

# Changing Perception of Piracy/Copyright Protection in Digital and Internet Era

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## Abstract

“Piracy” is a bad word, it is an equivalence of “theft” and “robbery”. But historically, many former “pirates” are today’s copyright holders, and many former “pirated works” are now protected by copyright. It is therefore important to have a changing perception of “piracy” and copyright protection, particularly in the era of digital and Internet technology that brings unprecedented opportunity for people to access, use, remix, recreate and redistribute copyrighted works. While international and national copyright laws are in urgent need to be modified to accommodate the new works and uses that are created by the new technologies, all stakeholders should also be prepared to embrace changes and to develop practical solutions to solve the conflicts between “piracy” and copyright protection. This paper uses “changing perception” to comment the current trend of copyright law reform at national and international level, particularly the drafting and adopting of ACTA and TPP, the copyright law amendments in the United States, mainland China and Hong Kong, and the role of grass-root movements such as Creative Commons.

## 1. Piracy/Copyright in Historical Context

“Piracy” is a bad word, a word originally referring to the act of “robbery” which is a crime committed by the “pirates” to be tried by military tribunals (Wikipedia). TRIPS agreement used the word to refer copyright infringement, that is, the use of works without the permission of the copyright holders.<sup>1</sup>

By this definition, perhaps none can claim a total innocence of “piracy” because we all use, one way or the other and once in a while, the copyrighted works without permission for various purposes, whether for sharing, posting, blogging, parodying, etc. Historically, many copyright holders were “pirates” before they themselves became copyright holders or their status being legalized. For example, US publishers, now copyright campaigners, were condemned as “pirates” in the 18<sup>th</sup> century because they printed, published and sold European novels without paying any royalty. Many US musicians and artists had been freely using some foreign classics until 1994 when US Congress pulled those

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<sup>1</sup> TRIPS art 61. TRIPS Article 51, footnote 14 For the purposes of this Agreement: (b) “pirated copyright goods” shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country.

works out from the public domain and restore their copyright under the Uruguay Round Agreement Act. Prior to 1994, these musicians and artists were good citizens, but they were branded “pirates” after 1994 when they continued their usual practices. Thomas Edison was branded as a “pirate” when he invented the phonographic record player, but now the RIAA (Recording Industry Asso. of America), the major users of phonographic technologies, has been challenging recordings and distributions of music by later technologies such as MP3 player at court in a 1998 case, RIAA v. Diamond Multimedia (Rio case). Cable TV is another example of former “pirate” turning into a “piracy” accuser. When cable entrepreneurs started cable television in 1948, they were taken to court by broadcaster and copyright owners because they refused to pay for what they did, that is, selling access to TV broadcasts. But in 2001, several cable TV companies accused Sonicblue for copyright infringement because Sonicblue marketed the ReplayTV device which allows customers to skip commercials through the “AutoSkip” feature, and to record and send the commercial-free TV programs to other ReplayTV owners over Internet through the “Send Show” feature).<sup>2</sup>

## **2. Main Arguments for a Changing Perception**

I use these examples here not to say that all current copyright holders were former “pirates” so they should shut up and not to take any action when their works are used without authorization. I want to use these examples to illustrate the following points:

First, copyright and “piracy” are two relative and evolving concepts. The then “pirate” may one day become a copyright holder, and the then act of piracy may one day be legitimated. Therefore, the two sides of copyright holders and pirate should have better understanding and certain degree of tolerance of each other because their roles may reverse one day.

Secondly, the role-change between a copyright holder and a pirate is caused by the advancement of technologies, the changes of culture and consumer choices, and by copyright law amendments prompted by technological, cultural and market changes. That is, when condition arises, works formerly created by infringing acts may be qualified as copyrightable works, e.g., sound recordings were banned in the U.S. before 1971, but received copyright protection afterwards. Therefore, all stakeholders whether lawmaker, judges, copyright holders, users, or pirates should appreciate and be prepared to embrace the changes rather than resisting them. In this respect, courts have been playing largely positive roles. For example, US Supreme Court decided in 1984 *Sony v. Universal City Studios* (“Betamax” case)<sup>3</sup> that the manufacturer of the home-video recording device is not liable for copyright infringement due to the device’s substantial non-infringing uses, and that personal use of the device to record broadcast TV programs for time-shifting purpose is a fair use. A similar decision

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<sup>2</sup> SonicBlue filed for bankruptcy before a verdict was reached.

