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To Name a Thief: Constructing the Deviant Pirate

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The term "piracy" is accompanied by considerable amounts of ethical, moral and legal baggage. Indeed, it is often discussed as "nothing but robbery," a heinous act that offends "the most precious aspects of our capitalist system, which protect individuals' property, creativity, and investment" (Pang 2004, 19). Within popular and much academic discourse it is hard to escape the understanding that pirates are nothing more than deviant thieves. On the rare occasions that pirates can escape this categorization, there is still little space to be seen as anything other than subversive radicals or potential consumers. This chapter focuses on a particular form of digital piracy, the circulation of East Asian films within file sharing forums, and asks how the file sharers within this context perceive themselves and to what extent these perceptions are shaped by external discourses on the nature of piracy. By drawing on ethnographic research conducted from 2006-11, I consider how the individuals within these communities understand and negotiate the moral and ethical ramifications of their actions. In doing so, I argue that file sharers within these groups see themselves as distinct from the "real" pirates because their form of copyright infringement does not involve monetary reward.

Piracy is a broad term to describe any instance of "the unauthorized copying, distribution and/or sale of copyrighted content" (Yar 2008, 607). Digital piracy describes a specific form of piracy most commonly associated with the unauthorized distribution of software, music and movie files through the Internet. Within this definition there exists a subcategory of digital piracy: file sharing. File sharing is used to refer to the process of sharing files directly with others through peer-to-peer technology such as BitTorrent.

File sharing is by no means the only form of digital piracy but the terms are often used interchangeably, glossing over the subtle differences between them. For instance, the act of file sharing implies that the user both downloads and uploads digital files through the Internet. On the other hand, while forms of digital piracy may include file sharing, it is possible to engage in digital piracy without ever sharing the downloaded files with others. Such a distinction may be

subtle, but it does highlight that the terms are not transposable and that digital piracy takes a variety of forms, of which file sharing is only one.

The academic literature on these various forms of digital piracy is extensive, but within such literature there is often an overriding concern with examining a few key issues: to what extent are the cultural industries damaged/assisted by digital piracy (Liebowitz 2006; Oberholzer-Gee and Stumpf 2007; Zentner 2006); how might 'pirates' be translated into consumers (Bounie, Bourreau and Waelbroek 2007); what factors influence the propensity to engage in digital piracy (Podoshen 2008; Taylor, Ishida and Wallace 2009); and, how effective are the current technological and legal deterrents to digital piracy (Sinha 2010; Waterman 2007)? In many respects these preoccupations could be tentatively linked to any variety of academic disciplines with specialists in economics, psychology, marketing and law all, rather unsurprisingly, prioritizing certain approaches within their research.

As noted above, within this broad and interdisciplinary area of interest, the figure of the digital pirate has been constructed in a number of ways: as deviant thieves, subversive radicals or inquisitive (potential) consumers. These categorizations by no means represent the *only* ways digital pirates are constructed, but I would suggest that certain, rather narrow, constructions are dominant and linked to the priorities and interests of certain groups within both academia and public discourse. The first section of this chapter will examine these constructions in detail, allowing the second half to consider how these constructions have been negotiated and internalized by the file sharers themselves.

The constructed pirate – a deviant thief

Undoubtedly, the most ubiquitous pirate is the figure of the 'deviant thief': instantly recognizable from the anti-piracy rhetoric cultivated and circulated by the copyright owners within the music and movie industries. Overall, this deviant is constructed as someone who only wishes to obtain something for nothing and threatens the very existence of the cultural industries. The deviant thief is often described as young, unconcerned about the rights of creators, lacking in self-control and unaccustomed to paying for digital content. Indeed, the attempt to associate youth with piracy can be seen as part and parcel of the historical tendency to draw links between youth, crime and delinquency (Yar 2008, 609).

This caricature of the deviant pirate has been developed and fostered by the

anti-piracy campaigns from the Motion Picture Association of American (MPAA) in the USA and the Federation Against Copyright Theft (FACT) in the UK. Through high profile public awareness campaigns, such organizations have attempted to convince audiences that digital piracy is no different from any other form of property theft. However, in criticizing these attempts, Yar argues that we should see such campaigns as "rhetorical performances"; that is, "…attempts to establish effectively the legitimacy of a given point of view, set of claims or assertions of rights, entitlements and responsibilities" (2008, 210).

