economy” (Leyshon 2003, 541, quoting Barbrook 1998, 3), by which “academic outputs are... given away in the anticipation that they will generate cultural capital for the giver” (Leyshon 2003, 540), Leyshon argues that academic sharing, including the open-source networks discussed in chapter three, is actually only gift exchange in the final sense of accumulating social or cultural capital.

generation peer-to-peer applications ensured that users uploaded while they were downloading, unless they manipulated platform settings to ensure this did not happen. BitTorrent clients followed suit – you can elect to cap your rate of uploading and minimize your contribution as a seeder of files, but there have been many experiments in “incentives” to encourage seeding (see, for example, Locher et al. 2006).⁶⁹ As Leyshon notes “many site operators imposed trading ratios, whereby files could be downloaded only in strict proportion to the number of files uploaded to the site” (2003, 544). Ratios of this kind are particularly common on “closed”, invite-only torrent sites. In the “discourse of BitTorrent support” (Özdemirci 158), “even though not all media pirates do share... all media pirates know that they should share” (De Kosnick 2012, 532; see also da Rimini and Marshall 2014, 339-340).

While reciprocity is a crucial element of Mauss’s theory of the gift, for which there is always an expectation of exchange, Mauss also argues that this expectation operates at a collective rather than an individual level (1966, 34, 48). This is why he can argue that modern social welfare systems are a step back towards the “archaic” gift economies he was studying (65-66), which makes the general system of exchange in peer-to-peer sites somewhat more like the gift economy than it first appears – each user might not be giving, perhaps not intentionally, and usually not out of a specific desire to give to a specific peer with whom they have a direct relationship, but users generally are doing so. Direct uploaders of files on peer-to-peer sites are certainly “giving”, and what they gain from this may, as Leyshon

⁶⁹ Leeching is often emphasized in scholarship on piracy, including in the fields of computer science and engineering, with many publications experimenting with how to improve the strength of a torrent or relay by ensuring more participants give as well as take. However, it is worth questioning the importance of the distinction between seeders and leechers in practice. Especially at present, within the flow of pirated content through the best-known channels dominated by super-uploaders, users who do not seed have minimal impact.

suggests, principally be social capital on the site and amongst the peers that also use it. But even leechers maintain a piracy resource's activity and thus its profile. If the content circulated by online media piracy should be viewed as quasi-commodities, this may in fact be another way in which the practices and effects of such piracy have bled out into media culture more broadly. Striphas even suggests that the forms of limitation on use after purchase entailed by existing forms of IP law mean "that commodity ownership remains more or less shared, despite the mediating exchange of money" (Striphas 2006, 249). The element of giving in file-sharing is thus a considerable one, just one that is broadly dispersed and not applicable to all users. The significance of this "giving" element is more notable, in fact, because it agitates against the convenience which is crucial to motivating piracy. Assuming a particular user has the necessary capability, it can be easier, quicker, and sometimes even cheaper to just download and never upload to piracy platforms, or at least to upload as little as necessary to obtain the content desired. Disrupting ease of sharing is thus one of the main strategies used to try and block or reduce online media piracy, and some degree of commitment to sharing regardless of the obstacles that may be posed is needed from those who use piracy networks for them to continue to function.

A reframed version of the gift economy, in which reciprocity is collectivized, nevertheless fails to fully explain peer-to-peer piracy practices. Reciprocity is not properly collectivized precisely because some users stand out as the ones who give – the social welfare analogy falls down and these services look more like charitable organizations with status accruing to some (media- and technology-wealthy) donors. The example of illegal media streams illustrates this – where an individual torrent-er might upload a fraction of the data they download as an incidental part of the acquisition practice, but still sustain the sharing of

media content by doing so, the host of a stream of media content does effectively all of the “giving”, and takes on proportionately greater risks in doing so. This is one of the reasons for the status systems internal to most online media piracy resources, where status is visibly recorded relative to the quality or popularity of uploads by a particular user. On TPB, for example, this involves specific symbols indicating “VIP” or “trusted” uploaders.

Schwarz’s discussion of file-sharing, highlighted by the essay title “The Quiet Agglomeration of Data: How Piracy is Made Mundane” (Schwarz 2012), centers on the ordinariness of content acquisition, and the “weakness” of ties between users who are unlikely to know more than minimal information about even their most prominent peers. Checking the comments on specific torrents to evaluate the quality of a file is a common practice, and one that at different times has been made more important by the disruptive forms of intervention discussed as “poisoning” in the previous chapter. In comments on TPB users can request seeds for less popular torrents, or discussing other matters related to obtaining the files they want. However, these utilitarian steps require no sense of belonging to the site as a social space, and in many ways TPB’s design actively precludes this. Individual torrent links appear and disappear regularly; files are collected and re-released in different formats, and file comment pages disappear with them. Individual users can upload content, but given the effort involved in doing so, the demand for high quality content, and the element of curation that goes into the marking of particular uploaders as “trusted”, the site is dominated by large-scale uploaders, usually representing major torrent-producing groups. These comment-based interactions thus have nothing like the kinds of community-building effect that characterizes fan communities.

Given these factors, TPB is not likely to be widely experienced as an interactive site, and this general sense of impersonality is clear from any attempt to use it. For example, on December 6 2016, a search for the new HBO series *Westworld* (2016--) generated a list of possible downloads which began, when sorted by popularity, with the first season finale that had aired two days before. The top result (“Westworld.S01E10.WEBRip.x264-FUM[ettv]”) had 38,000 seeders. This name indicates the content of the file, makes claims about its technical qualities, and identifies the uploader – ettv, a widely known and sought-after uploader of pirated series connected with the website ExtraTorrent. Most of the results for *Westworld* were named similarly and also uploaded by ettv. TPB today tends to produce relatively short lists of similarly-formatted files, carefully selected from trusted uploaders. Older iterations of the site were more haphazard, and issues like mislabeled content and broken links were common, making comment/feedback more integral to finding content. This experience persists with new release films, where “cam” copies (filmed from within movie theatres) dominate before other formats are available. For these uploads, content quality varies greatly, and files are accompanied by much more engagement. Clicking on a file takes you to a page with technical details about the file, perhaps screenshots and/or a donation request from the uploader, and a rarely-used space for feedback. This can involve thanking the uploader, commentary on the quality of the file or torrent, demands for more seeders, or commentary on the text itself. On an ettv upload of episode 9 of *Westworld*’s first season, user “Fyllehatten” breaks the relatively impersonal trend of TPB by simply praising the show: “I’m really looking forward to next episode! :) Omg, the number of great talented actors and actresses in this series is simply stunning!” ([https://ThePirateBay.org/torrent/16372632/Westworld.S01E09.WEBRip.x264-FUM\[ettv\]](https://ThePirateBay.org/torrent/16372632/Westworld.S01E09.WEBRip.x264-FUM[ettv]))

As television series and films move further from their release date, the level of curation and the tendency for files to be uploaded by large preferred uploaders also diminishes. A December 10 2016 search for *The Simpsons* (1989--) produced largely the newest episodes, generally uploaded by major uploaders with a single file for each episode.⁷⁰ A search for earlier seasons, on the other hand, produced a wider array of uploaders and formats, including season collections. What we might call the “power uploaders” are usually enterprises based in countries with different legal restrictions than major content-source countries like the U.S. The changes that brought these uploaders to the fore are also those that brought advertising to the fore in experiences of TPB, angering some of its founders, like Peter Sunde (Ernesto 2014; Schwarz 2013, 134).

Distinguishing between gifting and sharing also returns me to the idea of non-rival goods, which Schwarz defines as “public goods” (2012, 588). Schwarz stresses that a non-rival good cannot be “exhausted” (588), but it can be accumulated, which links these goods to discussions of piracy as collection – as a curated archive of digital content. As Abigail De Kosnik puts it, no digital “collector’s possession of a media file excludes any other collector’s ability to share the same file” (2012, 532). Quite the opposite might be the case, given that for many online media piracy tools the more people sharing a given object the more accessible it is for each subsequent user.

⁷⁰ The dubious legality of these power uploaders can make them unstable. Although it was once also a highly reliable resource, and still appears frequently on TPB, eztv was taken over by imposters/scammers in early 2015, as was widely reported in piracy forums (<https://torrentfreak.com/take-over-new-eztv-domain-name-150425/>). Since then it has changed domains multiple times and the website no longer reliably offers access to new episodes of series.

De Kosnik claims that pirates tend to keep and curate the files they acquire (2012, 525), and some accounts by “pirates” suggest this is the case. De Kosnik draws on Benjamin’s discussion of book collecting to claim that media pirates are less consumers who don’t want to pay than curators of a digital repository. “What digital technologies have altered significantly” for media fans, De Kosnik argues, “are the individual’s capacities for acquisition and the relationship of the collector vis-à-vis the law” (2012, 537). This argument centers on the experiences of “Joan”, a self-nominated “pirate-collector” (De Kosnick 2012, 525). Joan’s emphasis on collection may be as historically and platform-specific as her own collection,⁷¹ but De Kosnik’s account nevertheless raises some useful questions. Joan’s “interest in piracy is at least partly attributable to the failures of official archives” (2012, 527), supporting the claims of other content acquirers, like Logie’s Costco employee, that they use piracy to acquire content not presently available to buy. Joan’s story also points to changes continually rippling through online media piracy practices, with news of new piracy modes or sites conveyed by social networks sometimes dedicated to keeping a loose community of media pirates informed. Joan “has friends in other countries who used to pirate extensively via downloading and who now only view pirated files via streaming” (2012, 534), but she is holding on to what De Kosnik sees as the somewhat narcissistic pleasures of the collector, retaining the files she downloads in the “magic circle” of collection (Benjamin 1999, 205; De Kosnik 2012, 534). Joan’s practices more directly rely on the support of others than use of TPB would. As her friends move on to streaming, Joan’s options for sharing – and her community of pirate collectors – shrinks, posing a challenge to the future of her archival labors.

⁷¹ De Kosnik does acknowledge the specificity of the example, framing her argument as one that works best “if we assume that the gender and age characteristics of North American media pirates in 2011 mirror those of Canadian music pirates in 2007” (2012, 525).

While the arguments that piracy involves sharing or collecting do not require the same sort of reciprocity as the gift analogy, sharing does still connote a positive affective relation. The pleasure of copying and sharing is, Nathaniel Poor suggests, “a fundamental and playful human behavior” (689), equally apparent in children’s play and commercialized innovations in copying like the cassette recorder (2012, 690). It thus cannot, he claims, effectively be made illegal. This brings the sharing economy discussion back to the conjunction of technological innovation and legal inertia stressed by Lessig. But it is possible to engage with the possibility that piracy involves cultural production without any commitment to claims about gifts or sharing. I have generally referred to online media piracy’s form of use/reception as *circulation*. Circulation is the primary aim, function and product of online media piracy tools. This doesn’t avoid the possibility that part of the appeal of circulating media in this way is *infringement*. That is, the problem of preventing online media piracy is part of its appeal, offering a measure of illicit pleasure for what is broadly understood as an insignificant risk.

In *How Music Got Free* – a popular history to which I’ll return to in chapter five when thinking about how the history of online media piracy is being written – Stephen Richard Witt recalls his intense investment in online music piracy in the 1990s and early 2000s, acknowledging both the appeal of the mildly illicit, and a generationalized technological horizon. He also recalls that he never listened to most of the music he pirated:

I actually hated ABBA, and although I owned four ZZ Top albums, I couldn’t tell you the name of one. What was really driving me, I wonder? Curiosity played a role, but

now, years later, I can see that what I really wanted was to belong to an elite and rarefied group. (2015, 1)

Similar stories of abundance are told by De Kosnick's Joan, and by da Rimini and Marshall's "M", who has "a hard drive full of movies" they haven't watched, or their "R", who is "working his way through" a collection of MP3s (da Rimini and Marshall 2014, 337). But Witt's book ends with a now recognizable story about the music industry's eventually largely successful responses to piracy, and with him destroying his stored music files as no longer worth the effort of curating them (Witt 2015, 261). I want to use this story – not quite stealing, not really sharing, certainly not gifting, and something more transient than collection – as a jumping off point for the remaining sections of this chapter, focusing respectively on the everydayness of online media piracy, the commercialization of media piracy, and, sharing the concerns of both the others and so falling between them, a case study in sports piracy.

Piracy is Ordinary

In piracy cultures literature it is (now) just as common to discuss piracy as ordinary as it is to discuss it as revolutionary (and collections always attempt to reconcile those claims). Like Schwarz, James Arvanitakis and Fredriksson claim that "piracy *must* be understood as part of the everyday" (2014, 5), and da Rimini and Marshall argue that piracy "is nowadays a mundane and everyday activity" (2014, 323). James Meese also makes a case for ordinariness in an essay that compares "three imaginaries of piracy": beginning with the "criminal" and the "revolutionary" but favoring the pirate as "a neutral media consumer",

and “piracy as a banal form of media practice” (2014, 20).⁷² For Meese, citing Rosemary Coombe, “imaginaries that populate the public sphere regularly fail to acknowledge both the productive and creative capacities of the pirate figure as a liminal subject and the ‘dialogic’ nature of cultural production and consumption.” (20) He finds the “neutral pirate” to be the “imaginary best able to illuminate these capacities” (21).

For da Ramini and Marshall, this ordinariness is encouraged by unclear distinctions between “normal” and unauthorized forms of file-sharing (2014, 326; see also Lessig 2008, xxi; Meese 2014, 21). This is facilitated by the tendency, discussed above, for users of piracy resources not see themselves as doing anything wrong. Piracy, da Rimini and Marshall argue, is both “what people do to keep in touch” and what they do to “consume impulsively” (328). What matters about this ordinariness, however, is not only that online media piracy is “an everyday practice by millions of people, and in that sense normal” (Peukert 2010, 15). Everydayness, as I suggested in chapter one, is not just commonly done, but can remain unthought.

As Coombe also argues, it is no way extraordinary for people to “engage in cultural practices of bricolage – resignifying media meanings, consumer objects, urban spaces, and cultural texts in order to adapt them to their own interests and make them fulfil their own purposes” (1998, 104). Coombe is specifically citing de Certeau here (on bricolage see de

⁷² Meese uses the SOPA and PIPA protests as examples of the revolutionary/activist pirate in action, noting an “estimated 90 million people visiting Wikipedia during the blackout” (2014, 24). For Meese, these protests avoided “full engagement with the pirate figure”, and he points out the *New York Times* ran editorials 10 days apart, first opposing SOPA and PIPA and then describing “piracy by Web sites in countries like Russia and China” as “a real problem for the nation’s creative industries” (24-25). Meese contrasts pirate activism with the arrest of “Kim Dotcom”, founder of digital locker website Megaupload as a figure for the criminal pirate: “a master of excess in all of its forms, be it bodily, or in terms of his ‘geekiness’” (26).

Certeau 1984, xviii, 29, 174, 226), and also specifically talking about fan fiction, and thus she unsurprisingly also refers to Jenkins's 1992 *Textual Poachers* (Jenkins 2013c; Coombe 1998, 124-125). As mentioned in chapter two, Jenkins draws his concept of poaching from de Certeau to discuss "the process of [fans] negotiating over the meaning of the text, and the terms of their relations with producers" (Jenkins 2013b, xxi), but by 2012 he prefers the term "participation" to "poaching" (xxi). Jenkins' use of Certeau has generated some criticism, as he notes himself (Jenkins 2013a), although it is not only his interpretation that leads Ben Highmore to contend that "Somewhere along the line, de Certeau's struggle to register that which isn't reducible to structures of domination has been interpreted simply as 'a generalized account of transgression'." (Highmore 2002, 154).

Poaching certainly draws a stronger line between authors and readers/users, and de Certeau's main chapter on poaching is, at one level, about readers stealing meaning (de Certeau 1984, 165-176). At the same time, however, de Certeau channels that proposition to talk about everyday life, and de Certeau's broader formulation in *The Practice of Everyday Life* seems useful to thinking about piracy. Neither negotiation nor transgression quite captures what de Certeau means by the productivity of consumption and use. He wants to focus on:

an entirely different kind of production, called "consumption" and characterized by its ruses, its fragmentation (the result of circumstances), its poaching, its clandestine nature, its tireless but quiet activity, in short by its quasi-invisibility, since it shows itself not in its own products (where would it place them?) but in an art of using those imposed on it. (de Certeau 1984, 31)

As poachers, media pirates signify the generally “unsigned, unreadable, and unsymbolized” “marginality” of everyday life; of the “activity of the non-producers” precisely because they visibly do not “buy and pay for the showy products through which a productivist economy articulates itself” (Certeau 1984, xvii). However that still visible line matters.

Poaching is not just a metaphor for de Certeau, and I think we can use his opposition (1984, xix) between “strategies” and “tactics” to think about the distinction that piracy maintains between content producers and content acquirers. Certeau describes strategies as “the calculus of force-relationships which becomes possible when a subject of will and power (a proprietor, an enterprise, a city, a scientific institution) can be isolated from an ‘environment’”. A strategy stands out with authority as having “a place” and “generating relations” to that place. It is distinguished from tactics, which are also “a calculus”, but one which cannot count on [such] a... spatial or institutional localization.... A tactic insinuates itself into the other’s place, fragmentarily, without taking it over in its entirety, without being able to keep it at a distance. It has at its disposal no base where it can capitalize on its advantages, prepare its expansion, and secure independence with respect to circumstances.... A tactic depends on time – it is always on the watch for opportunities that must be seized “on the wing.” Whatever it wins, it does not keep. It must constantly manipulate events in order to turn them into opportunities. (de Certeau 1984, ix).

These terms do not perfectly fit all the practices I have been describing – Joan is a keeper, some pirates have strongly institutionalized profit motives – and I want to make much of the fact that online media piracy can hover on the borderline between having the authority of a place, or just seizing things through “clever tricks, knowing how to get away with things,

'hunter's cunning,' maneuvers, polymorphic simulations, joyful discoveries" and other names de Certeau gives tactical "ways of operating" (1984, xiv). The continual risks/portents of strategic industrial commercialization of online media piracy to which I will return below makes these terms even more useful for me, as does the clear line between authorial organization and tactics of the moment. To the extent that TPB names an ordered space, at least for now, it is only by the evasive tactics of supporters, and not even this is true of its transient users.

Certeau's choice of the term "calculus" is, I think, also instructive. I have proposed already the idea of a convenience calculus that integrates authorized and unauthorized forms of media acquisition in the everyday processes of content acquisition. I want to return to it here, first by recalling Frow and Leyshon's different recognitions that even gifts involve calculation, and then through Slack and J. Macgregor Wise's discussion of convenience. Slack and Wise note that convenience has come to have a high value in the representation and evaluation of technology: "while progress is still what is more, new, advanced, better, cool, neat, rad, or awesome, it is also more convenient." (2015, 25). They draw here on Thomas Tierney's argument that convenience is a matter of overcoming limits (on what can be done in the time available) "through the ravenous consumption of technology" (1993, 42). Tierney views convenience as a value produced by the expansion of capital and itself producing "techno-fetishism" (90), an argument that opposes "independent, hence dangerous, producers" and the "consumers of technological conveniences", and describes the risks of converting the former into the latter (107).⁷³

⁷³ It is notable that Tierney's book appears just on the crest of the expansion of personal computing and yet computers (and all they do) are unimportant here. Rather "the automobile is... the probably the best symbol of modern convenience, where speed in overcoming the various limits of the body is a primary value" (Tierney

Slack and Wise note that while convenience once meant being “in accordance with, in agreement with, suitable or appropriate”, today convenience values what favors “personal ease and comfort” (2015, 35). It is also ordinary:

Progress is a grand and formal story that accompanies feelings about big events....

But convenience is a mundane story, an everyday, garden-variety warrant for decisions involving technology at its most banal. Convenience, more often than not, is the everyday motivation that justifies ongoing choices involving the role of technology in everyday life. (Slack and Wise 2015, 34)

The argument that the value of convenience is a direct product of, and entirely contained by, capital is contradicted by its importance to experiences of leisure, including online media piracy. As leisure activities these are all time-costly, far less than optimal return on industry investment either, and yet convenience is key.

While content acquisition may increase the effort that media consumption requires (see Slack and Wise 2015, 41-43), as the Telstra ads with which I began my introduction recognize, efficiency and convenience are very different things. The convenience calculus encompasses many factors, including time. It encompasses not only those Australian television viewers who will neither pay for Foxtel nor wait to see *Game of Thrones*, but also “Y”, from da Rimini and Marshall’s study, who will sometimes download games, but notes:

these days you can get games... legally in the comfort of your own home with applications such as Steam... they often have a lot of specials on, so [I don’t

1993, 110). Choosing the car, rather than electricity, radio, the telephone, let alone the computer, the printing press, or sewerage, as this model suggests the very historically situated life Tierney wants to defend against technology.

download much], because the availability is there and the price is reasonable (2014, 335).

Studies have regularly pointed out the tendency for media pirates to spend money on legally obtained media even while utilizing piracy as one form of consumption among others (Schwarz 2013, 41; Meese 2015). What I mean by convenience calculus is thus, in fact, more like “suitable” or “appropriate” than simply “time-saving”.

