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## Spaces of Piracy – a work in progress

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of the Mind. [...] I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. [...] Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live. (Barlow 1996)

These evasive words are taken from John Perry Barlow's famous *Declaration of the Independence of Cyberspace*: a defense for the freedom of Internet that he wrote in 1996 in response to the new Telecommunications act that the United States passed the same year. At the heart of Barlow's declaration lays the conviction that this cyberspace exists beyond the material world and should be left untouched by its rules, regulations and notions of property. This struck a note among netizens of the world and the *Declaration of the Independence of Cyberspace* soon became one of the canonized texts within the hacker community and the digital piracy movement of the late 1990's and early 2000. Today, it is generally taken for granted that piracy in the digitalized 21<sup>st</sup> century belongs to this purely immaterial cyberspace. In the following article I will challenge this position and discuss how copyright and piracy is connected to spatiality.

Thirteen years later the copyright historian Adrian Johns paints a vivid picture of the challenges facing a music industry that is grappling with the notorious spread of piracy:

It is the beginning of a new century, and the music industry is facing a crisis. New technology, new media, and innovative business practices are challenging the copyright principles that have underpinned industry for as long as anyone can remember. Taking advantage of a revolutionary process that allows for exact copying, "pirates" are replicating songs at a tremendous rate. The public sees nothing wrong in doing business with them. The publicity, after all, speaks of a mainstream music industry that is monopolistic and exploitative of artist and public alike. The pirates, by contrast, are ostentatiously freedom loving. They call themselves things like the People's Music Publishing Company and sell at prices anyone can afford. They are, they claim, bringing music to a vast public otherwise entirely unserved. [...] In reaction, the recently booming 'dot' companies band together to lobby the government for a radical strengthening of copyright law – one that many see as threatening to civil liberties and principles of privacy. In the mean time they take the law into their own hands. They resort to underhand tactics, not excluding main force, to tackle the pirates. They are forced to such

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length they say, because the crisis of piracy calls the very existence of a music industry into question. (Johns 2009: 328)

This could be an accurate description of the current conflict between file sharers and copyright organizations if it wasn't for the fact that Johns actually describes the flagrant piracy of printed notes that haunted the music publishers in early 20<sup>th</sup> century. During the last decades of the 19<sup>th</sup> century a combination of new technology and changing trends on the music market had radically redefined the conditions for distributing printed music. This was largely a consequence of the piano mania that had struck Victorian England in the second half of the 19<sup>th</sup> century when the piano had become a fashionable attribute for the growing middle class, soon to be found in every respectable home. This gave rise to a growing demand for printed music, but the high prices charged by the established music publishers left the market open cheaper alternatives, and new technology supplied grand opportunities to develop such alternatives.

The newly developed technology of photolithography made it significantly easier and more cost effective to produce more or less exact copies of already printed material, and particularly of single sheets such as music scores. The only obstacle to this new printing revolution was copyright, which gave a few established publishers exclusive rights to the most popular works. Not only the pirate publishers and the majority of the consumers, but also many music dealers and composer regarded this as an unjust monopoly that mainly served to enrich a few publishers at the cost of the consumers and the culturally inclined public. In this regard the pirate publishers were regarded more or less as cultural workers who spread music to the people at a reasonable cost. And when the newly established organization for music publishers, the Music Copyright Association, addressed the problem by setting up its own bands of pirate hunters who tried to chase down the pirates with harsh, and sometimes semi legal, methods this only served to reinforce the picture of the publishers as greedy monopolists.

If the fights against the maritime pirates of the past had taken place on the ocean, then the war on music piracy was fought in the modern cities. When the Music Copyright Association's pirate hunters started to canvas the streets for illegal music they faced an elusive enemy: "Almost always the men disappeared into the city's back streets, leaving no trace of their presence. They simply abandoned the seized copies [...] meanwhile the hawkers obtained more copies from their suppliers and returned to work." (Johns 2009:336) Here Johns depicts something that looks almost like a kind of urban guerilla warfare that took place in ever growing areas in London, followed by other major cities in England: "At first it manifested itself mainly in metropolitan thoroughfares like the Strand and Fleet Street. But it was soon 'all over the place'" (Johns 2009:331).