Arguably, associating piracy with traditional notions of deviance and theft is problematic on a number of levels. Firstly, associating digital piracy with the theft of goods such as handbags and cars tries to convince audiences of the "equivalence of tangibles and intangibles" (Yar 2008, 610). However, one obvious issue with this equivalence is that digital copies are 'non-rivalrous' goods: thus through obtaining a copy of the latest Hollywood blockbuster, by legal or illegal means, I am not denying that opportunity to anyone else (Condry 2004, 349). Secondly, it has been argued that associating piracy with deviance is a deliberate strategy to control the activities of others by attempting to dictate the boundaries of normality (Denegri-Knott 2004). Indeed, naming piracy as 'theft' supports a deliberate ideological agenda and "labeling unauthorized copying as 'piracy' suggests an undue rhetorical certainty about the property conceptions underlying copyright" (Kretschmer, Klimis and Wallis 2001, 434).

Furthermore, these 'property conceptions' are invariably Western in nature. As such, associating piracy with theft within anti-piracy discourse serves to reinforce the claim that Western notions of copyright and intellectual property (IP) are somehow universal and enduring. Whereas, a historical examination of copyright "shows that copyright laws are the outcome of a political bargaining process and do not necessarily reflect any unwavering norms or values" (Nill and Giepel 2010, 34). With this in mind, the project of an institution such as the World Intellectual Property Organization (WIPO) to produce an international IP system will undoubtedly produce rules and regulations that are devised through such political bargaining. Inevitably, the Western nations who have more power and influence within such an organization, and upon the global stage more generally, will be best placed to mould the global IP regime in their own image and to their own ends.

Furthermore, there are mixed results when it comes to actually *proving* the

losses that the cultural industries claim to have sustained as a result of piracy (Krishnan, Smith, Tang and Telang 2007, 205). In fact, some even suggest that "rather than seeing these statistics as facts, one should view them as discursive strategies for attempting to construct a political and public consensus about the immorality of piracy" (Yar 2008, 608). Indeed, many have argued that despite the loud complaints about the threat of illegal circulation of their cultural products, Hollywood is actually making record profits (Lewis 2007; Lobato 2009). So, while profits are undoubtedly decreasing in some areas (for example, the rental market), DVD and cinema ticket sales are actually increasing (van Eijk, Joost Poort and Rutten 2010, 37). Even when evidence has been found to prove that Hollywood is incurring some loss due to piracy, it has also been suggested that those losses have been significantly exaggerated by the film industry (Hennig-Thurau, Henning and Sattler 2007, 14). Indeed, while it is indubitable that the development of the Internet and digital technologies are having far reaching effects on the cultural industries, it is a gross oversimplification to suggest that piracy is chiefly to blame for the state of the industry when other factors such as increasing competition from computer games and mobile phones are undoubtedly also at play (Hennig-Thurau, Henning and Sattler 2007, 14).

The focus within anti-piracy campaigns on the economic losses incurred by the industry reinforce the idea that pirates are nothing but thieves whose activities threaten the continued existence of the cultural industries, and thus cultural production. However, in reality, artistic creation is not dependent on the existence of the cultural industries, those industries exist in order to harness the economic potential of artists and provide a framework for cultural production but they are not *de facto* necessary. Indeed, individuals and collectives create artworks, music and films outside of the associated industries and without economic reward. Whilst many might seek remuneration, economic recompense might not be desirable or achievable for all who create cultural works. However, the anti-piracy rhetoric would have us believe that artists need industries and that those industries are invaluable because they provide economic rewards for the artists who create within them. However, "authors and artists seldom retain control over copyright, but routinely assign those rights to corporate entities who then have virtual *carte blanche* over decisions as to the work's commercial exploitation" (Yar 2008, 616).

