

Towards An Understanding of the Copyright Crisis

In the 1890s, piano rolls and gramophone records were an exciting new technology that mechanically recorded and replayed music. Tim Wu accounts for a sort of cultural fever around the new technology because it had the capacity to enable a massive new market of listeners to become music lovers (Wu, 2004, p.298). However, the new technology was controversial because the musician received no payment or fee for the new format copies (although they had received a fee for printed sheet music). Two competing value systems butted heads: copying without payment would destroy artist creativity, while copyright would destroy the marketable value of the new invention (Wu, 300). The recording industry accused the music publishers of trying to protect their monopoly through political subterfuge while the sheet music publishers accused the new gramophone and piano roll companies of piracy (Horten, 2012, p. 25).

Politically, each corporate position presented the rights of individuals and the rights of the public as the fulcrum for balancing capitalist values, however, there are several value systems operating in conjunction and quite separate (even oppositional) from each other. Indeed, the private companies have an economic interest in sustaining their business model while the individual creators have a right to make a living from work that the public consumes. The public also has a right to access for creative works that enrich culture, universally. The former values need not be in conflict and a company can exploit

a viable market for creative media work while still providing the original artist with enough compensation that they are motivated to continue creating. However, issues become complex with the notion of “public interest” in the matter of media access, as culturally, “interest” is a polysemous term – each individual or group will have a different set of values for what is deemed “interesting” for them.

The piano roll/gramophone legal dispute culminated in the 1909 US Congress decision for the *White-Smith vs. Apollo* case whereby a mechanical license was introduced whose fee would be paid to the original composer for the right to make a recording (Horten, 25). However, the *Betamax* case before the US Supreme Court in 1984 assessed public interest values quite differently and in a way that opposed the economic rights of creators and copyright owners. This court decision appears to reflect nuanced values of a postmodern philosophy regarding the public’s right to access, that arguably has helped contribute to rampant media piracy since that Supreme Court decision.

Computer hacker philosophy is largely guided by the concept of inalienable rights to open information and it foregoes corporate values for viable business models, or the values of artists to receive adequate (and proportionate) financial compensation for creative works that are consumed by the public (Levy, 1984). Peer-to-peer (P2P) software has enabled the mass distribution of media text copies without regard for copyright laws or satisfying the values of sustaining businesses that invested in owning rights to creative work, and without respect for the value of providing creators with a means of survival

through payment for their work. The “hacker” philosophy constructs a contradictory value system to that of corporate/capitalist philosophy; however, such contradictory values need not be held simultaneously by any individual or group. The music label owner or movie studio CEO will adamantly reject hacker values (or ethos) as destructive to business while the hacker, with equal force, will reject the corporate values of exploiting and restricting “information” for capital gain. The murkiness creeps in when the average consumer of media texts understands advantage in both value systems and holds contradictory values simultaneously (the formation of a “schizophrenic consumer”).

When an average consumer of media believes that they have a right to information, but paying for such access is correct, then media industry is sustainable, however, rapid technological advancement in formats for media content can shift the equilibrium in balancing these competing cultural values. If the industry cannot compel the consumer in believing that a new technological format has significantly altered the economic value of the media text, then the consumer may resist - or reject - paying multiple times for access to the same creative content. I would suggest, and intend to show, that “technological amnesia” facilitates a “schizophrenic decoding” of meaning for media access, such that average consumers readily participate in a pirate market and that this form of meaningful decoding meaning has its roots in the history of legal development for copyright law.

I would suggest that, historically, corporate entities’ appropriation of cultural values regarding “public interest” (as a means of serving their own economic goals) has had the

effect of fueling the flames of hacker ethos in the postmodern context, such that the public has developed a distorted value on the right to open access for information. That is to say, the history of copyright legislation and enforcement reveals assumptions on the public's right to media access, such that the public can establish conflated contradictory values of the individual's cultural right to access of information with the creator's economic right to controlling the distribution of their work and the corporate proprietary right to control distribution of content that is owned by them. Technologically, shifting formats facilitates this conflation in the postmodern context and has resulted in a crisis of media access through Internet piracy.

The historical discourse on copyright and the public's cultural right to media access is critical in understanding how piracy has become so rampant that artistic creation itself has been redefined in the waning postmodern epoch (ie. Vines, dubstep music, shuffle dancing, Worldstar pugilism, etc.). Anemic enforcement of copyright has altered media platforms such that new creative content is hailed as the pinnacle of democratic forms, but also has the quality of vapid cultural detritus. The "free" content that is promoted through contemporary culture is largely a conglomeration of mass popular forms crafted by unskilled labourers where commercial success is mainly determined through the potency of viral marketing campaigns that are often subject to a lottery within their subset of vastly similar, and arguably redundant, content.

