

## **Confusing The Captain With The Cabin Boy: The Dangers Posed To Reform Of Cyber Piracy Regulation By The Misrepresented Interface Between Society, Policy Makers & The Entertainment Industries**

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**Abstract:** Although commentaries regarding intellectual property regulation frequently point out the complexities inherent in its subsistence and reform, the subject is still often discussed in overly simplistic terms of black and white. This paper examines the problems such a view poses, and questions whether a blanket of misunderstanding, or even misdirection, has been used to influence the progression of the regulation in the digital age.

The primary hypothesis is that public perception of the law relating to cyber piracy is out of step with the contemporary *de facto* legal position.

The definition of cyber piracy is summarised, and the issues relating to confusion surrounding the boundaries or simply considering the myriad categories of piracy as a single topic are discussed. The current law as per the Copyright, Designs and Patents Act 1988 as amended is also outlined for the purpose of evaluating the hypothesis, and the border of cyber piracy in relation to the entertainment industries (concerning film, television and software) is set for the rationale of the analysis.

Further exploration takes place through two case studies which concentrate on DVD piracy. The first regards a marketing campaign which has been mounted by the entertainment industries purporting to, *inter alia*, raise consumer awareness of cyber piracy law in order to adjust public attitude to the practice toward the negative, and to lobby for tougher IP regulation. It is argued that the campaign falls foul of the dangers of failing to fully identify piracy, and fails to communicate an accurate interpretation of the legal position to the intended audience.

The second case study examines an editorial concerning film piracy in an influential consumer movie magazine. It is submitted that the summation of piracy law and representation of the regulation in general is heavily flawed, and it is questioned whether the bias behind this journalistic failure could be as a result of the influence of lobbies such as those found in the first case study.

The findings of an exploratory study carried out in December 2006 are then presented. In addition to uncovering opportunities for further research, the results indicate that the public are, in many situations, under the impression that criminal sanctions regulating piracy are wider reaching than the current legislation presently provides. It is submitted that the results of the study lend credibility to the notion that influences such as those recognised in the case studies have effectively misrepresented the law to consumers. The danger posed by the possibility that policy makers may be as vulnerable as consumers and perhaps even the press to well-funded and wide-ranging lobbying is considered.

It is concluded that the representation of intellectual property regulation with regards to piracy must be counterbalanced if a truly objective middle-ground can be maintained when considering approaches to reform.

### **Main Text**

“...there is nothing more difficult to execute, nor more dubious of success, nor more dangerous to administer, than to introduce new political orders. For the one who introduces them has as his enemies all those who profit from the old order, and he has only lukewarm defenders in all those who might profit from the new order. This lukewarmness partly arises from fear of the adversaries who have the law on their side, and partly from the incredulity of men, who do not truly believe in new things unless they have actually had personal experience of them. Therefore, it happens that whenever those who are enemies have the chance to attack, they do so with a partisan zeal, whereas those others defend hesitantly, so that they...run the risk of grave danger.”<sup>2</sup>

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<sup>2</sup> Niccolò Machiavelli, “The Prince”, (Oxford University Press, 2005), p.22

## **1.0 Introduction**

It has become almost customary to point out within the introductory section of any paper regarding intellectual property regulation the extent of the complexities involved in the discussion to come. While warning potential readers that what is to follow is going to be a challenging symposium may have the effect of dissuasion as much as persuasion, it is also indicative of the perception of the area in sum. The regulation of intellectual property (IP) in what has become known as the digital age is linked into many facets of contemporary society, drawing together the reluctant bedfellows of the realms of law, politics, economics and public policy, amongst others, into what can be imagined as a tangled ball of string.

Naturally, the warning is often qualified with a promise to unravel the string to help the reader to understand the issues which lie entangled within. Despite these promises, the current state of IP regulation is still languishing in an unkempt state which lies well beyond the reach of those whom it affects the most – society.

The difficulty in making sense of IP regulation lies partially in the overlying representative interface to which it is most often approached. Despite the convolution of the current state of affairs at its core, observers of the surface are pigeonholed, voluntarily or otherwise, into distinct camps. On the one side stands the colossal Goliath in the form of the groups of industries who are collectively concerned in the business of producing IP in the form of information, whether these are music producers, film distributors or software publishers<sup>3</sup>. Standing in the shadow of the colossus is David, the wandering consumer who desires access to the information produced by the industries without being encumbered by bothersome IP restrictions. The question of whether David can bring Goliath to his knees with a well utilised slingshot is one that is in itself fundamentally flawed in that it enjoys neither relation nor relevance to the underbelly of IP regulation, although the idea of one being brought to the same level as the other is amusingly compelling.

Nevertheless, these two apparent camps have been given their own pet names. Anyone arguing on behalf of the mighty entertainment industries have been dubbed, quite possibly with a hint of irreverence, as “Copyright Warriors”<sup>4</sup>. The consumers who go so far as to defy the industries by flouting IP regulations have been handed the collective title of “pirates”.

While it is one of the fundamental arguments of this paper that this branding is a gross oversimplification of the underlying problems of IP regulation, it is important to recognise the significance this apparent polarisation has had on those it affects the most – society. Although it is acknowledged in many quarters that the problems of regulating a web of ever-expanding networks, replete with the countless streams of information which are perpetually transported around it, are significant, the representation of this journey is not always one which accurately reflects the reality of those issues.

A superficial evaluation of the ongoing debates raging over IP regulation might see such elements as the reporting of these arguments dismissed as little more than journalistic reportage appeasing the shallow appetites of areas of society, but a closer examination of the depiction of the debate reveals roots which extend far deeper into the underlying tangle of the current status and development of IP regulation than might be expected. Indeed, a reader of the recent Gowers Review of Intellectual Property observing a reference to persons who “seek to prevent others from using a patented invention without permission” being branded “trolls”<sup>5</sup>, may very well note the influence of what is being presented as an interface for society is having on the policy makers, perhaps even with the result of confusion<sup>6</sup>.

It is the purpose of this paper to first pierce through this veil of ambiguity and erroneous simplification by presenting a definition of cyber piracy and the spectrum of piracy which exists<sup>7</sup>, which in itself will reveal several flaws in debates concerning the area. The hypothesis that the status of the IP regulation conundrum, particularly with regard to the law regulating the area, has been misrepresented to the extent that a danger of wide-reaching confusion has been perpetuated among consumers and, potentially, policy makers, will then be explored. This will be achieved through the critical analysis of two case studies, namely the “Piracy Is A Crime” (PIAC) campaign funded by areas of the entertainment industries with the stated objective of raising awareness of IP regulation among consumers<sup>8</sup>, and an allegedly journalistic report presented in a magazine, of which approximately 175,000 copies were sold<sup>9</sup>, as an unbiased and accurate account of a wide range of issues relating to piracy<sup>10</sup>.

<sup>3</sup> This paper is primarily concerned with the interface between consumers and the entertainment industries

<sup>4</sup> A term used in Lawrence Lessig, “Free Culture: How Big Media Uses Technology And The Law To Lock Down Culture And Control Creativity”, (Penguin Press, New York, 2004), at p.79 et seq (passim)

<sup>5</sup> Andrew Gowers, “Gowers Review of Intellectual Property”, (The Stationery Office, 2006), p.12 (available at [http://www.hm-treasury.gov.uk/media/583/91/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/media/583/91/pbr06_gowers_report_755.pdf))

<sup>6</sup> It should be noted that in common internet parlance, a “troll” is one who provokes arguments in internet discussion areas such as forums

<sup>7</sup> In section 2.0, below

<sup>8</sup> In section 3.0, below

<sup>9</sup> <http://abcpdfcerts.abc.org.uk/pdf/certificates/13631738.pdf>

Finally, the results of an exploratory study carried out with the purpose of testing the hypothesis will be presented<sup>11</sup>, along with an analysis of the results interpreted in this light<sup>12</sup>.

## **2.0 Defining Piracy: The Captain & The Cabin Boy**

The application of the idiom “pirate” to certain categories of persons who infringe IP rights and restrictions has become a convenient umbrella term generally encapsulating those who infringe particular terms of the Copyright, Designs and Patents Act 1988 (CDPA) which seems to fire the imaginations of observers, be worn almost proudly as a badge of honour much like “ASBOs”<sup>13</sup> have been among a different sub-set of society, and yet be wielded as an accusatory term by the supporters of the existing IP regulations. This sometimes overexcited use has inevitably led to ambiguities as to whom actually lies under the umbrella, sometimes resulting in a failure to acknowledge that piracy covers a number of acts which range distinctly in how they are managed by the law. Although piracy can be extended to cover such disparate groups as those unlawfully transmitting radio broadcasts to mass importers of fake designer goods, this paper is concerned with cyber piracy in relation to the entertainment industries.

The literal term of piracy is defined as “the unauthorized use or reproduction of another’s work”<sup>14</sup>, while cyber is characterised as “relating to or characteristic of the culture of computers, information technology, and virtual reality”<sup>15</sup>. Thus cyber piracy in the context of the entertainment industries can encompass any person who utilises IP in a digital form without the authorisation of the rights holder. The kinds of IP the entertainment industries most commonly produce which can be exploited via digital means are television programmes<sup>16</sup>, movies<sup>17</sup>, music<sup>18</sup>, and software applications<sup>19</sup> (including computer/video games). The physical means used to digitally store infringing copies of works protected by IP regulation<sup>20</sup> range from writeable compact discs and digital versatile discs to hard disk drives contained in either personal computers or dedicated media players. Distribution of information is most commonly accomplished via physical transmission of, for example, a writeable CD (whether sold or given) containing the information or over the internet through the means of peer-to-peer networks, BitTorrent, Usenet or direct transmission.

The range of piracy is significant, as we will come to see when considering the case studies, as the acts covered by the term vary significantly. On the highest end of the scale lies what could be termed a career or business pirate, namely a person who obtains protected materials (whether lawfully or otherwise), removes or circumvents any digital rights/restrictions management (DRM) or copy-protection measures built into the material<sup>21</sup>, mass-produces copies of the material<sup>22</sup>, then sells the unauthorised copies<sup>23</sup> for profit<sup>24</sup>. In addition to committing a litany of primary and secondary infringements which will attract civil liability, the crucial ingredient of carrying out particular infringements in the course of business is that these activities will be likely to be treated as criminal offences. The kind of pirate who operates on this end of the scale might be termed the “Captain”.

On the other end of the scale lies what was described above as a leecher, namely a person who downloads unauthorised copies<sup>25</sup> from, for example, a peer-to-peer network such as Kazaa, where payment is neither given nor required. This kind of pirate could be described as the “cabin boy” as, although still operating as a pirate, the kind of infringement is arguably not as de facto or wilfully damaging to society or the industries as the actions carried out by the “Captain”.

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<sup>10</sup> In section 4.0, below

<sup>11</sup> In section 5.0, below

<sup>12</sup> In section 6.0 and the Appendix, below

<sup>13</sup> Anti-Social Behaviour Orders

<sup>14</sup> Oxford Dictionary of English, 2<sup>nd</sup> ed. (revised), (Oxford University Press, 2005)

<sup>15</sup> Ibid.

<sup>16</sup> Treated as films or broadcasts, protected by ss.5B & 6 CDPA respectively

<sup>17</sup> Treated as films, protected by s.5B CDPA

<sup>18</sup> Treated as sound recordings, protected by s.5A CDPA

<sup>19</sup> Treated as literary works, protected by s.3 CDPA

<sup>20</sup> Hereafter referred to as “unauthorised copies”

<sup>21</sup> An infringement according to ss.296, 296ZA & 296ZG CDPA, although possession of circumvention tools in the course of business is a criminal offence according to s. 296ZB (inserted by the Copyright and Related Rights Regulations 2003 as required by the EU InfoSoc Directive 2001/29/EC)

<sup>22</sup> A primary infringement regulated by ss.16-17 CDPA

<sup>23</sup> A secondary infringement regulated by s.23 CDPA

<sup>24</sup> A criminal offence according to s.107 CDPA

<sup>25</sup> The reproduction of which can be deemed to be a primary infringement regulated by ss.16-17 CDPA

In between these two types of pirate are other pirates who obtain, utilise and/or distribute unauthorised copies to varying degrees<sup>26</sup> who will all be liable for civil infringements. Only towards the highest end of the scale, near where the Captain operates in the course of business, do criminal sanctions take effect.

In his discussion of piracy in the context of music, Professor Lessig identifies four particular types of file sharer:

- (a) “A. There are some who use sharing networks as substitutes for purchasing content. Thus, when a new Madonna CD is released, rather than buying the CD, these users simply take it. We might quibble about whether everyone who takes it would actually have bought it if sharing didn’t make it available for free. Most probably wouldn’t have, but clearly there are some who would. The latter are the target of category A: users who download instead of purchasing.
- (b) B. There are some who use sharing networks to sample music before purchasing it. Thus, a friend sends another friend an MP3 of an artist he’s not heard of. The other friend then buys CDs by that artist...
- (c) C. There are many who use sharing networks to get access to copyrighted content that is no longer sold or that they would not have purchased because the transaction costs off the Net are too high...
- (d) D. Finally, there are many who use sharing networks to get access to content that is not copyrighted or that the copyright owner wants to give away.”<sup>27</sup>

Although, as acknowledged by Lessig, only the first three of these types of file sharers are technically pirates, these categorisations illustrate the menagerie of motivations and goals of which form just a small proportion of types of pirate, namely those who share music via computer sharing networks. When one considers the multiplicity of other materials which can be shared, such as television programmes, computer software and movies, and then the means through which they can be shared, the number of ways in which pirates can operate becomes apparent and, necessarily, the inappropriateness of pigeonholing such a wide group of activities under one simplistic banner is revealed.

Although the fast-moving progression of the digital age has led to the CDPA providing something of a hotchpotch of regulation due mostly to the harmonisation measures required by the EC Directives, the result is a messy mass of IP regulation which misfires for several reasons, hence the enormity of debate currently surrounding reform of the area. For example, consider the conflict of s.50A CDPA with s.296ZA. The former section grants a right to make a back-up copy of a lawfully obtained piece of IP, which it is submitted is an entirely fair and reasonable exception to the prohibition of copying. However, this is rendered almost entirely unusable by the latter section which effectively allows makers of copyrighted material to simply add in technological restrictions such as DRM or anti-copying measures, the circumvention of which will trump s.50A and result in an infringement.

Nevertheless, the regulation is not entirely without merit. It is difficult to argue that the acts of those who operate as Captains of piracy by profiting from the labour of others are anything other than an economic and moral wrongs which are damaging to the relationship between author and consumer, and so it follows that the use of the criminal law should be wielded when attempting to prevent such activities. However, the confusing and often inapt body of law is ripe to be wielded by those who believe their interests lie in preventing all forms of piracy, potentially opening the door to allow those who desire to represent the law to society as criminal to do so wholly inappropriately and, arguably, to the detriment of the industry they apparently believe they are safeguarding.