<sup>3</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

was reached by a UK court in the case of *CBS Songs v. Amstrad* (1988)<sup>4</sup>. But the courts' recent decisions on Napster<sup>5</sup> and Grokster<sup>6</sup> have caused some concerns that using contributory infringement and active inducement theories to decide ISPs' liability may have adverse impact on the development of Internet technologies. Concerns have also been raised about the recent legislative attempts to pass the laws that place heavier liability burdens on Internet industry, ISPs and users in storing, linking, transmitting and using copyright works over Internet. These legislative attempts include: (1) US Anti-Piracy Bills (PIPA and SOPA) that allows copyright holders and US DOJ to shut down the suspected infringing sites without court hearing, or to cutoff the payment to the websites, among others; (2) ACTA (Anti-Counterfeiting Trade Agreement) that requires online service providers to disclose information of a subscriber's account to a right holder "expeditiously"; (3) "Three strikes" graduated Response measures that may lead to bandwidth reduction, protocol locking, and temporary account suspension after a series of notices of infringement, (4) TPP (Trans-Pacific Partnership Agreement) that imposes on member states much higher IP protection standards that those under TRIPS agreement such as treating temporary storage of a digital file as reproduction.

The above two points remind us that one should perceive copyright and piracy as evolving and changing concepts and be prepared to embrace the changes, and that "piracy" is not all evil and should be completely eliminated. On the contrary, some "piracies" may well become seeds for the growth of the next new type of copyrightable work, and the former "pirate" may transform into a new copyright holder at some points. In fact, "copia", the Latin word of "copy" means "abundance, plenty, multitude".<sup>7</sup> Some studies (e.g., by Dr. Jinying Li of Oregon State University) show that piracy may foster some of underground art creations, "to speak unspeakable" in a society like China that cultural creation is censored.<sup>8</sup> We may even consider not using such a strong word as "piracy" to label all unauthorized uses and copying because, as defined in the beginning of my paper, the word of "piracy" refers to the crime of robbery. This is exactly why people feel so offended when they are labeled as "criminals" for merely posting or viewing the copyrighted works on Internet.

### **3. The Importance of Respecting Basic Copyright**

Having said this, I would also like to emphasize the importance of respecting the basic IP rights of the copyright holders. I am not at all "in praise of piracy" (note that I am borrowing the expression from Professor Marcus Poon's book title "In Praise of Copying"). I firmly believe that copyright is a property right of an author or a creator, which provide important incentive for further creations.

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<sup>4</sup> *CBS Songs Ltd -v- Amstrad Consumer Electronics Plc* [1988] RPC 567

<sup>5</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001)

<sup>6</sup> *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)

<sup>7</sup> Marcus Boon, *In Praise of Copying* (Harvard University Press, 2010), at 41.

<sup>8</sup> From her presentation PPT.

Research done by Prof. Tomas Gomez-Aropstegui of Lewis & Clark Law School<sup>9</sup> shows that copyright existed in a form of common law right even before the enactment of the world's first copyright act, the Statute of Anne, in 1710. When one becomes a copyright holder of his work, he should be consulted and be paid for using his work because he has invested his labor, time and resources in creating the work. He should be respected and compensated just like any other workers. This applies to original author or creator, the holders of neighboring rights such as rights of performers, producers of phonograms and broadcasters, and any other legally recognized copyright holders. Any large scale, malicious and commercial exploitation of copyrighted works without permission and compensation should be prohibited and penalized. The recent case of a Chinese engineering being sentenced by the U.S. court to 12-year imprisonment for cracking the codes of software that are used in high and sensitive technologies and making profits of over one billion US dollar is one of such examples,<sup>10</sup> although we can ask the question whether the penalty is too severe.