In coming back to Henri Lefebvre’s account of the everyday here I want to both credit the purpose that leisure is supposed have in modern life, and stress the importance of its *inefficiency*. Lefebvre both notes modern industrial civilization’s invention of “leisure” from similar activities of earlier times – “both a general need for leisure and differentiated concrete needs within that general framework” (1991, 32) – and argues that the “critique of the everyday plays an integral part in the everyday: it is achieved in and by leisure activities” (29). The weight Lefebvre gives to leisure in the task of interrogating everyday life is largely because, as de Certeau would later suggest, leisure doesn’t serve the same apparent social functions as work and private/family time, and gives rise to more open questions about why we do what we do. Finally:

Far from suppressing criticism of everyday life, modern technical progress realizes it. This technicity replaces the criticism of life through dreams, or ideas, or poetry, or those activities which rise above the everyday, by the critique of everyday life from within: the critique which everyday life makes of itself (Lefebvre 1991, 9).

The modern world “produces ‘leisure machines’ (radio, television, etc.). It creates new types of play which transform the old ones, sometimes conflicting with other activities, sometimes overlapping” (32-33) and this “world of leisure” is both ordinary and extraordinary (34). The

question that most arises from leisure is, for Lefebvre, the one that matters most. In expecting “to find something” different “in leisure” than in the rest of everyday life, the question of happiness is raised (34).

Sports Piracy

I want to use sports piracy here to demonstrate the convenience calculus in action, and also the interleaving of piracy resources with authorized sources of content acquisition. I believe together these suggest something more significant than “the routine, noncreative sharing of proprietary content as a simple alternative to paying for it” (Fleming 2012, 675), while being nothing like a revolution in the making. Jack Birmingham and Matthew David note that “until recently”, music fans “undertook copyright infringing peer-to-peer file-sharing to a degree not emulated in sport” via live streaming (2011, 69), but there is now a growing literature on online sports piracy and a plethora of online access points.

Florian Hoof offers an exemplary story with which I can begin, of following his preferred German second division football club “via live text ticker on a German sports web page” in an Internet café in the Sydney suburb of Potts Point in 2002 (Hoof 2016, 86). Hoof was “completely geoblocked from live TV coverage”, with the only options being week-delayed highlights on the SBS network’s German news every Sunday morning, or trying to find a sports bar that was willing to show a German second-division soccer match, despite Australian preferences for other sports. So, he was forced instead to simply “press the reload button of the live ticker hoping VfL Bochum would prevail” (86). “Geoblocking” is the term Hoof uses in this story, but he notes that it was not an “optional digital rights management feature” in 2002, but instead something “inherent in the materiality of [his]

situation” given “geographic, cultural and infrastructural circumstances that could not be circumvented” (86). Today, an array of other options would be part of Hoof’s convenience calculus, even if there are still notable geographic limitations. The network beIN SPORTS Australia has the rights to German football and they show some Bundesliga games on pay TV, but are unlikely to show the second division. Accordingly, illegal live streams would now be Hoof’s likely choice (87). After all, “bandwidth is no longer a restricting factor” as it would have been in 2002, but instead a “negotiable and scalable question of image... quality” (86-87). He could even ask friends back in Germany to stream the game for him off their television, via a “live-streaming service such as Periscope” (87).

Hoof’s story offers several useful prompts, but I will begin with his friends. The UseNet groups that swapped videocassettes involved often intimate individual and group relationships. Even Napster had chat rooms. In fact, it is the BitTorrent and 1CH sites on which Schwarz focuses that dramatically weakened the social ties needed to be part of piracy cultures. Sports piracy, however, seems to counter this trend. The persistence of an element of *gifting* might be seen in a streaming channel like “afl dude”, which streamed unauthorized Australian Football League (AFL) games regularly over several seasons, and through several different websites.⁷⁴ The status measures discussed above are clear in the way fans on reddit can be seen specifically discussing afl dude as a source for streams. A post from 2014 wonders, “Has AFLdude moved to another website?”

[\(https://www.reddit.com/r/AFL/comments/2cysye/has_afl_dude_moved_to_another_website/\)](https://www.reddit.com/r/AFL/comments/2cysye/has_afl_dude_moved_to_another_website/)

⁷⁴ The “AFL” is a professional league for Australian rules football, also known as “Australian football” or “Aussie rules”. It is a contact sport involving teams of eighteen players, played on a large, oval field. It is the most popular spectator sport in Australia, measured by both attendance and television viewership. See: https://en.wikipedia.org/wiki/Australian_rules_football

[te/](#)) after his twitch.tv page went offline, and another from 2016 suggests “AFL dude on Vaughnlive might have finally got shut down”

(https://www.reddit.com/r/AFL/comments/4i9cz2/afl_dude_on_vaughnlive_might_have_finally_got/). Here, users question his choice of hosting website and suggest alternative ways of watching games to one another. Such a personal community identity is not the rule in unauthorized sport streaming, and many sports streaming sites are far more anonymous aggregators of content compared to torrenting, though, sports piracy can often proceed through community-organized forums that are based around sports fandom. While any community interactions still have less significance than the content in attracting users, the pleasures of watching with an online group (including fan banter, strongly encouraged in online sports communities) blend fairly seamlessly with discussion of access options.

Hoof’s discussion of sports streaming focuses on the possibility of “digital lemons”: “poor quality streaming sites, often containing malware, and offering an unreliable and unstable streaming resource” (2016, 88). Hoof notes that “sports broadcasting” is particularly subject to these “lemons” because of the value placed on “liveness” – that is, the significant bias towards “live” viewing, or curated highlights packages viewed soon after the event, as opposed to file collection for on-demand viewing at a later time. “Unlike music or movies, which has a much longer commodity lifespan,” Hoof notes, “live sports cannot be replicated through classical forms of piracy... because its value will have diminished greatly after the final score is known” (88). Because liveness is “non-reproducible”, viewers will “face costs that are fundamentally different when compared to downloading music or movies”, which makes “live sports events an extremely valuable resource for content providers” with rights deals (88), and makes sports piracy a different proposition than much other media. As

Meese and Anita Podkalicka note, “professional sporting clubs at the highest level earn the bulk of their income from... the sale of broadcasting rights” (2016, 74; see also Hutchins and Sanderson 2017, 33).

While traditional file acquisition styles of online piracy are on the wane, the demand for liveness in sports viewing, in conjunction with the new availability of streaming technologies, evidences a movement in the opposite direction. As mentioned in chapter two, BitTorrent style piracy is rarely used to access sport, and given the primacy of the result, the issue of “exclusivity” is key to sport, with broadcasters looking to protect the “*in situ* broadcast” (Meese and Podkalicka 2016, 76). Competing rights deals make this more complex, and these layers create complex networks of circumvention. The prevalence of piracy in response to these deals is shaped by the convenience calculus, which includes factors reflecting personal dispositions, including any perceived disconnection between the perceived “costs” of piracy and how they might be felt in sport – by team administrators, sporting leagues, and television companies, but perhaps not by the players that fans like to watch.

Fan communities for particular media are often openly hostile to piracy discussions on the grounds that it defrauds the content creator, even if they don’t fear charges of piracy. In this respect, there seems to be an inverse relationship between hostility to piracy and the popularity/monetizability of the media being consumed. A small, independent film or a band without a large international following and major label backing is likely to be viewed as more at risk than a series on HBO or a massive international film. Games also divide this way – there is generally more visible hostility to pirating indie games from smaller developers

than large AAA titles. Sports communities rarely seem to feel this way about piracy. Some ban piracy discussion because of perceived risks of associating the site with that behavior, but sports fans rarely discuss feeling they are defrauding the rightful owners of the content. A fan of Manchester United might well watch an illegal stream of a Manchester United game without feeling their favorite player is missing out on income, or even that the club itself is suffering. The “victim” would more likely be seen as the English Premier League (EPL), which is rarely the object of significant fan loyalty. The money involved is also too significant to produce a situation where fans would imagine their contributions to keenly felt.⁷⁵

The EPL earns more money from broadcast rights deals than any other league in any sport in the world, worth more than a billion pounds a year globally (Harris 2016). In 2016, the Australian rights were purchased by telecommunications carrier Optus, after previously being owned by subscription television company Foxtel. Only Optus mobile or broadband customers could watch EPL games under this deal, aside from a small number of select games broadcast free-to-air on SBS television. Most games are thus not viewable on offline television in Australia, and there were significant complaints about both the Optus pricing (ABC 2016) and the quality of the broadcast (Marsh and Haynes 2016). While the movement from a relatively unpopular subscription television provider to a carrier able to offer viewing on smartphones as well as computers, tablets, and smart TVs belongs to the shift away from traditional television viewing I discussed in chapter two, in practice this doesn’t necessarily mean a broadening of options for content acquisition. Rather, the significance of the change

⁷⁵ Birmingham and David make the opposite argument, seeing football fans as unlikely to pirate due to team loyalty, and partly on the grounds that music fans have the option of “downloading music and then paying more for live performances”, which football fans do not (2011, 70).

would vary greatly between different specific consumers. This supports Ramon Lobato and Meese's (2016) discussion of the narrative in which Australian consumers feel like digital second class citizens, and counters any claim that changing distribution practices always favor more mobile/flexible viewing and increased consumer freedom. More importantly, for my purposes, it certainly does not discourage piracy, as indicated by coverage of the comparable situation in the U.K. the same year.⁷⁶

The influence of piracy on this content industry is clear in the rise of multiple-viewpoint online streams displayed across subsidiary channels for greater choice (for example in Channel Seven's Australian coverage of the 2018 Winter Olympics) or, more often or in addition, through streams embedded in websites or smartphone/table apps belonging to the broadcaster. Most major sporting events are now broadcast across many associated channels, sites, and apps. The integration of flexible, multi-device, online viewing of sport could be described as *piracy adjacent* precisely because it is now expected by viewers as part of a set of strategies to combat the likelihood of online sports piracy. An example of this response can be found in the flexibility of online streaming options for the 2016 Olympics (see Hutchins and Sanderson 2017). The BBC in the U.K., Channel Seven in Australia, the CBC in Canada, and NBC in the U.S., among many other channels, all offered

⁷⁶ Birmingham and David claim that English football is in the midst of an economic boom that rivals the launch of CDs prior to Napster, with significant rises in the money spent on broadcast rights for the EPL, and increasing costs for those who pay to watch on television ("matched by increases in the prices of match tickets") (2011, 71). They also see some similarities between file-sharing and live-streaming which make the latter "vulnerable to legal challenge" (72). Their primary case study is Justin.tv, which is a location for live-streaming the EPL around rights deals (73): "on match-day weekend there are numerous streams for every single Premier League game", with the game between Chelsea and Liverpool on 26 October 2008 getting "more than 574,000 individual hits during the course of the 90 minutes", and an international game involving England having "over 30,000 viewers" at one time on one of six different streams (73).

highly-trafficked streaming services.⁷⁷ Some networks offered free streaming, some subscription streaming, and some a combination of free and paid “premium” offerings. All boasted that they offered significant flexibility and user control, with advertising focusing on the wide variety of channels available, audience control over events viewed, and on-demand catch-up for a variety of devices. What goes unsaid on these sites, but undoubtedly underpins these changes, is that if these legal streaming services were not available, illegal streams of Olympic content would inevitably appear.

The blend of authorized and unauthorized sources apparent in live sports viewing is apparent in reddit discussion of streaming options. During the Rio Olympics, for example, posters commented that the NBC stream was “actually pretty good” this time around and they wouldn’t have to use their VPN to watch the BBC coverage as they had during the previous Olympics. There was even criticism of people complaining about the 2016 American coverage – for example, complaining about a lack of diversity in sports showed – as a “circlejerk”, suggesting that those complaining must had not really tried the authorized streaming options for this Olympics. The example of the Olympics emphasizes that the rise of VOD is not only about affordable on-demand media texts, but also about more particular viewing practices.

There are, in fact, many different relations to unauthorized content acquisition on sports fan sites. Meese and Podkalicka mention highlights and replay sites, which “look professional and appear to be an authorized place to consume content’, but “often feature copyright

⁷⁷ Hutchins and Sanderson discuss the high cost of TV rights for the Olympics (NBC paying 4.38 billion US for four Olympics from 2014 to 2020 and Channel 7 paying 170 million in Australia for 2016 and 2020) and the policing of coverage to “combat infringement by outside media operators” (2017, 36).

infringing content” (2016, 77-78). Community-based sports fan sites may focus on engagement to which piracy is only an accessory. The site CricketWeb (www.cricketweb.net/), for example, represents itself primarily as a news site, with supporting discussion forums featuring both sports and off-topic material organized in appropriate sections. But piracy discussion is banned, along with swearing and other potentially offensive behavior, and the community is carefully moderated along these lines. While memes about ads on specific channels and discussion by commentators does indicate what is being watched, the caution over piracy limits direct discussion even when connected users might know it is in process.

Reddit, on the other hand, frames itself as a free-speech-friendly site, and although not a piracy platform primarily, it functions as a resource for piracy, including for sports fans. Subreddits are occasionally closed down, usually after negative media coverage (see Massanari 2015), but reddit would be extremely unlikely to shut down a sports subreddit for discussing piracy. This might change if a lawsuit was brought against the site by a distributor, as was the case following the Sony Hack, when reddit complied with a cease and desist demand and closed the “SonyGOP” subreddit (Goldman 2014), although even then reddit seems likely to contest the case. This pro-free speech stance also explains why piracy discussions are prevalent on reddit, and it remains a community aggregator for fandoms of various kinds and the piracy practices they engage in. For example, after “afldude” had his streaming page shut down, other users posted on the AFL subreddit offering to link their stream to users that were regular participants on the site via private messages.

The various “soccer” subreddits act as an aggregation points for piracy in a more direct way. The main “soccer” subreddit hosts a wide range of content: discussion threads about various issues related to the sport, clips of highlights, and links to news articles, but the most popular threads are usually the match threads accompanying prominent games as they occur. These include both general discussion and user-generated content, and selecting a match thread usually accesses game highlights, mostly in the form of fan-made GIFs, which can be hard to find in other spaces due to the inflexibility of existing broadcasting arrangements. While not a complete pirate broadcast of the match, this content is unauthorized and an important element of the community, helping fans collectively keep up with the sport and strengthening ties to particular sites of engagement. These central threads are dominated by discussion of currently featured matches, before, during, and after the game, and part of this discussion involves negotiation of viewing practices, including discussion of streaming.

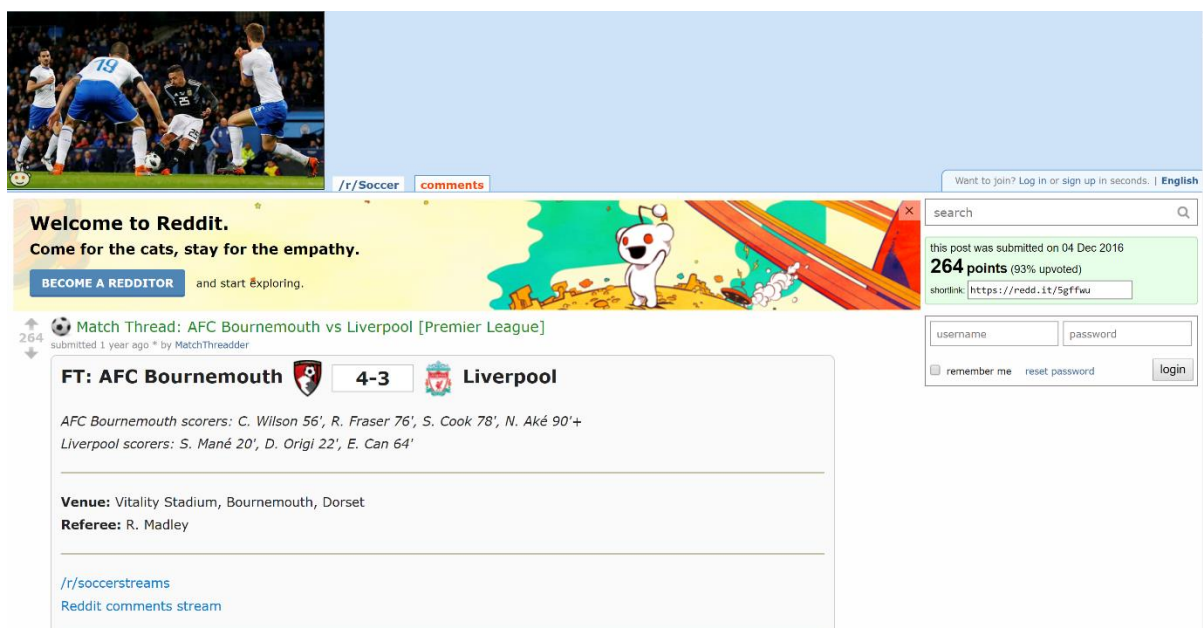


Figure 33: https://www.reddit.com/r/soccer/comments/5gffwu/match_thread_afc_bournemouth_vs_liverpool_premier/

Match threads on /r/soccer have a specific, consistent format, usually posted by automatically by a bot. Figure 13 represents the EPL game between AFC Bournemouth and Liverpool from early December 2016. The match thread template includes basic details: the teams and their line-ups, and major events of the match as they occur are updated into the original post, such as goals and substitutions. Community discussion flows around these details, with comments on the game punctuated by GIFs of game events, and the most popular content floating to the top via reddit's "upvote" feature. Requests for streams, however, and links to stable, high quality streaming options have largely disappeared with the creation of the "soccerstreams" subreddit (<https://www.reddit.com/r/soccerstreams/>), designed to provide convenient access while keeping the main thread clear of such requests. As of late 2016, the subreddit heading read: "Welcome to soccerstreams! This is a subreddit to help you find streams for every soccer game. Match Threads are posted 1 hour before kick-off, and deleted after full-time." Threads here have low comment counts, as it is not primarily a place to discuss the sport, but the subreddit has almost 200,000 subscribers (nearly a quarter of the number subscribed to the main soccer subreddit).

These participants might be thought to have weak ties to one another, but not in the same way as TPB. The flow of recommendations is relatively impersonal. Only a small proportion of users are likely to know other users by name, and the majority of comments do not express specific relationships to specific posters. Compared to a traditional fan forum, which may have a much smaller user base and avatars designed to make specific users easily identifiable, reddit is quite anonymous. It also allows for "multis" – that is, for the same user/IP/email to have multiple accounts for different purposes – whereas more traditional fan forums like CricketWeb may ban them as impediments to friendly, structured

community environments. Nevertheless, compared to the anonymity of torrent aggregators like TPB, piracy in r/soccer and r/soccerstreams is highly community oriented.

An announcement posted in the soccerstreams subreddit in December 2017 announces a new system for indicating “verified” streams, in which high quality streams will be “featured” in a thread titled “Streams of the Week”. If the stream holds up through the increased traffic this will generate for four consecutive weeks, they “will be awarded with the Verified Streamer flair”, and their stream will appear in the subreddit permanently. This innovation is evidently designed to help community members negotiate the unreliability of some streams. The two major types of streams offered here are embedded browser-based streams, which are generally easier to access, but less reliable and often of lower quality (sometimes Hoof’s “lemons”), and what are internally referred to as “Acestreams or “p2p” streams, made available through clients like Ace Player, which are the most popular, especially among the most technically savvy users.⁷⁸ As with torrenting, there is a learning curve involved, particularly with p2p streams, which require users to download a third-party program if they don’t already have it, obtain a link, and paste that link into the program. By comparison, a browser-based stream can usually be accessed by navigating to the URL. The soccerstreams wiki provides instructions for new users, and a “sticky” (permanently visible) thread in the subreddit titled “Acestreams & You: What are they and do I use them” gives detailed information about p2p streams. The subreddit also contains discussion of paid

⁷⁸ Here, p2p streaming is distinguished from browser-based streams where a video is embedded on a site, usually supported by advertising. Major streaming hubs like twitch.tv for streaming games are similar. Acestreams are accessed through a third-party client and stream directly through the client, with the capability of receiving data from several sources at the same time, resulting in a more stable and higher quality stream. The experience is more like using a torrent client than viewing an embedded stream, though the source of the material is usually the same array of television broadcasts.

streaming services that might be useful to fans alongside this support for piracy, without any moral distinction.

Acestreams work similarly to BitTorrent, streaming from multiple sources simultaneously through an external client, all broadcasting the same content, rather than directly streaming from a website that could get shutdown for infringement at any moment. Browser-based streams can often be rife with popups, malware, and other distractions from the ease/comfort of viewing. Acestreams avoid that, much like the curated files from “trusted” uploaders on TPB avoid the frustrations and complexities involved in downloading files from less reliable sources. My site observation indicates that quality of image is one very important criteria for sports streamers, although Meese and Podkalicka (2016, 82-83) argue at some length that quality is relatively unimportant. Certainly, p2p stream links are more complex to use and sometimes have other problems – they may fail, require more effort to access, and they might not be in your preferred language. Although the “lemons” Hoof discusses are not as prevalent with Acestreams, such quality assessments are only one part of the convenience calculus. In such ways the “significant costs” involved in watching live sports streams (Hoof 2016, 91) are not confined to money. Timing of a broadcast/stream, effort to locate it, quality, portability to a preferred location, and fees are all costs to the user. This is the “convenience calculus”. The reliability of a viewing experience may be worth more to some viewers than others, or at some times, as options change.