To demonstrate how the entertainment industries have chosen to interpret and communicate IP regulation to society, two case studies will be considered.

### **3.0 Case Study 1: The “Piracy Is A Crime” Campaign**

In March 2004, several key representative corporations of the entertainment industry formed the Industry Trust for IP Awareness (ITIPA). The members of ITIPA largely subsist of DVD distributors, retailers and rental businesses who share the common goal of combating “against a common enemy, the DVD pirates.”<sup>28</sup> An initial fund of £1.5million was designated for the purposes of a four-point plan to be initiated. These were:

- “to mount a consumer awareness campaign that starts the process of shifting consumer attitudes so that DVD piracy is no longer seen as acceptable;
- to bolster the resources of the industry’s anti-piracy squad, FACT;

<sup>26</sup> Including distributing by file sharing and circumventing copy-protection measures for private use

<sup>27</sup> Lawrence Lessig, “Free Culture: How Big Media Uses Technology And The Law To Lock Down Culture And Control Creativity”, (Penguin Press, New York, 2004), pp. 68-69

<sup>28</sup> “Revealing The True Face of Piracy”, [http://www.piracyisacrime.com/press/pdfs/ipac\\_piracy\\_guide.pdf](http://www.piracyisacrime.com/press/pdfs/ipac_piracy_guide.pdf)

- to provide more fire-power to lobby central and local government politicians for more effective enforcement and tougher legislation against pirates;
- to initiate training for retail staff in how to deal with piracy.”<sup>29</sup>

The British Video Association (BVA), a member of ITIPA, expands upon the first goal by adding an objective to “dispel the idea that DVD piracy is an acceptable, victimless crime” and broadens the fourth goal by offering support for enforcement agencies in general<sup>30</sup>. These goals essentially steer towards the funding of an advertising campaign with the purpose of influencing several key sectors of society, including consumers and policy makers.

The route which has been trodden since the campaign was initiated has been to place advertisements intended for consumer consumption in cinemas and on DVDs, the funding of various poster and television commercials, and to publish and make available a number of documents on the campaign website<sup>31</sup> which purport to explain the law and justify why DVD piracy is “wrong”.

There are several areas of the campaign which have attracted the attention of many forms of observers, pirates and otherwise, since its inception, many of which contain considerations outside of the scope of this case study. There are however a number of facets which do warrant closer inspection.

The first point is one concerning a term of phrase which is occasionally used by Copyright Warriors, and which frequently appears in advertising and literature from the Piracy Is A Crime (PIAC) campaign. The term is “copyright theft”, and is sometimes referred to as “IP theft”. There is one advertisement which is particularly well known among DVD consumers, inter alia, due to its high level of proliferation. The advertisement, of which there is more than one variant but all communicate the same point, makes statements which compare the downloading of films and movies in their digital form from the internet to the theft of motor vehicles, televisions and handbags<sup>32</sup>. The commercial then depicts a person apparently stealing a DVD from a shop before the words “Movie piracy is stealing, stealing is against the law,” appear. The commercial concludes with the slogan: “Piracy. It’s A Crime.”

The ambiguities in the messages delivered in this advertisement are numerous. For example, the commercial appears to be alluding to piracy in the sense of downloading films from the internet, thus targeting what this paper has identified as the cabin boy. The CDPA specifies that possession of unauthorised copies which are not held in the course of business do not fall under s.107 of the Act which deals with criminal liability. Even if the download is being made utilising peer-to-peer software which is set to allow file sharing to take place, s.107(1) specifies that this form of distribution<sup>33</sup> must either be in the course of a business or be to such an extent as to affect prejudicially the owner of the copyright.

As the commercial is apparently targeting consumers downloading for their own private use (and thus could not be considered to be acting in the course of a business), the downloader would have to be distributing the file or files to such an extent as to affect prejudicially the owner of the copyright. Therefore the commercial could be construed as suggesting the downloading of an unauthorised copy of a video file is a criminal act akin to stealing. There are two significant problems with this analogy which will be addressed in turn: first, that downloading unauthorised files for private use cannot constitute an offence according to the CDPA, second, that the comparison with “theft” is faulty.

In addressing the first issue, one might be tempted to refer to a guidance leaflet aptly entitled “The Letter of the Law”<sup>34</sup>. Inside, the leaflet reproduces inter alia the definition of what constitutes an infringing copy<sup>35</sup> and s.107 CDPA in relation to criminal liability. There is also a segment with what is presented as a summary of the sections by Mike Northern. Under the heading “Offences”, several acts are listed including “making unauthorised copies e.g. burning films onto DVD-Rs”<sup>36</sup>. This is misleading, as it lacks the necessary qualifying context of possessing in the course of a business with a view to committing any act infringing the copyright<sup>37</sup>.

Under the heading “Downloading and file sharing”, it is unhelpfully stated that downloading “may be unlawful”, inter alia. It would therefore seem that the author is uncertain as to what the ramifications of the law reproduced in the leaflet actually mean in the contexts of downloading and file sharing unauthorised material.

<sup>29</sup> Ibid.

<sup>30</sup> <http://www.bva.org.uk/piracy.asp>

<sup>31</sup> <http://www.piracyisacrime.com>

<sup>32</sup> See <http://www.piracyisacrime.com/commercial2/pop-up-video.htm>

<sup>33</sup> Provided that it does indeed satisfy the definition of “distribution”

<sup>34</sup> <http://www.piracyisacrime.com/press/pdfs/1132%20LAW%20FLYER%20new%20A4.pdf>

<sup>35</sup> S.27(2) CDPA

<sup>36</sup> Supra.

<sup>37</sup> S.107(1)(c)



Unusually, in the version of the leaflet designed for licensees as opposed to consumers<sup>38</sup>, the summary represents the sections of the CDPA reproduced far more accurately in terms of current understanding of the Act.

Whether file sharing for private purposes or indeed any purpose which does not involve the course of a business can ever constitute a criminal offence rests most prominently on the precise definition of s.107(1)(e), which levies criminal liability upon anyone who takes an infringing article and “distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright.” The implication of this section is that the magnitude of the act of anyone who is using file sharing software which is distributing unauthorised copies to other users would have to cross a particular threshold to attract liability, that threshold being the point at which the interests of the copyright holder are affected prejudicially.

This section of the Act, or any of the other sections of the CDPA which contain the above phrase for applying liability to alternative types of infringement, such as the playing or showing in public of a film<sup>39</sup>, are unfortunately unaccompanied by any definitional guidance. It is pointed out by Cook and Brazell<sup>40</sup> that in the absence of guidance, the threshold of prejudicial affect is “clearly a very subjective test.”<sup>41</sup> It is also argued that as it derives from the Berne Convention<sup>42</sup> “three step test”<sup>43</sup>, which was implemented into the EU InfoSoc Directive<sup>44</sup> stipulating that the measures “shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”<sup>45</sup>, it may be legitimate to examine the judicial decisions of other jurisdictions to obtain guidance.

A consultation paper issued by the Hong Kong Commerce, Industry and Technology Bureau<sup>46</sup> discusses this particular aspect of UK law, in addition to the provisions provided by other jurisdictions, in the context of considering reform of the Hong Kong Copyright (Amendment) Bill 2006. The Hong Kong Copyright Ordinance<sup>47</sup> takes the same position as UK law, but the Consultation Paper is similarly uncertain as to whether the threshold of prejudicial affect applies to users of peer-to-peer networks<sup>48</sup>. The proposals for reform recognise the danger such ambiguity represents, with the suggestion closest to the current UK position<sup>49</sup> specifically pointing out that criminalising unauthorised downloading and file sharing activities would only take place if the activities were to result in direct commercial advantage or are otherwise “significant in scale”, and that such provisions if passed would have to enjoy particular attention being given to “the clarity of the circumstances in which unauthorised downloading would fall under the criminal test.” This is referring to the observation made earlier in the paper that where criminal convictions have taken place against file sharers in France and Germany, the sharing activity “involved rather large quantities of infringing copies.”<sup>50</sup>

Ironically, Hong Kong has also played host to two notable hearings on the subject of the threshold of prejudicial affect. In the case of *HK SAR v. Chan Nai-Ming*<sup>51</sup>, the defendant was convicted of charges brought under ss.118(1)(f) and 119(1) of the Hong Kong Copyright Ordinance<sup>52</sup>, inter alia, for placing unauthorised copies of three Hollywood movies onto BitTorrent (which was construed in the case as “distributing”). On interpreting prejudicial affect, Magistrate Colin Mackintosh found that;

“It was a distribution in a public open forum where anyone with the appropriate equipment could obtain an infringing copy from the defendant. The technology has developed to such a point that the prejudice to the copyright owners when their films are distributed in this fashion is, in my judgment,

<sup>38</sup> [http://www.piracyisacrime.com/press/pdfs/1132\\_LAW\\_FLYER.pdf](http://www.piracyisacrime.com/press/pdfs/1132_LAW_FLYER.pdf)

<sup>39</sup> S.107(3)

<sup>40</sup> Trevor Cook & Lorna Brazell, “The Copyright Directive: UK Implementation”, (Jordans, 2004)

<sup>41</sup> At para.3.113

<sup>42</sup> Berne Convention for the Protection of Literary and Artistic Works 1886 (1971 revision with 1979 amendments)

<sup>43</sup> Art 9(2)

<sup>44</sup> Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

<sup>45</sup> Art5(5)

<sup>46</sup> “Copyright Protection in the Digital Environment”, available at

[http://www.citb.gov.hk/cib/ehmtl/pdf/consultation/Consultation\\_document.pdf](http://www.citb.gov.hk/cib/ehmtl/pdf/consultation/Consultation_document.pdf)

<sup>47</sup> Cap.528

<sup>48</sup> Ibid. p.1

<sup>49</sup> Ibid. para.1.11(c)

<sup>50</sup> Ibid. para.1.6

<sup>51</sup> [2005], see [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_frame.jsp?DIS=46722](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=46722); and

[http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_frame.jsp?DIS=55378](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=55378) for the judgment from the High Court Appeal

<sup>52</sup> Cap.528

manifest. And these were attempts to commit offences even if the completed offences had not been committed.”<sup>53</sup>

This judgment was affirmed by the Hon Beeson J during the High Court appeal, who also affirmed the wide view taken of the test where it was held that “It is inevitable that distribution to 30 or 40 or more downloaders would involve prejudice to the copyright owners through unauthorised distribution of their intellectual property and lost sales. And though lost sale, in the context of the evidence in this case, might be small, nevertheless, such losses would amount to a prejudicial effect.”<sup>54</sup> Thus, the threshold of prejudicial affect was set at a low level.

However, it should be emphasised that the charge brought in relation to this case was one of attempt, as it was found that copies of the unauthorised material had only been distributed to three people, one of whom was a Customs Officer, before the connection was ceased. It is not made clear in the case reports who was responsible for terminating the connection, but it is an important question. If it was the appellant who broke the connection voluntarily, then surely it cannot be argued that it was his intention to distribute to “30 or 40 or more” downloaders, to which it would follow that he should therefore not be judged on an attempt to distribute to such a number unless it could be proven that he had attempted to do so but had to break the connection prematurely.

If the connection was broken by a third party, such as the appellant’s ISP on request of the authorities, the appellant’s intention to distribute unauthorised copies to the “30 or 40 or more” downloaders would still need to be proven for the charge of attempt to succeed if the court is suggesting that that is where the threshold for prejudicial affect lies. At the time of writing<sup>55</sup>, leave for appeal to the Court of Final Appeal is still pending, but it will be particularly interesting to note the final outcome of this case considering its current uniqueness in the context of prejudicial affect, and its potential to be considered by domestic courts as persuasive should an action against a file sharer occur in the UK under the current law. Even so, it should not be forgotten that the appellant had actively hosted a torrent, as opposed to merely sharing while downloading.

As the situation currently stands, it is still difficult to ascertain whether a UK court would consider a file sharer to have breached the threshold of prejudicial affect, although the nature of networks such as BitTorrent encouraging an upload to download ratio of 1:1, which means many users would only be responsible for uploading the equivalent of a single copy to other users, lends credibility to the notion that non-commercial file sharing would rarely, if ever, be subject to criminal liability.

Regarding the fiction of “copyright theft”, the notion that intellectual property can be compared to physical or tangible property is one which can be dismissed with reference to the law, and to the nature of properties. The PIAC advertising seeks to draw comparison of the downloading of an unauthorised copy of a film with the “stealing” of a television and car. This notion, which is flawed both legally and philosophically, when coupled with the suggested connotations with crime invites a comparison to be made to the legislation which would be invoked when dealing with the theft of a television or car.

The definition of this type of theft is classified on a statutory basis:<sup>56</sup> “A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it”<sup>57</sup>. As any competent first year law student will know, but will remain generally unknown to persons who have not undergone the ordeal of such training, this definition can be split into five components which all have to be satisfied for the offence to form.

“Property” is given the following statutory definition<sup>58</sup>: “‘Property’ includes money and all other property, real or personal, including things in action and other intangible property.” Intangible property read literally forms the essence of what defines intellectual property. Nevertheless, the legislature has ruled that “information” in its purest sense cannot be treated as “property” for the purposes of the Theft Act<sup>59</sup> in recognition of the principle that information is more suitably regulated away from the arena of theft legislation.

Surely if property as defined by the Theft Act cannot constitute information, then it follows that it is incapable of being appropriated. Further, it is an absurdity to suggest that an owner (or, more accurately, rights holder) can have information permanently deprived from them.

On the matter of intention to permanently deprive, *R v. Lloyd*<sup>60</sup> concerned the removal of films from a cinema so as unauthorised copies could be made before being returned. It was held that the physical removal of the

<sup>53</sup> B131

<sup>54</sup> B130-131

<sup>55</sup> January 2007

<sup>56</sup> Theft Act 1968, as amended

<sup>57</sup> S.1(1)

<sup>58</sup> S.4(1)

<sup>59</sup> See *Oxford v. Moss* [1978] 68 Cr.App.R.183, and *Absolom* [1983] *The Times*, 14/09/83, which deal with the information contained on an examination paper and trade secrets respectively

<sup>60</sup> [1985] Q.B.829

films which were contained on reels, a tangible property, could not fall within the scope of the Theft Act as the “intention of the appellants could more accurately be described as an intention temporarily to deprive the owner of the film and was indeed the opposite of an intention permanently to deprive.”<sup>61</sup>

His Lordship went on to consider the relationship between the media which the film was contained on and the information (that is, the film) itself by comparing it to the removal of railway tickets which were intended to be returned after the journeys they permitted access to were completed<sup>62</sup>, affirming that the “thing” was returned in such a changed state that “all its goodness or virtue had gone”. Thus, the value of the intangible benefit (allowing travel on the railways) attached to the physical item (the ticket) had to have been totally exhausted.