However, the conventional criticisms about copyright (or IPRs in general) is that the copyright holder's output and his reward are too disproportionate because the royalty is too high, the work is too expensive, the work is non-exhaustive, which means a work can be duplicated and sold again and again, and the payment could be indefinite given the long protection term for a single work that may well have been derived from somebody else's work. From the perspective of public interest, the monopoly of the copyright may also impede technological innovation and cultural creation. So, how can we do both – having an evolving perception about piracy (or unauthorized uses) and respecting copyright?

#### **4. Striking a Right Balance between Protection and Uses**

Instead of wasting time on condemning piracies or curbing various uses of copyrighted works by the public, our effort should be devoted to developing practical solutions so that the interests between the copyright holders and the rest of the world can be better balanced. On this point, I would like to endorse the effort made the Social Science Research Council (SSRC), a non-profit international organization, in carrying out the research and publishing a comprehensive report on Media Piracy in Emerging Economies.<sup>11</sup> I like the approach taken by the researchers in this project to find what have caused "piracy" and how to reduce it. While enforcement may play some role in curbing piracy, e.g., HK's BT case<sup>12</sup>, I agree in general with the researchers' conclusion

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<sup>9</sup> Tomás Gómez-Arostegui, Prof. of Lewis & Clark Law School, delivered a talk at Legal History Seminar: 'Copyright at Common Law Before 1710 And its Modern Implications' at the University of Cambridge, Faculty of Law on 1<sup>st</sup> May 2013.

<sup>10</sup> "Chinese man gets 12 years in US prison for software theft," itnews for Australian Business, <http://www.itnews.com.au/News/346477,chinese-man-gets-12-years-in-us-prison-for-software-theft.aspx>

<sup>11</sup> Joe Karaganis (ed.), *Media Piracy in Emerging Economies* (SSRC, 2011)

<sup>12</sup> *HKSAR v. Chan Nai Ming* (FACV No. 3 of 2007). This is the world's first criminal prosecution of file sharing of motion pictures on Internet.

that mere emphasis on enforcement may miss the mark as weak enforcement is not the sole factor causing “piracy”, and other factors such as “high media prices, low local incomes, technological diffusion, and fast-changing consumer and cultural practices” also matter;<sup>13</sup> that the efforts on enforcement have had little, if not at all, impact on reducing piracy,<sup>14</sup> and that the discussion of enforcement should have connection “with larger problem of how to foster rich, accessible, legal cultural markets in developing countries.”<sup>15</sup> Therefore, the trend of strengthening IPR enforcement promoted by US Anti-Piracy Bills, “Graduated Response” measures, ACTA and TPP may be counterproductive. This may also be the reason why these legislative attempts have faced massive criticisms and strong resistance from the public. Among the four, US Anti-Piracy Bills were dropped under public protest; likewise, ACTA has been under severe public criticisms and was only ratified by Japan, “graduated responses” are adopted into copyright laws only in a handful countries including France, New Zealand, South Korea and UK; and the leaked drafts of TPP have already attracted worldwide attack for its wide scope of changes and much higher standards comparing with the TRIPS.

## 5. Finding Practical Solutions

While lowering the price to compete for local customers is helpful in combating piracy, as suggested by the SSRC report, I believe that other solutions are equally important in dealing with media piracy issues. These solutions include: (1) changing the perception of copyright protection and piracy, (2) finding alternative business models like Apple’s iTunes Stores, (3) providing copyright-supplementary schemes such as open sources and creative commons licences, and finally (4) revising current copyright law systematically to address not only enforcement issues but also the need of public access to copyrighted works.

I would like to reiterate the importance of the first solution which is changing the perception of copyright protection and piracy. Simply put, copyright holders should not take their rights too prohibitively as they themselves might have not taken others’ rights too seriously when creating their works. Instead, they should take a “soft approach” towards IPRs, that is, giving authors/copyright holders more options and freedom to authorizing the use their works by offering different licenses (such as CC licenses), charging minimum licensing fees, and offering low prices for the physical copies. In this respect, Creative Commons project has played an important role in foster the “soft approach” of IP protection by providing 6 different licenses ranging from the most liberal “attribution” licence to “attribution share alike”, “attribution no derivative”, “attribution non-commercial”, “attribution non-commercial share alike”, and finally to the most restrictive “attribution non-commercial no derivatives” licence. Over 400 million works on Internet are marked with CC licences, and the users of CC licences include White House, Parliament of Australia, UK and Korean