The very fact that this pirate hunt initially took place in the streets highly contributed to its failure. While piracy was generally associated with street vending, public markets and certain infamous pubs and shops that served as under cover hotspots for pirated music, significant parts of the business actually took place in people's homes. It was in the private dwellings that the stocks were kept, and it was here that the hawkers went for new supplies when the old ones were confiscated. Thanks to a deeply rooted respect for the private, patriarchal, family

home as a fundament of the British society, it was hard for the pirate hunters to gain access to these dominions. Eventually the MCA adopted a more aggressive, and partly illegal, strategy that often involved breaking in to the homes of suspected pirates. This strategy was successful in the sense that it did break up some of the pirate networks, but it also reinforced the image of the copyright owners as powerful and ruthless monopolists and the pirates as some kind of cultural freedom fighters (Johns 2009: 340). In this sense you could say that the war on piracy worked with at the very intersection between private and public spheres where the private sphere for a while served as a hideout for the pirates. This example shown how the currently epitomized tension between the copyright organizations attempts to protect their own rights of ownership and the individual consumer's rights to privacy was present at an early stage in the history of piracy and how this was acted out not only in the metaphorical public sphere of letters but also situated in a highly physical space.

### **Piracy, Copyright and Colonialism**

If 19<sup>th</sup> century piracy was physically situated in an urban, social space, it was also equally situated in a global, geopolitical landscape. Piracy was nothing new for the Londoners of 1900. The practice of illegal reprinting had been particularly frequent in 17<sup>th</sup> and 18<sup>th</sup> century England and by late 17<sup>th</sup> century the London publishers and booksellers were talking about those renegade publishers as 'book pirates' (Johns 2009: 23 pp). Just like the Victorian music pirates, the earlier generations of book pirates also tended to take a slightly heroic oppositional position. The British book pirates, who usually came from Ireland or Scotland, often claimed that they only contributed to the public access to good literature, which was otherwise hampered by the monopolistic strategies of the greedy London publishers (Johns 2009: 122; Rose 1993).

Piracy was already at an early stage a transnational problem since many of the pirate publishers that haunted the national markets were based abroad. Large parts of the pirated literature on sale in England or France was actually printed in Ireland, Scotland, Germany or Belgium (Rose 1993; Saunders 1992). The problems with imported reprints took a particular form in the English speaking colonies when Great Britain passed its Copyright Act of 1842. This was largely an attempt to stop the import of foreign reprints of British works, not only to England but to all the colonies that constituted the United Kingdom. To further protect the borders of the Kingdom, the Copyright Act was soon backed by a new Customs Act that helped the customs to control the inflow of foreign reprints (Seville 2006: 79pp). Restrictions like these were particularly unwelcome in the English speaking colonies of Canada where people were accustomed to buying cheap reprints from the United States of America. In this sense the British Copyright Act of 1842 became an attempt to protect the British Empire's borders against the unregulated literary market that reigned beyond the colonized territories.

The controversies surrounding American reprints of English authors would be a long lasting cause for conflicts between the UK and the US. The anti-English sentiments expressed by many Scottish publishers were even more evident in The US. Adrian Johns describes how the first generation of American publishers came to constitute themselves as book pirates who openly violated British copyright law by systematically reprinting works that the British

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publishers considered their own lawful property. This laid the foundations for a vital but highly controversial book market in the new world and Johns concludes that by “the 1820s, Jacksonian America had a secure and vibrant public sphere – but to European eyes an utterly piratical one” (Johns, 2009, p. 180). This pirate market was not fueled by lust for profit alone, it also signaled a resistance against the authoritarian claims of the former colonial power. But unlike in the UK, this was not an illegal market since the American legislator’s took a similar position and refused to grant foreign authors protection under the copyright law of the United States.