His Lordship applied this to the information on the film canisters: “That being the case, we turn to inquire whether the feature films in this case can fall within that category. Our view is that they cannot. The goodness, the virtue, the practical value of the films to the owners has not gone out of the article. The film could still be projected to paying audiences”.

It should be emphasised at this point that his Lordship was considering the “owner” of the “feature films” as the cinema from which the reels were removed, thus theft in the sense of the physical property could have been considered only if the value of the information contained on the reels was entirely exhausted. In recognition of the true nature of the offence, his Lordship continued: “Our view is that those particular films which were the subject of this alleged conspiracy had not themselves diminished in value at all. What had happened was that the borrowed film had been used or was going to be used to perpetrate a copyright swindle on the owners whereby their commercial interests were grossly and adversely affected... That borrowing, it seems to us, was not for a period, or in such circumstances, as made it equivalent to an outright taking or disposal. There was still virtue in the film.”

The key components of these rulings all lead to the same conclusions. Digital information is not regarded as “property” according to the Theft Act, and will only even be considered if it is attached to a physical medium which results in the owner of the *physical medium* being permanently deprived of it. It is therefore submitted that the only way digital information could possibly fall within the remit of the Theft Act is if it was contained on a medium such as a DVD, and was stolen from the owner of the DVD, and the taker of the DVD had no intention of returning the DVD containing the information to the owner. Even then, the Theft Act would only impose liability for theft of the DVD itself as opposed to the information contained on it, and the owner of the DVD, as opposed to the author of the information (or copyright holder), would be considered to be the victim of the crime through the loss of their DVD.

The only possible liability which could potentially be found under the Theft Act lies in the offence of “going equipped to cheat”<sup>63</sup>, but this would have to entail a person who has in his possession a quantity of unauthorised copies which have been made to appear the same as authorised copies (with packaging and so forth convincing enough to deceive customers) who has the intention of selling the copies as genuine copies. Even if intention could be proven, it is pointed out by Bainbridge<sup>64</sup> that it is more likely that copyright offences<sup>65</sup> would be pursued instead. In support of this submission, it should also be noted that this is a very particular scenario, and one which more readily equates to the CDPA’s offence of dealing with unauthorised copies in the course of a business<sup>66</sup>.

The philosophical differences between the theft of a television set and the downloading of a movie are easier to identify to anyone, even those who have not been encumbered with so much as the most basic of legal training. It seems obvious to the point of absurdity to point out that the theft of a television set deprives the owner of the television set of their property, whereas making an unauthorised copy of a movie does not deprive even the copyright holder of their own copy of their property.

Much of the output of the PIAC campaign has been predictably attacked by those who support the relaxation of the legal regulation of file-sharing, but among the opinions of society lie engagingly level-headed responses to the frequent disingenuous representations made by the industries<sup>67</sup>. The affect of the PIAC campaign on society will be considered below, but the following case study first examines a particular facet of the campaign’s influence: the press.

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<sup>61</sup> Per Lord Lane CJ

<sup>62</sup> Referring to *R v. Beecham* [1851] 5 Cox C.C.181

<sup>63</sup> S.25 Theft Act 1968

<sup>64</sup> David Bainbridge, “Introduction to Computer Law”, 5<sup>th</sup> ed, (Pearson, 2004), p.411

<sup>65</sup> Namely those provided by the CDPA

<sup>66</sup> S.107 CDPA

<sup>67</sup> See <http://www.piracyisnotacrime.com> for a collection of articles and links to sources disputing many of the arguments central to the PIAC campaign



## **4.0 Case Study 2: The “Empire Investigates” Piracy Article**

Empire is Britain’s biggest selling movie magazine, boasting a worldwide circulation of 175,656 copies per month<sup>68</sup>, of which 157,495 are distributed in the UK and Republic of Ireland alone. In 2006<sup>69</sup> the magazine ran a five page piece which purported to investigate movie piracy and its effects on the movie industry. It carried with it the results of a survey which was reportedly carried out through their website. As a consumer magazine article, it would not be unreasonable to expect an unbiased examination of the impact of movie piracy on the film industry in the light of the PIAC campaign, and the findings of their own journalistic research. Although it is far outside of the scope of this paper to comment on the directionless narrative and rambling structure of the article, a summation and critique of the content is directly relevant to the central point being submitted.

The article sets itself four central questions. Next to a picture of a man selling what appear to be unauthorised copies of films on DVD, it is asked,

“Is this man:

- funding terrorism?
- working for the mafia?
- promoting slave labour?
- killing the movie industry?”

The article includes a number of boxed results derived from a poll that ran on the website of the magazine<sup>70</sup> which are sparingly referred to in the main text, which itself is primarily dominated by the narrative of the journalist, contributions from representatives of the film industry, and quotes apparently derived from the research.

The article opens with an imaginatively sensationalised retelling of a press release describing a police raid on a dwelling where piracy in the course of a business was taking place<sup>71</sup>. The source for this was the Federation Against Copyright Theft (FACT), a coalition of film and television companies who fund the body to protect “the interests of the industry in the fight against pirate film and DVDs and the increasing threat from online piracy.”<sup>72</sup> As a representative body, FACT can act as a prosecutor in criminal cases, but also aims to “create an effective deterrent to film piracy in the UK by increasing public awareness of...criminal activity”, aid law enforcement bodies such as the police by offering information, and to ensure that “the government and public understand the threat to the UK’s film and television industry and to the community at large from the growing threat of DVD and online piracy.”

Curiously, the term “copyright theft” is less apparent in information provided by FACT, often opting to more appropriately refer to “copyright infringement” instead. Perhaps the persons responsible for naming the organisation decided that “FACT” was a more desirable acronym than “FACI”.

The opening account of a premises containing a sizeable number of unauthorised copies and equipment in which more could be manufactured is indicative of a theme which runs noticeably strongly throughout the rest of the article, in addition to the body’s website and, indeed, the PIAC campaign website of which FACT is a supporter<sup>73</sup>. The theme is one of highlighting instances of criminal piracy carried out in the course of a business by a person who also commits other criminal offences. By focusing on the issue of some criminal business-pirates being involved with other criminal offences<sup>74</sup>, FACT and the PIAC campaign are apparently attempting to link offences such as that contained in s.107 CDPA with what are generally regarded<sup>75</sup> as more “serious” offences such as people trafficking.

This focus is baffling on several levels. In one regard, it at the very least acknowledges that society does not view the criminal offences related to business-piracy as “serious”, possibly as individuals who obtain unauthorised copies either do not believe that their actions are harming the industry, or that any harm existing is

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<sup>68</sup> <http://abcpdfcerts.abc.org.uk/pdf/certificates/13631738.pdf>

<sup>69</sup> Issue 206, August 2006

<sup>70</sup> <http://www.empireonline.com>

<sup>71</sup> [http://www.fact-uk.org.uk/site/latest\\_news/news\\_archivemay06.htm](http://www.fact-uk.org.uk/site/latest_news/news_archivemay06.htm)

<sup>72</sup> <http://www.fact-uk.org.uk/site/about/index.htm>

<sup>73</sup> <http://www.piracyisacrime.com/links/supporters.php>

<sup>74</sup> Which can include being merely associated with others committing other criminal offences, or the carrying out of criminal piracy enterprises in the same location that other criminal offences are being committed

<sup>75</sup> As purported by the research carried out by the magazine

negligible<sup>76</sup>. In another regard, it appears to rely upon the assumption that non-piracy crimes carried out by criminal-pirates (Captains) are intrinsically linked in a way that not only creates a reliance of the former upon the latter, but passes down a degree of culpability to anyone who obtains unauthorised copies (cabin boys).

The article utilises quotes from a number of other figures who are deemed to be representative of the film industry. These figures are Geraldine Moloney of the Motion Picture Association (MPA)<sup>77</sup>, Lavinia Carey, Director General of the British Video Association (BVA)<sup>78</sup>, Andrew Cripps, Chief Operating Officer of United International Pictures<sup>79</sup>, Neil McEwan, Managing Director of Warner Home Videos<sup>80</sup>, Steve Knibbs, Chief Operating Officer of Vue Cinemas<sup>81</sup>, and Gennaro Castaldo, Head of Press & PR of HMV<sup>82</sup>.

As the article looks to address the question of what effects piracy (which is never defined for the purposes of the article or any of the statistics given) is having on the film industry, the MPA cites a worldwide loss of \$6.1 billion. The source of this figure<sup>83</sup> is a study commissioned by the MPAA, and refers to the year 2005. The figures are broken up into three categories:

- “Bootlegging”, defined as “Obtaining movies by either purchasing an illegally copied HS84/DVD/VCD or acquiring hard copies of bootleg movies.”
- “Illegal copying”, defined as “Making illegal copies for self or receiving illegal copies from friends of a legitimate VHS/DVD/VCD.”
- “Internet piracy”, defined as “Obtaining movies by either downloading them from the Internet without paying or acquiring hard copies of illegally downloaded movies from friends or family.”

It was reportedly found that \$2.4billion in “lost revenue” was attributable to bootlegging, \$1.4billion to illegal copying and \$2.3billion to internet piracy. If these figures are accurate, it would seem that these forms of piracy collectively have a significant economic impact upon the worldwide movie industry. However, the study raises several questions.

Firstly, there appear to be overlaps between what the study constitutes as illegal copying and internet piracy. For example, in that both can involve receiving/acquiring unauthorised downloads from friends.

There is also the issue of what constitutes illegality. As a worldwide study, the US law is being applied. However, regulation such as the Digital Millennium Copyright Act<sup>85</sup> takes a more draconian approach to enforcing copyright restrictions than the laws of many other jurisdictions, including that of the UK. An example of a problem this can cause is demonstrable when considering the definition of “illegal copying” as “making illegal copies for self”. In the UK, the act of making a back-up copy for personal use is considered lawful<sup>86</sup>, and format shifting<sup>87</sup> is due to be legalised in the wake of the Gowers Review of Intellectual Property, yet both would fall within the study’s definition of piracy.

Further problems arise when attempting to evaluate how the makers of the study determined which acts of piracy or copying could be interpreted as a de facto economic loss to the film industry. On one of the MPAA’s analyses of the study, it is stated that “Piracy loss calculations are based on the number of legitimate movies – movie tickets and legitimate DVDs – consumers would have purchased if pirated versions were not available.” This wholly formless statement can imply a number of methodologies, such as the inclusion of the scenario of making a back-up copy instead of purchasing a second copy of the same film as a loss.

The most frustrating element of this study is that no real analysis by anyone outside of the MPAA, including the academic community, can be carried out to satisfy its ambiguities and apparent flaws, as the study itself is not publicly available. It is thus submitted that the study cannot be relied upon in any serious academic evaluation.

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<sup>76</sup> Either of which could indicate that consumers believe that figures indicating losses to the film industry caused by piracy are exaggerated, which is discussed in further detail below

<sup>77</sup> A counterpart to the Motion Picture Association of America

<sup>78</sup> Another representative body, whose members consist mainly of home video and DVD distributors

<sup>79</sup> A film distributor

<sup>80</sup> A home video and DVD distributor

<sup>81</sup> A national chain of cinemas

<sup>82</sup> A chain of retail outlets which sells, inter alia, music, film and game software products

<sup>83</sup> Which is not referenced in the article, but further information on the study by LEK Consulting to which it is referring to can be found here: <http://www.mpa.org/USPiracyFactSheet.pdf> and here: [http://mpaa.org/press\\_releases/2006\\_05\\_03lek.pdf](http://mpaa.org/press_releases/2006_05_03lek.pdf)

<sup>84</sup> It is submitted that the MPAA meant to refer to a “VHS” here

<sup>85</sup> 1998, H.R.2281

<sup>86</sup> S.50A CDPA

<sup>87</sup> Converting a legitimate copy of, for example, a movie file to a format capable of being played on an iPod Video

When putting the notion, reportedly submitted by a respondent of the survey, that downloading an unauthorised copy is a victimless crime to the representative bodies, the argument discussed above that career piracy is intrinsically linked to other crimes is again relied upon. The logicity of this argument is flawed in two notable respects. The first is that when one stops to consider that the specific comment is referring to movie downloading, not purchasing from business-pirates, it is clear that the behaviour cannot be funding them. This in itself is indicative of the confusion and ambiguity to which referring to "piracy" as a generalised term can yield, essentially confusing the captain with the cabin boy.

The second flaw lies in the responses from Leinster and Carey. The former points out that those charged with manslaughter in relation to the Morecombe cockle-pickers tragedy were also found to be in possession of unauthorised copies and equipment which could be used to make further copies, and assumes that "those poor souls who went on the beaches were also being obligated to get [pirate DVDs] onto the streets."<sup>88</sup> There is no evidence to support this assumption.

Carey takes the assumed link further by using an analogy of drug users being responsible for "the people who are exploited in the Colombian cocoa fields", and "all those people who get shot running drugs or die"<sup>89</sup>. If Carey's continuation of the analogy in the assertion that "Most of the pirate masters, certainly pre-release, have been camcordered in the back of the cinema" is to be accepted at face value<sup>90</sup>, then it would seem that the analogy is connecting the criminal activity of purchasing controlled narcotics to the civil infringement of purchasing an unauthorised copy, and linking exploited Columbians and the "people who get shot running drugs or die" to the recording of a film in a cinema with a video camera which, as the article itself admits, is not a criminal offence. This assumption itself relies upon taking on face value the contention that cause and effect is quite as strong as Carey suggests, which would in turn make anyone who has purchased clothing manufactured in terrible conditions in third world countries morally responsible.

In apparent answer to the key question heading the article enquiring as to whether business-pirates support terrorism, the BVA and MPA are both adamant that there is unequivocally no link. Carey states "Terrorism is not a link...There's not a proven link."<sup>91</sup> Moloney adds to this by pointing out "We'd really rather move off that...In PR terms, if you talk about piracy and terrorism in the same breath, the reaction is, 'Now you're getting silly.' I think the Spanish had evidence that the Madrid train-bombing had been involved in some degree of piracy. But the point about that is it's trivialising. It's not a good argument. It's one we need to steer clear of."

Aside from drawing upon the obvious disparity between an unwillingness to trivialise terrorism through unproven links to piracy but attempting to compare the latter with serious organised crime such as paedophilia<sup>92</sup>, *inter alia*<sup>93</sup>, the most bizarre aspect is that at the time the article was published, and, indeed at the current time of writing<sup>94</sup>, the PIAC website still makes claims linking piracy to terrorism and offering links to documents which purport to prove the connection<sup>95</sup>.

The article also refers in this section to downloading unauthorised copies of movies using peer-to-peer software as "IP theft" (the faults of which have already been discussed above), but goes on to paraphrase a respondent of their survey as being "absolutely aware" that his activities constitute copyright theft." This is enlightening both in the sense that not only is the article intent on branding civil infringements as criminal acts in a similar vein to theft, but that the respondent is apparently under the impression that this falsehood is an accurate representation of the situation.