Without the concepts of “tech-amnesia” and “schizo-decoding”, it becomes challenging to explain why Western society is allowing this state of affairs for the development of media. Today, the issues of “fake news” proliferate through underpinned notions of rights to access on free information that then enact a lackadaisical approach to validating the authenticity of information through forms of copyright. In the pursuit of protecting the rights of public interest, toothless copyright legislation has simply ensured a poor character for contemporary media content. It is worth noting that this scathing indictment is heavily-based on my personal experience as a prolific creative content artist in the post-Napster era of digital media distribution.

Monica Horten, in her book, *The Copyright Enforcement Enigma*, explains that copyright enforcement refers to the imposition of a sanction or punishment, for the unauthorized copying, distribution or use of copyrighted creative works (Horten, 1). The advent of P2P (peer-to-peer) file sharing technology has initiated a period of aggressive lobbying of policy-makers by copyrights holders, with the goal of making broadband providers (ISPs – Internet Service Providers within the Telecoms industry) responsible for copyright enforcement. The copyrights holders (usually music labels and film studios) have sought graduated-response sanctions (ie. three-strikes) in hope that they might avoid the need for litigation in the courts (Horten, 3). This attempt to reduce sunk costs (ie. lawyers’ fees) and avoid unfavourable verdicts that might have their basis in political agendas has historical precedent dating back to the sixteenth-century.

Legally, copyright holders have often asserted their rights to distribution of creative content as being economic rights as opposed to proprietary ones, but Parliament (in the West) has found on several occasions that the fundamental rights of individuals can be compromised through these limitations. That is to say, if the copyright holders' rights are simply economic then graduate-response sanctioning would be sufficient as punishment for infringement; however, this implies a violation of the right to due process (i.e. the right to a fair trial) which is understood as a fundamental right of individuals. Governments have become resistant to enacting legislation which would compromise a person's right to judicial ruling prior to punishment (Horten, 5).

Paul Goldstein accounts for the earliest known dispute over the ownership of a "copy" as originating in Ireland in the sixth-century. Two monks, St. Columba and St. Finian debated the former's right to own a copy of a manuscript authored by the latter (Goldstein, 2003, p.30-31). St. Finian argued that the copy which was created by hand in secrecy belonged to him and the argument ended in the Battle of Cul Dreimhne, in 561. Issues over the right to copy and punishment for infringing those rights have existed since the invention of the printing press, and they have always presented a dilemma over balancing private and public rights.

Copyright, as a modern concept, was connected to the ownership of printing presses and was not tied to the author until the eighteenth century (Kawohl, 2008, p.8). Thus, copyright was an economic right and not a property right or related to culture. The

printing industry in the West was an oligopoly with monopolies in particular nations. Copies were a pressure on the hegemony of the printing industry which in turn was an affront to hegemony, ideologically. As such, governments and monarchies supported the monopolies at first, providing legislation for enforcement of copyright, which included seizure and destruction of copies, as well as physical punishments (Horten, 14).

The first known copyright law is the Statute of Anne in England in 1709 (Lloyd, 2004, p.507). Enforcement of copyright through the Statute was to be achieved by litigation - an element of the legislation that was largely determined through the close relationship between the printing industry and the state. The right to print books had involved rights to censorship for religious purposes and all books printed in England or imported had to be read first by the Privy Council (Patterson, 1968, p.23-26). The censorship process saw printing presses as required government agents which had in turn led to the formation of the London Stationers Company as a monopoly over the print trade in the late sixteenth century.

The first recorded infringement of copyright in England was in 1554 when “Master Wallye” was fined for printing a copy of a work called “A Breafe Cronacle”, having failed to present the work to the Stationers Company for review before printing (Patterson, 42). The Stationers Company had been founded in 1403, but Queen Mary provided a Royal Charter in 1557 that ensured its hegemonic control of book printing in England.

The Stationers Company enforced state censorship in return for economic control of the book trade (Horten, 16). Early copyright was a publisher's right and not that of the author, and where the Stationers Company was given the power to enforce the state's authority through the right to search premises for unlicensed copies and to prevent distribution (burning copies if necessary). The draconian measures of enforcement were granted greater force and effect during the reign of Elizabeth I. A new decree in 1586 made unlawful printing punishable by imprisonment (three months) and a fine (twenty shillings)(Horten, 17).