I have described these sites in detail to point to forms of online media piracy that are expanding rather than contracting in use, against the current marked by the Netflix moment. They are highly integrated into the broader community of soccer (and other sport)

fandom on one of the world's largest websites.⁷⁹ Soccerstreams features curated links to infringing streams, complete with warnings about ensuring you have an ad blocker installed before going to certain links, and even direct interaction between the sites that provide the streams and reddit moderators and viewers, negotiating such terms as acceptable methods of promoting their ad-revenue driven streaming services on reddit, and warnings against manipulating votes in favor of one stream over another.

In the practices of these sports pirates, then, we can see other alternatives than claiming online media pirates simply are or are not producers/creators. As Axel Bruns suggests, there is variety amongst the practices of "active users":

some of them participating more strongly with a focus only on their own personal use, some of them participating more strongly in ways which are inherently constructive and productive of social networks and communal content. These latter users occupy a hybrid position of being both users and what in traditional terms would have to be loosely described as producers (Bruns 2007).

Given that online sports pirates also conform to Bruns's argument that "many users now understand the major media industries to be highly exploitative businesses operating according simply to the financial bottom line", and will not respond to demands for moral consideration "made by individuals and institutions [not] understood to have themselves acted morally and ethically in the past, or where the costs of acting morally are not significantly higher than those of engaging in copyright 'piracy'" (Bruns 2008, 263).

⁷⁹ According to the website rankings at Alexa for 2017 (<https://www.alexa.com/topsites>), reddit is ranked 6th in the world in terms of traffic, with the only sites above it being the leading English and Chinese language search engines (Google and Baidu), YouTube, Facebook and Wikipedia.

This is a far more contained argument than those which argue for the intrinsically revolutionary spirit of piracy, including Ned Rossiter and Soenke Zehle’s argument that the broad availability and use of piracy resources “registers the possibilities for both individual and collective refusal to turn our communicative relations into generators expected to power the data-driven enterprises of an experience economy” (2014, 346), outside the “totalizing” limitations of designed “user experience” in major corporate versions of social networking like Facebook and Twitter (348). To begin with, an “experience” is very much in demand among these online sports pirates, and they constitute an “informal economy” (see below) interacting with the formal one rather than a complete refusal of existing industrial forms. It is also worth noticing, however, that an opposition between online piracy and social media platforms ignores the parallel use of algorithms to sort and predict shared emphases. Indexing piracy services should be equally subject to Striphas’s critique of representing “algorithmic” culture as “the ultimate achievement of democratic public culture”, in which anyone can “have a role in determining” the most valued forms of culture (Striphas 2015, 407). Claiming TPB shares values “like a community” is rather like saying Google or Amazon shares values like a community because the things recommended are shaped by other users of that service. Similarly, while some online sports pirates are engaged by criticism of rights management, this is truer of smaller, closer knit groups than of a place like /r/soccerstreams, where most users are simply anonymous viewers of streams who subscribe to follow their chosen sport in a way that lines up with their convenience calculus, rather than having particular investments in one form of consumption over another. And googling for an unauthorized stream and watching it flash-embedded on a major website flanked by advertising, such as www.freematchesandshows.com, does not

require any critique of sports media deals at all, and seems as likely to be driven by lack of access as by a commitment to one form of viewing over another.

Pirate Radio (a conclusion)

In his history of piracy, Adrian Johns writes that:

Piracy was central to the emergence of the information society. This was true not just in the obvious sense that radio pioneers pirated each others' inventions and unauthorized transmitters competed for bandwidth. At a broader and deeper level, the identification of new forms of piracy— and the actions taken to fight them— required articulating what mass communication and information themselves would be in a democratic society. (Johns 2009, 401)

As I indicated in chapter one, one of the most influential examples of this dynamic is pirate radio. There are actually many forms of unauthorized radio, including famous “free radio” stations motivated by various (usually political) aims in Europe and the U.K. But at the center of any history of “pirate radio” is the dramatic incursion of pirate radio stations on the British airwaves in the 1960s.

Significant pirate radio stations included Radio London and Radio Caroline, both broadcasting from ships off the British coast, or Radio Luxembourg, broadcasting from the continent over a much longer period. These and other stations were not only unauthorized, but built a strong connection between piracy on the high seas and unauthorized media streams. In *Death of a Pirate: British Radio and the Making of the Information Age* (2011), Johns outlines the contestations over these stations which transformed British broadcasting. BBC radio services had a state-sponsored monopoly over broadcasting in the U.K. at this

time and, as Johns argues, “the BBC was never just an expedient response to the threat of ether chaos. It was also designed to be an instrument of cultural improvement” (Johns 2009 397). It therefore had a particularly Arnoldian vision of radio programming and, for example, programmed very little popular music.

Based on popular reception of their alternate programming (see Boyd 1986) the pirate stations thus forced a space in the visible patterns of radio consumption that required not only the passing of new laws (Miley and Read 2017) but the restructuring of the BBC to include a dedicated station for popular music. The combination of legislative and litigious action, a public media campaign and economic sanctions that attempted to halt the success of pirate radio in the UK were successful, after a sense, but ultimately transformed British radio and British broadcasting policy to allow for things that looked more like the stations they were attempting to shut down. The parallels to the Napster and Netflix moments are clear, but it is worth remembering that while the resistance to banning pirate radio was fierce, and once again closely aligned with a generational narrative, pirate radio was not necessarily a resistance to the commercial distribution of popular media for profit. These stations were commercial ventures, aiming to play the most commercially successful music and using many of the same notable radio hosts as the BBC, at the same time as they were rallying points for a critique of the existing structures of radio.

This returns me to the politics of online media piracy. Ekin Gündüz Özdemirci sees a concern with “free culture [rather] than saving money” as characterizing “the torrent community” (2014, 171). He doesn’t see this community as “homogenous community”, but its component “micro-cultures” are, he believes, linked by an identity with “free culture”:

“people from a cross section of ages, professions and social environments that consider free sharing and reproduction of information ... as a social right”, and who “reject the current copyright system” (171) and its central focus on the profits of a small number of companies, which is “in open conflict with the decentralized structure of BitTorrent networks” (172). Online media piracy raises contradictions, but I argue that it is more important when understood through its continuity with authorized modes of content acquisition, even if specific communities or networks focus on those contradictions.

Online media piracy has helped produce new forms of international communication and cultural dissemination, but these have complex relationships to the border between authorized and unauthorized, between de Certeau’s authoritative “strategies” and dispersed “tactics”, and between formal and informal economies. Lobato and Julian Thomas define “informal media production and distribution networks” as media circulated through “informal media economies: zones of unmeasured and unevenly regulated media production and exchange, which articulate with conventional media systems in unpredictable ways” (2012a, 379; see also Lobato 2012). These informal economies are situated “outside regulated, consolidated, and policy-governed audiovisual industries”, which generally means in “third world” or “global South” zones, or peripheral zones defined by dubious legality, such as “user-driven streaming sites, and transnational VHS piracy” (379). Synonyms for this term thus include the “hidden, irregular, shadow, parallel, or secondary economy” (379). I am particularly interested in the fact that “The various economies analyzed here encompass production, distribution, and consumption; they connect with established media systems in surprising ways; they span the legal and extralegal realms; and they range from tightly organized to amorphous and anarchic” (381).

While piracy is clearly at the heart of this definition of informal economies it cannot be separated from a global economy that has, as I have already discussed, sought a homogenous definition and enforcement of laws against piracy. As Frow stresses, “the process by which the [Trade-Related Aspects of Intellectual Property Rights] agreement was forced onto the world agenda and into international law” (Frow 2008, 433-4; see also Frow 2006, 114-115). As Peter Drahos and John Braithwaite put it:

a small number of US companies, which were established players in the knowledge game, captured the US trade-agenda setting process and then, in partnership with European and Japanese multinationals, drafted intellectual property principles that became the blueprint for TRIPs. The resistance of developing countries was crushed through trader power. (Drahos and Braithwaite 2002, 12)

Such forces have reshaped and even produced informal economies. Tristan Mattelart discusses piracy as dependent on and producing an “informal” “cultural infrastructure” and an “underground economy of communication” (2012, 736-37). Such an approach offers an effective alternative to either celebration or nor to condemnation of online media piracy. Informal economies can shadow formal economies and mirror their flows, or else sit further outside some of their forces.

Writers who discuss piracy as this kind of informal economy, or as part of one, tend to focus on its relation to an international economy, but their object is, at least indirectly, the cultural relation that pirated content and its circulation always invoke.⁸⁰ Mattelart, for

⁸⁰ Within this, as Meese notes, scholars usually discuss commercial piracy with a critical tone, from “large-scale operations that occur in street markets in the global South”, to services like Kazaa! “where businesses are built off the back of widespread digital piracy” (2014, 21). By comparison, non-commercial piracy like bootlegging,

example, is interested in “placing piracy in the context of international power relations” (735), in terms of what is counted as piracy and what might be more murkily discussed as a “sharing economy”, but also in terms of understanding why certain materials rather than others are “pirated”. Mattelart sees in media piracy more broadly an informal mode of “globalization from below”, which is not necessarily opposed to the interests of the copyright-based industries that would prosecute pirates because it spreads demand for their content (2012, 746). What Mattelart here calls globalization, and Laikwan Pang discusses as the perceived threat of Westernization in China (2012), Jie describes as a set of “positive externalities” to movie piracy easily ignored by figures detailing losses, such as teaching audiences to appreciate Hollywood cinema, or exposing them to “advertisement for movie-related products in both symbolic and physical forms” (Jie 2014, 204). For Mattelart this “globalization” is a negative consequence of the prevalence of piracy – a homogenization sought by consumers who want access to the same content as everyone else.

What I have called the mainstreaming of piracy practices is not straightforwardly compatible with this approach because it is not concerned with peripheries or shadows, but it does offer another way of thinking about piracy cultures as a space of emerging cultural practices. It focuses on the fuzzy relations between platforms with ostensibly legitimate business models and those with overt piracy practices. This is a much longer history than the success of Netflix suggests. As Logie points out, when the iPod, a major piece of Apple tech, was first released, it essentially depended on piracy to function:

file-sharing and “transformative amateur media creation” “are generally viewed in a positive light by many scholars (Benkler 2006; Jenkins 2006), who see this sort of copying as inherently ‘creative’” (21).

there were no stable and comprehensive commercial online music sources. Apple itself would not launch its own music service, the iTunes Music Store, until April of 2003. Though Apple could not have fully anticipated Napster's closing... [it] almost certainly recognized that the success of the iPod hinged on the ready availability of music in the MP3 format ... and thus must have implicitly understood that their product was thereby yoked to the continuing availability of peer-to-peer music downloads. (2006, 65)

The clearest content acquisition alternative to such downloads was ripping music from CDs. Logie notes that even given "an optimistic fifteen minutes per ripped CD", it would take "the better part of seventeen days" to fill an 80 gigabyte iPod that holds "over 1,600 CDs" worth of music (64). Both consumers and producers of MP3 players at the time clearly realized that the success of the iPod was tied to practices at the time being decried as piracy.

Logie notes that one of the early iPods came with a "Don't Steal Music" sticker in four languages applied, and contrasts this with an earlier ad for a new iMac with a CD-RW drive built in, promoted with the advertising slogan "Rip. Mix. Burn" (2006, 63). He characterizes Apple as moving here from a "rhetorical stance that was widely understood as providing a winking acknowledgement of consumers' potentially illicit" consumption practices to "the marginally insulting assumption that iPod purchasers would steal unless told not to" (2006, 63). The iMac campaign was controversial, drawing the ire of companies like Disney, and seems to foreshadow the tacit approval Netflix once offered to people using circumvention techniques to bypass geoblocking for Netflix access. Even more overtly, in 2011, encouraged by the kinds of resentment I discussed as "the Australia tax", Australian national electronics retailer Harvey Norman offered a product "designed explicitly for geo-circumvention" – the

McTivia – which came bundled with a VPN subscription. While Harvey Norman denied they were promoting circumvention, the marketing material was hard to misinterpret: “‘Stream direct from the USA!’ ‘Tailor your home entertainment system to meet your lifestyle and gain access to a global library of previously geographically restricted media to your TV’” (in Lobato and Meese 2016a, 124).

The iMac, the iPod, and the McTivia are part of a broader story about the interplay between authorized/unauthorized content and authorized/unauthorized systems of distribution. A more recent example appears in Schwarz’s argument that TPB should be seen, in some senses “a rentier capitalist” operation (2013, 142; see also Meese 2014). Frow uses the term “institutionalized piracy” instead, arguing that it

expands what we might call the counter-public domain of illegally produced materials is ultimately no more than an alternative form of capitalist production, asserting an alternative set of property rights in the black market which shadows the domain of legal distribution (Frow 2006, 123).

I want to take up Frow’s challenging question and ask “How can we imagine the shared, non-competing and non-exclusive rights that characterize the public domain, without simply reverting to a defense of piracy or to an idealized communitarian past?” (2006, 124)

Schwarz finds it significant that

the engineers behind Spotify honed their skills by crafting pure-play file-sharing applications (µtorrent) and that the Swedish founder of the voice and messaging service Skype, Niklas Zennström, similarly began his career in 2001 by founding

Kazaa, a file-sharing program based on p2p technology, which in May 2003 was the world's most downloaded software application (2013, 2).

In fact, Spotify's origins are linked to file-sharing in ways that continue to cause controversy insofar as Spotify's current corporate image requires a distance from that history:

Much as TPB managed to build new infrastructure around the scattered activities of individual file sharers, Spotify managed to build a rogue archive of mp3 files that users could remotely access via streaming protocols, before reaching a deal with record labels and ultimately succeed[ing] to make the service legit. (Schwarz 2013, 32)

Schwarz's argument suggests that the success of streaming services is less the eventual profit-oriented collaboration between pirate technologies and recording industries finding a new way to sell music than the capitulation of the record companies over the future of the CD technology and a deal with pirates that newly monetized the old technology of radio.⁸¹

David Choi and Arturo Perez, writing in a field they describe as "management and entrepreneurship literature" (2007, 169) note that "Historically, piracy has had little to do with legitimate business" and not been "identified for its ability to spur legitimate businesses or economic value creation" (168-169), but this is not the case with online media piracy. They note that it has pioneered new technologies, been a source of valuable forms of "market insight", created new markets – their example is Napster indicating a market sector that iTunes partly filled – and created "innovate business models" (169). While online

⁸¹ Schwarz suggests as much, with reference to research indicating that "the incentive to buy CDs has dropped significantly when exposed to the same songs, albeit in lower technical quality, online, and for free. 'In fact, the alternative to file sharing might not be the purchase of CDs, but instead might be the activity of listening to radio. Interestingly, the recent proliferation of streaming services such as Spotify has made this analogy even clearer.'" (2013, 41, quoting Liebowitz 2006, 153)

music distribution is an example of the latter Choi and Perez note the “piracy” origins of blogging, which “poaches” other sources, and video-game modding, which is based on game code-cracking, both of which have been taken up and monetized by the respective fields of journalism and game development (2007, 170), and the use of BitTorrent to distribute massive games (175).

There’s an apparent paradox in seeing these content industry developments as “a positive dimension of piracy” (Choi and Perez 2007, 169). Choi and Perez, correctly I think, argue that “online piracy has had and is likely to continue to have a large impact on the fast-changing media and software industries.” Their interest, however, is in effective business models rather alternative economic arrangements, and for this they propose that an alternative to litigation “for both incumbents and entrepreneurs may be to view online piracy as a source of innovation that has been lacking in the traditional media sector.” (2007, 177). This is certainly not what many activists, developers and critics have seen as the aspirational possibilities of online media piracy. Nevertheless, Perez and Choi’s final recommendation to content industries is to pursue exactly the kind of leveraging of pirate and fan communities that appears between the lines of Jenkins’ arguments about convergence culture. That is, to “harbor communities”. They note that “The Internet is uniting and segmenting people with similar interests more closely than ever before,” and so companies “should identify mutually beneficial relationships with such pirate communities, officially or otherwise” seeking to “foster a creative environment... based on the carefully observed tendencies of online pirate communities” (2007, 178).

The way in which piracy and anti-piracy forces reciprocally innovate is nothing new, but this exchange seems to occur faster and more dramatic online. Thus, record companies now allow music videos to be shown on YouTube, while not long ago they were viewed as pirate texts in that context. Of course, music videos were always promotional, screened on both free-to-air and subscription television, so deeming their distribution on YouTube as piracy was always a technology lag. Today, ad-based profit systems are attached to sponsored YouTube videos and the music industry only targets rogue, ad-free videos for removal. However, while discussions of music streaming services generally represent them as having resolved the piracy problem for that industry (see chapter one), as Witt suggests it more specifically required a complete transformation of industrial dissemination rather than creation. While “new Spotify subscribers stopped pirating more or less completely”, he suggests they “also stopped buying albums”, leaving the recording industry “in a difficult two-front war with the streaming services on one side and the pirates on the other” (2015, 261).

Arvanitakis and Fredriksson insist that even if online media piracy disrupts the hegemony of content industries, making their economic structures visible, we should “also ask if those new digital technologies are not as likely to be co-opted and commodified by the culture industry as the film medium of the 1930s” (2014, 9). On the other hand, while Nick Couldry’s pointed critique of “convergence culture” studies acknowledges that people “outside media institutions” are “not just using but producing those interfaces”, he also questions any suggestion that “this media tumult will challenge established forms of organization across many domains” (489). I am not certain co-option is the right term for either pirate radio or streaming radio; nor that these are these minor alterations in the status quo. For the

informal economy argument, it is not necessary that such an opposition be maintained. This is its advantage over the resistance narrative about online media piracy, for which the non-profit status of media pirates is key, and concepts like the digital “commons”, “non-rival goods” and “anti-rival goods” discussed in the last chapter are deployed as definitive. Such terms, as Striplhas and McLeod and Frow differently assert, remain within the rhetoric by which the world is organized by who owns what. As Striplhas and McLeod also ask: “to the extent that the commons are defined as private property’s constitutive other, does it make sense always to couch our appeals for universally shared resources in exactly that language?” (2006, 138)

In his own exhortation to pay attention to the everydayness of online media piracy, Schwarz links peer-to-peer sharing to Carey’s “view of communication as ritualistic and shared” (Schwarz 2012, 589). More specifically, he suggests that the naturalization of categorically everyday and “ostensibly ‘free’ models for broadcast” media distribution (590), like free-to-air television and radio, where users expect not to pay for the specific components they consume, fed positive attitudes to peer-to-peer file-sharing (591). We can see a similar pattern, then, in the quick adaptation of music audiences to pop (pirate) radio and to online (pirate) sports, both of which were traditional content of free public access media.

Ultimately I think we should neither presume that those engaged in online media piracy always think about it as “piracy”, nor that their media consumption is clearly distinguished as authorized and unauthorized. The fact that the full continuum of content acquisition practices, from evidently legal practices to the most clearly unlicensed, is accessed by the convenience calculus of content acquirers today suggests that cultures of use and tactics of acquisition are better tools for understanding the resilience of online media piracy today.

Chapter 5 – The Problem of Media Change

In this concluding chapter I turn to considering how a history of online media piracy might be written, or perhaps (and this may well be a different project) how online media piracy should be historicized. In the process, I will also revisit some of my key themes from previous chapters. To begin with, however, let me reiterate that insisting on online media piracy as an “ordinary” form of media consumption does not deny its extraordinary impact on patterns of content distribution. Online media piracy has served to devise and revise significant new modes of content *circulation*, which have helped make *post-distribution* circulation a newly important and highly visible stage in the life of all media content. In the preceding chapters I have been focused on quite specific developments in the ways that popular media content is “acquired”, with an emphasis on almost twenty years of peer-to-peer file-sharing. For example, in chapter one I noted the Sandvine Report’s claim that, in 2008, online file-sharing made up 31% of all online media traffic in North America, with the majority of that via BitTorrent. By 2014, this had dropped to less than 9%, displaced by Netflix, which then encompassed almost 35% of that traffic. I have also engaged with some broader claims about the transformation of popular media “content industries” in that time. Thus, to explain the former statistic, I have considered accounts about the rise of file-sharing after the “Napster moment” and to explain the latter I have discussed the disaggregation of television (and also post-cinema film) in the “Netflix moment”. Here, I want to offer some further brief comments on available statistical evaluations of present piracy practices, before taking a step back to ask about the significance of trying to name such *moments*.

Global online piracy-tracking company MUSO claims there were more than 140 billion global visits to piracy sites in 2015 (MUSO 2016, 2), and 191 billion in 2016 (MUSO 2017, 2).

However, this increase obscures other changes. In 2015, more than half of these visits were related to film and television piracy, but 73.7% of those were to streaming sites rather than torrenting sites (Spangler 2016). A slight recovery in torrent traffic in 2016, with torrenting overall once again at 19% of traffic compared to 17.2% the year before, suggests that perhaps the unstable availability of torrent indexing sites following raids, resulting site closures (some temporary, some permanent), and website blocking in certain locations, exaggerated the drop in demand for torrenting. Although MUSO offers global, rather than North American assessment, the U.S. is the source of most online piracy traffic internationally, further indicating that the reasons people choose piracy cannot be reduced to a lack of authorized options, even if that impacts on the fact that the greatest “piracy demand” (by “Internet population”) is in Eastern Europe. As the Sandvine data anticipates, unauthorized streaming made up 74% of the 2015 online piracy of film and television, again fairly stable the following year at 64.4% of all piracy site visits (MUSO 2017).⁸² There is thus, at the time I write this, a degree of stability in online media piracy, but there have been dramatic changes across the life of my thesis research. It has been central to my argument that these changes interact with authorized audience changes, such as an overall shift from collecting files (on CD or DVD as well as computer hard drives and portable devices) to streaming on the spot (referring to both Netflix and its peers and unauthorized streaming on

⁸² I am not staking any claim to the superiority of MUSO’s reports (which have been criticized, see Ernesto 2015b) over national reports, but its global statistics are broadly compatible with national reports. MUSO calculates “piracy demand” based on number of visits to more than 23,000 of the most active piracy sites (MUSO 2017,16). The largest use of piracy overall has always been the U.S. in these reports.

a variety of websites and third party platforms), and I have emphasized the ordinariness of online piracy as one among many options weighed in any content acquirer's convenience calculus.