The quotes continue by suggesting that piracy in all forms is economically damaging film studios and is responsible for the closure of two retail chains<sup>96</sup> without offering supporting evidence. It is outside of the scope of this paper to examine the link between piracy and its effects on the film industry in detail, although the fact is prominent in its notoriety that the heavily-pirated and ironically titled *Pirates of the Caribbean 2: Dead Man's Chest* was not only the highest grossing film of 2006, but broke box office records for the highest grossing single day<sup>97</sup> and took £2.3million at the UK box office on its opening day alone<sup>98</sup>. The reasons why two retail outlets which went into administration in 2006, of which MVC specifically cited "cashflow difficulties as a result of

<sup>88</sup> Empire, Issue 206, August 2006, p.120

<sup>89</sup> *ibid.* p121

<sup>90</sup> Although it should be noted that no verifiable authority has been cited to support this assertion

<sup>91</sup> *Ibid.*

<sup>92</sup> [http://www.fact-uk.org.uk/site/media\\_centre/cs\\_paedo.htm](http://www.fact-uk.org.uk/site/media_centre/cs_paedo.htm)

<sup>93</sup> [http://www.fact-uk.org.uk/site/media\\_centre/casestudies.htm](http://www.fact-uk.org.uk/site/media_centre/casestudies.htm)

<sup>94</sup> January 2007

<sup>95</sup> <http://www.piracyisacrime.com/bigissue/terrorists.php>

<sup>96</sup> MVC and Silverscreen

<sup>97</sup> <http://www.boxofficemojo.com/alltime/days/?page=open&p=.htm>

<sup>98</sup> <http://news.bbc.co.uk/1/hi/entertainment/5160644.stm>

competitive trading conditions”<sup>99</sup>, are generally accepted as a consequence of competition from out-of town and internet retailers<sup>100</sup> as opposed to piracy.

It should also be pointed out that some studies have suggested that piracy can aid in the profitability of some industries.<sup>101</sup>

The article concluded by re-asking the question of whether the film industry is being endangered by movie piracy. Anyone who has repeatedly observed the PIAC advertisement which often runs at cinemas prior to a movie which, in an attempt to dissuade the audience from obtaining unauthorised copies of the film for playback on home formats, asserts that there is no substitute for watching a film at a cinema, might argue that it carries the same affect of devaluation of the DVD market of which it is suggested by Castaldo is being rendered by unauthorised copies being available.

Arguably the most telling assertion comes from Moloney of the MPA who, despite Carey’s claim that “82 per cent of people know piracy is a crime” (while still not defining which type of piracy), concurs with the observation of the author of the article that, according to their survey, DVD piracy is ranked as less “serious” than speeding. The scale on which this particular piece of research is based on is utterly perplexing, as not only does it seem to arbitrarily make assumptions concerning which crimes are more “serious” than others without any explanation (for example, the scale rates tax evasion above drug possession, breaking the speed limit and shoplifting, which can charitably be described as a subjective view to say the least), but the suggestion that an activity, which at its most extreme is arguably economically damaging and morally dubious, should be considered more “serious” than an activity which frequently causes damage to property, physical injury and death, is beyond reason.

The author summarises a few measures designed to discourage pirates (the context suggesting downloaders and purchasers) including reducing the window between the official release of a film in a cinema and its appearance on legitimate DVDs, and the provision of legal downloading options. Unfortunately, a fleeting and cursory reference is all that is given in the article to these sensible options which rely upon working with market forces and drawing the balance between satisfying consumer demand and compensating the industries, which are potentially far more meritorious than simply wielding the full force of the criminal law, adopting a threatening tone or applying further DRM measures.

The conclusion is left to Moloney who argues the PIAC campaign is “a hearts and mind campaign...We have to persuade people, convince people, that surely if something is worth spending two hours of your time watching, it has a value...you should pay for it. I view that in the same way as everything else – music, movies, whatever.”<sup>102</sup> Although the notion that to be of merit intellectual property has to have an economic value attached to it is most likely to attract less than agreeable comments from creators of public domain and open source material, perhaps the most controversial aspect of this article is that it is supposed to be taken as read that it is an unbiased critical investigation of piracy and its effects on the film industry.

Taken at face value, a consumer who has little or no knowledge of piracy would have little reason to doubt that this was the case. However, the flaws in the article are numerous. The list of contributors representing the industry are all either members or supporters of the PIAC campaign. Further, any opposing views are not only heavily outweighed in terms of the balance of argument and the amount of space afforded to consideration of such counter-theories, but they are all derived from alleged anonymous recipients of the survey purported to have taken place. This survey in itself is also faulty in that the methodology and information concerning the results (such as the number of participants and how the questions were posed) are, in common with the study referred to by the MPA, not available for public analysis and interpretation<sup>103</sup>. Any other figures were estimates, resulting in an “investigation” which is entirely lacking in any breed of verifiable referencing, thus making it of no academic value.

There are two possible reasons for this journalistic failure<sup>104</sup>. The author may either have genuinely believed the representation of piracy as given by the industry representatives and PIAC campaign and simply

<sup>99</sup> [http://www.thisismoney.co.uk/news/article.html?in\\_article\\_id=405899&in\\_page\\_id=2](http://www.thisismoney.co.uk/news/article.html?in_article_id=405899&in_page_id=2)

<sup>100</sup>

See

<http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2006/03/31/cnsilv31.xml&menuId=242&sSheet=/money/2006/03/31/ixcity.html> & <http://business.timesonline.co.uk/article/0,,9074-2351986,00.html>

<sup>101</sup> See, for example, The Speaker Box 2005 study from The Leading Question, as reported at [http://www.theregister.co.uk/2005/07/27/p2p\\_users\\_legal\\_downloads/](http://www.theregister.co.uk/2005/07/27/p2p_users_legal_downloads/)

<sup>102</sup> Empire, Issue 206, August 2006, p.122

<sup>103</sup> Several requests for this information were made to the persons responsible for the article and the survey itself to no avail. It is also worth noting that the magazine refused to consider any right of reply offered to correct the errors in law via either a counter-article or a letter. Further, the administrators of the forum of the magazine where the study reportedly took place deleted posts made by the author of this paper without explanation

<sup>104</sup> The National Union of Journalists sets out a code of conduct which journalists are expected to uphold, of which it is submitted the journalist responsible for this article was, unwittingly or otherwise, in breach of rules 1 (to

failed to check the accuracy of the facts, or he possibly aimed to have shaped the stance of the article in such a way as to avoid disagreement with the message the industry wishes to put out, as it is the same industry which grants the magazine access to its films before the general public for review purposes, and provides a significant source of revenue through advertising.

If the first reason is true, then the hypothesis that the PIAC campaign is succeeding in misrepresenting IP regulation is supported. If the second reason is to be followed, then this is indicative of the PIAC campaign seeking to outsource its reach from advertising and its website to influencing society through the specialist press.

## **5.0 The Exploratory Study**

In order to assess the reach of the influence exerted over society, an exploratory study was carried out in December 2006 in which respondents were invited to answer questions online and anonymously regarding, *inter alia*, their perception of the law of piracy regulation.<sup>105</sup>

The study was made publicly accessible online, and was advertised via posters placed around the School of Law of the University of Hertfordshire, and the link was also made available on a number of internet discussion forums in order to attract participants who had sufficient experience with computers to visit such virtual locales.

In advertising for the survey, and in the introduction of the survey itself, it was requested that participants answer the questions honestly and independently without discussing them with others or looking up the answers in books or via the internet, which was of paramount importance if the study was to reveal how the participants perceived the law of piracy as opposed to judging their ability to find out.

The term “unauthorised copies” was defined in the survey as meaning “unauthorised copies of copyrighted music, games, software applications or video footage such as films or television programmes.” The first question asked “Which of the following do you believe is a criminal offence under English law?” The acts specified were:

- Downloading unauthorised copies
- Viewing unauthorised copies
- Purchasing unauthorised copies
- Selling unauthorised copies
- Giving unauthorised copies
- Recording a film in a cinema with a video camera without permission

The legal stance on the above activities is that only the act of selling unauthorised copies can be a criminal offence<sup>106</sup>, whereas the other acts are only capable of constituting a civil infringement. Downloading can be deemed to be an act of infringing reproduction<sup>107</sup>, as can recording a film in a cinema. Viewing would involve the possession of an infringing copy<sup>108</sup> unless the copy belonged to another person, in which case the viewer could not have committed an infringing act. Purchasing, once the transaction had been made, would also involve possession of an infringing copy, and giving could be caught by the same tort of possession and, if the giver made the copy for the receiver, infringing reproduction would occur<sup>109</sup>. Therefore, if there is an understanding among the public concerning which of these acts can constitute a criminal offence and a civil infringement, the results would be demonstrated by the majority of respondents selecting “Not Criminal” for all but the act of selling.

The results showed that most of society (94%) is aware that selling unauthorised copies can constitute a criminal offence. A strong majority of respondents incorrectly believed that downloading (71%), purchasing (74%), and giving (72%) unauthorised copies could constitute a criminal offence, whereas an even stronger majority (87%) believed that recording in a cinema was criminal in nature. Nearly half of the respondents (47%) believed that merely viewing an infringing copy, which is not necessarily even a tort, constituted a criminal offence.

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maintain a high professional and ethical standard), 2 (to strive to prevent distortion), 3 (to ensure information disseminated is accurate and to avoid the expression of comment and conjecture as established fact and falsification by distortion, selection or misrepresentation) and 4 (rectifying inaccuracies, ensuring corrections are made and allowing a right to reply): see <http://www.nuij.org.uk/inner.php?docid=59>

<sup>105</sup> A full analysis of all aspects of the exploratory study can be found in the appendix of this paper, and the results of the study can be viewed at <http://www.surveymonkey.com/Report.asp?U=291499026511>

<sup>106</sup> S.107(1)(d)-(e) CDPA

<sup>107</sup> S.17 CDPA

<sup>108</sup> S.23 CDPA deems this to be a secondary infringement if certain circumstances, such as possessing in the course of a business, are met

<sup>109</sup> S.17 CDPA



The suggestion these results strongly assert is that the vast majority of the public are fully aware of the criminal offence of selling unauthorised copies. However, the results also indicate that a considerable majority are under the erroneous impression that four of the five other acts are also criminal in nature, with the only act not invoking a majority belief (viewing) still apparently viewed incorrectly by close to half of society.

The fourth question in the survey asked the respondents to indicate why they thought each of the acts of downloading, viewing, purchasing and selling unauthorised copies were crimes. In order to avoid leading the participants, no reference to the PIAC campaign was mentioned in the options given, although this has been the predominant body in the UK involved with exerting an influence via advertising and the availability of information, as discussed in the case study above. The available answers were:

- I've seen a commercial which says so
- I've read an advertisement which says so
- I don't know / Other
- I don't think it's a crime

Of those who thought each act constituted a criminal offence, nearly half (49.4%) of those who believed viewing was criminal, and the majority of those who believed purchasing and downloading (53.6% and 62.6% respectively) were criminal indicated that they had garnered this misperception from watching or reading a commercial. As the PIAC campaign is currently the only campaign concerning the regulation of piracy running in the UK, this lends strong support to the notion that the "Piracy. It's A Crime" commercial which runs in cinemas, on television and is included on DVDs (as discussed above) and the various print advertisements are responsible for miscommunicating the legal position to a significant proportion of the population. Although it could possibly be said that the PIAC campaign has at least had the positive side effect of contributing towards communicating the message that selling unauthorised copies can constitute a criminal offence (with 53.6% of those believing purchasing unauthorised copies to be a crime indicating that they had watched or read a commercial which said so), the unfortunate consequence of failing to define piracy in these commercials is the infliction of an apparent mass confusion.

As this was an exploratory study, questions were also included to aid in identifying the cross-section of the public whom the results are more commonly applicable to. The second question asked the respondents if they had ever engaged in the act of downloading, viewing (in the case of, for example, films) or using (in the case of software), purchasing or selling unauthorised copies. Respondents could indicate that they had not engaged in the particular acts, that they had engaged in the particular acts, or that they had engaged in the particular acts but sometimes went on to purchase an authorised copy of the unauthorised material at a later point in time.

This question was designed not only to ascertain what proportion of the respondents came into contact with unauthorised copies and what kind of activities were the most prevalent, but to explore the notion that those who do obtain or use unauthorised copies do not necessarily do so at the preclusion of purchasing authorised copies of the same material.

The results revealed that a minority of respondents (9%) sold unauthorised copies. A notably high majority of respondents admitted to downloading and viewing/using unauthorised copies (87% and 84% respectively). A minority of the respondents (37%) also admitted to purchasing unauthorised copies. These results carry with them a number of suggested conclusions, namely that means of obtaining or using unauthorised copies which are free are considerably more prevalent than obtaining unauthorised copies at a cost, and also that the fact that high percentages of the respondents believe acts such as downloading unauthorised copies to be criminal offences demonstrates that criminal sanctions in relation to copyright do not have a deterrent effect.

Another revealing aspect of the survey was the difference in behaviour of those who download unauthorised copies and those who purchase unauthorised copies. A majority of downloaders (69.1%) indicated that they sometimes purchased an authorised copy of the same information later, whereas a slightly lower majority (57.1%) of those who view and/or use unauthorised copies also admitted to purchasing authorised copies later. However, a lower proportion (39.7%) of respondents who purchase unauthorised copies later go on to purchase an authorised copy. This could indicate that users of unauthorised copies will be more conducive to the prospect of purchasing a legitimate copy if they have not already spent money in obtaining an unauthorised copy. This in itself supports the notion that those who sell unauthorised copies should indeed be subject to criminal sanctions, as it is here that a displacement of spending can be demonstrated.

The following question was designed to shed further light upon the myth that non-business pirates carry on the practice of obtaining unauthorised copies instead of purchasing authorised copies. The respondents were asked to select which one of four categories best described their activities:

- I buy authorised copies and download unauthorised copies
- I only download unauthorised copies

- I only buy authorised copies
- I neither buy nor download

The vast majority of respondents (72.6%) indicated that they purchased authorised copies in addition to downloading unauthorised copies, thus affirming the intimation in the previous question that non-business pirates (or, indeed, “cabin boys”) still actively spend money on authorised copies. A small percentage (16.6%) indicated that they only purchased authorised copies, whereas a small minority (8.3%) claimed to only download unauthorised copies (2.5% claimed to neither buy nor download). In addition to affirming the conclusions drawn from the results of the previous question, this data further suggests that piracy which takes place on what can be considered a lower level than business-pirates do not pose the economic danger to the entertainment industries to the extent suggested by interpretations of studies which assume that anyone who obtains or uses an unauthorised copy does so to the exclusion of purchasing a legitimate copy.

In recognition of the fact that although statistics on their own would provide valuable data regarding legal perception, even more could be learned from discovering the motives of pirates, respondents who download, view, purchase or sell unauthorised copies were invited to give their reasons for doing so in an open text box. This yielded a surprisingly detailed picture on the motives and behavioural patterns of pirates<sup>110</sup>.