Finding the monopoly's exertion of authority to be spurious, John Milton issued a written attack against the censorship regime accusing the Stationers Company of misleading Parliament regarding the stakes of losing income for its poorer members. Milton's polemical indictment was articulated through his *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parlament of England* (1644). In *Areopagitica*, Milton argues that censorship of literature by the state ensures a monopoly in the print industry, which in turn stifles the creativity of authors. Authors will begin to fear expressing freely, will self-censor, and will pander to the needs of the state, and Milton warned that this goes directly against the rights of the public and the public good (Milton, 1644). Milton also understands that a compromise to the public good is a slippery slope (this is echoed by Levian hacker ethos). Milton writes, "if we think to regulate printing, thereby to rectify manners, we must regulate all recreations and pastimes, all that is delightful to man" (ibid.).

John Locke also aggressively protested the monopoly of the Stationers Company and lobbied his MP, Edward Clarke, through a published *Memorandum* (1694). Locke was seemingly less concerned with the ethics of state censorship and more interested in presenting economic arguments for breaking up the monopoly. Locke saw the Stationers Company monopoly as ensuring low-quality printing whereby foreign markets could provide better quality products at a lower price. He was particularly upset by the high cost of classical works and opposed perpetual exclusive rights in expressive works (Hughes, 2006). Locke attacked the publisher's privileges and asserted the rights of the author for their creative works. What is important to note here is that in condemning the Stationers Company monopoly, Locke asserts that the author owns the rights to their work for a limited time and then that work should become part of the public domain as this is in the public interest and for the public good. Locke writes, "...this certainly is very absurd at first sight, that any person or company should now have a title to the printing of the works of Tully, Caesar, or Livy, who lived so many ages since, in exclusion of any other; nor can there be any reason in nature why I might not print them as well as the Company of Stationers, if I thought fit" (Locke, 1694).

Locke's arguments were compelling in Parliament and the Licensing Act expired in 1695. This meant that anyone who could afford to buy a press was entitled to print books. The Stationers Company lobbied for ten years to have licensing re-introduced and in 1706 they changed their tactics, altering the demand to reinstate their monopolistic authority and

shifting focus to arguing how their control of the industry would ensure the protection of authors' rights (Horten, 18). Daniel Defoe's *An Essay on the Regulation of the Press* (1704) set forth a rationale for how the Stationers Company might act in the interests of authors and the public. Defoe refers to the "licentious extravagance of authors" and the "prodigious looseness of the Pen" as having the potential to produce scandals that necessarily require regulation (Defoe, 1704). For Defoe, unlicensed printing has two negative consequences: dangerous texts can be printed that harm the public, and regular texts can be interpreted freely in such a way that they become dangerous for the public. In effect, regulation of printing through the Stationers Company protects the public from being party to transgressions that they were unaware of, while it also protects authors through creating an interpretive status quo on the general meaning of the author's text.

Defoe attempts to logically tie codified law to copyright, explaining that the public must be aware of laws so as to avoid transgression. Thus, the rights of the text and author are ensured through proper regulation. Defoe writes of the value of regulation through codified law that, "all these Evils would be Obviated, and Men might know when they Transgress, and when they do not" (Defoe, 1704). Defoe defends the logic of his positions by arguing that, "the present uncertainty of the Crime seems to be the greatest Occasion of the Crime, for Men are apt to be bold in a Thing which they cannot find expressly Condemn'd by the Letter of the Law." (Defoe, 1704). The issue isn't simply that a lack of copyright regulation exposes the public to ideological dangers, but that it encourages piracy and thus proliferate those dangers.

The Statute of Anne was amended to give copyright to authors for a limited time – fourteen years, extendable to a maximum of twenty-eight years. Authors could sue for damages and unauthorized prints could be seized by rights-holders (Horten, 18). The claimant could also sue for damages – one penny for every sheet, with half going to the Queen. The Statute also provided for a form of indirect liability whereby booksellers involved in unauthorised production through distribution might be subject to sanctions. The issue of indirect liability is at the heart of current debates over copyright infringement involving P2P platforms and ISPs on the Internet.

France also had a monopoly in the print industry, that was state-supported – *Corporation des Librairies de Paris*. France recognized authors' rights early on, and in 1586, the lawyer, Simon Marion, made a pleas to Parliament that the author have a sole right to communicate their work to the public (Horten, 19). In the mid-seventeenth century, authors battled the Corporation monopoly over control to distribution of the works, citing a need for a greater proportion of the revenue than they were receiving at the time. However, the Corporation's authority was reinforced until the French Revolution when it was then dissolved (Horten, 20). Within the power vacuum, the *droit d'auteur* legislation was passed in 1791 and punishment for infringement involved being chained for three hours in a public square next to a placard with the words, "thief infringer" (ibid.). That legislation was amended two years later which became the basis of copyright law in France until 1957.