Here, I want to return to larger claims about media transformation in relation to which this argument is clearly situated. As indicated in my introduction and chapter two, I began this thesis at a time when "television" was being discussed as a somewhat anachronistic term for what is consumed under that name, given its acquisition through clients, apps, and web-portals, and on computer monitors, smartphones, and other devices. However, the few years in which I have been writing this thesis have shown that television is not, in fact, a disappearing technology or a redundant concept, however much it is changing. Such propositions always involve claims about what's just over the horizon, and risk easily being proved wrong by some fresh turn of events. However, the risk of turning out to be wrong concerns me less here than the pressing difficulty of writing about contemporary transformation, even as viewing the present through ideas about future transformation is a very popular rhetorical position in studies of new media. Thus, the focus of this chapter is the problem of how to write about media change as it is going on.

Media under the influence of online piracy seem to be in a state of particularly rapid continual change, and as my discussion of piracy practices has demonstrated, any claims about how piracy is done risks collapsing the dominant or cutting-edge practices of different periods across the last twenty years. I am perpetually risking that by the time this thesis is complete some of my examples – and perhaps most of all statistical claims like those above, because they have the absolute tone of all positivist claims – will be practically obsolete.

New sites and modes of piracy are constantly appearing in response to industrial, legal and legislative developments, as well as new technological capabilities, and so are new forms of authorized content distribution, and new relationships between the two. Even the year between one professional academic conference and the next might outstrip any definitive analysis. As an example, Ramon Lobato and James Meese's discussion of the use of VPNs to evade geoblocking was published in January 2016, using up-to-date discussion of the ambivalent relation between geoblocking, circumvention, and companies like Netflix, but by the end of that same month the situation was far less ambivalent, and Netflix had begun cracking down on VPN usage to access their service (see chapter three). One of the issues I have faced in all the preceding chapters is how to draw insights from scholarship dealing with an at-the-time crucial force or pattern in online media piracy, despite the fact that the force/pattern is now no longer so crucial, and when such arguments need to sit alongside those made under other historical circumstances that may, viewed from a future vantage point, appear to be happening at the same time.

Discussing authorized and unauthorized sources of popular media together through the conceptual frame of content acquisition doesn't require that any particular component practice be *new* or presently dominant to be of interest, but it does not avoid the larger problems of writing about media change. This chapter therefore considers three important critical formations in theories of media change. I'll call the first *technological experience*. Under this heading I want to consider accounts of media change that reach back into the past for examples that highlight ongoing relations between the appearance of "new" media and the experience of change as a fundamental premise of modern life. For these arguments, media change itself has a consistency that explains its significance as a

characteristic of modernity. I will focus on the work of Carolyn Marvin and Tom Gunning. The second formation is often labelled *media archaeology*, an approach largely indebted to Michel Foucault's "archaeological" histories, and always focused on exploring the context in which any change appears. The third formation I want to call *cultural determinism*, because it appears to counter the specter of "technological determinism", whether through the widely cited model of Henry Jenkins-style "convergence culture" or through also very widely cited, over a longer term, model of Raymond Williams' discussion of the interface between culture and technology. Before discussing any of these, however, I need to consider a set of problems with which they all engage: presentism.

Presentism/Historicism

In the final stages of writing this thesis I feel that I know a great deal about the specific difficulties of writing about online media piracy history, but when it comes to "historicizing" – that is, to issues of narration and temporal orientation – I have to deal with the same theoretical issues as every other writer looking at how we arrived at the situation we are in today. The problem of putting historical limits around any project, and the challenges of understanding how the past relates to the changing present, are hardly specific to studies of new media. That can be easy to forget when dealing with what seem to be entwined and equally rapid processes of technological and cultural change, so a brief prehistory of the problem seems useful. I make no claims to be a historian, but how to write history – how "the facts" of the past are "to be described in order to sanction one mode of explaining them rather than another?" (White 1985, 134) – has often been debated in terms of its relation to the present. Here I want to draw on these debates to introduce the multiple

meanings of “presentism”, which invokes a particular set of problems for writing about issues that seem urgently of the moment.

An interpretation of philosophical presentism, in which “only the present is real” (Crisp 2005, 211) and “everything is present – that, and only that, which is present exists” (Mozersky 2011, 122), has long informed historians’ debate about the extent to which and the ways in which the writing of history is shaped by the present. Key texts in this debate include Herbert Butterfield’s *The Whig Interpretation of History* (1931), which complained about the tendency of historians “to emphasize certain principles of progress in the past and to produce a story which is the ratification if not the glorification of the present” (Butterfield 1931, v). While such an approach to history may claim to be pragmatic – because one can only write from the present rather than in the past – the unselfconscious ratification of the present has a number of consequences. As George Stocking summarizes Butterfield’s complaint:

Faced with the massive complexity of historical particularity, the general historian falls victim to the “historian’s ‘pathetic fallacy’”, “abstracting things from their historical context and judging them apart from their context – estimating them and organizing the historical study by a system of direct reference to the present.”

(Stocking 1965, 211-212, quoting Butterfield 1931, v)

Stocking proposes as an alternative to such “presentism” the principle of “historicism”, polemically interpreted as “the essential quality of the commitment to the understanding of the past for its own sake” (Stocking 1965, 212).

Stocking explains this historicism with reference to the insights of Thomas Kuhn (1962) on paradigm shifts in scientific knowledge. He does add a series of caveats:

Kuhn's book is imperfectly historicist in its focus on the inner development of science to the deliberate neglect of the role of "technological advance or of external social, economic and intellectual conditions" (Kuhn 1962, xii), and, one might add, the variety of national cultural traditions within which scientific development takes place. (Stocking 1965, 213-214)

But this "historicism", he feels, rescues history from the failings of "presentism". He argues that such a paradigm shift allows scientific knowledges to be understood "together with the questions they are meant to answer" (Kuhn 1962, 52, quoted in Stocking 1965, 215).

Stockbridge does not, finally, favor pure historicism, but rather an "enlightened presentism" which writes history engaged with on-going conversations and needs (215).

I have chosen to begin with Stockbridge's account of Butterfield and Kuhn here, rather than the far better-known debates around the historical methods of Foucault, in order to force some distance between my discussion in this chapter and rote endorsement of Foucault's "history of the present". Understanding the contemporary formations of online media piracy certainly requires historical context, and this does mean starting from the situation we have arrived at. What Napster looks like today is inevitably filtered not only through its eventual failure but also through the trials of TPB and the rise of Spotify. The historians I have already cited know this, but I also want to highlight two points from Foucault's discussion of the history of the present.

The first, from the essay, “Nietzsche, Genealogy, History”, highlights divergence. Foucault writes that “what is found at the historical beginning of things is not the inviolable identity of their origin; it is the dissension of other things. It is disparity” (Foucault 1977c, 142). The history of Napster includes the relatively unknown my.MP3.com, Cecilia Gonzalez at a Kazaa trial pleading her own ignorance, sixty-something Costco workers collecting uncollectable classics they bought years before, the lost mandate of the Secure Digital Music Initiative, and the decline of the CD via a method based on its own innovative success. As Foucault argues, in this case “no one is responsible for an emergence; no one can glory in it, since it always occurs in the interstice” (Foucault 1977c, 150). Shawn Fanning is the principle creator of Napster, but not of peer-to-peer file-sharing, which even in the moment of Napster’s greatest success is created as much by the Homebrew Computer Club (see Johns 2009) and the Sony judgement as by Fanning. It is, as Alexander Monea and Jeremy Packer put it, “the endless play of repeated dominations that leads to the emergence of forces” (2016, 3143). The second point comes from Foucault’s *Discipline and Punish* (1977a), where Foucault makes it clear that “the history of the present” is not a matter of better understanding the past in terms of present interests or perspectives (Foucault 1977a, 31).⁸³ The disjunction between the prison and prior forms of punishment he outlines here are not a shift in shared paradigms, in Kuhn’s terms, but a focus on “the unthought conditions of possibility of specific ways of thinking and generating statements” (Garland 2014, 371).

⁸³ Foucault concludes the introduction saying, “I would like to write the history of this prison, with all the political investments of the body that it gathers together in its closed architecture. Why? Simply because I am interested in the past? No, if one means by that writing a history of the past in terms of the present. Yes, if one means writing the history of the present.” (1977a, 31)

As Michael Sternberg argues, cultural studies has broadly rejected “the ideological and professional logic of historical understanding while insisting on its political necessity” (Sternberg 1996, 117). He doesn’t see this as new to cultural studies, and it is relevant to my discussion below that he particularly sees this stance foreshadowed in the work of Benjamin, citing Benjamin’s “Theses on the Philosophy of History”: “To articulate the past historically does not mean to recognize it ‘the way it really was’ (Ranke). It means to seize hold of a memory as it flashes up at a moment of danger.” (Sternberg 1996, 117, quoting Benjamin 1968, 255). It matters also that Benjamin is in turn citing Leopold von Ranke’s insistence that the project of history is faithfulness to the past. Cultural studies has, as this suggests, usually found more purchase in the presentist rather than historicist side of this historians’ debate, and with the position that historicization can only “bring questions of the present to bear upon the ‘remains’ of history”, and “necessarily understand the past in ways that people of the time did not” (Clark 2004, 19). Here, Elizabeth Clark foregrounds Michael Oakeshott, who influentially claimed that “what the historian needs... is not a postulate, but hypotheses; and what he applies his hypotheses to is not... ‘past facts’ but present facts” (Oakeshott 2004, 328). This, Oakeshott would argue, is actually the “advantage” rather than the failing of the historian (Clark 2004, 20).

Cultural studies has also, on the other hand, denied charges of presentism and stressed its attention to context. As Lawrence Grossberg stakes this claim, “context is everything and everything is context for cultural studies; cultural studies is perhaps best seen as a contextual theory of contexts as the lived milieu of power” (1997, 7-8). As both of these arguments are supported by a range of work in the field it might be best to distinguish between two forms of presentism, one more strictly historical or methodological, and one I

will call, after Graham Murdock and Michael Pickering, “cultural presentism” (2009, 173). They are clearly closely tied together as either, at its worst, precludes any sense of the difference of the past. But they are different tendencies. For example, Simon During describes cultural studies as “an expression” of the fact that “we are today more interested in time now than in time past compared to earlier generations” (2004, 61).⁸⁴ On this basis, he argues that cultural studies is oriented towards “‘presentism’, which means both seeing the past through the light of the present in ways that lose sight of that past’s otherness and being narcissistic historically speaking, that is, being overconfident that historical trends are reaching their apogee now” (During 2004, 61). But the former failing is looking to the past and seeing the present, while the second failing is looking only at the present. On the latter point, given debates I’ve cited above, it seems During’s claim about our difference from generations past would also be presentist. So, rather than simply trying to avoid all forms of presentism, I instead want to ask what they mean for writing about media change.

I will begin with Jonathan Crary, who wrote in his 1999 history of attention that Edison’s kinetoscope and phonograph depended on a logic of “solitary” rather than “collective” “perceptual experience” (1999, 32-33) which was being “replayed today in the increasing centrality of the computer screen as the primary vehicle for the distribution and consumption of electronic entertainment commodities” (31-32). This argument, right in the Napster moment, could not be more aptly timed, given that what the computer (and “digital

⁸⁴ The historian Carolyn Steedman, while acknowledging in line with the debates above that “the historian can always... present a plot that seemingly *had* to be shaped in a particular way” (1992, 613)(1992, 613), once provocatively asked, “why does cultural studies *want* history? What does wanting it mean?”, in order to stress the difference between cultural studies’ tendency to an expansive critical reach compared to “the historical case study in its pedagogy” (621). Meaghan Morris responds to this question in *Too Soon Too Late* (1998)(1998, 3-8).

culture”) means for entertainment today is as different from 1999 as Crary notes the camera obscura differed from the visual culture of the twentieth century. Crary also sees in Edison signs of the “emerging (and enduring) patterns of vertical integration”, for which Edison’s attention to different points in “the economic relation between hardware and software... is paradigmatic for what it foreshadows in subsequent technological arrangements” (32).

What does this set of comparisons mean for thinking about the specificity of the Napster moment, or of peer-to-peer file-sharing or unauthorized streaming today? The “convergence” Crary sees in Edison is certainly not the same as Jenkins sees in *Survivor*, but does the similarity of the trajectory undermine the contemporaneity of what Jenkins sees as significant in his version of convergence? Does the sociality of the Internet today question Crary’s sense of how “solitary” the perception of earlier electronic entertainment commodities really were, or the other way around? And as to the substance of the experience, which matters most, in a historical sense – the solitude of the media pirate before their screen, or the collective endeavors that produced their particular act in all its technical and cultural specificity (and the possibility of online media piracy in general)?

While I have stressed the ordinariness of online media piracy practices, and offered accounts of how such practices developed, I have also considered suggestions, made by pirates as well as those who oppose them, that online media piracy not only presents a challenge to particular media business models, and to ideas about copyright in specific legal contexts, but also more radically disrupts a relationship between state-based legal systems, international trade agreements, and media consumption. I have thus had to ask myself

whether online media piracy itself can, or cannot, be thought of as a distinct break with or intervention in media consumption practices; or, how it has come to have the kind of pervasive effects on media culture I have discussed in the preceding chapters if it is not distinctive in that way.

My starting proposition when I began this aspect of my research was that online media piracy, however notorious it has become by the beginning of the twenty-first century, is not distinct enough from other online media consumption practices to warrant being considered a “break” in the ongoing evolution of media. However, it may nevertheless be too significant to be incorporated as just one among many modes of electronic popular media. Although it is closely integrated with other content acquisition practices, the impact of media piracy may even be paradoxically easy to downplay because of the cultural obscurity in which it needs to operate. In practical terms, we can readily recognize when, in a given media environment, a genre like reality television becomes dominant, with its consequential reimagining of celebrity and narrative (see Turner 2010), or when the production of blockbuster superhero films dramatically increases, with its flow-on effects for “transmedia” tie-ins and thus relations between film and other media (see Taylor 2014). It does not seem difficult to date the shifts by which the Internet became a dominant method of everyday communication, however many complex forces are involved in that development over decades (see Ryan 2010; Castells 2013). But despite being connected to each of these more easily periodized changes, the emergence and impact of online media piracy seems harder to narrate.

To begin with, its practices seek to be less visible and tend to begin with and predominantly involve networks of individuals that internally produce and negotiate the changes they involve. It is harder to locate early experiments in piracy, or to evaluate how they emerged in relation to existing media practices, than is the case with television or film genres. Even the specialist practices and sites that precede and drive the move from the Internet to the World Wide Web in what Manuel Castells positions as the “digital revolution” are more clearly a matter of record, despite revisions and counterclaims that serve particular interests. In fact, piracy only appears once in Castells’ widely cited account of the emergence of the Web, in *Communication Power*, but it occurs in a reference to anti-piracy laws (2013, 270) that clearly indicate its prior existence at a level significant enough to incite legislation.⁸⁵ The impact of media practices that attempt to operate with some measure of discretion can also take longer to be felt, even considering the mass participation required by its peer-to-peer modes.

A history of online media piracy is thus additionally difficult to produce, and many of the alternatives left behind – the “dissensions” Foucault mentions – may never be articulable. I can compile the accounts of specific technologies or sites into an incomplete story in which both dramatic change and gradual developments will seem to be hallmarks. But grand, epochal claims are never far away, even when the focus is on users rather than designers of piracy tools. If not great names, then great controversies are the touchstone of writing the history of media piracy, whether that is the pre-history compiled in Adrian Johns’ *Piracy* (2009) or Stephen Richard Witt’s far more anecdotal popular history of the Napster

⁸⁵ The first edition of this book was released in 2009, and by the 2013 second edition the Swedish Pirate party does also get mentioned for its involvement in international politics (including WikiLeaks).

moment, *How Music Got Free* (2015). Witt's book was promoted with the line "what happens when an entire generation commits the same crime?" And it opens with such generational claims. The tone itself is significant, with the opening paragraphs establishing a sense of massive and rapid upheaval:

I am a member of the pirate generation. When I arrived at college in 1997, I had never heard of an mp3. By the end of my first term I had filled my 2-gigabyte hard drive with hundreds of bootlegged songs. By graduation, I had six 20-gigabyte drives, all full. By 2005, when I moved to New York, I had collected 1,500 gigabytes of music, nearly 15,000 albums worth... I pirated on an industrial scale, but told no one. It was an easy secret to keep. You never saw me at the record store and I didn't DJ parties. The files were procured in chat channels, and through Napster and BitTorrent; I haven't purchased an album with my own money since the turn of the millennium. (1)

Witt's history quickly reveals, however, that the moment of his discovering piracy is hardly isolated. His research uncovers:

the manifesto from the original mp3 piracy clique, a document so old I needed an MS-DOS emulator just to view it. I found the cracked shareware demo for the original mp3 encoder, which even its inventors had considered lost. I found a secret database that tracked thirty years of leaks – software, music, movies – from every major piracy crew, dating back to 1982 (2).

Finally, Witt's history becomes a micro-heroic story of how specific individuals and small groups have propelled the changes we now see as mass phenomena (3).

Both Castells and Witt set the terms of the present they represent, and the past changing present they seek to record. Agreement over major events in this way is nevertheless important. Where scholarly accounts of online media piracy consider history, they usually share Witt's narrative starting point and begin with Napster (Logie 2006; Ryan 2010; Schwarz 2013; Atkinson and Fitzgerald 2014), which has become the sign of online media piracy's becoming visible to the public. This is equally affirmed by the opposite course for historicizing online media piracy, which ends with Napster.

Johns' *Piracy* is the most notable history that reaches as far as the "information age". I have called it a pre-history of online media piracy not because it begins even before piracy at sea but because, while it discusses the emergence of both the Internet and personal computing in terms of an interplay between innovation, property and piracy, it discusses file-sharing only as the future portended by debates internal to the Sony case (see Appendix). Johns writes that "when digital media arrived", the Sony ruling would be exploited by "file-sharing and peer-to-peer networks like Napster and MP3.com... in the first Internet generation, followed by Grokster and Kazaa in the second, and the Pirate Bay in the third" (454). The remaining chapters of Johns' history are concerned with major U.S. national and international events that continued to make piracy a touchstone for trade relations and the U.S. culture industries, such as bootleg video and U.S.-Japan contestations over recording technologies, before moving on to the great names of the invention of home computing. Johns' claim that software is "the word most often associated with piracy at the turn of the twenty-first century" (2009, 463) does not seem to be supported by other literature at that time, however fascinating his stories are about the continuum that can link phone piracy, hacking, and the innovations of Bill Gates, Steve Jobs and their peers (Johns 2009, 463-496).

This elision comes back to the problem of presentism. Johns' conclusion clarifies that his work was written as the first vote passed on what would eventually become the U.S. PRO-IP Act (2008), for which online media piracy is a principle target. This is a history Johns cannot write (yet) in the same way as he can write about the open-source development of Internet and software protocols. Its parameters are not yet able to be placed in the category of known facts.

It is a mark of its status as "the contemporary" that online media piracy is usually either the end of a history or the historical context sketched at the beginning of more specific studies. In the latter case, it is the contemporary produced by a series of precedent events. In his wide ranging *A History of the Internet and the Digital Future*, Johnny Ryan's account of the transition from the invention of the MP3, through Napster's success and then closure, to a new era of media distribution centered on "choice and availability, assertive audiences and extruded content" (Ryan 2010, 154), takes only two pages. More detail tends to be available in overviews of the challenges digital culture has posed to intellectual property and copyright law. Benedict Atkinson and Brian Fitzgerald's chapter on "Dissent and P2P" in *A Short History of Copyright*, for example, contextualizes Napster within debates about how the:

argument of Internet copyright laws, and the practices they regulated... became a political argument of the merits of proprietary restriction and the limits of individual freedom. The debate placed the copyright industries, for the first time in their histories, at a polemical disadvantage, for every use of the Internet could see the opportunities for communication and exchange of information supplied via the Internet. (2014, 111)

Napster is here one of several strategic operations spawned by the new communicative practices of the Internet.

The prominence of Napster in historicizing online media piracy certainly comes from the visibility it was given by legal action (see my Appendix; Atkinson and Fitzgerald 2014, 112-114) and by media coverage as much as its technological innovation. But even a conjunction of litigation, publicity, and innovation doesn't necessarily mean Napster should be treated as a paradigm shift. The question of what stands out as a transformative event in the history of a changing media environment consisting simultaneously of legal, technological, economic, industrial and popular forces and flows is fundamentally about the relation between media innovation and cultural change. For a story of media change to support claims to significance, beyond some particular media forms and practices, retrospectivity is a powerful advantage. This is the risk Jenkins takes, and which is more often taken by journalists than by scholars, in not just focusing on the present but laying claims to why it matters in a long historical sense. In the field of writing on media change, questions about where change comes from tend to refer to a field that consists of pervasive social systems and powerful institutions, the pervasiveness and power of which are historically evident. Usually being stories about the past, then, they also tend to focus on key names and events, and less often on the activities of more ordinary or even marginal groups and individuals.