Qualitative analysis of the responses revealed that the responses given could each be assigned to one or more of thirteen particular categories, which are defined as follows:

**A:** The user<sup>111</sup> believes authorised copies are too expensive or that they are subject to “rip-off Britain”<sup>112</sup>, and that they would not purchase them even if the option to obtain an unauthorised copy was not available due to the price.

**B:** The user is attracted by the availability of unauthorised copies of US or other foreign television programmes and films at an earlier point in time than when authorised copies become available domestically, as many popular US programmes are shown often months before a UK broadcaster transmits them, and the UK also often trails behind in terms of the release date of cinematic releases.

**C:** The user purchases an authorised copy when it becomes available.

**D:** It is extremely difficult or impossible to obtain an authorised copy in the UK – enthusiasts of old or obscure television programmes and/or films and enthusiasts of Japanese Manga products typically cited this reason.

**E:** The user uses unauthorised copies as a means of evaluation or “try before you buy”, insinuating that the user will purchase an authorised copy if the product meets their expectations.

**F:** The user prefers using unauthorised copies as obtaining them is easy and/or free of charge.

**G:** The user is of the opinion that the industries have not taken advantage of the efficient means by which copies can be distributed digitally, thus relies on those who have.

**H:** The user holds a negative view of the industries and/or believes obtaining unauthorised copies is a victimless act.

**I:** The user has already paid to use an authorised copy, thus believes they should not have to pay again (such as a user who has purchased an authorised copy of a film on DVD, but does not believe they should have to pay for an authorised copy of the same film to watch on a portable playback device).

**J:** The user would have had no intention of purchasing an authorised copy even if an unauthorised copy was not available.

**K:** The user uses an unauthorised copy as a means of time-shifting, for example, by downloading a copy of a television programme which has been broadcast and was available to them but was not viewed.

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<sup>110</sup> The responses given by the respondents to this question can be found in the appendix, and at <http://www.surveymonkey.com/Report.asp?U=291499026511>

<sup>111</sup> “User” in these categories means any person who uses unauthorised copies, including downloading, viewing or purchasing

<sup>112</sup> A term used to describe many instances of British prices being higher than those charged for the same product in the US or other countries

**L:** The user believes unauthorised copies are superior to authorised copies, for reasons such as music containing DRM or DVDs containing unskippable advertisements.

**M:** The user believes the unauthorised copies to be “abandonware”<sup>113</sup> or orphaned works.

By applying one or more of the above categories to each written answer appropriately, an initial quantitative set of results is yielded. The most popular three reasons given for obtaining unauthorised copies are reasons A (34%), E (33%) and F (32%). These results are illuminating as they provide key clues as to why non-business pirates are willing to participate in an unlawful activity. The most popular reason, that goods are too expensive, is revealing in that not only do consumers appear to still have a view that products should be sold at lower price points, but that they would not have purchased the items due to the high price attached even if obtaining through means such as file sharing had not been available.

The second most popular reason, that unauthorised copies are used for evaluation purposes, is another arguably benevolent use of unauthorised copies. The practice of issuing demonstration copies of software for evaluation purposes has been common for many years, but these often have their functions restricted in some key fashion in order to deter users from simply keeping the evaluation copy. Although it could be argued that some users who evaluate full copies of unauthorised materials do dishonestly opt to refrain from purchasing an authorised copy, the activity could suggest an evolution, albeit one brought about by forces outside of the control of the industries, of the evaluation copy model. Consumers can gain a fuller understanding of an unrestricted version of unauthorised copies, and could even lead to purchases being made that otherwise would not have occurred if the evaluation could not have taken place if there are extra benefits present, for example, a high quality DTS-soundtrack accompanying an authorised copy of a DVD movie, or online support for a complex piece of software.

The third most popular reason, that obtaining unauthorised software is free and easy, is entirely expected yet potentially the most worrying. That a consumer would opt to obtain a free unauthorised copy without leaving the seat in front of their computer over a paid-for authorised copy which would take longer to arrive or offers no real benefit over its unauthorised counterpart, is another consumer-led evolution of the market which could not only affect the market for such products detrimentally, but is indicative of the base problem – that despite the attempts of the industries to throw a blanket message of deterrence over the practice, insufficient effort is being afforded towards tapping into the market of those who would choose a more convenient alternative over a legal option.

The next most popular justifications provide an equally mixed message insofar as the questions of how file sharing may or not be damaging to the industries and what should be being done to aid the evolution. 27% of respondents cited option D (that it is excessively difficult or impossible to locate an authorised copy to purchase within the UK) which indicates that the only potential sales being lost here are due to the industries not taking advantage of means of digital distribution and e-commerce methods to meet market demand.

The next two most popular options, H (21%) and C (20%), send an equally mixed message. Citing a negative view of the industries as a reason to obtain unauthorised copies could be interpreted as an open protestation indicating not only that the PR machine is failing, perhaps because their focus is being somewhat misdirected, but that it is viewed as an essentially victimless activity – a theory which has yet to be convincingly proven or disproved in any meaningful form. In stark contrast, the admission that legitimate copies are always purchased later is another indicator that file sharers are not only participating in the evolution of digital distribution before the industries have managed to fully take advantage of the avenues open to them, but that, again, yet another group of “pirates” have been revealed who are not actually damaging the economic interests of the industries in any demonstrable fashion.

The study designed to follow up on this research will offer the above thirteen options to non-business pirates to obtain a more steadfast indication of their motivations. For now, the ramifications of the above case studies and the results of the exploratory study must be brought together.

## **6.0 The “How”, The “What”, The “Why” & The Danger**

The preceding exploration of the facets of intellectual property regulation which relate to piracy has focussed upon the representation of this regulation to society, and the perceptions held by society as a result – the “how”. In evaluating the hypothesis, it has been argued that the PIAC campaign has either influenced the press or has seen a component of the press being complicit in disseminating its message. It has also been argued that this message, which has been fed to society through the PIAC campaign and the press, offers a fundamental misrepresentation of IP regulation.

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<sup>113</sup> Works which are considered to be old and devoid of commercial value, i.e. taken as “abandoned” by the rights holder

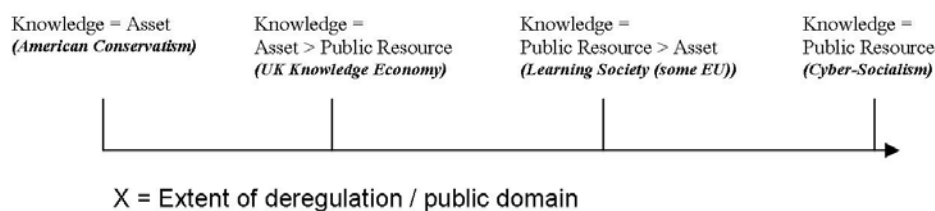
Now we have seen how IP regulation has been misrepresented, it must be questioned what precisely the industries are actually trying to affect.

### 6.1 The “what”

As the exploratory study has suggested, society has indeed been influenced by this misrepresentation in that the majority of respondents indicated that their understanding of the civil infringements in relation to the obtaining and use of unauthorised copies, as described above, specifies a misperception that they are criminal offences. However, “society” encompasses far more than just consumers, or indeed potential consumers, of authorised copies.

In an evaluation of the national importance of balanced IP regulation in an international context, Davies & Withers<sup>114</sup> identify a spectrum<sup>115</sup> of stances of regulation leading from IP restrictions control through to ultimate deregulation and unfettered distribution of digital information<sup>116</sup>.

*Figure 1: IPPR Regulatory Scale*



On one end of the scale lies the notion of knowledge treated purely as an asset. This corporation-focused approach likens IP to tangible property, and levies all the same restrictions and controls over it as if a piece of digital information was indeed a piece of land.

The next marker on the scale is that of treating knowledge as an asset first, and a public resource second. Although this approach still favours the corporation, certain concessions are made towards opening consumer rights. Then lies the notion of knowledge as a public resource first, and an asset second. This empowers the consumer with more rights when it comes to accessing IP, disempowering the might of DRM in favour of fair-use defences and clearing up confusing contradictions such as the s.50A/s.297ZA CDPA dichotomy by allowing the former right, being as it is a right designed to protect authorised users, to prevail over the limitations of the latter.

The end marker of the scale is defined as knowledge as a public resource only, and dubbed rather aptly “cyber-socialism”. This essentially proposes the deconstruction of the distinction between consumers and rights holders in favour of a world (virtual or otherwise) in which the public domain flourishes, and creators are willing and compelled (although by what is left unidentified) to produce and share work with their fellow file sharers.

The first marker is dubbed “American conservatism”, a clear reference to the DMCA which is widely noted as treating IP as a corporate asset to the almost complete exclusion of all other interests. The second marker is described as the “UK knowledge economy”, in reference to the CDPA becoming increasingly focused upon restricting rights, albeit not to the same extent as the arguably draconian DMCA. The third marker is considered to be “a learning society”, and cites several examples of how European states have interpreted the rights restrictions of the EC InfoSoc Directive in a minimalist fashion in order to afford IP a greater degree of openness in its use. It is argued by Davies & Withers that this approach should be followed by UK policy makers.

Despite the arguments of the IPPR encouraging a shift away from the asset economy and towards the knowledge economy, it is clear that the goal of the PIAC campaign on behalf of its member bodies and supporting associates is to bring UK law closer to the highly restrictive DMCA and its asset-based approach towards regulation.

The most recent proposals for reform lie within the pages of the Gowers Review of Intellectual Property which, if followed, would largely have the effect of entrenching UK IP regulation in its current position, namely that of treating information as an asset first, and public resource second. Although recommendations such as maintaining the current limit on the length of time for which copyright subsists in a work are considered to be

<sup>114</sup> William Davies and Kay Withers, “Public Innovation: Intellectual Property in a Digital Age”, (Institute for Public Policy Research, 2006)

<sup>115</sup> *ibid.* p.76 et seq

<sup>116</sup> See figure 1, below

relatively positive to those who would prefer a less restrictive approach to IP regulation, certain proposals such as the heightening of criminal sanctions applicable to particular criminal offences in order to bring the notion of IP infringement in line with counterfeiting of physical property seems to suggest a gravitation towards the approach of the DMCA and the knowledge as asset theory.

Although the Gowers Review could certainly have chosen to manoeuvre UK IP regulation towards an even more restrictive approach, the decision not to follow the lead of many of the UK's European counterparts in taking a minimalist approach to tightening IP restrictions has been welcomed by many representatives of the creative industries<sup>117</sup>. This invites two questions: firstly, why are the industries so keen to hold onto, and indeed expand upon, the applicability and enforcement of digital rights restrictions and, secondly, what dangers lie ahead if lobbying such as the PIAC campaign is overly influential?

## 6.2 The "Why"

The entire rationale behind the industries' desire to see a far more restrictive approach to digital restrictions along similar lines to the DMCA is one that, just as IP regulations themselves cannot be simply bundled together into a knotted ball of wool and expected to be easily untangled, cannot be explained in simplistic terms. Commentators such as Lessig have written influential observations which centre around a desire for keeping what would naturally become a sharing society if left to its own devices as opposed to a restrictions and corporate-control based regime, as the title alone alludes to of the book "Free Culture: How Big Media Uses Technology And The Law To Lock Down Culture And Control Creativity"<sup>118</sup>.

But surely this notion, if accepted, means that the industries are being short sighted and even self-harming. In a critique to the above work, Wild & Weinstein<sup>119</sup> identify an alternative future to that of regulation of the internet being overly influenced by "big media" seeking to protect their current economic benefits, namely "a guarantee of the social bargain with the creator (artist) with a view to providing a framework under which he may choose to offer his work under license." However, this bargain between the creator and the consumer need not necessarily involve larger corporations such as the film distributors and the record labels in the digital age.

The doctrine of corporations enjoying the status of a single legal personality is one that has been cynically, yet compellingly and convincingly, represented as such bodies being comparable to a psychopath on a single minded pursuit of profit and power<sup>120</sup>. These major bodies have reaped the benefits of distributing the intellectual property of authors and creators on physical media such as video cassettes and optical discs for many years prior to the rise of the internet and the withering of the analogue era. The digital era has opened many new doors when it comes to means of distribution of works but, and it is here that representative bodies, whether psychopathic or otherwise, should be worried, many of these new means need not involve the distributors. For example, the recent changes in how the UK top 40 music singles charts have adapted to take into account sales made digitally and not rely upon physical media sales have seen the first band to enter the charts without being signed to a record label<sup>121</sup>.

Perhaps then the industries are concerned not so much by the bargain between the creators and consumers, but their own interests when it comes to representing the creators. By lobbying to raise enforceability of IP restrictions and encourage the proliferation of DRM, it could be suggested that the industries are operating in what they see as a fight for their survival – an attempt to justify their existence by holding onto old fashioned concepts of physical distribution and limiting the natural evolution of the digital age. This focus on short term gain, a hangover from the analogue era, shows an unfortunate lack of vision, as it could also be suggested that funds placed into attempting to control the market by influencing the perceptions of society perhaps to the ends of moulding the law itself could be far better spent on embracing methods of digital distribution which strike a truer bargain between authors and digital consumers which proves attractive (and so necessarily as least restrictive as possible to the latter) to all parties, including the representative bodies.

The view of the industries in how to approach the issue of piracy also often appears to be at odds with the creators they are representing<sup>122</sup>. With regards to the music industry, Rod Stewart in a BBC interview refused to be

<sup>117</sup> See, for example, Director General of ELSPA Paul Jackson at:

<http://www.elspa.com/?i=5456&s=1111&f=49&archive=>

<sup>118</sup> Op cit

<sup>119</sup> Stuart Weinstein and Charles Wild, "Lawrence Lessig's 'Bleak House': a critique of 'Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity' or 'How I Learned to Stop Worrying and Love Internet Law'", (2005), IRLCT, vol.19, no.3, pp.363-375

<sup>120</sup> See Joel Bakan, "The Corporation: The Pathological Pursuit of Profit and Power", 2<sup>nd</sup> ed. (Constable, 2005) p.56 (passim) & "The Corporation", 2003, directed by Mark Achbar and Jennifer Abbott

<sup>121</sup> <http://news.bbc.co.uk/1/hi/entertainment/6260995.stm>

<sup>122</sup> Although there have been negative interventions from creators, such as Lars Ulrich of the rock band "Metallica" speaking publicly against Napster before it was legalised, their numbers are fewer than those who have spoken out either intimating an apathetic stance or actively supporting the practice of file sharing. An



led into condemning those who download unauthorised copies of his music, responding to the interviewer's questions (after it was pointed out that he had sold 175,000 copies of his album and was at number one in the US charts) "how are you coping with this downloading problem where all these people are getting your music for free, how do you protect yourself from that... do you find that numbers are dwindling because of technology?" with the retorts, "It's something that doesn't concern me... No, it doesn't worry me."<sup>123</sup>

Similar views have been expressed by software authors. For example, leading software developer Warren Spector speaking at the Game Developers Conference 2005, stated, "I've said for the last 15 years that anybody who worries about piracy is full of s\*\*\*... Anybody who's going to pirate the game wasn't going to buy it anyway, just because, I mean, it just doesn't follow, OK? You sold a bunch of copies of the game, just live with it, be happy, move on."<sup>124</sup>

Developer Chris Hecker further pointed out;

"The right thing here is that, if someone who [designed] the vested interest in either side, should actually do the sociological epidemiological research, and figure out whether piracy actually hurts game sales. The BSA and ESA or whoever the f\*\*\* they're calling themselves nowadays, are not the people to do that. Of course they're going to find--they're like the RIA of our industry.