Most infringement cases in the courts involved disputes over distribution for particular geographic regions or for use of technical formats. The “Battle of the Booksellers” in 1731, saw Scottish printers trying to exploit the English market with out-of-copyright works. Belgium “pirated” French works and the United States pirated European works (Goldstein, 2003, p.149). Charles Dickens and Victor Hugo campaigned against this territorially-based piracy which led to the signing of the Berne Convention in 1886 – the first multi-lateral copyright treaty (Drahos and Braithwaite, 2002, p.33). However, the treaty only established rights, and not enforcement measures (Horten, 21).

The history of copyright reveals a tension of economic rights with notions of the public interest (cultural rights). When the Stationers Company became unsupported by the state, they shifted their values from promoting their rights to hegemonic industrial control to promoting their ability to protect the authors in the interest of the public. Milton argued that free access to the author’s work is part of the public good, while Locke put forth that for the public good, the author’s work needs to eventually enter public domain and be free of copyright restrictions on access. Defoe, on the other hand, saw the protection of the public and the author through copyright enforcement, while Dickens and Hugo campaigned similarly. Historically, there is an issue of “teetering”, where absolute enforcement of copyright was met with a fierce resistance that then saw to a slackening which in turn created profound problems in the opposite direction.

In 1975, Disney and Universal filed a lawsuit against Sony over Betamax videocassettes enabling copyright infringement through letting television broadcasts be recorded onto the tape of the cassette (Horten, 25). The US Supreme Court ruled in 1984 in favour of Sony claiming that the new technology did not imply contributory infringement. That is to say, the Supreme Court determined that the primary purpose of the tapes was not about pirating copyright content and therefore, the tapes did not function as facilitators of piracy – they were merely reverse-engineered to those ends by a select group of “hackers”. Jack Valenti, the Chairman of the Motion Picture Association campaigning on behalf of the studios testified to Congress in 1983, claiming hyperbolically, “the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone” (Horten, 26). Ironically, the film industry came to protect the videocassette format and its successor, the digital video disc (DVD), against piracy offered by P2P platforms on the Internet.

With copyright law, there are two narrative threads to follow historically prior to my presentation of a theoretical prolegomenon diagnosing the contemporary copyright crisis. The first thread, involves development in the ideological prerogatives of the print industry with the shift away from economic arguments about ownership rights and hegemonic industrial control, and move toward cultural arguments regarding the rights of authors and the rights of the public to proper and responsible access of creative content. The second thread regards in-fighting with the print media industry over how copyright can be enforced and protected within a landscape of constantly shifting and

evolving technological formats. A lack of proper regulation for the latter combined with fervour for the former has produced a cultural context in the postmodern moment whereby media piracy is rampant. Culturally, there is an absurd reductionism on the Milton-Locke logic, while economically cases such as *White-Smith vs. Apollo* and *Universal vs Sony* have not provided print media industry with a sufficient means of enforcing copyright for new technological formats.

There is a lineage to follow from Queen Mary to Jack Valenti, but the real question should be, why has Western society accepted Internet piracy and why have regular users of the Internet embraced the idea of media piracy and built-up collections of pirated digital copies of all sorts of media, from films and television series to comic books and pornography? I offer a theoretical prolegomenon on cultural technological amnesia and psychological/semiotic schizophrenic decoding to answer this important question.

Technological amnesia is a form of cultural amnesia and has been theorized, more than adequately by Andreas Huyssen (Huyssen, 1995). Taking some liberties from his definition, I would explain the cultural condition as being rooted in psychology and can only properly be defined through a remediation of some basic Freudian terms from classical psychoanalysis. When a trauma is experienced psychologically, there is a break in the chain of associations of meaning (a semiotic rupture) whereby articulating around the trauma becomes challenging, if not simply impossible. To maintain mental cohesion, the trauma is disavowed (rejected) and is substituted with a fetish. The fetish can produce

meaning regarding the trauma without referring directly to it. The fetish is the part of the trauma that can be articulated separately and abstractly from the trauma. As such, the fetish effectively masks the trauma as a psychological rupture, through its synecdochal modes of meaning-production.