While most early copyright laws only protected domestic authors, the vast majority of Western countries started to introduce reciprocal protection for foreign authors in the course of the 19<sup>th</sup> century; a process that eventually led to the passing of the international Bern Convention for the Protection of Literary and Artistic Works in 1886. The idea of a protection for foreign authors caused resistance in many countries, but in most cases it passed quickly as the principles of international copyright were included in the national legislations in late 19<sup>th</sup> and early 20<sup>th</sup> century. The big exception was the United States. The arguments of the American anti-international-copyright lobbyists were largely similar to those that had circulated in Europe, and particularly in its more peripheral areas such as Scandinavia. They claimed that an international copyright protection would serve as a kind of “tax on reading” that would make imported literature too expensive for the average reader and thus impede the inflow of literature and hamper the cultural development. But the United States’ recent colonial history added another perspective to the issue. If marginal European countries such as Sweden had been eager to show that they were a part of the European civilization by conforming to its copyright norms, the American position was often marked by open defiance towards the European copyright paradigm. (Fredriksson 2009, pp. 152; Fredriksson 2011; Homestead 2005, pp. 4; Johns 2009) This led many American politicians and legislators to take positions that seemed blatantly piratical to European copyright hawks. This American resistance against an international copyright consensus prevailed long after it had been abandoned by most European countries and The US would for instance not ratify the Bern Convention until 1989.

China provides an even more obvious example of the connection between copyright and colonialism. As William P. Alford describes in his book *To Steal a Book is an Elegant Offense*, China’s first modern intellectual property laws were an immediate consequence of the Angol-American gun boat diplomacy. In the aftermath of the boxer uprising in 1900, the UK and the US imposed a number of new legal and economic reforms on China in order to open up the country to foreign (i.e. Western) trade. Some of those reforms concerned the introduction of a new national currency for the entire Chinese empire, the abolishment of certain trade restrictions and the passing of fundamental patent- and copyright laws. China agreed to these conditions most reluctantly and the passing and implementation of the new IPR-laws largely followed a strategy of appeasement where the Chinese government did nothing more than what was absolutely necessary to ward off interventions from the West (Alford, 1995, pp. 36).

In one sense the expansion of copyright in the 19<sup>th</sup> and early 20<sup>th</sup> century was closely connected to ideas of colonialism as a way to share the light of western civilization with the

rest of the world. It was a predominantly European endeavor where a way of understanding the appropriation and circulation of artistic works that was firmly rooted in romantic aesthetics and enlightenment thinking was to be spread to new territories (Fredriksson 2011). The US was initially skeptical against such attempts, but the fact that they sided with UK to urge China to adopt intellectual property laws that could protect Western business interests also reveals the pragmatic tendencies in the United States' copyright policy.

In the later part of the 20<sup>th</sup> century, USA would also take a more active role in the development of international intellectual property rights. Eva Hemmungs Wirtén has pointed out that a kind of Americanization of copyright took place in the 1980s. As the Reagan administration became aware of the huge economic values created by the American copyright industries the US swiftly reconsidered its position on the copyright question. Not only did they ratify the Berne convention, but the US all of a sudden became the driving force behind the internationalization of copyright in late 20<sup>th</sup> and early 21<sup>st</sup> century (Hemmungs Wirtén, 2004). But at the hands of the Americans it was mainly the trade related aspects of copyright that came to be enforced, and this was largely done within the already existing structures of economic globalization.

The process of internationalization took a new course in the late 20<sup>th</sup> century. The former head of the World Intellectual Property Organization (WIPO), Daniel J. Gervais, has claimed that the internationalization of copyright law entered a more trade related phase in the 1970s and 80s when IPR was integrated in the new structures of international trade regulations – most prominently through the inclusion of intellectual property rights in the General Agreement on Tariffs and Trade (GATT) in 1986 and WTO's passing of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994 (Gervais 2002: 939 pp). The latter required all member countries of the World Trade Organization to adapt their national legislation to a set of international standards for intellectual property rights set down in the agreement. Critical spectators, such as the Australian professor of law Peter Drahos, regard the TRIPS agreement as the starting point for a new globalized period in copyright history where international IPR regulations have become means for developed countries and multinational companies to exploit the immaterial resources of the third world (Drahos 1997: 201 pp; Hemmungs Wirtén 2004). A standpoint that also epitomizes how the (post)colonialist aspects still tend to mark the international development of copyright law.