Therefore, the industry is not in a war against piracy solely because copyright infringement damages artists and jeopardizes future artistic production, but

partly because piracy allows individuals to attain cultural products without the mediation of the cultural industries. Thus, the protection afforded by copyright is jeopardized by individuals who are able to circumvent the control that large corporations have over traditional channels of distribution. Thus, while piracy can be understood as outright theft, it can also be interpreted as a political statement against the commodification of artistic works and/or a wish to challenge the control that a few major corporations hold over most of the cultural industries.

From deviance to subversion

Aside from the oft-criticized figure of the deviant thief, another construction of the 'pirate' is as a 'subversive radical' engaged in a power struggle with the cultural industries. This conception of the digital pirate sees the pirate as liberator, as someone who deliberately challenges the current corporately owned structure of the cultural industries. Such individuals not only have opposing views about current IP and copyright regimes, but also wish to destabilize the pre-existing monopolistic models for the distribution of music, films, software and games.

One of the reasons that such a figure can exist is because the image of the music and film businesses is often far from favourable. According to Bishop, "with such a history of unfairness and one-sided contract negotiations with artists, greed, the lust for power, price gouging, and price fixing, the industry has worked hard to earn its unfavorable reputation" (2004, 101). Indeed, it has been suggested that some music file sharers "are likely to justify their behavior with reference to the perceived egregiousness of record companies" (Huang 2005, 40). Furthermore, it has also been claimed that the motivation to share files online might be linked to a wish to distance oneself from the taint of the commercially orientated music industry or in some circumstances as a means of actively challenging the control wielded over the music industry by a few large companies (Giesler and Pohlmann 2003, 273).

That is not to say that all pirates and file sharers view the industry negatively. I have discussed elsewhere that my own file sharer subjects are surprisingly supportive towards certain sectors of the industry (Crisp 2012b). Marshall also suggests in his study of bootleggers that while "their actions seem to critique it," bootleggers and tape traders actually "offer strong ideological support for the legitimate industry" (2003, 57). Indeed, the romantic "ideas about art and creativity which form the bedrock of the legitimate industry" are equally important

for traders and bootleggers who distribute content precisely because it brings them closer to the revered 'artist' (Marshall 2003, 69). Marshall suggests that while academic scholars would readily identify bootlegging and trading as an anti-industry political statement, the individuals concerned are unlikely to view themselves in such terms (Marshall 2003, 64–65). Thus, while it may be true that some individuals view their participation in the illicit circulation of goods as a means of destabilizing the current media landscape, this is by no means the only interpretation. Indeed, even though it may be tempting to assign to file sharing behaviour a political motivation, it may be that the file sharers themselves do not view their activities as particularly politically motivated.

Pirate as consumer

Moving on from the subversive pirate, the potential consumer conception of the digital pirate is a picture of an individual who is probably not doing as much damage to the creative industries as is often claimed, and furthermore can be seen as an *explorer*: a voracious consumer who uses file sharing as a form of sampling so they might investigate products before they buy (Bounie, Bourreau and Waelbroek 2007, 168). Indeed, these authors are not alone in their suggestion that users may in some instances use file sharing as a form of sampling content before purchasing it, rather than instead of it (Cenite et al. 2009, 208). In such a context the downloaded copy is not seen as equivalent or equal in value to the purchased product and so sampling online encourages the individual to seek out the 'superior' version through legitimate channels (Peitz and Waelbroeck 2006, 908). Thus, while it may seem like the availability of free copies would cause sales to fall, this need not necessarily be the case if the copy was not seen as equivalent to the 'original'. When a film airs on television, there is a growth in both illegal downloads and legitimate sales (Smith and Telang 2009, 321). This is because a "television broadcast of a movie is sufficiently differentiated from the DVD version (in terms of convenience, usability, and content)" (Smith and Telang 2009, 322). However, it is important to note that while there is some support for the sampling argument, unauthorized copying takes various forms, meaning that this argument is not applicable to all forms of digital piracy (Holt and Morris 2009, 382) and is not the only way that pirates are seen as potential consumers.

According to van Eijk, Poort and Rutten, "when it comes to attending concerts, and expenses on DVDs and games, file sharers are the industry's largest custom-

ers" (2010, 44). However, the authors do not claim that there is a causal relationship between downloading and purchasing behaviour, they rather recognize that file sharers are often early adopters of technology and enthusiasts who are likely to voraciously seek out content using legal and illegal methods. Consequently, while piracy may be still understood as both immoral and illegal within such discussions, these criticisms might be accompanied by the suggestion that piracy has nonetheless, "directly and indirectly spurred the creation of legitimate and innovative business models" (Choi and Perez 2007, 169).