In the post-modern context (which I believe has ended in the West – however, this discussion would be grounds for another paper), individuals have an intra-generational sense of technological obsolescence, where previously such a sense was intergenerational. Young people in the 1950s could scoff at their parents’ or grandparents’ generation for having only had black-and-white film (in the 60s it was the cassette tape, in the 70s it was video games, in the 80s it was cellular phones, etc.), whereas young people in the new millennium must scoff at themselves for having used outdated technology only a few years earlier. Psychologically, it is traumatic to accept the obvious: the present moment is outdated with the technology currently being used can be understood as inadequate, and for all intents and purposes, obsolete. This trauma leads to disavowal of the technological facts and a subsequent fetish of the present as an eternally-progressive cultural moment in time-space. This fetish flattens the spatiotemporal register for where meaning is produced psychologically and the individualist past is rejected at the level of culture-technology. The collectivist present is hailed as signifying past, present, and future, simultaneously. The rejection of individualist pasts collectively produces a cultural amnesia. The value of technology in the past is rejected and becomes that which cannot be articulated (hence a resultant technological amnesia).

Schizophrenic decoding builds from Stuart Hall's concepts of encoding/decoding and in particular, Umberto Eco's concept of aberrant decoding (itself being a kind of decoding that emerges from the interstitial region of Hall's negotiated readings and oppositional readings). Schizophrenia, in this case, is being defined through a semiotic understanding whereby schizophrenic decoding means that two contradictory values are held simultaneously in order to decode meaning in a message twice. One set of decoded meanings will satisfy a notion of status quo while the other set will satisfy a notion of fantasy on what is significantly real. The experienced meaning and desired meaning are not conflated, but co-exist despite being contradictory.

The classic example of schizophrenic decoding comes from the dissociative cognitive mental condition, whereby a paranoid schizophrenic will at the same time believe that someone they are talking to will act as if not telepathic while actually being telepathic (projection). There is an expectation for the schizophrenic decoder that one set of meaning from the conversation will explain the status quo of non-telepathic communication while a second set of meaning will reveal telepathic knowledge. The idea that telepathic knowledge does not necessarily express through non-telepathic communication is contradictory (if you can hear what I thought about you, then you should be acting on it the same way that you would if I had spoken it verbally) and it is often paranoia that supports these contradictions in how meaning has been decoded

(there is a “cosmic” plan for why an expected response to statements is negated when expressed telepathically).

My suggestion is the following: technological amnesia renders the postmodern (“post-passé”, in fact) media user to a psychological state where they reject the economic value of obsolete technological formats, however, they also reject their own past experience with those formats in significant ways such that the “up-to-date” format is abstract from the historical framework of formats (and is placed in an idealized present). This media user conceives of having already purchased the creative content because they are familiar with it, but to pay again for the new format would create a link to having paid for the old format – and the old format is disavowed, meaningfully. The media pirate downloads all the Star Wars movies on .mp4 or .avi format for free because they know the media (implied ownership), but do not acknowledge a significant difference in economic value between formats (technological amnesia). The roots for this issue were emerging in the 1909 copyright case regarding gramophones and piano rolls. Technological amnesia addresses the economic thread in the history of copyright to explain rampant and irresponsible media piracy.

With schizophrenic decoding, the cultural thread is elaborated on. The postmodern (or post-passé) “millennial” media user holds one set of values on publicly-consumed work being worthy of financial revenue and copyright protection, with a contradictory set of values on all publicly-consumed creative content being of public interest and therefore

subject to free access status. This mode of meaning-production encourages media users to saturate the digital market with their own amateur fare in order to craft a new digital economy based on lottery as opposed to capitalism. The shuffle dancing video or dubstep beat that gets a hundred million downloads and thus generates advertising revenue is creatively identical to hundreds of other offerings because the market is saturated. With everyone in on the act of being content creators as it were, yet without expectations of a stable and predictable economic structure, it becomes rather simple to devalue all work economically, and therefore culturally promote its status as free information. The schizophrenic decoding presents the contradictory values of expecting financial revenue from winning the digital viral media lottery with disavowing financial gain through the consumption of creative content as free information.

My prolegomenon is exactly that – a crude and cursory exploration of significant issues that undermine the rights of the author and copyright holder in the post-passé context. However, the history of copyright reveals two threads – economic and cultural – that are well-served by my concepts of technological amnesia and schizophrenic decoding. It remains to be seen whether a counter-culture will emerge in the next few generations that has a penchant for neo-luddite values and an impulse toward constructing history more honestly (ie. without fetishism). If so, then we might expect the authors' rights and rights of the copyrights-holders to be reaffirmed against the cultural mandate of constructing the meaning of creative content in terms of its contribution to the “public good”. John Locke appreciated that, part of what is “good” is that authors are encouraged

to continue producing work, which then requires a stable and predictable economic framework within which creative content is produced. The Internet at present doesn't construct this kind of stable and predictable framework, therefore as much as free information might be for the good of the public, arguably the anemic enforcement of copyright at present has discouraged talented creators from working and therefore done great harm to the public in rendering the public bereft of the works of our greatest artistic prodigies.

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