### **Copyright and Piracy in a Postcolonial World**

A hundred years down the road, many of these conflicts seem to remain. Not only does the somewhat stereotypical opposition between freedom loving pirates and monopolistic publishers ring familiar in the current debate. The colonialist past also echoes in many contemporary discussions about copyright and piracy. The United States may have changed its position, but China's reluctance to enforce international intellectual property laws is still an issue for the Western copyright industry. If the UK reacted harshly against American reprints in the 19<sup>th</sup> century, then the spread of Chinese counterfeit handbags and pirated DVDs draws similar criticism from American politicians today. In a speech before the American senate the head of the Motion Picture Association of America, Jack Valenti, developed his view on China as the great nemesis of Western copyright owners:

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The spread of theft of America's creative works flows like a swiftly running river in every nook and cranny of this planet. Today I'd like to focus on China and Russia, where ... the piracy problems are spilling out beyond their borders to infect markets all around the world[...]. (Wang, 2006, p. 414)

Valenti's metaphor where he likens Asian piracy to a contagious disease has a clear undertone of colonial anxiety, reflecting an implicit fear that the lawless wasteland that reigns beyond the borders of the civilized world threatens to invade and ruin the fragile cultural order of the West. And a quick look at how Western media report on issues of Easter piracy tends to reveal a similar colonialist logic. A high level of copyright protection is often seen as a hallmark of Western civilization while China's inability to enforce international intellectual property rights is regarded as a symptom of its lack of cultural development (Philip 2005; Fredriksson 2011). In 2000 the editorial of a major Swedish newspaper could for instance read:

In countries like China and the Soviet Union, the lack of Intellectual Property Rights led to massive piracy of popular works [...] In *our more civilized societies* the software companies has for centuries fought an uneven struggle against plagiarists and counterfeiters [...] The recent closing down of the music company *Napster's* webpage, where you could download music free of charge, is probably a sign that the respect for the rights of ownership is about to increase. (*Svenska Dagbladet*, 2000, July 29)

When the Office of the United States Trade Representative (USTR) in February 2011 listed 17 of the world's most prominent hotspots for sale of pirated goods in the report "Notorious Markets", all of them were located in Asia or South America (Out of Cycle Review of Notorious Markets 2011). In this sense it is obvious that spread of piracy outside of Europe, North America and Australia is still largely contextualized within the geopolitical landscape of colonialism. But it is a kind of colonialism that is manifested through the late capitalist structures of global trade relations. Within this context piracy is regarded first and foremost as a breach of international agreements, such as WTO's treaty on Trade Related Aspects of Intellectual Property (TRIPS), which gives it a political weight that can even, as has been the case with USA and China, lead countries to the brink of trade wars. From the perspective of most Western governments and copyright organizations, the notorious markets in Asia and South America are thus both a crime and an object of diplomatic conflicts. The India based lawyer and activist Lawrence Liang on the other hand describes this kind of third world piracy as "leaks in modernity": a way for the people of the third world to get at least some limited access to the cultural and technological fruits of modernity (Philip 2005: 213). Regarded in that perspective the Western attempts to stifle piracy in Asia can be interpreted as part of a colonialist urge to mend these leaks and contain the privileges of modernity within the boundaries of the Western civilization.