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<sup>13</sup> *Media Piracy in Emerging Economics*, at iii.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, at iv.

government, Wikipedia, etc. In HK, users of CC are also growing (by Oct. 2010, 403,977 internet works were recorded for using cchk licences), including RTHK, Asia Weekly, Reader's Digest, and ICAC Moral Education Web; InMediaHK ; Open Radio Hong Kong (ORHK) ; MySinaBlog ; Snoblind ; CCmixter ; Magnatune; Foncept ; Deviant Art ; Flickr; A Map of Our Own: Kwun Tong Culture and Histories ; Hong Kong Stories; RTHK ; hk3teachers; philosophy; PSMSAR. I have had a privilege to be a part of the force in HK to promote this movement as a legal-lead of CCHK. In addition to the CC, there are also open source, open courseware, open government, open textbook (<http://creativecommons.org.nz/2013/11/hacking-a-media-text-in-a-weekend/>), and open access journal ("Laws" at <http://www.mdpi.com/si/laws/ip>) projects.

While copyright holders should take a "soft approach" towards the protection of their rights, users should also have basic respect to the copyright holder and the work they used. Slavish and malicious copying without any attribution for commercial gain or for avoiding payment is a type of stealing and robbery therefore should be prohibited. As to derivative works or second creation, the creator should also respect copyright holders' rights because as soon as they completed their derivative works (not complete copying), they are the copyright holder themselves and will expect the same respect from the others. It is simply not to the benefit of anyone to develop a "piracy culture". As to the fourth solution, a systematic legislative reform, is being carried out all over the world. In the United State, the House of Representatives of the US Congress Judicial Committee is holding a series of hearings about US Copyright Law revision. The importance of public access to copyrighted works has been recognized by some of the key people such as the Register of Copyright, Maria Pallante. In HK, the public consultation on copyright protection in digital environment started in 2006 has not resulted in any legislation yet. The issues about criminalization of distributing unauthorized works over internet and parody have been under debate. In July 2013, another public consultation was conducted by Hong Kong government on the special treatment of parody. Three options for dealing with parody are considered: (1) clarification: clarify whether "parody" have caused "more than trivial" economic prejudice to the copyright owners; (2) criminal exemption: to specifically exclude parody from the existing "distribution" and "communication" offences; (3) fair dealing exception, like in Australia, Canada and the UK. In March 2014, the Legislative Council Panel on Commerce and Industry issued a discussion paper based on the consultation, which In China, the copyright law is being amended to balance the copyright protection and public use. For example, while adding more rights such as public communication right over internet, rental right, resale royalty right, public performance rights, etc., the amendment draft also tries to provide more chances for public uses. For example, the third proposed draft gives more flexibility in fair use by making it an "open" regime, a hybrid of "fair use" and "fair dealing" system, and added the "three-step" test (limited, not prejudice to the normal exploitation of copyright holders, and not to prejudice the legitimate interest of copyright holders). It added the protection to orphan works, strengthen the management of collective society, etc.

As Creative Common's statement of support for copyright reform said:

"Our experience has reinforced our belief that to ensure the maximum benefits to both culture and the economy in this digital age, the scope and shape of copyright law need to be reviewed. However well-crafted a public licensing model may be, it can never fully achieve what a change in the law would do, which means that law reform remains a pressing topic. The public would benefit from more extensive rights to use the full body of human culture and knowledge for the public benefit. CC licenses are not a substitute for users' rights, and CC supports ongoing efforts to reform copyright law to strengthen users' rights and expand the public domain."<sup>16</sup>

In summary, focusing on enforcement alone has failed in copyright protection. Therefore, a systematic copyright law reform that takes public access concerns into consideration, together with the government enforcement, society and industries' own initiatives in creating new legal and business models, might work to change people's perception of copyright protection and piracy.

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<sup>16</sup> Timothy Vollmer, "Supporting Copyright Reform,"  
<http://creativecommons.org/weblog/entry/39639>