Launching an MIT book series on "Media in Transition", David Thorburn, Edward Barrett and Jenkins introduce their version of the media change framework this way:

New media technologies and new linkages and alliances across older media are generating profound changes in our political, social, and aesthetic experience. But

the media systems of our own era are unique neither in their instability nor in their complex, ongoing transformations... The series hopes to nourish a pragmatic, historically informed discourse that maps a middle ground between the extremes of euphoria and panic that define so much current discussion about emerging media – a discourse that recognizes the place of economic, political, legal, social, and cultural institutions in mediating and partly shaping technological change. (2003, ix)

This framework involves juxtaposing and evaluating competing claims about the newness not just of “new media” or “digital media” (terms sometimes used synonymously) but of its cultural reception and use. It thus reflects a widely accepted periodization by which, when online media piracy is discussed by academics, by policy makers, or in popular discourse, it is the piracy of the present that matters. Accounts of online media piracy overwhelmingly situate it in the present, and in discussions of rapidly changing digital media practices and their impact. Before embarking on this project, I would have broadly agreed with the idea that media and culture are changing more rapidly now than in the past, and by default I might well have accepted the term “digital” as periodizing what I mean by “now” in that assumption. For this reason, turning to the following accounts of media change also offers a useful challenge to my preceding arguments, which have often tacitly framed online media piracy in those terms.

Formation 1: Technological Experience

Having acknowledged that the pace of media change does seem (to me) more rapid now than it once was, I should also acknowledge that my own present-tense experience of that change is undoubtedly part of that certainty, and other perspectives clearly exist. David Morley draws on Steven Kern to argue that, “in proportional terms, the increase in numbers

and distances travelled” by people in the late nineteenth century was “far more radical” than anything experienced in recent years, and that “rates of technical change in the period 1880-1910... were far higher, proportionately, than those of recent years” (2012, 88). Documents like Alan Varney’s “chronology of Telegraph, Telephone and Radiotelephone” support this (Varney n.d.), showing another period of dramatic technological change that had far-reaching, and continuing, cultural effects. But the experience of those changes, or how those big names and events were temporally experienced, is not something I can access. I think Morley overstates his thesis that the present is not “radically innovative” and instead represents relative “technological stasis” (2012, 88). Even if, as Morley suggests, my “typing with a Qwerty keyboard” is not a new technological process (88-89), everything that contextualizes that act now, or follows from it, is shaped by the difference of digital communication. This nevertheless represents an interesting challenge to my own technological experience, and similar challenges are offered by other scholars who set out to deflate vertiginous claims about the digital age. I will come back to Morley’s criticism that there is a tendency in new media studies to “focus on invention over use, acquisition over maintenance, and inevitability over choice”, when what truly matters is “how technologies are used and by whom” (2012, 89-90), but for now I want to consider more closely on what underpins this challenge.

In this section I will consider arguments that foreground the experience of media change as encapsulating the experience of modernity itself. These approaches downplay the specific difference of digital technologies in favor of continuities spanning the history of mass communication. They often prioritize the electrical revolution in communication technology over the digital one, giving crucial emphasis to the appearance of telegraph, telephone, and

radio, and thus emphasizing the period of rapid technological and “media” change in the late nineteenth and early twentieth centuries. But the approaches I am referring to here also often make the more radical claim that digital technology itself is a product of the nineteenth century.⁸⁶

Carolyn Marvin’s *When Old Technologies Were New: Thinking About Electric Communication in the Late Nineteenth Century* (1988) is a ground-breaking example of these approaches characterizing the experience of media change as fundamentally *modern*, rather than distinguishable across changes like analog to digital culture. Marvin’s history stresses a pattern of responses to new technologies as they emerge, and as their effects permeate culture. Introducing her book in 1988, which is now long enough ago to itself pose some questions about the feeling that media transformation has suddenly become urgent, Marvin writes:

We are not the first generation to wonder at the rapid and extraordinary shifts in the dimension of the world and the human relationships it contains as a result of new forms of communication, or to be surprised by the changes those shifts occasion in the regular pattern of our lives. If our own experience is unique in detail, its structure is characteristically modern. (1988, 3)

If much discussion of digital culture forgets to question its presumptions of novelty, it is nevertheless easy to be critical of Marvin’s quick extension of this point to flatten out

⁸⁶ As Thorburn and Jenkins suggest in *Rethinking Media Change*, “the nineteenth century as the site of the emergence of a new information culture and as a parallel to our own age of transitions has received extensive consideration” (2003, 12). The books they credit as flagships of this argument concerning nineteenth-century information culture include Thomas Richards, *The Imperial Archive* (1996), Tom Standage, *The Victorian Internet* (1999), James W. Cortada, *Before the Computer* (2000), Daniel R. Hendrick, *When Information Came of Age* (2000), and Doron Swade, *The Difference Engine* (2001).

differences between the nineteenth century and today, representing the computer as, in a “historical sense”, “no more than an instantaneous telegraph with a prodigious memory”, and all its associated “communications inventions” as “elaborations on the telegraph’s original work” (3). The expansions of digital culture since the 1990s make this latter claim less convincing, but we need to remember that the “computer” she is describing is from the mid-to-late-1980s.

The substance of Marvin’s analysis focuses on how media change always exceeds technical questions, and instead involves a complex of cultural and social fields with a characteristically modern sense of urgency. She offers five themes which all can suggest parallels between the impact and effects of electrical and digital communication: expertise, progress, transformed embodiment, media spectacle, and space-time compression. Each seems familiar today even when explained through nineteenth-century examples, so I will avoid recounting them in order to single out some particularly useful comparisons.

The expertise that interests Marvin involves marking a moment in communication history as “new” – verifying its significance, translating its impact for various audiences, and establishing forms of consequent knowledge. What Marvin calls “technological literacy as social currency” in the context of the electric revolution encompasses scientists and a hierarchy of engineers and technicians, but also support for both groups of “electrical experts” amongst “cadres of operatives... striving to attach themselves” to the authority of this network of new forms of knowledge (1988, 10): journalists, editorialists, and other social commentators invested in “an expanding and varied culture of electricity through the larger society” (11). Marvin’s account of the relations between “popular and expert

culture”, including “how skills and techniques for performing particular literate practices are transferred from communities of adepts to less skilled communities” (1988, 14), can be used to think about how the skills and tactics of online media piracy have disseminated through everyday mainstream media use. They are no less useful than parallels between online media piracy and earlier forms of expertise that agitated against certain forms of industrially controlled knowledge – like the evolution of both “ham” and “pirate” radio alongside commercial radio broadcasting.

Certainly “technological literacy as social currency” (1988, 15) seems an apt framework for understanding the relations between, and impact of, expert inventors (like Jobs or Fanning) and expert interpreters (like Stewart Brand or Clay Shirky),⁸⁷ but it also comprehends other kinds of expertise, including those contesting how literacy should be used (like Lawrence Lessig, perhaps, or the founders of TPB). Marvin also uses an opposition between “insiders and outsiders” (1988, 15-17) to discuss the way experts and their training established the knowledge proper to the times. A parallel is clearly available distinguishing between “early adopters” of digital technologies and those who await their possible mainstreaming. Online pirates are often discussed as early adopters (for example, Choi and Perez 2007; Lobato and Meese 2016; Tufekci 2016),⁸⁸ and in Marvin’s account too the diffusion of electrical technologies also required official and unofficial forms of educating the general public. Communication in publicly accessible language and popular demonstrations of electrical

⁸⁷ For discussion of the legal contestations around inventing communications technologies that developed the U.S. patent system, see Slack (1984) and Beauchamp (2010).

⁸⁸ The term “early adopters” comes from Everett Rogers’ 1962 *Diffusion of Innovations*, where it describes the people who follow innovators. Importantly for the popularity of this term in discussion of digital technology, early adoption is, for Rogers, the phase of diffusion in which direct peer-to-peer recommendation and evaluation are key (Rogers 2003, 274).

ingenuity helped lay forms of expertise develop, and enabled mobility between the public, amateur insiders, and expanding types of expert professionals. Napster's forms of self-promotion amid the consolidation of home-computing accomplished all these tasks to some degree, furthered by the campaigns of next-generation file-sharing services that invited users to overcome economic and geographical barriers through piracy.

Both electrical and digital communication offer a leap forward in standardizing how people communicate – not only with what tools and in what languages but with what content. As Marvin puts it:

The most admired feats of the telephone, cinema, electric light, phonograph, and wireless were their wonderful abilities to extend messages effortlessly and instantaneously across time and space and to reproduce live sounds and images without any loss of content, at least by the standards of the day.... But wherever these extraordinarily sensitive new nerve nets extended, there was little genuine sense of cultural encounter and exchange... newly accessible lands and people... appeared as islands of cultural anomaly that new techniques of communication made available for absorption into the mainstream. (1988, 191)

Film and broadcasting also gave rise to particular forms of institutional and lay expertise, manifesting a drive towards progress and its attendant anxieties, and given meaning by spectacular forms of popular novelty and attendant forms of awe, nostalgia and alienation. They also facilitated cultural homogenization, not only offering standardized tools for communication and representation but through those tools standardizing expectations about content. This doesn't just mean genres, but the representation of ordinary concerns and interests, confirmed by ties between technologies and the social institutions they either

produced or rearranged. While both governments and industrial/economic interests have set limits on what can be on television, for example, regulating access to television and establishing boundaries around what counts as television, television also foregrounds particular kinds of popular culture as appropriate to televisual representation and thus television viewers (see chapter two). Marvin's argument helps us think about not only the experience of new technologies, but about the life of popular technologies in their dominant phase.

The imagination of an electrical future Marvin maps through both insider and popular representations utilized a progress rhetoric of "limitless... improvement" (1988, 64), and without collapsing these moments of technological change we can take Marvin's themes as prompts for questions about the mainstreaming of online piracy, and rhetorical alternatives invoked in the process of its diffusion. Among Marvin's other themes, one often taken up to discuss online media piracy is cultural homogenization, of which piracy is, as I discussed in chapter four, represented as both symptom and tool. The tensions arising around this idea are also key to Marvin's much later essay on "context collapse in a mobilized age", where she returns to the experience of media change, this time with reference to digital culture (Marvin 2013). This essay is particularly important because Marvin's book on electricity is such a benchmark in narratives about the "old-ness" of the new media experience.

Here, Marvin stresses the impact of digital mobile media on "social distance", meaning "the cultural imaginary within which an individual's coordinates of social status and contingent social location allow or inhibit contact with similarly and dissimilarly located others" (2013, 153). She calls this impact "context collapse", citing Michael Wesch (2009), and highlights

new social knowledges and arrangements emerging from digital culture (Marvin 2013, 154), which she refers to elsewhere as new “structures of feeling” (Marvin and Hong 2017, 1). This collapse “is instigated by a distinctive combination of affordances: deep connectivity, the accelerated speed and volume of communicative exchange, enhanced social legibility and asymmetric communicative transparency” (Marvin 2013, 153). Situating the digital as another “world-historical” set of communications technologies, Marvin also stresses the difficulty of writing its history:

the digital transformation unfolding at different velocities and levels of awareness around us is a game-changer. It has taken time to cross the threshold of visibility; it will chew up the old ways for a long time to come. Appreciating the scope of its impact, the multiplicity of its causes, its countertrends and uncertain consequences will take longer still. The chatter we offer about it along the way is a fascinating and sometimes comically deluded part of the process. (2013, 154)

The epochal difference digital communication involves, for Marvin, is its defining of and collapsing of boundaries between “public and private space”. The ways “technology transforms social distances we are invested in is an old story” (155), but if “broadcasting deposited socially distant worlds in domestic space, upending older codes of discretion and trust” (2013, 155) that electricity itself had not challenged (Marvin 1988, 162-63), the changes the digital involves are as yet not entirely clear.

In “Re-Newing Old Technologies: Astonishment, Second Nature, and the Uncanny in Technology from the Previous Turn-of-the-Century”, an essay included in Thorburn and Jenkins’ *Rethinking Media Change* (2003), Tom Gunning uses Marvin’s early work to introduce what he understands to be the categorical importance of technological

estrangement to the experience of modernity. He outlines “a cultural history of technology” centered on the tension between “old and new” and a “general line from amazement to habit” (Gunning 2003, 39). This argument is suggestive for writing the history of online media piracy, which clearly has its own arc from amazement to habit, even if no one single line (and no completed line) could be traced to explain this. As Jennifer Slack and J. Macgregor Wise suggest, technological “wants and luxuries become necessities” as they “become habits deeply entrenched in the way that culture is organized” (2015, 40).

Gunning draws many of his key examples from national or world Expositions/Exhibitions, in which amazing technological innovations are put on display for the wonder, enjoyment and speculation of mass audiences – from Ferris Wheels to washing machines. Here, Gunning writes, new technologies are presented “in the form of magic” (2003, 40), and more generally the Exposition format was a space for developing “newness and amazement” as “a mode of reception for technology” (40). Theorists of modernity have often noted the high value placed on the new – even at the expense of excellence or utility – as characteristic of modernity. I want to use Gunning’s emphasis on the interrelation of astonishment and familiarity, in which novelty alone can have only limited force and must give way to second nature utility; to invisible habits. Gunning writes:

A discourse of wonder draws our attention to new technology, not simply as a tool, but precisely as a spectacle, less as something that performs a useful task than as something that astounds us by performing in a way that seemed unlikely or magical before. (2003, 45)

If we might write about the Internet’s “move from dazzling appearance to nearly transparent utility, from the spectacular and astonishing to the convenient and

unremarkable” (Gunning 2003, 39),⁸⁹ this does not quite so easily suit online media piracy. I have stressed how piracy is used (today) within a convenience calculus, but many forms of what could be labelled online media piracy have historically been displaced (like peer-networked music downloading sites), or have been forcefully quelled (like the Aereo, as I discuss in chapter one). Even where amazement gives way to habit, with obsolescence around the corner, making Gunning’s formulation especially apt, there are other forces in play.

Recall the opening to Witt’s book as an exemplary memoir of an online media pirate. Napster’s rapid success is clearly figured as wonderful spectacle, and Witt discusses the dizzying novelty of pirating music in amazement at his own escalating pirate collection – 2-gigabytes, six x 20-gigabytes, 1,500 gigabytes... The fact that he doesn’t consume these audio-files underlines that they are expressions of amazement rather than acquisition of desired content (or at least that’s how Witt’s framing of his experience now makes them appear). “Convenience” does not seem to be central in technology overcoming limits in wondrous ways and the rapid suppression of Napster forestalled any possibility of it becoming entirely habitual. Its dispersal into a range of continually displaced and replaced alternatives – Grokster, Kazaa, LimeWire, etc. – might have dispersed some of its novelty. But Witt’s story suggests that what happens is not habituation but a transformation from wonder to uselessness. Witt stops, realizing that he didn’t know why he pirated music he did

⁸⁹ We might refer this to During’s study of magic, which explicitly connects “secular magic” and film and offers a number of suggestive comparisons for understanding the expansion of digital communication, for example in his argument that “Because magic shows require so few competencies to enjoy, they move easily across cultural and linguistic barriers” (2002, 2). During positions film as “one of those cultural technologies that absorb and displace the magic assemblage” (261), being both wondrous and obviously illusory at the same time and thus always fending of the habituation that the Internet instead has pursued.

not want. A new technology, as Gunning accounts for it, “opens with heightened astonishment, gradually fading into understanding as the dazzle of the first encounter yields to knowledge” (41). But the struggle against anti-circumvention measures means that no piracy tool becomes so entirely invisible to its users. File-sharing in its unauthorized forms is always being kept visible by strategies of spoiling and poisoning (chapter three) and by the disappearance of piracy resources as well as the appearance of new anti-piracy measures. This both keeps the experience somewhat novel and prevents the habituation that Gunning sees as characteristic of other technologies, even if piracy can still be read as “ordinary” in many respects.

The final point I want to draw from Gunning is his premise that “technology in the modern age has a direct relation to the phenomenon of innovation and novelty, and therefore to what makes the modern age modern” (2003, 39). This is part of Marvin’s interest too (1988, 150). It draws on Gunning’s earlier work on the “cinema of attractions”, in which the spectacle of early cinema’s novelty was part of what first drew mass audiences; even the most ground-breaking film could never be so novel or unfamiliar now (see Gunning 1994; see also During 2002). However, Gunning goes further than describing a media arc from amazement to familiarity to “disenchantment”. He also wants to ask what *makes* something “new”. Gunning takes his understanding of the invisibility of the not-new tool from Martin Heidegger’s philosophical work on technology (1954, 1962), and one of the key points of this theory, as read by Gunning, is that a tool can only become invisible/habitual while it works.

The struggle for continual access to working versions of piracy tools ahead of their disruption by anti-piracy measures, and the struggle to maintain their working operation in the face of blockage and disruption, keeps online piracy tools literally visible. Users have to keep looking for them or for new ways to access them. In the short-term, online media piracy may begin to feel habitual, as the respondents in Francesca da Rimini and Jonathan Marshall's study (2014) suggest is the case for them, but this is a problem with any synchronous study. Continual monitoring of the kinds apparent in the MUSO reports, and in the legal cases discussed in the Appendix, indicates that piracy resources are always somewhat impermanent. Da Rimini and Marshall's respondents would likely feel their piracy practices were less habitual and ordinary if their particular chosen method was suddenly made impossible by some legal or technical change. Online media piracy is performed by a tool-set in need of continual monitoring and updating, which is one of the ways in which platforms like Netflix can come to seem more convenient, even if the library of content they offer is much more limited. Authorized download and streaming tools may become habitual, and build new expectations, in Slack and Wise's sense, but only once drawn away from this struggle against disruption. Only as authorized processes requiring no ongoing special effort can they begin to fade into the background of content acquisition. Online media piracy remains new, in Gunning's terms, and thus burdened by a tension between effort and novelty that demands insider-experts, who need other kinds of commitments than astonishment (even at their own success) to keep working on maintenance or improvement of piracy resources.⁹⁰

⁹⁰ Electrical and later technological experts, Marvin notes in her epilogue, "are social actors with a variety of loyalties" that "cannot be fully understood without attention to their efforts and aspirations" (1988, 232).

The analogies between the electrical experts Marvin discusses and those in the world of digital innovation today include “their concern to preserve a familiar social order whose advantages to them were enhanced by technology,” making them “bellwethers of their society, not apart from it” (1988, 233). But while online media pirates can also only be comprehended as part of their social context, once again un-authorization makes a difference. Even at their most banal, piracy practices operate at a margin that means, while technology advantages them in at least some respects, it is also continually employed to pursue and defeat them. The convenient obscurity that consigns them to the margins, except where they have become case law, sets them apart from Marvin’s institutionalized experts. Both the mobility of online media piracy practices (and the vicarious chains by which they might be able exploit ingenuity for profit) set digital pirates apart from such institutionally authorized experts as much as its mobility sets digital communication apart from the wired and broadcast forms of electrical communication that preceded it.

If piracy cannot become habitual because it cannot remain “ready to hand” long enough to become banal, piracy also may exceed any tools. Piracy itself is not a tool but a practice, or a project. In this sense, while I have argued that the idea that “media pirates” are a subculture or an identity is flawed, it may be reasonable to discuss piracy as an orientation. For some users/creators, a commitment to piracy may be an orientation to media consumption, involving a commitment to which any specific tool or any content acquired may be secondary. As the quotation from Witt also suggests, this is not an identity, and such an orientation can end. It is also unlikely to be generally shared, which is why traffic on illegal downloading/streaming sites is directly affected by legal versions of the same access. However, in this sense, the anti-piracy endeavors that work to block the smooth operations

of piracy sites may themselves continually make the need for that project visible and help produce new committed “pirates”:

It is the breakdown of equipment that allows us to experience it afresh. The interruption makes the project itself explicit. When a tool is missing “our circumspection comes up against emptiness, and now sees for the first time what the missing article was ready-to-hand with and what it was ready-to-hand for. The environment announces itself afresh” (Gunning 2003, 45, quoting Heidegger 1962, 105).

Gunning’s account of the relation between novelty and technology doesn’t rely on claiming any moment of media transformation as the most transformative. Instead it is concerned with a normalized desire for experiences of novelty which is continually shadowed by feelings of unease, alienation or, as he argues after Sigmund Freud (1953), “the uncanny” that reminds the subject of modernity of the limits of their own knowledge. Although beginning with Marvin, Gunning ends with Freud and thus by representing an endlessly repeated modern experience *of* media change. I have tried to show the provocative usefulness of this idea, which depends on the way it focuses on the presentist experience of new technologies (or broken ones), even as it also erases the specific contexts that make piracy “piracy”, including questions about its legality.