The Swedish editorial's reference to Napster could serve to undermine this colonialist logic since it, contrary to what the author imagined at the time, actually highlights the beginning of a new wave of illegal downloading that took place in the suburbs of Europe and North America. Apart from falsifying the assumption that piracy is essentially an Asian

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phenomenon, the recent focus on of file sharing networks in the West have also inspired different kinds of pirate organizations, and even so called Pirate Parties, that criticize the traditional Western copyright paradigm for promoting a biased understanding of authorship and ownership. But this new social and political movement is not necessarily free of ethnocentrism itself. Kavita Philip, STS scholar at University of California, for instance claims that much of the copyright critique associated with this kind of piracy actually reinforces this colonialist logic by making sharp distinctions between Western piracy and piracy in the third world. If Western piracy tends to be described as a legitimate form of creative practices involving pastiches, re-assemblages and quotations, then Eastern piracy is often discarded as plain theft. She particularly accuses Lawrence Lessig, professor of Law at Harvard University and one of the central characters in the open source movements, for using Asian piracy as an example of ‘bad’ piracy against which he contrasts and legitimizes his own conception of Western piracy:

Asian pirates thus serve as his limiting case: the limit point of difference from bourgeois law, the point towards which the energies unleashed by the free culture/free software movement tend, often, chaotically and euphorically to move, but the dangerous borders from which it must be turned back, lest the foundations of bourgeois law be threatened. (Philip 2005: 212)

According to Philips, Lessig uses the image of Asian piracy as the big threat, claiming that unless we liberalize copyright law now, it will gradually disintegrate and the west will fall into the same state of lawlessness that reigns in Asia.

It is also significant that this kind of third world piracy is associated with material markets while piracy in Europe and North America is almost entirely regarded as a digital phenomenon. If the file sharing that takes place in the suburbs of Europe and North America is imagined as a part of the so called cyberspace – that immaterial space that Barlow named “the home of the mind” – then Asian piracy seems to be firmly rooted in the physical world. Even though the report on “Notorious Markets” mentioned a few websites it focused mainly on actual physical marketplaces, all of which were located in Asia, South America or the former Soviet Union. Places like the Silk Market in Beijing, the Ladies Market in Hong Kong or the Savelovskiy Market in Moscow are crowded sites for exchange of commodities. And if we to this list add the more general peddling of copy watches, pirated DVDs and counterfeit handbags that takes place in the streets of cities such as Hong Kong, then we are looking at something rather similar to the exchange of pirated note sheets in the streets and alleys of Victorian London.

Markets like the ones targeted by the USTR seem to represent an older form of distributing of pirated works that has more in common with the ‘industrialized world’ than with a postindustrial cyberspace. In this sense the distinction between East and West also involves a dichotomy between material and immaterial piracy that could be regarded as analogue to the traditional, and highly ethnically charged, dichotomy between Body and Mind or Nature and Culture.

## Piracy Between the Public and the Private

There is obviously a complex interconnection between how copyright is situated in a physical space and in a geopolitical landscape: when piracy is attributed to the colonial ‘other’ it seems to be more strongly associated with a physical location. But the fact that piracy in Europe and North America is generally understood as an immaterial matter does not necessarily mean that it is. If you scratch the surface of the piracy movement you are soon brought back to the issue of spatiality. This is an example of how the Swedish debater Christopher Kullenberg describes the struggle for freedom on the Internet in his pamphlet *The Net Political Manifest* [*Det nätpolitiska manifestet*]:

”When the open networks are insufficient, when they are restrained by the copyright based industries’ hunt for ‘illegal file sharers’ or by different regimes’ hunt for political dissidents, the net activists dig tunnels in the network and make themselves invisible for the panspectric gaze. The tunnels create pockets between two points which make the person in between lose control. The wall that has been erected to stop the flow of information brakes down. Net presence prevails in cipherspace, a room that is slowly growing and diverging in different worlds. (Kullenberg 2010: 69)<sup>1</sup>

At a first glance Kullenberg’s words clearly echoes of the utopian, oppositional ethos that made Barlow’s *Declaration of the Independence of Cyberspace* so popular. It displays the same kind of libertarian rhetoric and a similar belief in the autonomy of the digital realm. And yet when he describes the defensive strategies of this “cipherspace” in the terms of tunnels, walls and panspectric gazes, he rather envisions a physical battlefield than a digital cyberspace. Here the digital information war is mapped with spatial metaphors that rather carry a resemblance to the urban guerilla warfare of Victorian London.