Like, someone actually needs to do the work. If game sales are actually hurt, and I assume that is not the case--and I think most people up here also assume that's not the case--by piracy, well, I mean, yes, if you're talking about like, the guy who just starts these gigantic factories to turn out copies of your game, and sell them all over Europe--sure! Totally shut them down. Like, me, like giving a copy of the game to my sister or somebody, to play, I'm thinking I'm not hurting the EA<sup>125</sup> bottom line that much. But somebody has to do that research. But guess what? We're not. We live in an industry of publicly traded companies who it's in their best interest to not actually figure out the answer to that question."<sup>126</sup>

The point that the industries are noticeably ineffective at citing verifiable research when arguing that non-business piracy is harming the interests of the creators is not lost on the world's press<sup>127</sup>, yet the increasing amount of research which suggests that no harm is done to the entertainment industries<sup>128</sup> is something which the industries would understandably be reticent to acknowledge if their economic interests were de facto being harmed. However, the flourishing growth in the market of online creative content<sup>129</sup> points resolutely to the motives of the corporations being more likely to be a result of a reluctance to allow the digital era to evolve, such evolution being seen as being at their own expense (although in reality this would be in the short term, although certainly not necessarily in the long term).

### 6.3 The Danger

A cynical commentator might suggest that the current state of IP regulation in the digital age is akin to making the technological leap from horse-drawn carriages to motor vehicles without bothering to enact the Road Traffic Acts. As the legislator is effectively playing catch-up when it comes to regulating IP in the digital age, the danger lies starkly in the potential reach of the influence of campaigns such as PIAC.

As the IPPR has identified<sup>130</sup>, there is no major body in the UK interested in presenting the perspective of intellectual property as knowledge first and asset second<sup>131</sup> which can compete in terms of the reach, funding and

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example of the latter, who can also be cited as a practical mirror opposite to Ulrich, is John Perry Barlow, a former lyricist for the rock group Grateful Dead (who always actively encouraged the recording and proliferation of their materials) who became a co-founder of the Electronic Frontier Foundation

<sup>123</sup> BBC Radio 2, 24/10/06

<sup>124</sup> See [http://uk.gamespot.com/news/2005/03/18/news\\_6120449.html?sid=6120449](http://uk.gamespot.com/news/2005/03/18/news_6120449.html?sid=6120449) for a full transcript of this discussion

<sup>125</sup> Electronic Arts, a large games publisher also encompassing several development houses

<sup>126</sup> Ibid.

<sup>127</sup> See, for example:

<http://australianit.news.com.au/articles/0,7204,20713160%5E15306%5E%5Enbv%5E.00.html>

<sup>128</sup> <http://www.newscientist.com/article.ns?id=dn4831>

<sup>129</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/95&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>130</sup> Davies and Withers op cit, p.80 et seq

influence of the numerous bodies and PIAC campaign which supports the polar opposite. As long as this is the case, the current state of IP regulation can be misrepresented or referred to fuzzily in terms of black and white, good and evil. As far as the industries are concerned, “piracy”, which in the same sentence can be and often is defined by them as what this paper has termed Captains and cabin boys, but without actually distinguishing between the enormous scope of the activities of the two and all who lie between them, is sweepingly referred to as an evil. This can only be averted by separating the issues out into identifiable singular or comparable sets of activities – the string must be unravelled, and examined piece by piece.

This paper has already demonstrated how the press can be influenced or even complicit in spreading an inaccurate summation of an extraordinarily complex area of law. Just as this influence can spread to a misperception held by society, the danger of policy makers falling foul of this same influence is real. A group opposing the PIAC campaign has documented an instance of an MEP apparently being the subject of precisely this kind of misperception<sup>132</sup>, where Arlene McCarthy announced that there was evidence of the sale of “pirate DVDs” being used as a partial source of funding for the bombing of the World Trade Centre on the 26<sup>th</sup> February 1993, over four years before retail DVDs became available<sup>133</sup>.

The website flippantly described the allegations as “time travel”, although a more disparaging commentator may well perhaps have viewed such an occurrence of the rewriting of history as comparable with the function of the Ministry of Truth<sup>134</sup>, conveying the message of the ITIPAC without reference to verifiable facts. If this is followed in light of Orwell’s bleak observation that “Ignorance is Strength”, the deep-reaching roots of what this paper has likened to an interface covering the tangled ball of string representing IP regulation become more clearly exposed.

## 7.0 Conclusion

It has not been the purpose of this paper to prove that piracy does not harm the entertainment industries, or that it is not desirable.<sup>135</sup> If the influence of the industries is as wide-reaching as the above discussion suggests, any such proof may well have served little utility.

In such a crucial point in the evolving era of the digital age, when policy makers are examining how intellectual property should be regulated, an objective view is needed. If Sir Francis Bacon’s somewhat more optimistic maxim “knowledge is power” is to be preferred, what could (and arguably should) be dismissed as merely one-sided hyperbole can in fact be presented to the magnitude that it is considered by society to be an objective viewpoint, which in turn presents the danger of a mass-misperception transforming a subjective viewpoint into what is thought to be an objective stance. The ease at which a disfiguration of the principle of utilitarianism can occur is appropriately summarised; an objective view of what constitutes “moral sensibilities are nowadays at such cross-purposes that to one man a morality is proved by its utility, while to another its utility refutes it.”<sup>136</sup>

And so we return to the quote which opened this paper: the new “political order” is the IP regulation mooted by reformists who favour a move away from digital restrictions. As the digital revolution is one which is relatively new, such reformists have ahead of them a difficult time in persuading those who have no experience of the digital markets of the future that they will profit from them, due to the overwhelming zeal of those who have already been profiting – and are intent on continuing to do so – from the old analogue era. Thus, a one-sided battle lies ahead, from which one of three outcomes are likely to occur: the limitation of the digital revolution in favour of increasing IP restrictions to maintain the illusion that technological innovation is occurring; the acceptance by the industries that the evolution cannot be stemmed by the tide of the law<sup>137</sup>, to which the industries would have to adapt as they did after the Amstrad<sup>138</sup> and Betamax<sup>139</sup> rulings, as opposed to hiding behind the skirt of the law; or,

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<sup>131</sup> Although some such bodies do exist, they fail to match the scope of the leading body in the US, the Electronic Frontier Foundation

<sup>132</sup> <http://www.piracyisnotacrime.com/timetravel.php>

<sup>133</sup> The transcript of McCarthy’s speech can be found at

<http://www.arlenemccarthy.labour.co.uk/ViewPage.cfm?Page=13415>

<sup>134</sup> The body responsible for rewriting history on behalf of “The Party” in the seminal work by George Orwell, “Nineteen Eighty-Four”, (1949)

<sup>135</sup> A follow-up research study intended to address this question is currently in progress at the time of writing

<sup>136</sup> Friedrich Nietzsche, “Daybreak: Thoughts on the Prejudices of Morality”, (Cambridge University Press, 1997), s.230

<sup>137</sup> A position which the Canadian “Captain Copyright” campaign has apparently accepted; see:

<http://www.captaincopyright.ca>

<sup>138</sup> CBS Songs Ltd v Amstrad Consumer Electronics Plc [1988] RPC 567, HL

unfortunately the most likely, an uncomfortable and ongoing battle between the law and cyberspace which will undoubtedly, after the passing of much time, litigation and expense, eventually result in the industries recognising the new opportunities for e-commerce, and resultingly adapting themselves to meet consumer demand and behaviour.

The first would be a stamp on the head of innovation, the second an embracement. The third is an almost inevitable messy compromise between the two which is likely to cast a misfocussed light over the regulation of cyber piracy and, consequently, intellectual property law as a whole, for many years to come.

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“...laws were made, that the stronger might not in all things have his way.”<sup>140</sup>

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<sup>139</sup> Sony Corporation of America v Universal City Studios Inc [1984] 464 US 417

<sup>140</sup> Ovid, “Fasti”, (Penguin Books, 2000), p.284

## **Appendix**

### ***Cyber Piracy: Behaviour, Motivations & Legal Perception (Exploratory Study)<sup>141</sup>***

In preparation for a full study into the effects of cyber piracy, common behavioural patterns with regards to cyber piracy, motivations for engaging in cyber piracy and ascertaining the predominant perception of the law which regulates cyber piracy, this exploratory study was implemented in December 2006.

The study was made available online in the form of a survey hosted by an independent survey hosting service. Potential recipients were invited to participate through advertisement of the URL at the University of Hertfordshire, and on a number of online forums. The study attracted 157 respondents, which strikes a satisfactory balance between gleaning enough answers to ascertain an accurate representation of society and the risk of over-exposing the research before the full study is implemented. The study was designed to be non-leading. Recipients were informed before participating in the survey that any data pertaining to their identities, such as IP addresses, would remain anonymous in order to encourage truthful answers if respondents had engaged in cyber piracy.

Prior to taking the survey, potential recipients were informed that the questions would be relating to English law. This is so the results could be read in light of English regulation and English external influences. A message was also displayed requesting recipients not to discuss the questions and possible answers with others or to research the correct answers, in order to obtain an accurate representation of the perception of respondents at the time of arriving at the survey.

On each page of the survey, a definition of “unauthorised copies” was given as “unauthorised copies of copyrighted music, games, software applications or video footage such as films or television programmes.”

#### ***Question 1:***

Which of the following do you believe is a criminal offence under English law?			
	Criminal	Not Criminal	Response Total
Downloading unauthorised copies	<b>71% (110)</b>	29% (46)	<b>156</b>
Viewing unauthorised copies	47% (74)	<b>53% (82)</b>	<b>156</b>
Purchasing unauthorised copies	<b>74% (116)</b>	26% (40)	<b>156</b>
Selling unauthorised copies	<b>94% (147)</b>	6% (9)	<b>156</b>
Giving unauthorised copies	<b>72% (112)</b>	28% (44)	<b>156</b>
Recording a film in a cinema with a video camera without permission	<b>87% (135)</b>	13% (21)	<b>156</b>
<b>Total Respondents</b>			<b>156</b>
(skipped this question)			1

The purpose of this question was to gauge the perception of the respondents with regard to which of the above acts constituted a criminal offence. “Selling unauthorised copies” is potentially a criminal offence. The other acts are not criminal, but can constitute civil infringements.<sup>142</sup> The bold figures highlight the majority figure in each instance, indicating the majority of respondents believed all but viewing unauthorised copies were criminal acts. The majority of recipients therefore believed erroneously that all acts listed other than viewing and selling could constitute criminal offences.

<sup>141</sup> The results of this study can be viewed online at: <http://www.surveymonkey.com/Report.asp?U=291499026511>

<sup>142</sup> See section 5.0 above for more detailed discussion

## Question 2:

Have you ever:				
	Yes	No	Yes, but I sometimes purchase an authorised copy later	Response Total
Downloaded unauthorised copies?	27% (42)	13% (20)	60% (94)	156
Viewed/used unauthorised copies?	40% (63)	6% (9)	54% (84)	156
Purchased unauthorised copies?	22% (35)	63% (98)	15% (23)	156
Sold unauthorised copies?	8% (12)	91% (142)	1% (2)	156
Total Respondents				156
(skipped this question)				1





The purpose of this question was twofold:

- i) to establish the proportion of respondents who engaged in the specific acts listed;
- ii) to establish an approximate proportion of those who engage in the listed acts who go on to purchase an authorised copy of the same material.

With regards to the first purpose, the results indicate that the majority of respondents have engaged in the acts specified which do not require payment (downloading, viewing and using unauthorised copies). The majority of respondents had not purchased unauthorised copies. It is also indicated that 8%<sup>143</sup> have sold unauthorised copies, potentially committing a criminal offence. The option to select “Yes, but I sometimes purchase an authorised copy later” should not have been available for the option of selling unauthorised goods as it is unclear what this means, but only 1% of recipients selected this option.

With regards to the second purpose, the results indicate the majority of those who engage in the acts specified which do not require payment sometimes purchase an authorised copy later<sup>144</sup>. Downloading, viewing and using unauthorised copies and going on to purchase an authorised copy of the same digital product would not be detrimental to the interests of the rights holders. As the option could be selected if recipients *sometimes* go on to purchase an authorised copy later, it cannot be assumed that all recipients who selected this option go on to purchase an authorised copy of every unauthorised copy they download, view or use.

## Question 3:

Which of these best describes you:			
		Response Percent	Response Total
I buy authorised copies and download unauthorised copies		72.6%	114
I only download unauthorised copies		8.3%	13
I only buy authorised copies		16.6%	26
I neither buy nor download		2.5%	4
Total Respondents			157

<sup>143</sup> 9% if those who selected the option “Yes, but I sometimes purchase an authorised copy later” are taken into account

<sup>144</sup> 69% of those who admitted to downloading unauthorised copies, 57% of those who admitted to viewing or using unauthorised copies and 40% of those who admitted to purchasing unauthorised copies indicated that they sometimes purchased an authorised copy later



(skipped this question) 0

This question anticipated the popularity of downloading unauthorised copies, and sought to establish whether those who download do so instead of or as well as purchasing authorised copies. The majority of respondents indicated that they downloaded unauthorised copies in addition to purchasing authorised copies. The distinction between this statistic and the section of question 2, which asked if respondents who download unauthorised copies go on to purchase authorised copies of the same material, lies in the fact that this statistic ascertains whether downloading unauthorised copies means downloaders do so at the exclusion of purchasing any authorised copies, whether they had already downloaded them or not. This invites further study into the spending activities of those who fall into this first category, as statistics pertaining to how much downloaders spend on authorised copies will provide a strong indication as to the extent, if at all, this activity is harming authors or copyrights holders.<sup>145</sup>

#### Question 4:

Why do you think each of these is a crime? (tick all that apply)					
	Downloading	Viewing	Purchasing	Selling	Respondent Total
I've seen a commercial which says so	30% (46)	20% (27)	28% (44)	36% (62)	73
I've read an advertisement which says so	17% (26)	12% (17)	19% (30)	21% (36)	45
I don't know / Other	28% (43)	25% (35)	34% (54)	37% (64)	80
I don't think it's a crime	25% (37)	43% (60)	19% (29)	6% (10)	66
Total Respondents					136
(skipped this question)					21

This question was primarily designed to ascertain where respondents who erroneously believed the activities of downloading, viewing and purchasing unauthorised copies constituted criminal offences believed they were given this information. As the only commercials and advertisements which have been broadcast and published respectively that contain information regarding the legality of activities which can be described as piracy over the last few years have been directly funded by the PIAC campaign or one of its supporters, the percentages for the first two options in each column can be added together to determine the proportion of respondents who believed the given activity to be a criminal offence who are under the impression that this representation was made by the entertainment industries.