Formation 2: Media Archaeology

Lisa Gitelman’s *Always Already New: Media, History, and the Data of Culture* (2006) takes on the challenge of disputing the importance of disjunction between different periods in media history and discounting cultural presentism. Gitelman suggests that by turning “The Case of

Phonographs” against “The Question of the Web” she can “challenge readers to imagine what a meaningful history of today’s new media might eventually look like” (2006, 1). In particular, she contends, the contemporary narratives of radical change centered on the Internet might look quite different with such a broader historical view (1), rejecting the way “today’s new media, in particular, tend casually to be conceived of as what might be called the end of media history” (3). Gitelman describes this project as a survey of how media can be historicized:

Is the history of media first and foremost the history of technological methods and devices? Or is the history of media better understood as the story of modern ideas of communication? Or is it about modes and habits of perception? Or about political choices and structures? Should we be looking for a sequence of separate “ages” with ruptures, revolutions, or paradigm shifts in between, or should we be seeing more of an evolution? A progress? (2006, 1)

In approaching the relation between progress and change Gitelman stresses innovation – “whether that somewhere gets described broadly as a matter of supervening social necessity, or narrowly in reference to some proverbial drawing board and a round or two of beta testing” (2006, 5) – but also historical practices of use.⁹¹

One of Gitelman’s points is that no form of media occupies only one historical location, either in how it is used or how it is produced. Although new media “comes from somewhere” (2006, 3), any account of the conditions that enabled it is bound to simplify matters, and any attempt at that history will probably take on “a prevailing mode” of

⁹¹ Gitelman’s discussion of use could refer to, although she doesn’t draw this connection, Heidegger’s idea of habituation. Discussing the use of technology she claims, for example, that no one thinks about a phone as they use it (2006, 5-6), and also that the work done by new technology is always intensely visible (6).

analysis which cedes to “media” themselves a determining role in history by identifying them “as or with technologies” (2006, 2-3). For example, landscape photography is understood as determined by photography rather than landscape art (6) or, for my project, torrenting could be seen as determined by the BitTorrent protocol rather than by its relation to piracy. I have already suggested, with reference to Foucault, that this is a useful recognition. Where such reduction takes the present as a determining end-point, it also risks a narcissistic sort of cultural presentism – so that only the most of-the-moment circumvention tactics would define my discussion.

However, Gitelman suggests that such a probably flawed attempt at historicizing media might still be useful, if it avoids reification of technologies and remembers the historical social frames that inform how even the newest technologies are used (2006, 6-7). This is the problem she identifies with “the oddly perennial newness of today’s new media” (3); a form of presentism that rests on an elegiac attitude and assumes that the digital will subsume all other forms of media (3). We can see echoes in this position of the critique of “convergence culture studies” by James Hay, Nick Couldry, and others discussed in the introduction (Hay and Couldry 2011). By contrast, Gitelman argues, a productive media history will be:

social and cultural, not the stories of how one technology leads to another, or of isolated geniuses working their magic on the world. Any full accounting will require, as William Uricchio puts it, “an embrace of multiplicity, complexity and even contradiction if sense is to be made of such” pervasive and dynamic cultural phenomena. (2006, 7)

These tensions are resolved, Gitelman suggests, by prioritizing the case study, because specificity and context are imperative in isolating precisely what moment's new media is being discussed –for whom is it new, and in what way is its newness understood.

Gitelman insists that

specificity is key Rather than static, blunt, and unchanging technology, every medium involves a “sequence of displacements and obsolescences, part of the delirious operations of modernization,” as Jonathan Crary puts it. Consider again how fast digital media are changing today. Media, it should be clear, are very particular sites for very particular, importantly social as well as historically and culturally specific experiences of meaning” (2006, 8).

A fuller quotation from this Crary text will help develop the connections between Gitelman's, Gunning's and Marvin's arguments. Crary claims that “for the last 100 years perceptual modalities have been and continue to be in a state of perpetual transformation, or some might claim, a state of crisis.” (1999, 13). This is especially so for vision, so that “what we familiarly refer to, for example, as film, photograph, and television are transient elements within an accelerating sequence of displacements and obsolescences, part of the delirious operations of modernization” (13). In the place of “any stable or enduring structure of perception”, Crary posits, “a disciplinary regime of attentiveness” appears (1999, 13). We could see this regime in either Gunning's cinema of attractions or in the novelty on which Gitelman is focused. Extrapolating from Crary, Gitelman concludes that we must avoid both technological and economic determinism (2006, 9) and emphasize the conceptual frameworks by which media is understood and used. Practically this means that her discussion of “the Web... opens a narrow window, 1968–1972, in order to glimpse a new

medium at its newest” before turning to “later, more popular uses of still-emergent digital media” (2006, 21), but always interested in how the media form historicizes itself.

This focus on specificity also brings Gitelman to the relation between media and intellectual property. Discussing the emergence of the phonograph she notes that, “like MP3 files and file-sharing technology for downloading music, the new medium distributed music in a new format, challenging existing market structures and provoking... bitter disputes over intellectual property” (2006, 18). Having made this point, however, she sets the phonograph-MP3 comparison aside as “pretty glib” (19), by inference because, despite this useful comparison, specificity has been lost. In explaining this commitment, Gitelman gives a central place to Benjamin’s model of historical research. She quotes his study of early twentieth-century shopping arcades, published posthumously as *The Arcades Project* (1999): “the present determines where, in the object from the past, that object’s fore-history and after-history diverge so as to circumscribe its nucleus.” (Benjamin 1999, 476; quoted in Gitelman 2006, 8). Considering this claim for my own field of inquiry, any form of online media piracy with which I engage would be thought to determine, through close examination of how it is used (or put into practice), the history which is appropriate to it. The specific social context and cultural practices will determine which technological, economic, or legal histories should be considered in its analysis.

While *The Arcades Project* is not primarily focused on popular media, Benjamin’s approach to the history of cultural forms is worth considering here. One of his symbols of the modern is the Expositions spectacle of change that Gunning (2003) also uses as a frame for understanding the strange attractions of the new. As Susan Buck-Morss describes the 1937

Paris exposition, with close reference to which Benjamin was writing, it displayed “the latest ‘advances’ in technology, which included this time not only radio, cinema, television, phonographs, electricity, gas, and air travel, but also biogenetics, x-ray technology and the new, wonder insulation, asbestos” (Buck-Morss 1989, 324). Benjamin writes this history by continually asking about the affordances introduced by new *materials* – by film or new forms of iron – new uses of materials – such as cinema, or new engineered conjunctions of iron and glass – and also new distributions of material – like forms of global trade, or cultural collecting. Buck-Morss discusses this as a form of “materialist pedagogy” (1989, 287ff). *The Arcades Project* itself is especially interested in new experiences of the city, encompassing new regimes of commodification and exchange, new forms of social interaction and urban life. All these changes are afforded, in Benjamin’s account, by the new “shopping arcades”, which he describes as, especially in their continual transformation, “the mold from which the image of ‘the modern’ is cast” (Benjamin 1999, 546). Nevertheless, this is not every possible version of the modern: “Every epoch appears to itself inescapably modern – but each one has the right to be taken thus” (Benjamin 1999, 546).

Marvin, Gunning, Gitelman, and Benjamin all establish links between new technologies and how we are subjects of history. They all position modernity an experience of ongoing change; of difference from even the immediate past. This sensibility is apparent in discussions of new media, and these scholars help us understand why this must be the case. This also reflects the historical formation of content industries, shaped by the imperative to be in the present today as much as they were in the modernist Expositions discussed by

Marvin, Gunning and Benjamin.⁹² Although Marvin's approach to the history of media seems to be one Gitelman would criticize (there is a reference, but only a passing one), Marvin also agrees that social meanings are crucial in accounting for media change: "new electrical inventions and ways of thinking about electricity were given shape and meaning by being grafted onto existing rules and expectations about the structure of social relations" (Marvin 1988, 232-233). In different ways all of these authors relate to the more recently popular approach to writing media history under the label media archaeology.

Gitelman connects her own work and media archaeology through their shared investment in case studies, but with a qualification:

By amplifying two specific case studies, one past and one more present, the shape of this book resembles and appreciates the "media archaeologies" produced by a number of recent critics. As Geert Lovink generalizes the archaeological perspective, "Media archaeology is first and foremost a methodology, a hermeneutic reading of the 'new' against the grain of the past, rather than a telling of the histories of technologies from past to present." By reading digital media "into history, not the other way around," Lovink suggests, the media archaeologist seeks a built-in refusal of teleology, of narrative explanations that smack structurally of the impositions of metahistory. (Gitelman 2006, 11, citing Lovink 2011, 11)

However, Gitelman also criticizes the historical method of Friedrich Kittler, one of the most influential writers for media archaeologists. Overviewing the sources Kittler considers,

⁹² Here I am reminded of one of Marvin's archival documents, an interview with Erastus Wiman, "the president of the Canadian telegraph system", for "the New York Electric Club in 1899", in which Wiman exhorts: "The means of communication which are the signs of the highest forms of civilization... are the most perfect by aid of electricity simply because they are instantaneous. There is no competition against instantaneousness." (in Marvin 1988:, 193).

Gitelman concludes that what matters “is less that Kittler overstates and undercites” than his presentist technological determinism (2006, 10). While media archaeology is “rightfully mindful of historical narrative as a cultural production of the present”, Gitelman stresses that her own case studies demonstrate history is “no less of a cultural production in the past than it is in the present” (11-12). These observations are not mutually exclusive, but Gitelman’s caution emphasizes concern over the tendency to prioritize the present in cultural analysis – a concern media archaeology certainly shares.

Erkki Huhtamo and Jussi Parikka acknowledge media archaeology’s close relation to studies engaged with the “newness” of new media, but argue that these too often disregard the past (2011, 1).⁹³ The media archaeology approach is thus also intimately related to about the above discussions of the modern experience of technology, but prioritizing uncanniness over vertiginous change. Huhtamo and Parikka argue that:

Rather than getting caught up in speed... we must analyze, as we try to grasp a present that is always degenerating, the ways in which ephemerality is made to endure. What is surprising is not that digital media fade but rather that they stay at all and that we stay transfixed by our screens (2011, 200).

As Thomas Elsaesser notes, “almost every writer’s definitions of Media Archaeology includes an objection to teleology and linearity, doubts that have their common root in [a] loss of faith in unlimited progress and human self-perfection” that he associates with critique of progress and a “crisis in history and causality” (Elsaesser 2016, 188).⁹⁴ Huhtamo and Parikka

⁹³ Monea and Packer describe Huhtamo and Parikka’s text as “for many... the first English-language aggregation of media studies scholarship operating under the banner of media archaeology” (2016, 3142).

⁹⁴ The latter is a critique, for Elsaesser, of “mono-causality”, involving “A Kittlerian line of attack” which argues “that a historiography that relies on chronological narratives merely reflects the cultural technology of writing and script, and thus is based on print as its medium, thereby proving itself not to be universal or necessarily

critique media studies in particular for avoiding historical context (for presentism), and they identify two necessary emphases. The first is theoretical self-consciousness, and the second involves looking for “unnoticed continuities and ruptures” and for “alternate histories of suppressed, neglected, and forgotten media that do not point teleologically to the present media-cultural condition as their ‘perfection’ (2011, 2).⁹⁵ From this perspective, what media archaeology should not do is try to tell a linear story about development, but it seems harder to pin down what it must do beyond that eclectic discovery.

In *What is Media Archaeology* (2012), Parikka describes the “archaeology” in media archaeology as a method that involves “digging into the background reasons why a certain object, statement, discourse or, for instance in our case, media apparatus or use habit is able to be born and be picked up and sustain itself in a cultural situation” (2012, 6).

Elsaesser (2016) gestures to the extensive array of publications that could be understood as media archaeology in this sense since Crary’s *Techniques of the Observer* (1990), which “breathe the spirit of Media Archaeology, even where they do not carry the words in the title or indeed use them in the text” (Elsaesser 2016, 182). Fending off some very broad claims for the field, Elsaesser stresses the consistent reference to both Foucault and Benjamin as well as the “the mercurial influence” of Kittler (182), and behind them the antecedent influences of Friedrich Nietzsche and Heidegger (183). It seems worth dwelling on how such a history could be written of online media piracy. On the techno-materialist

true, but historically determined. If historians have – until quite recently – been reluctant to accept as valid evidence material that could not be presented in the form of written documents or printed sources, this surely cannot be right for media history” (2016, 189).

⁹⁵ Huhtamo and Parikka refer to Benjamin as “arguably the most prominent forerunner – beside Foucault – of media-archaeological modes of cultural knowledge” (6) in this sense, and *The Arcades Project* as a model for media archaeology in its reliance “on a multitude of sources, including texts, illustrations, urban environments, architecture, public spectacles like the panorama and the diorama, and objects deemed to be emblematic of the era” (2011, 7).

side it would be possible to search out the physical residue of online media piracy, such as the mp3s Witt found, or the hard drives he and others kept. De Kosnick's interest in how piracy works as collection (for some people) could take a historicist turn and analyze pirate collections. Formats themselves could be a focus, investigating obsolescent protocols and platforms for the futures of piracy not taken up, or the Internet Archive and Wayback Machine versions of UseNet and similar communities where people traded materials could be mined for what they tell us, not about piracy today, but the historical period to which they belonged. All of these would be interesting stories.

Taking up Parikka's definition, Monea and Packer (2016) identify the origins of "media archaeology" in the work of Kittler, Wolfgang Ernst, and Siegfried Zielinski, before arguing that it "needs to be politicized" (3141), in terms that should remind us again of Hay and Couldry's critique of convergence culture. Monea and Packer want to approach "media as encompassing a much broader range of technologies, all of which served to articulate and link things together in networks of forces, practices, knowledge, and institutions," stressing (usefully for a discussion of online media piracy) that "even infrastructures were always already media" (Monea and Packer 2016, 3152). Given that the "archaeological component of media archaeology is always Foucauldian in its origins" (3142), they set out to politicize media archaeology by distinguishing between Foucault's archaeological and genealogical methods, stressing the latter's "investment in the analysis of power — or more specifically, technologies of power, technologies of governance, and technologies of the self" (Monea and Packer 2016, 3141). While this politicization turns out to be largely terminological, given that they argue the best media archaeology work is already genealogical (2016, 3142-43),

stressing this change of emphasis prompts a particularly interesting definition of the media archaeology approach.

Monea and Packer distinguish between media archaeology which can “articulate the specific affordances and constraints of a technical media apparatus’ functions of capture, processing, storage, and transmission”, and media genealogy, which will “articulate the clashes of power that resulted as multiple technologies were (counter)posed as potential solutions within a problematic field, and thus trace the emergence of a stabilized (socio)technical apparatus.” (3145-46). One way of using this approach for online media piracy would be through the series of legal cases discussed in the Appendix which have ruled some technologies in and some out of “piracy”, confining others to particular kinds of use. Or more specifically, within this, I might focus on concrete instances what Dan Burk calls the process of “inventing around” IP law, by which he accounts for much innovation in online media piracy.

Monea and Packer’s criticism is that media archaeology focuses on technical/scientific forms and their affordances (techno-materialism), in contrast to which they want to focus on fields of power. But while online media piracy tools and other resources do take their meaning from fields in which a confluence of forces interact – IP laws, technical know-how, economic resources, activists and industries – considering Foucault’s definition of “apparatus”, the approach they ascribe to archaeology might actually produce this but add to it a wider set of concerns. Foucault explains what he calls a *dispositif*, or discursive apparatus, as follows:

firstly, a thoroughly heterogenous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific

statements, philosophical, moral and philanthropic propositions – in short, the said as much as the unsaid. Secondly... the nature of the connection that can exist between these heterogenous elements. Thus, a particular discourse can figure at one time as the programme of an institution, and at another it can function as a means of justifying or masking a practice which itself remains silent, or as a secondary re-interpretation of this practice, opening out for it a new field of rationality.... a sort of interplay of shifts of position and modifications of function which can also vary very widely. Thirdly, I understand by the term “apparatus” a... formation which has as its major function at a given historical moment that of responding to an urgent need. The apparatus thus has a dominant strategic function. (Foucault 1977b, 194-95)

The apparatus/dispositif in this sense might address the relation between fields of power that I described above, but this is not its only possible focus. This broader view seems important for the analysis of changing cultural practices.

As Elsaesser accounts for media archaeology’s impact, and its problems, the “reverse-engineered history” that results from “the discovery of meaningful patterns” in past media “turns unforeseen consequences retrospectively into causal agents not only in order to eliminate what might have been, in favor of what has been, but also in order to predict and pre-empt the future”, and leaves behind “as unclaimed residue what is of interest to media archaeologists” (2016, 190). In a useful reflection on what this means for appreciating the heterogeneity of the conditions of possibility for particular media forms, Elsaesser argues that presuming heterogeneity from the beginning, in this way, and “*modelling multiple determinations – or ‘multiple variables in simultaneous interaction’*”, also “carries within

itself the very principles it is supposed to investigate, thereby... reflecting the prejudices and preferences of our present age” (191, original emphasis).

Formation 3: Cultural Determinism

It goes to the heart of the debates about technological determinism that technologies have to be not just *available* but *known* in order to affect media change. Just as Marvin’s nineteenth-century electrical experts could hardly imagine a version of radio technology that was independent of wires, or which operated as a continually broadcast flow of information (1988, 231), new digital tools are initially imagined as resembling familiar ones. Facebook was conceived as an interactive online photo album, as its name suggests, and TPB is imagined as a safe harbor where those who dare to steal from the flow of commercially traded content can store their goods for circulation in an informal economy. However, the technological experimentations that these familiar frames of reference name are more speculative. As Marvin reports, in 1921 neither the soon-to-be-head of AT&T nor the corporate head of Bell Telephone could imagine radio as something that operated independently of telephones (Marvin 1988: 230-231), and the industrial strategies of the MPAA are still playing catch-up with the experiments of pirate entrepreneurs.

In this final section, I want to return to the question of technological determinism raised in the introduction. If it is difficult to write about online media piracy because it is an endlessly shifting field tied tightly to historical contexts, every version of that field confronts the determinist question. In his critique of the technological determinism he thinks characterizes convergence narratives, Morley argues that “we need to focus on how technologies are instituted in specific localities, under particular cultural, economic and

political circumstances, rather than on digitalization in general, or on cyberspace in the abstract” (2012, 85). Elsaesser agrees that:

A change in media technology, so the determinist argument would go, will invariably bring with it a change in models of reality, of the mind and of the conceptual means by which we interpret both mind and reality. No universe as a clockwork and God as a watchmaker without the mechanical timepiece; no Descartes dividing the world into *res cogitans* and *res extensa* without the telescope. (2016, 189)

Presentist tensions seem inescapable in discussions of new media, which undoubtedly encompasses online media piracy, but this determinist question seems equally inescapable.

In the sense that it evaluates claims about what makes “new media” *new*, the media change framework is indebted to a pragmatic cultural studies approach to media, associated with people like Harold Innes and James Carey.⁹⁶ In *Communication as Culture*, Carey argues that with digital technology “we are dealing with an old story rather than a new one”, and that the “computer and satellite” are the “latest chapter in an old tale” (1989, 2; see also Carey and Quirk 1989). While critical of analysis that emphasizes “the revolutions and ruptures that come with electronic communication” (Carey 1989, 2), Carey doesn’t focus on debates about presentism or linearity. Instead, he aims to move “beyond happy pastorals of progress or grim narratives of power and domination” to discuss technology as “thoroughly cultural from the outset: an expression and creation of the very outlooks and aspirations we pretend it merely demonstrates” and “not merely instruments of will but definite forms of

⁹⁶ In their respective studies of the historical-cultural impact of, for example, the organization of trade and transport (Innes 1995), or of communications media like the newspaper and the telegraph (Carey 1989), are as focused on the context from which any change appears as any media archaeologist, but tend to focus on dominant formations (dominant now or in the past).

life” (7). In describing technology as definite forms of life, Carey is stressing that culture precedes us and also changes around us and impacts on us, even while we are contributing and responding to it. Thus, culture is “an expression and creation” of aspects of us “we pretend it merely demonstrates”; culture is not an instrument of our will but a definite form of life. Technology is cultural in just this sense.

Unlike the presentism debates, there is a degree of consensus in scholarship on new media that technology is not, itself, socially determinant. Cary is emphatic: “to cite Deleuze again, ‘Machines are social before being technical.’” (1999, 31, quoting Deleuze 1988, 13). Marvin stresses that “television’s inheritance from the electric light is both technological and social” (1988, 189). Even Kittler insists that “technical media are never the inventions of individual geniuses, but rather they are a chain of assemblages that are sometimes shot down and that sometimes crystallize” (1999, 153, quoted in Monea and Packer 2016, 3146), making them subject to cultural selection. And Slack wants to focus on the historical circumstances from which a technology emerges – “technology is developed and used in society, in the complex interplay of social forces that are at the same time both cause and effect” (Slack 1984, xv).