The copyright war is, crudely put, a battle over public and private spaces where the copyright owners attempts to monitor and regulate the distribution of what they regard as their private property interferes with the freedom of the public domain. The copyright scholar James Boyle describes the current tendencies towards copyright expansionism as a “second enclosure movement”. The first enclosure movement – ‘the enclosure of the commons’ as it is generally called – refers to a series of land reforms in England between the 15<sup>th</sup> and 19<sup>th</sup> century that gradually transferred publicly owned and collectively used agricultural areas into the hands of a small group of wealthy landowners. This marks a huge privatization of common resources but it is also often describe as process that made agriculture more efficient as it turned small scale inefficiently used land into large scale well organized production units (Boyle 2003). Boyle sees a strong parallel between the enclosure of the agricultural commons of the past and a contemporary enclosure of the cultural commons where the copyright industry constantly tries to expand its rights and control over cultural products and exploit the intellectual resources of individual creators as well as the traditional knowledge of indigenous cultures.

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<sup>1</sup> När de öppna näten inte räcker till, när de begränsas av de upphovsrättsbaserade industriernas jakt på ’illegala fildelare’ eller regimers jakt på politiska dissidenter, gräver nätaktivister tunnlar i nätverket och gör sig osynliga för den panspektriska blicken. Tunnlarna skapar veck mellan två punkter som gör att den som står mittemellan tappar kontrollen. Den mur byggts för att förhindra informationsflödet faller samman. Nätvaron fortsätter i cipherspace, ett rum som sakta växer och förgrenas i nya världar.

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Like the first enclosure movement it is a process that might in some cases ensure a more efficient exploitation of intellectual resources, but at the cost of an increasing privatization of culture and a shrinking public domain.

This battle over public is not only as a metaphor but also as an actual legal conflict. Another front figure in the Swedish pirate movement, Rasmus Fleisher, describes the copyright dilemma like this in his book *The Postdigital Manifest*:

Copyright as a system, and particularly the collective of copyright laws that emerged over the 20<sup>th</sup> century, rests on a strict dualism between what is called public performances and private use. In spite of this, grey zones has made themselves known in copyright disputes concerning how music can be used in schools, workplaces, in associations and religious communities, and lately also within the framework of different forms of digital communication of semi public character.

Private or public? Authorities that uphold the law are compelled to label every practice as either the one or the other [...] We would on the other hand like to acknowledge these grey zones a legitimacy of their own due to their importance for the emergence of new cultural forms. In such cases, copyright conflicts can serve as platform for formulating new questions regarding the room for communities to gather, which opens up for a new policy regarding urban space. (Fleischer 2009: 39)<sup>2</sup>

The conflict between the private and the public is thus built into the very structure of copyright law and one of the challenges for those who want to reform the law is to find a way to overcome this dichotomization and make room for the grey zones that are neither private or public. And as Fleisher suggest, space is not only a metaphor for the understanding of copyright but the study of Intellectual Property Rights can also enrich the understanding of spatial issues such as the current privatization and regulation of urban, public space. A notion that opens up for the possibility of an entirely new field of research that focuses on the interconnections between the regulation of space and real estate on the one hand and of intellectual property rights on the other – mapping the confluences of two contemporary enclosure movements.

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<sup>2</sup>Upphovsrätten som system, och särskilt de upphovsrättsliga kollektiv som tog form under 1900-talet, bygger på en strikt dualism mellan vad som kallas offentliga framföranden respektive privat bruk. Trots detta har gråzonerna gjort sig påmindra i upphovsrättsliga dispyter om hur musik ska få brukas på skolor och arbetsplatser, i föreningar och religiösa samfund, och på senare tid inom ramen för olika digitala kommunikationer av halvöppen karaktär.

Privat eller offentligt? Rättskipande organ är tvungna att klassa vare praktik som antingen det ena eller det andra [...] Däremot vill vi tillerkänna gråzonerna en egen legitimitet på grundval av deras betydelse vid framväxten av nya kulturfenomen. Upphovsrättsliga konflikter kan då tjäna som språngbräda för att ställa nya frågor om utrymmet för gemenskaper att samlas, vilket öppnar för en ny politik i frågan om stadens rum.

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