That a very minor percentage of respondents do not believe the act of selling unauthorised copies to be capable of being a criminal offence demonstrates that correct information has been communicated to them via the PIAC campaign, inter alia. The results also suggest that the majority of respondents who believe downloading, viewing and purchasing unauthorised copies constitute criminal offences have formulated this misperception as a result of the PIAC campaign.<sup>146</sup>

#### Question 5:

The results and analysis of this question and its results are at the end of the appendix, below.

#### Question 6:



<sup>145</sup> Please note that due to the limitations of the format transfer process, the bars representing the percentages may not be perfectly to scale

<sup>146</sup> The software used to tabulate the results of the survey incorrectly calculated the percentages for each category in this question, as the percentages were calculated on a row by row basis as opposed to a more appropriate column by column basis. The percentages shown above were amended to the correct values by the author by calculating the response figures on a column by column basis





Do you think the following industries have become more or less profitable over the last few years?				
	Worth more	Worth less	Don't Know	Response Total
Music Industry	68% (92)	21% (29)	11% (15)	136
Games Industry	91% (124)	3% (4)	6% (8)	136
Film Industry	70% (95)	18% (24)	12% (17)	136
Total Respondents				136
(skipped this question)				21

In anticipation of a significant proportion of respondents stating reasons concerning a negative view of the industries, this question was designed to discover if respondents are under the impression that three of the entertainment industries to which this study is pertinent are increasing or decreasing in profitability. That the majority of respondents indicated that they believed each of the three industries have become more profitable lends support to the theory that consumers do not believe industries are being harmed by various forms of piracy.

### Question 7:

Are you:			
		Response Percent	Response Total
Male		98.5%	134
Female		1.5%	2
Total Respondents			136
(skipped this question)			21

### Question 8:

How old are you?			
		Response Percent	Response Total
17 or under		0.7%	1
18-25		36%	49
26-34		50.7%	69
35 or over		12.5%	17
Total Respondents			136
(skipped this question)			21

These questions were designed to discover the demographic reach of the exploratory study. The majority of recipients who chose to reveal this information were males between the ages of 26 and 34 years old inclusive.<sup>147</sup>

### Question 5 (detail):

<sup>147</sup> Please note that due to the limitations of the format transfer process, the bars representing the percentages may not be perfectly to scale

This question asked respondents who download, view, purchase or sell unauthorised copies to give their reasons for doing so in a text box. The purpose of this question was to establish the most common rationales of those who choose to engage in those particular acts. The answers given by the 101 respondents are reproduced in full below. Please note that the answers given by the respondents are unedited and some contain language which some readers might find offensive.

If you download, view, purchase or sell unauthorised copies of copyrighted music, games, software or video footage, please explain why:	
1.	I'm cheap innit lol.
2.	generally i only download latest episodes of american tv shows that aren't available here. i will then buy the season on dvd later, however.
3.	Such wares are often too expensive or marked-up to buy, or otherwise hard to find. I can sample such wares before I decide whether they are deserving of purchase. Downloading wares is particularly easy and free of hassle, and certain industries have either been unwilling or too slow to take advantage of Internet technologies for this kind of trade.
4.	Why not? I can get music for free, the musicians make most of their money from gigs anyway so the only people losing out are the cunts in the record companies. Most of those record companies are owned by multinationals that also make movies, I usually only download films I have seen at the cinema, or stuff that's really old, they've made their money out of it already. It's pretty much a victimless crime. But if they want to stop it then they need to reduce prices. It is scandalous that CDs DVDs etc cost so much more to buy here than they do elsewhere, so if they are going to fuck the general public over they can't complain if I decide to fuck them over in return...
5.	In the case of anime to get the latest titles (or those that have no chance of making it uncut into English because of knee jerk idiots inevitably blaming them for the latest rape/murder). Additionally, when they do *finally* translate the shows they are localised to be more 'Western' (e.g. removing honourifics etc). I'm not interested in their attempts to mainstream something that will on the whole remain a niche hobby. In the case of video games I want to play old classics which have been translated by fans into English. Or retranslated from Ted Woosley et al's god awful approximations. Additionally I'd be more than happy to purchase them but they have to be full screen, full speed (Nintendo's just buggered that up with their virtual console's PAL games). In the case of movies and music I want to try before I buy it's as simple as that, if it's worth buying then I have no qualms picking up the DVD or album. Indeed, it's broadened the type of music I now listen to and allowed me to see many independent and foreign films which don't get coverage in the mainstream. Not to mention avoided utter dog shit like Superman Returns.
6.	I use downloading as a kind of 'try before you buy', if I like what I download I almost always buy it, and that which I do not like I simply remove from my computer having not wasted money buying it. Most of the people I know who download unauthorised copies do the same, and this leads me to believe the only reason film companies, music labels and so on are so worried is because their output is increasingly worse and people will know this before buying it.
7.	because it's easily available and gives you the chance to try before purchase.
8.	To see if the product in question is enjoyable enough to merit a purchase.
9.	Because there is no mechanism in place for getting them legit and at the correct place and time.
10.	I like free stuff and think it's unlikely I'll get caught.
11.	javascript:NextFunction(); Next **
12.	I got hooked on Lost when it was on channel 4 and refuse to give in to Murdoch's coercion into paying for his subscription service. I sometimes download pirate games, usually at other people's request or when I used to own a game but it is now unplayable due to old consoles/scratched disc etc. I sometimes download music but not often, and usually only if I can't find it in a shop
13.	Because I don't like paying for things. The people who make the music/games/films make enough money from the copies that they sell. With regards to music, the music industry is total scam and I by downloading major label records, I like to think that I am contributing to their demise in some way. Fucking scam.
14.	Because prices of software, i.e photoshop and 3ds max are too high for the casual user
15.	I cannot afford the package I need.
16.	Because it doesn't cost any money, and the company making the product do not lose money, as if I had to pay for it I wouldn't be able to afford it, and as such wouldn't have bought it anyway
17.	I tend to play too many games, watch too many films etc to justify buying them all. Generally speaking I will buy a DVD copy of a film I d/l because of the extra content/improved picture/sound, but there's little functional advantage to purchasing a game over downloading a copy
18.	Long lead times between cinema and retail release. overpriced cinemas. Some DVD's, especially foreign movies are never released in the UK.
19.	If I don't think the product is worth the price being asked for in shops. Eg: Films that were hyped up enough to make me want to see them, but then got bad/mediocre reviews once released; Software that I'd like to learn to use/get familiar with, but cannot afford the ridiculously high professional costs (although I do look for more open-source free software, nowadays).
20.	Free, easy and convenient.
21.	Friends occasionally give me an unauthorised copy as a gift.
22.	To try before I buy or if it is not available in my region.
23.	It's a "try before you buy" scheme plus the cost of actually buying the games in the first place is a direct factor. I've spent over £6000 on SNES and Megadrive games back in the 1990's when the games were £50 each. Many was the time when I'd play a game that cost me £50 and I felt that it wasn't value for money. Now with the internet and file sharing I can download a game

	and play it to see if I like it. Usually, I play them for a day then delete them. However, quality games like Tomb Raider and Half Life series I will always buy as I want to see further episodes in the series.
<u>24.</u>	Once by accident (ebay). Sometimes because it's so expensive, and never on TV (anime). Sometimes because you can no longer obtain them or the hardware to play them on (ROMs).
<u>25.</u>	I watch, play and discard large amounts of visual media on a weekly basis, it's quick and easy to access. It simply would not be financially viable to do so with authorised content, which is still primarily available on physical forms of data storage e.g. DVD, CD. Content stored in this way is subject to availability and requires delivery or physical purchase. speed - availability - viable More importantly, before using unauthorised copies I would purchase a certain amount of visual media, that amount hasn't changed, I just have greater access to a wide range of products that would have previously been unobtainable.
<u>26.</u>	I use torrents for US shows such as 24, The Sopranos, Lost etc simply because I feel I shouldn't be made to wait for it to air in the UK where I then have to subscribe to Sky. I find this justifiable because I almost always buy the dvd boxsets when they come out which usually cost around 50 pounds, I reckon I've spent close to thousands on these products so whats the problem with downloading them when they air in the US?
<u>27.</u>	Because it's well ace. Plus it's quick and easy, no going down to the shops or waiting for deliveries.
<u>28.</u>	I download tv shows not available in the uk and software I need that is way beyond my means to purchase.
<u>29.</u>	Testing. Things are too expensive (re: software) Things unavailable in this country. Film companies/ cinema rip people off. No sympathy for certain capitalist organisations.
<u>30.</u>	I would only ever download/view/listen to something unauthorised if I would have no intention of buying the authorised version. eg had no intention of going to cinema or buying DVD of Terminator 3, but was happy to watch a pirate DVD.
<u>31.</u>	Generally just to try things out. Particualry with shitty games on things like PSP, where a pinball game costs Â£30 and is fun for about 10 minutes. Generally always buy a real copy if I find something I like. Normally I just buy though.
<u>32.</u>	- try before buying - some products are not readily available in local shops - some products are not the worth the asking price
<u>33.</u>	I have downloaded a few ROMs for for emulation (some of which I already own, a few I don't). I don't have any unauthorised copies of current consoles, and have no intention of getting any.
<u>34.</u>	try before you buy!
<u>35.</u>	Some software does not exist in shops anymore, or in this country.
<u>36.</u>	I cannot justify paying £50 for a game, without playing it thoroughly first to make sure it is worth buying. Illegal "warez scene" copies allow me to try before I buy. If I copy and try a game and decide that I don't like it, I don't see how the software companies are losing out, as I would not have bought the game (unless I bought it by mistake, hated the game, and then would distrust any other game from that publisher again). I have only ever sold a few copies to friends, to cover blank disc costs, I would never make a commercial enterprise out of it as that really is damaging the industry. In the old days you used to feel like you were getting £50 worth of game when you got a nice box, cartridge, and hefty booklets. These days what is the difference between printing your own discs and labels and placing it in a dvd cover, compared to a cheap flimsy dvd "original" - it certainly doesn't feel like £50 worth.
<u>37.</u>	Often as a trial - if I then really like the software I will purchase it. Basically some bits of software are too expensive to purchase before knowing if it's what I really want.
<u>38.</u>	Allows for the trial of various forms of media before i commit to purchase. Also I like the fact that I can "graze" on various items of media that I may potentially never experience if i had to purchase all media.
<u>39.</u>	It's free.
<u>40.</u>	I don't see what harm downloading TV shows I've missed does. When it comes to films, I'll download films I've no intention of buying on DVD, but if I like it I'll buy it for the extras.
<u>41.</u>	trying before i buy. otherwise unavailability. because i have the technology to have what ever i want.
<u>42.</u>	1) It's free. 2) You can often see it prior to authorised copies being released.
<u>43.</u>	I'm lazy, tight, and can get away with it, so I will. I like getting summat for nowt.
<u>44.</u>	Software such as MS Office/Adobe Photoshop etc. is ridiculously expensive.
<u>45.</u>	Rare and unreleased music is easier to find from the net than trawling round record stores. And it's cheaper.
<u>46.</u>	Aside from being free, it's just incredibly convenient and in most cases there's no legal alternative. I buy my mp3's online because I have that option, but where can I buy films and - steam aside - games?
<u>47.</u>	Usually release dates, if something is out in the US (TV series' mainly) then I'll maybe download and watch on their schedule thus avoiding internet spoilers in the 12 months or so until it reaches the UK. I'll usually only do this for things that I'm so interested in that I'll end up buying on DVD once available.
<u>48.</u>	Because I have no respect for authority?
<u>49.</u>	Sometimes it can be far, far too expensive to do otherwise.
<u>50.</u>	Because worldwide release dates don't allow me to view them where i am, when i want. Regions and release dates should be brought into line the world over, just look at the console debacle at the moment as a paradigm.
<u>51.</u>	I often try out a few singles from an album which I then buy. I often buy authorised copies from bands I am trying to support as I like to show my support by giving them my money. Similarly, I will download an unauthorised copy from bands who I do not think will be harmed by the loss of sale. I also feel that record companies do not respect or even like their customers, on the evidence of money hungry business practices and over zealous approaches to illegal downloading. I often feel that illegally downloading is a small way of 'sticking it to the man'
<u>52.</u>	I only download TV shows, because I can't be bothered to set the video to tape them myself.