Do file sharers dream of virtual pirates?

The following section of this chapter considers how certain communities of file sharers have internalized, interpreted, rationalized and appropriated these varying understandings of pirates as deviants, radicals or consumers. The communities in question consisted of two file sharing forums, referred to within this chapter by the pseudonyms *Chinaphiles* and *Eastern Legends*. Both forums provide links to downloadable copies of East Asian films. They might also provide links to tangentially connected materials such as anime, soundtracks, music or *manga*, but the main focus of each forum is the discussion and circulation of East Asian films. The research concerning these communities was part of a wider research project conducted from 2006-11 into formal and informal distribution networks for East Asian film that has also been discussed elsewhere (see Crisp 2012a; 2012b).

As will be seen, the discussion below illustrates how the file sharers attempt to distance themselves from the notion of piracy, defining and labeling others as the 'real' pirates. Indeed, we can see within these forums that the label 'piracy' is not appropriated as a badge of honour but is viewed in distinctly negative terms. The 'pirate' label is used by the file sharers to label others as deviant: reinforcing their own moral credentials by juxtaposing their not-for-profit 'sharing' activities against the circulation of tangible goods in exchange for monetary reward. The file sharers align themselves with a moral code that constructs their activities as a form of sharing that facilitates the 'sampling' of film texts. They imagine their own activities as ultimately promotional thus distinguishing themselves from the immoral, illegal and indefensible actions of the for-profit pirates. By constructing others as encompassing all the negative traits of piracy they leave themselves free to align their own activities with the more palatable notions of sharing, sampling and reciprocity.

Such distinctions can be seen to mirror those observed by Marshall in relation to tape traders and bootleggers, where tape traders see their "activities as vastly different from those of commercial bootleggers": practices that might appear indistinguishable to the untrained eye (Marshall 2003, 66). Of particular importance is the role that money has to play in the equation. For the file sharers discussed here, and the tape traders examined by Marshall, it is important for their sense of authenticity that each group defines themselves against the more commercial concerns of those that profit from the illegal distribution of goods. Thus, understanding themselves as different from the real pirates is not just about accepting the anti-piracy rhetoric and demonizing the 'deviants', it is arguably about distancing oneself from the taint of commercialization so as to maintain the authenticity of one's fan practices.

Within discussions on both forums, an emphasis was often put on the fact that file sharing activities *should* be used as a form of sampling. Forum members would argue that they owned vast DVD collections, the contents of which would have been brought to their attention through downloading (Garfeld, BBC News Article Discussion, 2009).[1] Indeed, there is evidence that file sharers often suggest their activities are a form of sampling and thus not harmful to content creators (Levin, Conway and Rhee 2004, 48; Bounie, Bourreau, and Waelbroeck 2007, 168).

Another reason that forum members saw file sharing as sampling was that the files they downloaded were generally of low quality (Quill, Thanks Discussion, 2004) and thus were not seen to be equivalent to legitimate purchased DVDs (Murb, Thanks Discussion, 2004). According to one forum member, Restel, downloads, regardless of their quality, were no substitute for the 'real thing' (Thanks Discussion, 2004). Such assertions mirror the ideas from earlier that the availability of free copies might not negatively affect sales as long as the copies were not considered equivalent (Peitz and Waelbroeck 2006). Indeed, as well as being concerned about the inferior quality of the downloaded files, forum members also complained that the virtual files lacked the 'shelf impact' of bought DVDs (Helo, Best Movie Discussion, 2003). Thus, in a similar way to the tape traders and bootleggers discussed by Marshall, while the activities of file sharers

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1 Due to the illegal nature of the activities on the forums under discussion it was decided to provide pseudonyms for both the overall forums and their individual members. Furthermore, since any direct quotations would be searchable in Google, no direct quotations from forum discussions have been used within the chapter. Instead, user comments have been paraphrased accompanied by an intext reference indicating the forum member's pseudonym, the discussion thread that is being paraphrased and the year in which the discussion thread began.

appear on the surface to go against the industry, they actually reinforce its position. Through fetishizing the official physical DVDs produced by the industry, they legitimize and reinforce the dominant position that the cultural industries have as gatekeepers to culture.