It is thus not particularly contentious when Morley says we must be “wary” of a “media-centric focus on the supposed effects of technologies” because we “also need to think about what people do with media technologies” (2012, 79). However, he also insists that “a critical theory of communications cannot have the media at its center without falling into technological determinism” (80). For Morley, “no technology has straightforward effects” because you need to consider “which people... see its relevance to them” and “how they

(variously) ignore or mobilize” the technology (80). Although this argument is pointedly directed at Jenkins and similar “convergence” arguments, a difficulty emerges because Jenkins, for example, would not disagree with any of these points. One of the key debates circulating around the narrative of convergence culture is how much new media technologies determine/produce the kinds of participatory culture on which writers like Jenkins focus. I should recall here that “convergence culture” is itself a theory of media change, and that both critiques of the “convergence culture” argument and the key tools for its defense hinge on media change. Jenkins, for his part, explicitly eschews technological determinism and the “excesses of ‘digital revolution’ rhetoric” (2013, 270). As Ginette Verstraete puts it, Jenkins may be idealistic about the cultural possibilities enabled by new technologies, but he refuses “to follow the old technological-industrial logic from the 1980s according to which the dynamics of integration of the Internet would gradually determine all spheres of previously unmediated culture”, and instead of this “narrow technological, deterministic approach”, he instead suggests that “future developments will greatly depend on cultural usage” (Verstraete 2011, 538). Meese, however, has made the case that user-centred analysis tends towards technological determinism (2015, 574), and Verstraete notes a contradiction, in convergence studies, where “technological cause and effect” on one side is ranged against “human freedom to do things differently” on the other (2011, 538).

In *Spreadable Media* (2013), Jenkins, Sam Ford and Joshua Green sets out to offer an account of what might be “different” in Internet-based media change. Their further development of the convergence culture model argues that a new form of media circulation has arisen, offering new meanings and functions for popular media. “Spreadable” media,

they claim, refers to “an emerging hybrid model of circulation, where a mix of top-down and bottom-up forces determine how material is shared across and among cultures in far more participatory (and messier) ways” (Jenkins, Ford, and Green 2013, 1). This “messier” form of distribution – which is also Verstraete’s “smarter consumption” – does align in some respects with my understanding of content acquisition, because it aligns with any narrative about active choices among media audiences, including piracy. Even content that is produced by one of a “small number of producers” who “create discrete and finished products for mass audiences” (Jenkins, Ford, and Green 2013, 1; see also Verstraete 2011) have their methods of distribution, monetization, and control over their product complicated by higher levels of audience autonomy in a media world increasingly shaped by digital consumption, both authorized and unauthorized.

For Couldry, the problem is not that “convergence” has no value in identifying “important shifts in media’s material conditions”, but that writers such as Jenkins, Castells, and Shirky have “seen in those conditions the leaping-off point for wider accounts of cultural social and political change” (2011, 487). My more “modest proposal”, to use Couldry’s terms, is that changes in the use of popular media which are also changes in the practices of everyday life can lead to changes in popular content industries. These changes are not necessarily linked to any revolutionary social agenda or transition, although they may be incrementally substantial in industrial terms. Where such changes expose a lack of fit between everyday practices of media use and the operations of large scale content industries – industries that because of their scale and historical density are necessarily characterized by some degree of inertia – they may, as the piracy wars demonstrate, raise unforeseen public conversations about the significance of popular culture and its role in a social contract of continuity.

Couldry, however, cautions against taking “changes that strike us as novel” from within a process of transformation as “necessarily the most significant indicators of future development” (2011, 493) and I agree that we cannot know, from within a moment of transformation, which of the myriad possibilities in play will be dominant in the future.⁹⁷

At one level *Spreadable Media* is clearly hedging against the criticisms of (undeclared) technological determinism that were levelled against *Convergence Culture* (Jenkins 2006a).

Jenkins et al. write:

Our approach doesn't presume that new platforms liberate people from old constraints but rather suggests that the affordances of digital media provide a catalyst for reconceptualising other aspects of culture, requiring the rethinking of social relations, the reimagining of cultural and political participation, the revision of economic expectations, and the reconfiguration of legal structures. (2013, 3)

Their understanding of “networked culture” acknowledges that these practices weren't created by digital technologies, comparing the saving and sharing of news and other media to scrapbooking and other earlier practices. But they stress that “what happened in a pre-digital world now occurs with exponentially greater speed and scope, thanks to the affordances of online social tools” (Jenkins, Ford, and Green 2013, 11). And even Gitelman agrees that “consumer” and “producer” are “inadequate” categories by which to explain the “deep definition of new media” (2006, 15). However, this inadequacy is, for Gitelman, mainly visible when a media form is new and ill-defined – which, as Marvin (2013) contends, may still be true of the Internet and digital culture despite its now substantial history. It is

⁹⁷ Couldry also notes that Jenkins's strong claims about a new media era draws on Gitelman's distinction between a “medium as a technologically based delivery system and a medium as a set of ‘associated protocols’ (2011, 490).

Jenkins' et al.'s preparedness to talk about future consequences that makes them stand out from most media and cultural studies' discussions of media change.

In some respects, I have been trying to shift this "spreadable" rethinking of convergence to the example of online media piracy. It seems a useful exercise because the increased significance of consumer control of content acquisition is important to the reconfiguring of content industries in the wake of online media piracy, however much I might not want to be aligned with the celebratory if not utopian tenor of many "convergence" arguments. If, as Jenkins, Ford and Green claim, spreadability refers to the potential – both technical and cultural – for audiences to share content for their own purposes, sometimes with the permission of rights holders, sometimes against their wishes (2013, 3), then the "against their wishes" aspect of this argument does still require acknowledgement of relatively centralized media production. Many of Jenkins et al.'s media examples – like the viral success of Susan Boyle's *Britain's Got Talent* audition performance – originate with mainstream media, just mediated and "spread" through fans' various creative practices. Spreadability, they nevertheless argue, "has expanded people's capacities" to circulate media texts and shape their media environment, even when "mass-media content remains that which spreads the furthest, the widest, and the fastest" (259).

Jenkins' defense of his work on convergence has stressed the importance of avoiding a discourse on inevitability on either technological or cultural fronts. An example of "a rhetoric of inevitability in critical studies" (2013, 274) he highlights is Richard Maxwell and Toby Miller's argument that:

The lesson of the newer media technologies is the as same print, radio and television: each one is quickly dominated by centralized and centralizing corporations, regardless of its multi-distributional potential, and each one depends on a massive contribution from the Earth and workers. (Maxwell and Miller 2011, 594, quoted in Jenkins 2013, 274).

Jenkins wonders if this is an “immutable law”, or if “there are moments of vulnerability when one system is giving into another”, and asks “what is the value of critique in a world that always must move towards the same inevitable consequences?” (Jenkins 2013, 274). Here is where I think we should recognize Jenkins, Ford, and Green’s citation of Williams in a section titled “Residual Culture” (2013, 95). In response to the illusion of complete transformation they stress that Williams “suggests that cultural change occurs at variable rates” and thus “we can be influenced by things... long after they have lost cultural centrality” (Jenkins, Ford, and Green 2013, 95, citing Williams 1977).

Although my instinct is to stress the importance of thinking about the difference of online media piracy from other fields of practice in which technologies are transformed by users, the media change frameworks I have discussed here encourage careful consideration of continuities. I want to return, in this context, to Williams’ *Television: Technology and Cultural Form* (1974), which is most widely remembered for its discussion of “television flow” (see chapter two), but is also about media change. Williams’ ideas about flow both connected television to previous forms (such as radio, which obviously offered a similar station-specific temporal flow) and acknowledged its innovations. Most broadly, Williams asks how we should understand the changes introduced by television, presenting television

as a site in relation to which we can try and understand the relations between technology and society.

Williams programmatically distinguishes here between claims that the development, funding, promotion and success of television as a concept/object/medium is effectively accidental and those that do not. On one hand, there are claims that "*Television was invented* as a result of scientific and technical research, and its power as a medium of news and entertainment *was then so great that it* altered all preceding media of news and entertainment" (Williams 1974, 11, original emphasis). On the other hand, there are claims that "Television was *discovered as a possibility* by scientific and technical research, and was then *selected for investment and development* to meet the needs of a new kind of society." (11, original emphasis) Television approached in what Williams calls a technologically determinist way presumes that "the steam engine, the automobile, television, the atomic bomb, have *made* modern man and the modern condition". The opposing argument, which he calls "symptomatic technology", suggests that technology is instead "a by-product of a social process that is otherwise determined. It only acquires effective status when it is used for purposes which are already contained in this known social process" (13). For Williams, both views are mistaken because they "depend on the isolation of technology" as a "self-acting force" (1974, 14). He proposes instead that technology is neither discovered nor found to be possible but rather developed to suit existing social conditions that it immediately affects through its coming into existence. Thinking about this model for discussing development and diffusion in terms of online media piracy, I want to reiterate my agreement with Williams that "we really do not know, in any particular case, whether, for example, we are talking about a technology or about the uses of a technology" (1974, 10).

Nevertheless, the determinism questions, Williams insists, “are not abstract questions. They form an increasingly important part of our social and cultural arguments, and they are being decided all the time in real practice, by real and effective decisions” (10).

That long paraphrase might seem to strangely deflect my own authority at the end of a doctoral thesis, but in fact I want to make an even stronger claim for the usefulness and importance of revisiting Williams’ insights when thinking about the interface between culture and technology. I want to credit the extent to which Williams foreshadows many of the insights of new media theorists. His argument is clearly related to Gitelman’s observation, also born out in the Jenkins vision of convergence, that “media and their public coevolve” (Gitelman 2006, 12). Her argument overlaps with Williams in positioning new technologies as neither invented in response to a previously unfulfilled need nor entirely constitutive of social change, but allowing that the users of new technology adapt to and alter the nature of technologies by using it. Gitelman notes, for example, that the phonograph was envisioned by Edison as largely a dictation recording machine that would make it easier to compose writing, but achieved success largely as a device for entertainment, playing back rather than recording (Gitelman 2006, 14) even while it blurred boundaries between these previously distinct forms of communication. This reinvention in the process of use is a consistent theme in studies of communication technologies.

Williams’ questions about the relationship between culture, economy and technology in the case of television in the early 1970s are also questions that can be repurposed for a consideration of online media piracy, even though it doesn’t stand on its own as a commodified technological form like television. Online media piracy is a set of changing

technologies and their uses, best understood as a symbiotic relationship between the need and space for a technology, the development of that technology, and its cultural effects. It's simplistic to say, for example, that the way piracy is operating today, across powerful barriers between nations, and driving changes to both legal and illegal consumption practices, is either a response to particular audiences or to particular distribution methods. Technological changes, legal-industrial distribution systems, and the cultural practices of users/acquirers are all integral to the set of changes we currently call online media piracy.

The stronger case I want to make for Williams' importance on this topic does not depend on breaking all the anti-presentist rules and exporting a 1970s story about television onto a story about online media piracy more than 40 years later. In fact, so far, I have used Williams' television analysis only as a model for thinking about technology in relation to culture. I now want to intersect Williams' analysis of television as a technological form that is always, and inseparably, also a social form, with his broader account of cultural change.

Directly before detailing what he means by "structures of feeling" in *Marxism and Literature* (1977), Williams overviews a now influential series of terms designed to explain the relations between culture, hegemony, and change: "dominant", "residual", and "emergent". This is an argument in which change is not a singular process – it is generally compatible with Foucault's dissensions, Crary's "displacements and obsolescences", and Gitelman's heterogeneity. These terms are not tools for a linear history, but describe simultaneous processes, representing multiple meanings and multiple histories. In seeking to understand a culture, Williams argues, we must focus on "the dynamic interrelations, at every point in the process, of historically varied and variable elements" (1977, 121). By this he (also) wants

to eschew “‘epochal’ analysis” which focusses on “determinate dominant features”, at least for the purposes of “historical analysis, in which a sense of movement within what is ordinarily abstracted as a system is crucially necessary, especially if it is to connect with the future as well as with the past” (121). For such an analysis, *dominant* culture means the “effective” or “hegemonic” culture (121), but it is never separable from the residual or the emergent (122).

The concept of “residual culture” identifies those “available elements of its past” that every culture maintains, although “their place in the contemporary cultural process is profoundly variable” (Williams 1977, 122). It might seem that the residual forms of media piracy are those trading in physical copies, but that would lack specificity. The bootleg markets discussed by Lawrence Liang, in India, or by Jenkins, Ford, and Green and Brian Larkin, in Nigeria, are not residual there, as they are in Australia today. This recognition might suggest that to discuss the dominant – in, say, Australia, or the U.S. – we should talk about the extent to which torrenting, while still “dominant”, is only one element in a field now itself dominated by pirate streaming. But can this tell us anything more than the reports issued by Sandvine or MUSO?

What Williams means by “dominant culture” is not simply a matter of how many people do things. We can better understand the dominant by understanding that the residual must be “still active in the cultural process, not only and often not at all as an element of the past, but as an effective element of the present” (Williams 1977, 122). It is therefore appropriate to talk here about what piracy means, rather than about statistical preferences for technical processes. For online media pirates in Australia (or the U.S.) today, what is *residual* is piracy

as a refusal of the authorized circuits of capital. This is still an idea with meaning, functional as a motivation for some, relevant as a risk piracy poses, and it supports the foundations of anti-piracy business. As the residual in this sense it involves “certain experiences, meanings, and values which cannot be expressed or substantially verified in terms of the dominant culture, [but] are nevertheless lived and practiced on” (Williams 1977, 122) although “for the most part it is incorporated, as idealization or fantasy... of the dominant order itself” (122). What is dominant for online media piracy is, instead, the convenience calculus, supported by and supporting the integration of piracy and authorized media consumption.

Williams also uses this model to talk about literature, and we can clearly use it to talk about the apparatus of television. There are residual elements of flow in contemporary television, and although it is now dominated by the kind of disaggregated program selection suggested by the Telstra ads with which I began this thesis, these forms of television meaningfully co-exist. Flow, while no longer dominant in the same way, is incorporated it into modes of disaggregation, like multiple screen viewing, DVR playback, and subsidiary channels. As the residual usually contradicts the dominant in some way that needs to be contained, flow is a specter of inflexibility and control that dominant narratives about television today would eschew. This is what Morley notices as a moralizing “orthodoxy” within the dominant modes of discussing media convergence, in which the “Bad Screen of broadcast TV” is being replaced by the “Good Screens of the newly interactive age of personalized computer-aided communications” (2012, 81). By comparison, the dominant convenience calculus mode of piracy incorporates the anti-capitalist open-source free culture narrative as a meaningful residue. It is often invoked in accounts of why people did or do pirate, and clearly incorporated into the structure of piracy resources. As Jonas Andersson Schwarz notes, it is

echoed in the “normative framework” that assigns a moral investment in information that “wants to be free” to terms like seeding and “leeching” (2012, 589). It also infuses some of the innovative work done by developers and maintainers of piracy resources working “against the pressures of incorporation” (Williams 1977, 123).

I have not, yet, touched on what might be *emergent* in online media piracy. The emergent is always difficult to trace, in Williams’s terms. It identifies:

new meanings and values, new practices, new relationships and kinds of relationship are continually being created. But it is exceptionally difficult to distinguish between those which are really elements of some new phase of the dominant culture (and in this sense ‘species specific’) and those which are substantially alternative or oppositional to it: emergent in the strict sense, rather than merely novel (1977, 123).

I should conclude by asking, then – what new meanings and values are being created for online media piracy at present? The hybridization of piracy and authorized modes of content acquisition is not a new value, it is intrinsic to the convenience calculus and therefore an element of the dominant culture: as Williams suggests, “much incorporation looks like recognition, acknowledgement, and thus a form of acceptance” (1977, 125). The emergent is only identifiable, Williams argues, “in relation to a full sense of the dominant” (123) but what is emergent agitates against the dominant. No “new practice,” Williams stresses, “is... an isolated process. To the degree that it emerges, and especially to the degree that it is oppositional rather than alternative, the process of attempted incorporation significantly begins” (124). So, what seems like it cannot be incorporated, at present, into the dominant processes of adapting online media piracy practices to the work of content industries?

My discussion so far has revealed at least three points of tension. From chapter two, there is the problem of Netflix. While it has been massively successful, in part by adapting the successes of torrenting, Netflix has also had to change in order to spread. It has had to relinquish tolerance of geoblock-circumvention in order to achieve international reach, and it also had to reduce its content library in order to negotiate with trade agreements in other places and compete with increased rival screening options (see Napoli 2016). While Netflix's global spread continues to be tremendously successful, its failure to maintain the focus on ever-expanding, sweeping access to content reveals, among other things, the problem of geoblocking for that particular project, and the limitations that residual cultural arrangements place on the possibilities of emerging technologies. In chapter three, geoblocking again returns in the form of people not believing the ethical condemnation of all forms of copyright circumvention – that is, their willingness to “pirate” despite prohibitions – and the moral claims of some kinds of geoblock-circumvention. And in chapter four a similar theme was apparent in the dissatisfactions of sports media fans who collectivize the problem of access unblocked by trade agreements, however unevenly they contribute to overcoming it.

If there is an emergent online media piracy, then, I would suggest it is one in which the world is not carved up into zones of access. If that is no kind of resistance to capital, as much of what that piracy seeks is in fact unfettered access to the polished product of capitalist content industries, it is nevertheless the refusal of certain currently dominant arrangements. After all, as Williams insists, “no mode of production and therefore no dominant social order and therefore no dominant culture ever in reality includes or

exhausts all human practice, human energy, and human intention” (1977, 125). This does not amount to a prediction that the ongoing drive to resist geoblocking and similar trade arrangements – sometimes in the name of free access to culture but mostly in the name of convenient access to preferred forms of everyday life – will coalesce in any way that challenges existing dominant forms of media culture. “Elements of emergence” are often themselves “incorporated, but just as often the incorporated forms are merely facsimiles of the genuinely emergent cultural practice” (Williams 1977, 126). This an ongoing question about the future of media practices that online piracy is still posing.

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Appendix – Piracy Trials 1984-2014

This Appendix considers some benchmark legal cases that test digital rights and (re-)define online media piracy. While it is tied to the themes of the thesis overall, it is concerned primarily with the changing legal definition of media piracy in the three decades leading up to the context the thesis addresses. Sometimes media change is a driving force in the following cases, but at times the technologies at stake in the case are not new and what is being contested – or, often re-contested – is what meaning should be made of the tensions between online media piracy and the content industries on which they also depend. Unlike the central thesis, then, this Appendix does not make an argument about the influence of online media piracy on media distribution in any direct way. The cases recounted here, hopefully, nevertheless proved useful and interesting background for the discussions in the main chapters. In line with the discussions of the thesis overall, the cases below run from the years just before the launch of the World Wide Web, up to the beginning of this thesis research, and are located in the U.S., Australia, and Sweden (although their effects are certainly not confined to those jurisdictions but have relatively immediate international effects).

What follows is not merely a timeline ending with our current situation; it is also a story about precedent. As a legal concept and legal practice, precedent describes how the past remains alive unless or until it is challenged by the claim that it no longer applies. As Randy Kozel argues, political alignments clearly operate as a frame for judicial interpretation, and “deference to precedent” is supposed to act as a rule subordinating those interpretations to “the historical practice of [the] court as an institution” (Kozel 2017, 6). But a difficulty arises,

for the practical use of precedent, around new technologies and new cultural practices (of which online media piracy was at one point both). In these cases the question of whether a precedent applies is a matter of simultaneously translating precedent and imagining consequences. I take one of my cues here from Lawrence Lessig's essay on the "Culture Wars" (2011), where he discusses a Supreme Court decision that allowed wiretapping during the prohibition era. Lessig highlights the dissenting opinion of Justice Louis Brandeis in this case, which emphasized the "principle" of protecting privacy rather than a literal reading of the constitution. Brandeis wrote that "time works changes" in technologies, and "thus the objective of the Court must be to translate old protections into a new context" (Lessig 2011, 112). Thus, "what made sense in one period will make no sense in another" due to changes in technology (115). These legal events manifest discursive conflicts with immediate material impact on the changing forms of media piracy

While precedent opens a speculative space of this kind, it is also a force for continuity. Both Paul Goldstein and John Logie, among others, highlight a unanimous opinion in the 1991 case of *Feist v Rural Telephone Service*, which exemplifies, as Logie puts it, the U.S. constitutional framing by which "the public's interest in access to information can trump the creators' expectation for a return on effort expended" (2006, 55). Goldstein cites the judgement as follows:

While "it may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation," Justice Sandra Day O'Connor wrote, the result "is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art." "Creativity" is the key to copyright, whether in selection or arrangement. Acknowledging that alphabetization does constitute an

“arrangement,” O’Connor concluded that “there is nothing remotely creative about arranging names alphabetically in a white pages directory. (Goldstein 2003, 198, quoting *Feist v Rural Telephone Service*).

What is at stake in the cases that follow is not only the relation of piracy to IP, but the relation of both IP and piracy to creativity and the rights that accrue to the designated author of a creative work over its use by others.

In briefly outlining the following eight legal cases I want to recall the histories I sketched in chapter one, but bring them more explicitly into the legal and economic frames of reference outlined in chapter three. First, I will consider the Sony Betamax case (1984), which preceded the World Wide Web but flags many of the concerns that have subsequently characterized the relations between copyright, technology, and media piracy. I will then consider three U.S. file-sharing cases, against Napster (2001), Grokster (2005), and Limewire (2010), followed by three undoubtedly less famous Australian cases against file-sharing service KaZaA (2005), against ISP iiNet (2012), and then the 2014 *DBC* test-case. Finally, I will consider international legal action centered on TPB (2009--). Many of these cases are widely discussed, so in order to streamline my account and foreground only particular analysis rather than agreed-upon facts, I will note here that my summaries cross-reference published decisions, contemporary media coverage (especially technological journalism), Wikipedia histories, and a range of scholarly overviews (notably Frow 1994; Wasser 2001; Logie 2006; Boyle 2008; Strowel 2009; Burk 2014; Atkinson and Fitzgerald 2014; and Meese 2014). These cases collectively inform the present blend of anti-piracy measures working simultaneously online and offline.