<b>53.</b>	Because it's free
<b>54.</b>	Having a massive authorised collection over the past 20 years, I will occasionally download a film I have seen in a cinema as a stop gap to buying the proper DVD. I would never pay money for an unauthorised copy.
<b>55.</b>	It's very easy to do, and more convenient. Generally it also means you don't have to sit through adverts too. Finally, it often means that anti-piracy measures have been removed and therefore the music/game/film is able to be played on more devices - again more convenient.
<b>56.</b>	I like to try before I buy
<b>57.</b>	Honestly - because it's so easy.
<b>58.</b>	Because it is not always possible to buy. And it is not always worth the money.
<b>59.</b>	I download unauthorised copies of music to save me the effort of replacing my old vinyl/cassettes etc.
<b>60.</b>	If we're talking TV, then its mostly BBC stuff which I download because it's easier than setting the video. For example: Video Gaiden. I could stay up until midnight and watch it (it's only on BBC Scotland, but that's OK as I have all the BBC regions on cable), however I'm not going to. I need my sleep. I could video it, but I'd have to faff around re-cabling the cable tuner to pass to the video, leaving it on the right channel and so on, so I'm not going to do that. I could... buffering... watch it on the... buffering... BBC's own online... buffering... viewer, but that's... buffering... crap. So: download a copy off the Internet and watch it whenever I've got time. Music I haven't downloaded much recently, but when I did it was generally to use it like a jukebox... but at home. Who's going to buy a hundred tracks just to listen to them once? Films I don't download because I don't even have time to watch the ones I've got legitimately. Games I don't generally download because they're ultra cheap if you've got the patience, so I'd rather own them, and again I wouldn't have time to play most. The only exception is the odd retro game, where sourcing a regular copy would be both impractical and a nightmare. OK answers?
<b>61.</b>	(i) Delay between initial broadcast of a television programme in the US and its broadcast here in the UK either by a ftv/fta channel or a channel which is part of my pay-tv subscription package. (ii) Delay between initial cinematic release in the US and its cinematic release here in the UK. (iii) Cinematic production or television broadcast may have occurred in the US but the show is not going to be/unlikely to be either shown or released in the UK. (iv) The inability of cinemas to police the behaviour of their patrons which often ruins the cinema-going experience. (v) Music which is out of publication and therefore unavailable or very difficult to obtain lawfully. (vi) Music which is only available digitally but is subject to onerous DRM requirements which attempt to restrict (a) the quality of the purchased music; (b) how I may use that music; (c) what devices I may use that music on and/or (d) what codecs the music is available in. (vii) The refusal of the media companies to recognise that copyright is a privilege granting a temporary monopoly on a work for the purpose of encouraging the creation of new works in order to enrich the cultural commons. (viii) The ongoing attempts by the media companies to render copyright as existing in perpetuity through their bribing of our selected politicians. (ix) The contemptuous attitude of media companies and their cartel-like representative bodies to our statutory rights such as s.50A of the Copyright, Designs & Patents Act which grants users a statutory right to make back-up copies of software they may own a valid licence for. (x) The refusal of companies to make available a low-cost mechanism for replacing damaged media even though you hold a valid licence, then attempting to prevent you from making back-up copies in order that damaged media does not prevent you making use of a licensed work thus forcing you to purchase new licence at full cost. (xi) Software where the rights holders are now unknown and/or the original format is no longer available. (xii) Try before you buy as not all content that you might consider purchasing is available via an easily accessible or reasonable rental mechanism. (xiii) Scarcity.
<b>62.</b>	Because I'd sooner make sure something is worth my money before wasting it. Also it gives me access to products I can't purchase (some TV shows) or would never have dreamed of checking otherwise. So in the main, try before buy.
<b>63.</b>	It is free or cheap and allows me to gain a feel for a work so that I might decide whether to move to purchase it. Some content I enjoy without purchasing it at a later date. I feel have accomplished something quite clever by acting in this manner.
<b>64.</b>	Getting something for free beats paying, it really is as simple as that.
<b>65.</b>	Because its easier than going to the shops.
<b>66.</b>	Because, sometimes its good to get a feel for the material before you purchase it. For example I purchased two Family Guy boxsets on DVD after having watched many of the episodes online. I felt the DVD purchases were justified. If they had turned out to be poor I wouldn't have purchased the DVD copies. In the same way people watch stuff on TV then purchase the DVD's. Back in the 1990's the BBC sold a sheldload of VHS Blackadders off the back of a repeat season for example.
<b>67.</b>	for funzies
<b>68.</b>	The law is an arse. Seriously, if it's for private use, then I make no money off the back of someone elses hard work. You may want to discriminate between civil/criminal offences as well (I've taken civil to mean criminal)
<b>69.</b>	It's less effort and takes less time. It's got nothing to do with the money in my case - I'm just lazy. I hardly ever watch what I download.
<b>70.</b>	Games are stupidly overpriced, so downloading unauthorised copies in order to make an informed purchase decision is a useful option.
<b>71.</b>	As regards movies, I only buy authentic DVDs since I can't be bothered to spend ages downloading movie files, and they tend to be dirt cheap anyway - 5 for AE30 usually. With music, I sometimes buy CDs, but more often download albums or individual tracks off P2P sites. I would never buy a DRM track. I think the artisits make more off me when I attend their gigs anyway.
<b>72.</b>	Try before buy, or, have a look at something I wouldn't ever pay for (costs too much, not my usual thing etc) tend not to keep them for too long if I do that.
<b>73.</b>	I'll happily download movies which are being promoted, but aren't available to watch (say, a big summer movie in the US which isn't being released over here until autumn / winter). If there is a product which has been made, which is finished, which is being promoted, which appeals to me, yet is not available for me to buy because I'm in the wrong territory, then I'll take a pirate copy instead. I don't mean a product which is not yet finished. I mean a product which is finished, but which I can't buy even if I want to - a movie which is out in the US but not the UK - a game which has been released in Japan / US but not in the UK etc. Whenever the copyright owners put what I see as an arbitrary barrier between me an the product; when they stop me paying for the product even though I want to because I'm in the wrong territory or time-zone, then I think "fuck em, I'll keep my money and take it for free".
<b>74.</b>	I download single tracks, to see if I like them. On the strength of that I can decide whether to buy an album (a real CD, not pirate



	or download. The sound quality of MP3s isn't good enough for repeat listening on a good stereo, in my opinion). It's also a way of hearing obscure/very old or very new music easily. I occasionally copy software, because it's expensive and I can't justify the cost, but I prefer to use Freeware where possible. The attitude of anti-piracy adverts is encouraging me to copy music etc, as it's so patronising and threatening, while everyone knows a record company is rolling in cash and musicians "earn" tens of millions, they can probably afford to lose my £8.99.
<b>75.</b>	Probably it's mainly due to habit and convenience, although with 90% of everything being rubbish it's the best method of assessment I can think of.
<b>76.</b>	To try before I buy - have been stung by exorbitantly priced rubbish on too many occasions in the past
<b>77.</b>	the offer isn't good enough: overpriced, 90% filler, thje offical version worse than the pirated ones (install routines etc)
<b>78.</b>	I object to 1) region coding on DVD's and games, 2) DRM on CD's that prevent me from listening to the music I've paid for on my PC, and 3) the extortionate pricing of games.
<b>79.</b>	I use it more as a 'try-before-you-buy' service. I begrudge paying money for something I don't enjoy. If I enjoy what I download, I'll fork over the cash for a legitimate copy.
<b>80.</b>	Ridiculous prices
<b>81.</b>	Non-availability in UK, or TV series that I want to watch where I've missed an episode and want to catch up.
<b>82.</b>	I sometimes sell unauthorised copies of films that are unavailable commercially. Sometimes I sell at unauthorised available releases at minimal cost to friends that would never buy a commercial copy anyway. I download things for my own viewing so that I don't have to pay out money to know if something is good or not. If I like it, I buy it.
<b>83.</b>	I mostly download games or music that I can't get hold of in shops, because they are obscure/ out of print/ foreign releases etc.
<b>84.</b>	Living in a satellite town without a cinema precludes me from seeing films without careful planning some days ahead and sometimes... you just want to watch a film NOW. Music, I only tend to download technically unauthorised copies of material I already own on, for example, vinyl. I will rarely download a new album but if I like it, I will almost certainly buy it. Try before you buy, if you like. The same with games. I never know how well a game will run on my PC so spending £30 on something which is going to sit there on the shelf because I'll need a new graphics card isn't something I'm prepared to do.
<b>85.</b>	the usual 'too expensive' excuse coupled with the fact that its easier to download games and music and you get it way before they are released in the UK. that said, I'm completely legit with my 360 and find myself enjoying the games much more because of that.
<b>86.</b>	Cost.
<b>87.</b>	It's a lot more convenient than walking to the shop or messing about with my credit card for the usual DRM-laden spywarefest that the media companies usually shit out
<b>88.</b>	Things are often released very late in this country and then are more expensive for less and/or crippled product that the USA - I can get things quicker, cheaper and have a better product with no stupid DRM restrictions on it.
<b>89.</b>	Because I don't think it's an inherently bad thing. I know for a fact that I personally wouldn't have bought half as many CDs, games and films as I have if I wasn't able to download them first. People want to know what they're getting for their money before they spend it, and if the relevant industry doesn't give them a legal way of doing this, they'll often find an illegal one instead.
<b>90.</b>	It's easy, and it's free. And that's the least flippant answer I can muster. Sorry.
<b>91.</b>	Because it's there, essentially. File sharing networks are a massive promotional medium for things that I wouldn't otherwise know existed, and wouldn't be able to track down on the high street even if I did. I'll often seek unauthorised versions of things that I already own, as the quality and usability is generally much improved. Smaller file sizes, better subtitles, up to date patches, and no unskippable adverts, demands for 'Disc 2 of 6' or unreliable anti-piracy bodes.
<b>92.</b>	Unavailability in domestic markets
<b>93.</b>	They are not available to buy in the UK.
<b>94.</b>	to try before I buy, or if something is hard to get.
<b>95.</b>	Because it's quick and easy.
<b>96.</b>	Generally I download things because they're obscenely overpriced, and the profits would only go to white collar criminals. Were I unable to download unauthorised music, films or games, I would simply do without. As it is, almost every album, film and game that I've bought in a shop (sometimes second hand, I'll concede) was bought as a direct result of hearing/playing a downloaded copy. If the people selling these things did so at a reasonable price and adapted to the rise of the internet in a productive fashion instead of lobbying to protect their extensive mark-ups, piracy would drop dramatically. As it stands, they charge too much because they spend too much, and pay themselves too much. I feel this is relevant: "Movie executives once paid Keanu Reeves Thirty million dollars. But piracy is making us bankrupt."
<b>97.</b>	Price. Speed. Time.
<b>98.</b>	Try-before-I-buy
<b>99.</b>	I simply can't afford to purchase all the items I'm interested in, and as a large percentage are terrible and media coverage of several fields (most notably video games) is so poor as to be completely unreliable as to my tastes, games etc are pirated, and if they are good they are bought later. This extends to products even decades old, with games and films often bought off ebay as they are no longer on sale. I appreciate owning legitimate copies of media I enjoy.
<b>100.</b>	becuase it is cheaper and you get the latest things which are not out yet earlier than normal british citizens
<b>101.</b>	Not available to buy, would rather not spend silly amounts of money on something that might not be worth it, occasionally through impatience.

These responses provide an invaluable insight into what motivates respondents to engage in the acts of piracy specified. An inherent limitation lies in the fact that not all individual respondents may have considered every possible reason, thus these responses were analysed and it was found that there are thirteen common categories which each response can be associated with. The categories, with a preliminary assessment of their potential to economically damage the relevant industries in italics, are:

- A. The user believes authorised copies are too expensive or that they are subject to “rip-off Britain”, and that they would not purchase them even if the option to obtain an unauthorised copy was not available due to the price. (*non-damaging*)
- B. The user is attracted by the availability of unauthorised copies of US or other foreign television programmes and films at an earlier point in time than when authorised copies become available domestically, as many popular US programmes are shown often months before a UK broadcaster transmits them, and the UK also often trails behind in terms of the release date of cinematic releases. (*potential impact on ticket sales for cinema releases, and advertising revenue for cinema and television*)
- C. The user purchases an authorised copy when it becomes available. (*non-damaging*)
- D. It is extremely difficult or impossible to obtain an authorised copy in the UK – enthusiasts of old or obscure television programmes and/or films and enthusiasts of Japanese Manga products typically cited this reason. (*predominantly non-damaging*)
- E. The user uses unauthorised copies as a means of evaluation or “try before you buy”, insinuating that the user will purchase an authorised copy if the product meets their expectations. (*predominantly non-damaging*)
- F. The user prefers using unauthorised copies as obtaining them is easy and/or free of charge. (*potentially damaging*)
- G. The user is of the opinion that the industries have not taken advantage of the efficient means by which copies can be distributed digitally, thus relies on those who have. (*potentially damaging*)
- H. The user holds a negative view of the industries and/or believes obtaining unauthorised copies is a victimless act. (*potentially damaging*)
- I. The user has already paid to use an authorised copy, thus believes they should not have to pay again (such as a user who has purchased an authorised copy of a film on DVD, but does not believe they should have to pay for an authorised copy of the same film to watch on a portable playback device). (*non-damaging, although distributors may argue that consumers should have to pay for extra copies*)
- J. The user would have had no intention of purchasing an authorised copy even if an unauthorised copy was not available. (*non-damaging*)
- K. The user uses an unauthorised copy as a means of time-shifting, for example, by downloading a copy of a television programme which has been broadcast and was available to them but was not viewed. (*non-damaging*)
- L. The user believes unauthorised copies are superior to authorised copies, for reasons such as music containing DRM or DVDs containing unskippable advertisements. (*potentially damaging*)
- M. The user believes the unauthorised copies to be “abandonware”<sup>148</sup> or orphaned works. (*predominantly non-damaging*)

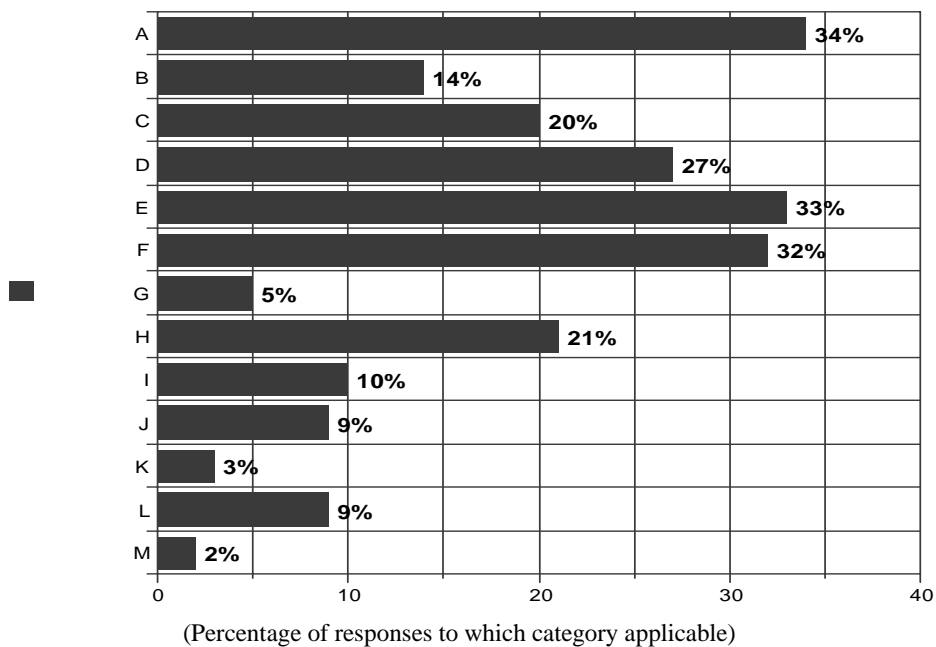
Of these categories, five are non-damaging (A, C, I, J and K), three are predominantly non-damaging (D, E and M) and five are potentially damaging (B, F, G, H and L).

These categories will be offered to respondents in the follow-up study. By applying each of the above responses to the thirteen categories, each response can be summarised as being assignable to one or more of the categories. The proportion of responses the thirteen categories could be applied to appear below<sup>149</sup>:

<sup>148</sup> Works which are considered to be old and devoid of commercial value, i.e. taken as “abandoned” by the rights holder

<sup>149</sup> Of the 101 responses, 1 is uncategorisable (response 11: “javascript:NextFunction(); Next \*\*\*)

Question 5: Behaviour, Motive &amp; Rationale Quantitative Extrapolation



34.7% of responses fall into the non-damaging category, 28.3% of responses fall into the predominantly non-damaging category<sup>150</sup> and 37% of responses fall into the potentially damaging category.

<sup>150</sup> Thus, 63% of responses indicate behaviour which is predominantly non-damaging or purely non-damaging