Not only were downloads perceived as inferior, certain methods were employed to encourage members to view the materials on the forum as 'samples' and to encourage users to purchase films that they particularly enjoyed. As a result, an understanding that files were inferior copies and thus could only be samples was not organically present within the forums but was instead actively promoted by certain forum members. This might be through a general plea to support East Asian cinema (Helo, Thanks Discussion, 2004) or by encouraging individuals to purchase specific DVDs (Kolmon, Thanks Discussion, 2004). In other cases, particular companies were referred to as specifically in need or worthy of support (Fishtank, BBC News Article Discussion, 2005). Thus, as in other work on file sharing, individuals are more likely to view their activities as sampling, and feel prompted to purchase legal copies at a later date if they feel an emotional connection with a particular artist or industry (Condry 2004, 353).

However, we cannot assume that just because file sharers perceive their activities to be a form of sampling that it actually is. Although users claim to have extensive DVD collections (and some undoubtedly have) it does not mean that there is a causal relationship between their online sampling and their legal consumption of DVDs. Indeed, it may be that the file sharer's claim that their activities are not harming anyone is a way of justifying their participation in some ethically dubious behaviour. For example, Hinduja argues that, "individuals are largely allegiant (rather than oppositional) to a normative belief system, and must therefore employ justifications to engage in deviant behavior" (2007, 190-91). If we were to accept that piracy is a form of deviance, then would we not expect file sharers to justify their own actions to make them less morally reprehensible?

This is a question worth considering, though I would argue it is rather patronizing to suggest that file sharers need to exist in a constant state of denial because they cannot face up to the moral realities of their own behaviour. Indeed, it has been posited that file sharers are more than capable of making their own distinctions between different forms of piracy and their own decisions about the ethical nature of each activity (Coyle, Gould, Gupta and Gupta 2009, 1034). Furthermore, there is also some question concerning whether individuals are as

concerned with conforming to norms as is often suggested (Hinduja 2007, 191). Within both *Chinaphiles* and *Eastern Legends* there was evidence that file sharing was not undertaken in a vacuum and forum members were acutely aware of the wider ethical and legal concerns that surrounded their activities. There was much discussion of, and disagreement concerning, larger questions of ownership, copyright, and the free circulation of information and intellectual property. Interestingly, within such discussions it became clear that forum members perceived their own sharing and sampling activities as something other than piracy. Indeed, they constructed their own identity as file sharers in opposition to the revenue stealing, 'for-profit' pirates.

Overall, it was profit and commercial concerns that were considered problematic. In particular this concern was leveled against the perceived commercial focus within certain sectors of the film industry. Thus, the forum members attempted to establish the morality of their own file sharing activities by denigrating any activity where tangible goods were sold for profit: whether legally or illegally. This was made apparent during discussions related to Hollywood where discussions described DVDs as generally overpriced (Detset, BBC News Article Discussion, 2009) and the film industry as "greedy" (Elegent, BBC News Article Discussion, 2009).

The 'real pirates' were identified as those that sought to gain economically from file sharing. Within both communities, individuals distanced themselves from the illegal and unethical connotations of the more pejorative term 'piracy' by defining it as something other than file sharing: that is, the for-profit distribution of physical goods. Within one particular discussion of the sale of DVD bootlegs on eBay it became clear exactly how for-profit piracy was viewed within the forums. The discussion concerned the fact that 'custom rips' made by members of the *Eastern Legends* community had been used by a third party to create bootleg DVDs available for sale on eBay (eBay Discussion, 2009). One particular forum member, Gouy, described the activities on *Eastern Legends* as individuals sharing their collections of bought DVDs, and so he/she saw their actions as very different from bootleggers or 'The Scene' (eBay Discussion, 2009). Thus, when it was discovered that a forum member was *profiting* from the 'custom rips' circulated within the forum that individual was instantly labeled a pirate by members of the community (Solon, eBay Discussion, 2009). A reward was even offered by one of the administrators for information that could identify the culprit and so

that they might be dealt with appropriately (eBay Discussion, 2009).