The Betamax trial: *Sony Corp of America vs. Universal City Studios, Inc.* 464 U.S. 417 (1984)

The *Sony v. Universal* case was central to permitting the VCR technology, in this case the Betamax format which was the property of Sony, to be distributed in the U.S. despite the objections of rights holders that it infringed their IP rights and facilitated piracy. This case ascended to the Supreme Court via the Ninth Circuit Court of Appeals, who overturned an original decision from the District Court that went in Sony's favor. Although VCRs have disappeared into historical reference for piracy studies, this moment when video looked like piracy remains an importance case, if only for making strange what it means to find a technology illegal. It is now very hard to imagine today's world without VCRs or any of the developments dependent on that technology, and all too easy to see parallels by which other culturally important technologies, like the Internet or the smartphone, could have been subject to the same critique. Michael Robertson, of mp3.com, whose own legal difficulties I discussed in chapter one, saw the Sony trial as a sign that popular new technologies would be accommodated by the U.S. courts. He told *Wired*:

The VCR had to go to the Supreme Court to gain legal acceptance in the market. At its first trial, it had a 3 percent penetration. By the time it got to the Supreme Court, it had 30 percent penetration. It seems to me that must weigh on the minds of the judges. It must. They aren't going to send the police to everyone's house to collect the VCRs. Time is definitely on mp3.com's side. (Wired Staff 2000)

In the Sony case, the content industries proposed that the VCR was purpose built for making unauthorized copies, while Sony asserted that it was designed for more convenient content consumption. Indeed, John Frow notes that the VCR and other "new systems for the reproduction and manipulation of information" around this time such as the photocopier

and the personal computer represented a “major threat... to the private ownership of intellectual property”. This is because they “facilitated the transfer of ... information from a locked and singular repository ... to a site of repetition and uncontrolled use” (Frow 1994, 292). Brian Yeh notes that “as there was no precedent in copyright law for imposing vicarious liability on Sony... Justice Stevens sought guidance from patent law” and argued, in the concurring opinion, that copyright must “strike a balance” between “protection of the statutory monopoly, and the rights of others to freely engage in substantially unrelated areas of commerce” (Yeh 2010, 4). That is, copying equipment like the VCR “need merely be capable of substantial noninfringing uses” to be found not to violate copyright in itself (Stevens quoted in Yeh 2010, 4).

The determination in this case was based on the principle of fair use (in this case fair private use rather than for the purposes of criticism or parody),⁹⁸ articulating what Boyle calls “the Sony Axiom”, that individuals may choose how to consume content they have legally acquired, including in storage and re-use. Fair use, designed to define the uses of a copyrighted work that are not “free”, is tied in the U.S. to the principle of “first sale”, after which a purchaser may make its own uses of a product, up to and including subsequent resale. Not just home video recording, but also gifting, second-hand and charity stores, and even recycling rely on this principle. Connected to this is the legal status of the activity known as “timeshifting”, or the “recording of a program in order to be able to ... watch it at

⁹⁸ Logie discusses the *Basic Books v. Kinko's* case refining the U.S. fair use doctrine, so that a teacher can distribute copies of excerpted work from published material, “thereby potentially stimulating interest in the work and thus enhancing its value”, but not “compile a coursepack of whole articles for a third party to sell to students”, as this would “likely have a negative effect on the values of the copyrighted works” (2006, 15-16). He characterizes the 2002 TEACH Act as “designed to present a series of obstacles to use, and also tacitly encourage instructors to forego making use of copyrighted materials altogether” (17).

a more convenient time” (Frow 1994, 293). This was a primary area of disagreement between District Court that had first heard the case and the Ninth Circuit court that overturned that decision on appeal. Ultimately the Supreme Court concurred with the District that timeshifting fell within the parameters of fair use, since it was an activity that was “noncommercial and “private” in character, and it served the public interest in “increasing access to television programming”, consistent with the First Amendment (294).

James Boyle highlights a second issue at stake: “the Supreme Court was, in effect, telling the Ninth Circuit that it was wrong, that its ruling would have required the ‘extraordinary’ (legal shorthand for ‘stupid’) conclusion that copyright law gave copyright holders a veto on new technology” (2008, 72). Still, it is worth stressing that it was a narrow decision in Sony’s favor, and the dissenting opinion, written by Justice Blackmun and discussed in detail by Frow, focused on other elements of the product – the possibility of promoting an alternative form of the VCR that did not allow recording but only playback, the distinction between “timeshifting” and “library building” that could be made, and the ability to skip through advertisements and thus deprive broadcasters of income over a longer timeframe (296).

Napster: *Napster Inc. v A&M Records et al.* 239 F.3d 1004 (2001)

Following infringement claims from a consortium of RIAA members, a San Francisco District Court issued an injunction ordering Napster to cease file-sharing in July 2000, upheld on appeal in February 2001. The court found, with reference to *Fonovisa v. Cherry* (regarding the physical sale of pirated tapes at a flea market), that Napster was vicariously responsible for piratical uses of its system and, with explicit differentiation from the Sony Axiom, that they had also contributed to infringement (see Burk 2014). The case was made more

complex not only by technological novelty but by the eighteen “amicus curiae briefs” filed by parties declaring themselves materially interested in the case, ranging from the MPAA to digital media coalitions and a consortium of eighteen law professors (led by Litman and including Patterson and Dan Burk), who contended that “the effect of a particular application of technology – in this case the effect of unauthorized copying on sales – is [no] reason to outlaw the technology” and that the original ruling “would ban a new technology in order to protect existing business models, and would invoke copyright to stifle innovation, not to promote it”.⁹⁹

Given conflicting studies on the question of whether the recording industry was economically damaged by file-sharing, rather than from a broader environment in which Napster was only one component, “the record companies did not want to engage in a war of dueling empirical studies” (Boyle 2008, 74). Instead the case turned on Napster’s failure to prove its purpose was substantially private and non-commercial, along the lines of the Sony Axiom. Boyle reads the case in comparison to the Sony trial as follows:

True, the Betamax owners could get TV shows for free just by watching at the regular time. But they could not get a copy of the show for free at the moment they wanted to watch it. That was why they taped. One could even argue that Napster users would have access to most songs over the radio for free. But... we need to focus on the change in the definition of “commercial,” because it illustrates a wider shift... The old test focused mainly on whether the motive for the copying was to

⁹⁹ The full list of amicus curiae briefs in this case can be found here: <https://h2o.law.harvard.edu/cases/4422>. The coalition’s amended brief is available here: <http://www-personal.umich.edu/~jdlitman/briefs/Amicus.pdf>. All these file-sharing cases, Jessica Reyman argues, involve “more than two parties” (2010, 4). Even when no amicus brief is involved they are “the battleground for competing value systems” ranging control of intellectual property rights against arguments about “the value of community participation” (2010, 4-5).

make money... The Napster court's test concentrates on whether the person consuming the copy got something for free. (2008, 75)

To set aside the possibility that Napster's product was too different from that of RIAA members to be commercial competition (being both free, and digital), the plaintiffs pointed to the comparative lack of success of paid music downloads. You Jie claims at least two of the early legal distribution systems – MusicNet (Warner, EMI and BMG) and PressPlay (Sony and Universal) – widely criticized for the quality of the files they offered (see chapter one) – were in fact designed to “materialize” claims in the Napster case that illegal file-sharing made “the market entrance threshold for legal online music services” unviable (Jie 2014, 201-202).

Grokster: *MGM Grand v. Grokster* (USC 2005)

As other file-sharing services followed Napster, other legal challenges drew heavily on the precedent established set by the Napster trial. The case against Grokster (also against Morpheus and KaZaA) was brought by 28 content producing companies, led by MGM, and dragged on for years with a district and an appeals court finding in Grokster's favor. While it is relevant that Grokster and its peers more clearly “made profits” from piracy than had Napster, “attracting advertisers who could deliver their messages in embedded adware and spyware” (Atkinson and Fitzgerald 2014, 115), the crux of the case was technological. As Burk puts it, Napster's liability was “architectural” (2014), and later services further decentralized their server architecture to avoid the same liability. Grokster enabled users to download files directly from peer computers, without even hosting indexes centrally. Others

used forms of encryption or relay to make it possible to “assert that they had no means of knowing who or what was on their system at any given time” (Burk 2014). As Burk puts it,

The *Napster* case and its progeny reveal a pattern of creative “inventing around” previous definitions of formal copyright boundaries. Such interactive re–imagining of technical and legal standards continues in current legal controversies regarding digital delivery systems such as streaming media, digital lockers, and “cloud” services (2014).

The second significance of this trial is in reframing precedent at the Supreme Court level such that forms of media use previously permitted were now deemed illegal.

The final verdict drew on and extended the decision against Napster by determining that Grokster had incited copyright infringement through their marketing, revenue model, and system design. The judgement thus invented a new form of infringement – not vicarious or contributory but by “inducement”. We should recall Kozel’s argument about the political tenor of overturning precedent when noting how often commentators on this trial, like Atkinson and Fitzgerald, suggested that the principle difference between “the Sony and Grokster decisions” is in fact “philosophical, reflecting judicial attitude to control” (2014, 117). The RIAA’s perspective by this point, that even copying music you own to your computer hard drive is copyright infringement, because that was not the form in which it was first sold, contests every element of the first sale/fair use principles, and the court’s endorsement via their decision effectively abandons the Sony Axiom.

LimeWire: *Arista Records LLC v. LimeWire LLC* WL 1914816 (2010)

Before the Grokster case was settled there was a new online piracy threat on the horizon, and in December 2004 the MPAA began legal action against BitTorrent sites. But the older court battles against peer-to-peer file-sharing services were not yet over. One research group tracking peer-to-peer systems in 2007-2008 reported that while “BitTorrent use jumped nearly 25 percent on average between November 2007 and March 2008”, Gnutella clients, of which LimeWire was one, were still far more popular (on 40.5% of surveyed PCs, compared to 28.2% for BitTorrent clients), and amongst specific applications LimeWire was most popular (36.4% compared to 11.3% for the top BitTorrent application, μ Torrent) (Bangeman 2008). Sheer numbers, then, bought the RIAA to encourage plaintiffs against LimeWire.

While LimeWire attempted an aggressive response, filing counterclaims under anti-trust laws, they were eventually held to have induced copyright infringement, after the Grokster precedent, and this case is most interesting as a solidification of the precedents discussed above that confirm IP owners have rights over the post-sale use of media. Two concepts are worth singling out, with the first being mitigating *action*. To be found liable for infringement it was no longer necessary to know what users share, or whether they profit from it. Instead, sharing services must consistently, from design through to operation, take mitigating action. Thus YouTube, for example, deploys terms of use indicating copyright must be respected, and while “the site boasts a mix of legal and illegal material, [it] allows users to flag the illegal material so that the company can remove it.” (Choi and Perez 2007, 176). The second concept is secondary *liability*,¹⁰⁰ which Burk describes as “dispositive”

¹⁰⁰ Under title 17 of the U.S. Code “one who, with knowledge of the infringing activity, induces, caused or materially contributes to the infringing conduct of another”, making them what the code calls “a ‘contributory’ infringer” (as cited in the Napster case – 239 F.3d 1019-20). See also Carroll 2005.

(loosely, decisive) in the Napster case (2014) but which now encompasses multiple forms of liability, with room for expansion. In conjunction with the above narrowing of fair use and expansion of ideas about indirect profit, the principle of secondary liability articulates a new model of producers' rights that could be understood as a new historical jurisdiction. The piracy practices and indeed media practices that precede this judgement no longer have the same meaning, rendering prior precedent irrelevant as clearly as if the difference was one of national jurisdictions.

KaZaA: *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* FCA 1242 (2005)

The trials of KaZaA present an interesting international history. In the Netherlands in 2002, KaZaA won an appeal against copyright infringement charges on grounds that resembled the Sony Axiom. As Brad King noted at the time, U.S. content industry representatives distanced their own pending cases against KaZaA from this precedent in another jurisdiction, stressing its unimportance given that copyright around the world was about to be recontextualized by the WIPO negotiations that were then underway (King 2002). For his article on this decision, King interviewed Bruce Lehman, one of the key figures in DMCA and WIPO, and Lehman's response reveals the extent to which legislation cannot only override case law precedent but also indirectly redefine the terms of media use:

“When you look at what goes on in the Netherlands, it's like a case going on pre-DMCA in the United States,” Lehman said.

Since the DMCA was crafted with Sony Betamax in mind, the new international laws will likely address the defense used by KaZaA BV, Lehman said.

In 2003, the RIAA also began filing suits against individual users of file-sharing sites, starting with KaZaA, by participating in the services to locate users who shared unauthorized files.

Faced with litigation in multiple jurisdictions, KaZaA was sold to an Australian company, and was soon in court facing claims by local arms of the international recording industry. U.S. precedent was not germane to this trial, but on different terms the result was similar. Individuals responsible for KaZaA's operations were found to have "sanctioned, approved or countenanced the primary infringing conduct", even though they could not be held accountable for the infringing communication itself. This case tightly interrogated the technology involved in file-sharing, as the first case of this kind in Australia, and the judgement stresses the evident options for monitoring and preventing infringement within the file-sharing application. Damages were once again framed in terms of lost first sales, but first KaZaA was ordered to alter its system to prevent infringement (see Figure 14). In a final resolution, KaZaA reached an international settlement with recording industries, but not before having set a tone for online media piracy cases in Australia in which monitoring the practices of individual users is key.



Figure 14: KaZaA banner reflecting an injunctive relief order (Australia) 2005

iiNet: *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) FCA 24 (2010)

The above focus on users is clear in the first of two cases involving the Australian ISP iiNet.

The claimants in this case represented "the major motion picture studios both in Australia

and the United States”, who had employed an online agency to gather data on infringing users downloading BitTorrent files over an iiNet connection, demanded that iiNet take mitigating action, and then taken legal action against the ISP for not doing so. The central significance of this case is in being, internationally, the first time a that “a court at the apex of a national legal system” had considered “the liability of an ISP for the infringements committed by its subscribers” (David Lindsay, quoted in Meese 2014, 27) (and also the first Australian trial to be live-tweeted).¹⁰¹ But again the question of precedent is key, because the relevant Australian “conventional principles of authorization” was found not to apply in this case. By this judgment, providing the means of infringement does not imply any responsibility on the part of the ISP even if they knew about infringements. Notably, the judgement considered the critical mass of accusations of copyright infringement produced by content industries and their representatives as a point in iiNet’s defense, suggesting that no ISP could reasonably be expected to know which claims were substantial, and which were not.

I want to also note here James Meese’s reading of this trial as turning on the “terribly mundane” figure of the everyday pirate (2014, 26), as opposed to any figure of the criminal pirate. Meese focuses on the “RC-20” in this case, the twenty “representative” examples of infringers used as evidence in the complaint. As iiNet CEO Matthew Malone explained it, “many of these users were not necessarily solely engaged in illegal copyright infringement, but instead were most likely balancing these practices with the legal consumption of numerous other forms of media” (in Meese 2014, 30). Meese argues that this case, and the

¹⁰¹ The judgement in this case is available here: <https://assets.iinet.net.au/website/about/mediacentre/copyright-case/case-documents/iinet-afact-judgement.pdf>.

revealed habits of the RC-20, demonstrate that “instead” of being viewed as outlaw consumers or revolutionary protestors, the pirate can instead be viewed as a mainstream digital citizen, more interested in questions of infrastructure and access than opposition and exclusion” (Meese 2014, 30). This is a point to which I will return.

DBC: Dallas Buyers Club LLC v iiNet Limited (2014)

A crucial context for the 2015 CAB was an ongoing Australian case involving a range of ISPs (centrally, again, iiNet), rights holder Village Roadshow, and almost 5,000 Australians deemed to have pirated the 2013 film *Dallas Buyer’s Club*. In 2014, the High Court found that iiNet was not liable for its users’ copyright infringement. This decision, widely viewed as a significant defeat for Roadshow, was specifically mentioned in the Discussion Paper proposing the CAB. In fact, when the Australian website *Crikey* leaked an early draft of the CAB, they argued that this legislation was a government attempt, spurred by pressure from content industry lobbyists, to effectively overturn that decision, since the legislation removed the need to prove ISP liability from the process of prosecuting pirates (Keane 2014).

A key aspect of this case was rejection of a practice often called “speculative invoicing”, by which legal representatives of content industries seek immediate acknowledgement of infringement by identified “pirates” and demand they engage in negotiating reparations. Justice Nye Perram noted that, having identified a list of users who had downloaded this film, the distributor proposed to send a letter to users that was inappropriately “speculative”. The judgement continues that this letter:

was quite long and, on the whole, negative about people copying the film, which is hardly surprising. Critically, however, it did not make any demand for a sum of money. Instead, it encouraged recipients to make a telephone call to discuss the matter or to engage in email correspondence with an unidentified representative of DBC. (FCA 838, 14 August 2015)

In refusing DBC the right to obtain a list of users for this purpose, Perram carefully elected to refer to unauthorized downloading as “copying”, rather than “theft”, and specified that any letter of demand must set a specific sum of money as an appropriate reparation.

The Pirate Bay: Stockholm District Court, B13301-06 (2009)

The first and most significant case for The Pirate Bay took place in Sweden, in 2009, followed by an appeal in 2010, but the legal pursuit of The Pirate Bay extends well beyond this timeframe, spanning from the first raids in 2006, through the formation of popular support networks and “pirate parties” (see below), and the tracking and arrest of defendants from the trial through 2012 and 2014. Today there are still ongoing efforts by online media piracy advocates and enterprises to sustain the name and reputation of The Pirate Bay through clones, mirrors, and legal defenses across multiple countries that are pursuing blocking injunctions and other actions. The symbolic as well as real dominance of The Pirate Bay over unauthorized torrenting at the time of the trial is aptly summarized by Timothy Seppala, for *Engadget*:

The Pirate Bay was the 97th most-visited website on the *entire Internet* in 2008, according to Alexa data. During the 2009 trial that saw co-founders Fredrik Neij, Peter Sunde and Gottfrid Svartholm charged with \$3.6 million in fines, along with

time behind bars for aiding in copyright infringement, it was reported that The Pirate Bay had some 22 million users (Seppala 2014, emphasis in original).

For 2017, Alexa reports that ThePirateBay.org has dropped to the 147th most visited site, this does not, of course, take those proxies and mirrors into account. Such a decline is notable, but still far from the disappearance of Napster, Grokster, LimeWire, or KaZaA.

The 2009 trial in Sweden turned almost entirely on the question of direct liability. Ekin Gündüz Özdemirci notes that the defendants “claimed they did not store any illegal files on their servers, and that the structure of the Internet allowed the access to ‘pirated’ content entirely through legal websites such as Google” (2014, 164). But, as Özdemirci also suggests, the question of what precedents Sweden applied in this case is rendered unclear by the extent of international engagement in the case. Freedom of information requests eventually revealed a series of close negotiations between the MPAA and the U.S. and Swedish governments over preparation for the 2006 police raid on The Pirate Bay and the subsequent charges. The Swedish embassy wrote at the time that “it is not clear to us what constraints Sweden and even U.S. authorities would be under in pursuing a case like this when the site is legally well advised and studiously avoids storing any copyrighted material.” (Ernesto 2017a). David Flint also records an “alphabet soup” of international agencies involved in the efforts to shut down The Pirate Bay (Flint 2012).

Conclusion

The cumulative effect of these cases is to leave behind the “granted privileges” mode of copyright and reframe media piracy for the digital age in terms of moral rights over the

post-sale life of media content. As Jessica Litman, a key player in the first legal protests against this redefinition of media piracy, notes in the wake of the Napster trial:

Forty, thirty, even twenty years ago, it was an article of faith that the nature of copyright required that it offer only circumscribed, porous protection to works of authorship. The balance between protection and the material that copyright left unprotected was thought to be the central animating principle of the law. (Litman 2001, 78)

The changes traced above, have opened, as Litman notes, “an opportunity to attack a huge realm of unauthorized but not illegal use” (2001, 82).

The non-U.S. cases above indicate not so much the exportation of U.S. ideas about copyright, given that, as I argued in chapter three, U.K. and European copyright was already founded on moral rights principles. Rather, it shows the ways in which content industries and their lobbyist supporters have tried to expand the consequences of U.S. precedent by embedding their decisions in international agreements like WIPO and TRIPS and by diplomatic appeals grounded in media industry protectionism. As the Australian cases indicate, these endeavors have met with mixed success. As a point to finish on, Laikwan Pang offers a mainland Chinese point of comparison for this tension between international treaties and local practices. Pang writes that:

As shown in China’s Internet Copyright Regulations, which are modelled after the Digital Millennium Copyright Act but enforce even more stringent control in anticircumvention... China’s current IPR laws often simply copy those in the developed countries, and they fail to take into account the specific circumstances and disadvantages of China as a developing country. The PRC is ready to submit to

global scrutiny in order to gain a legitimate IPR status; however, no one can deny that rampant IPR offenses take place throughout China every day. As government supported research shows, 46 percent of interviewees admitted that they have knowingly purchased pirated publications, and doubtless the actual figure is much higher. (Pang 2012, 99)