Again, parallels can be drawn with Marshall's work as one group engaged in illegal distribution (file sharers/tape traders) show contempt for those who *profit* from circulating the very same materials (Marshall 2003, 66). Indeed, within the *Eastern Legends* community there was some discussion of how the transgression should be dealt with. This debate mainly centered on how the forum member selling the bootlegs should be punished, with one member suggesting that the individual be reported to eBay (Maloi, eBay Discussion, 2009). In addition, there was also some discussion of how to protect the forum members from future unauthorized distribution of their 'custom rips'. Indeed, there was some concern that measures be taken to prevent a similar situation arising in the future with one person arguing that forum rips be watermarked to avoid future "pirating" (Xirit, eBay Discussion, 2009).

The suggestion of watermarking again highlights how the forum members perceive their own activities as very different from the eBay bootlegger. The fact that watermarking is commonly used by the film industry as an anti-piracy measure highlights how the appropriation of such a strategy confirms the distinction drawn between file sharing and piracy. The suggestion of watermarking was made in order to protect what the forum members perceived as, in some respects, their own intellectual property. Through the laborious encoding process and the addition of elements such as 'fansubs', the file sharers saw their activities as 'adding value' to the files they circulated (Crisp 2012a). Thus, they would not align their own activities with pirates who simply redistributed the work of others.

In addition to the concern that the eBay seller was violating their own rights, community members were also particularly concerned that his or her actions might draw unwanted attention to their community (Usef, eBay Discussion, 2009). The communities in question are password protected and members are particularly concerned about keeping their communities hidden due to the possible repercussions of being discovered by the authorities. Thus, when other file sharing websites and forums were shut down due to anti-piracy crackdowns, this was obviously of some interest to the members of the forums and would be discussed at length. Interestingly, within such discussions, forum members would suggest that other sites were targeted precisely because they asked for donations or subscriptions from members (Newzbin Discussion, 2010). Again, this represents the perception that somehow being associated with profit or commercialization

was what earmarked the 'real' pirates.

While I have made the claim that some forum members discussed their activities as somehow distinct from the for-profit pirates, there was by no means a consensus within the community. Indeed, some forum members thought it hypocritical that others were complaining about the actions of the eBay seller (Mellos, eBay Discussion, 2009) while others suggested that bootlegs bought on eBay formed an important part of their collection (Avves, eBay discussion, 2009). Indeed, the differing opinions expressed within this particular discussion thread suggest that there was not a universally ethical understanding of piracy within the forum. Nevertheless, it is clear that some forum members see their activities as sampling, and thus perceive a significant distinction between their own sharing practices and other forms of piracy.

Conclusion

This chapter has examined the dominant construction of digital pirates as deviant thieves, subversive radicals or potential consumers. In doing so, I have discussed that the labels of theft and deviance most commonly attributed to piracy serve to support a particular ideological agenda and maintain the status of the cultural industries as the primary gatekeepers of cultural content. By considering how these common constructions of piracy have been received within file sharing communities, we find that the pirates themselves have neither entirely embraced nor rejected the construction of the deviant thief. Instead they have adopted parts of the anti-piracy rhetoric to pour scorn on those that they perceive to be the real pirates: that is, both those who engage in the unauthorized circulation of physical goods for economic reward as well as some of the major owners of copyright.

On some occasions file sharing might be seen as a political act to subvert the shackles of the creative industries over the artistic output of musicians and film-makers. Indeed, within the work of Giesler and Pohlmann (2003) there emerges the suggestion that file sharers might be motivated by a wish to either avoid the taint of the industry or try to topple the balance of power. However, among the file sharers discussed here we see very little evidence of individuals who wish to subvert the industry. Indeed, rather than wear piracy as a badge of honour, individuals on these forums see piracy as a resolutely negative categorization, one they wish to avoid being associated with. In order to establish their own 'ethical' credentials in opposition to others, members of both forums are more

likely to cast themselves in the mould of the potential consumer and dedicated fan: understanding their file sharing practices as a method of product sampling rather than theft.

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