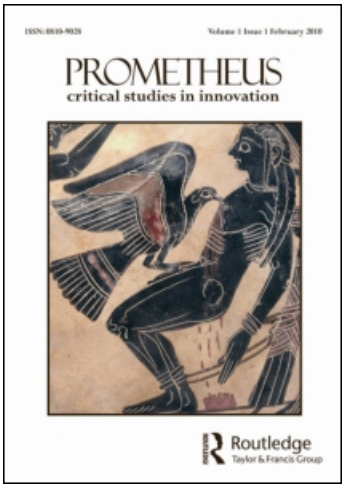

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RESPONSE

Consumers, crime and the downloading of music

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Law, business and culture can often be curious and uneasy bedfellows – especially in times of change. As Birgitte Andersen clearly points out in her paper, the evolution of the UK's Digital Economy Bill and its passing into the Digital Economy Act illustrates a law-making process where the public benefit is unclear, lobbyists' interests a little too evident in the drafting process, and the voting procedure more a knee-jerk reaction to a deadline than a considered response to developing a sustainable digital economy. The formation of a coalition government involving the Liberal Democrats (who originally opposed the legislation), recent announcements of a further review to the UK's copyright laws (looking specifically at the implication of introducing fair use provisions) and even the granting of a judicial review of the Digital Economy Act have further indicated difficulties in the UK's development of a rational intellectual property policy.

In her analysis of the Act, what Andersen has successfully done is demonstrate how downloading of illegally copied content has started a witch hunt, even moral panic. Stories of lost millions in revenue went largely unquestioned during the wash up process, consumer agencies were pretty much excluded from debate about the Bill, and the whole process was rushed through parliament in an end-of-term frenzy. Through her discussion – and previous empirical work on the consumption of digital music (Andersen and Frenz, 2010) – it is clearly demonstrated that links between evidence and informed policy were not strong during the evolution of the Digital Economy Act.

While downloaders of illegal content were being held responsible for an impending collapse of the UK's music industry, several key issues were absent from the debates. In what I hope complements some of Andersen's arguments, I want to offer further consideration of two aspects of the piracy debate: changes in the music industry's model of business and the representation of illegal downloaders by the trade agencies.

Changing the music model

Innovations in digital distribution (most often originating from outside the music recording and publishing industries) have significantly changed users' relationships to

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the music they consume. As early as 1999, Shawn Fanning's Napster had demonstrated that there was a demand for digital music and that consumers were willing to trade the music quality of CDs for convenience as they downloaded small files from huge, illegal, online collections. Although the exchange of files across networks had previously gone on through bulletin board systems, binary newsgroups and semi-private file transfer protocol servers, Napster was a key innovation. This essentially hobbyist software made it easier for users to locate and access music, and significantly broadened the participation in the exchange of illicitly copied music. Napster's ease of use – as well as the broad range of music available – led to the rapid development of a large user base. While estimates of the number of Napster users vary between 25 million and 80 million, between February and August 2000 users grew from 1.1 million to 6.7 million, making Napster the fastest-growing software application ever (McCourt and Burkart, 2003).

Napster provided access to music often not then available from licensed online sources. Napster – along with eMule, BitTorrent and other peer-to-peer services – demonstrated that there was an unfulfilled demand for instant music, free from the physical container of traditional sales, and outside the packaged unit sale model that the music industry was so focused upon and enthusiastic to control. Napster showed there was an untapped potential for a new model of music distribution and consumption. What might be seen as the natural extension of early Internet utopianism for free exchange of information and a frictionless market had, however, a significant impact on the music industry (and, in turn, on other digital content industries).

These disruptive innovations changed consumers' relationship to music (Harris and Dumas, 2009) and had an undeniable impact on music sales. Indeed, the International Federation of the Phonographic Industry (IFPI) has estimated that 'around 95 per cent of tracks are downloaded without payment to rights holders' (IFPI, 2010, p.5). However, the impact on sales was not entirely negative, and not merely in the way argued by industry during the development of the Digital Economy Bill.

The most visible of these changes was the launch of iTunes by Apple in 2001 to complement its mp3 player – the iPod. By February 2010 – a quarter in which it was reported that iTunes sales accounted for 28% of the US music market and 70% of the US download market (NPD research reported by MacRumors.com) – Apple had sold 10 billion songs through the iTunes store, and had a catalogue of 12 million tracks (Apple, 2010). This success has also played a major role in revitalising what was considered to be a dead element of the music market – the sale of singles. In 2009, just 1.2 million vinyl and CD singles were shipped in the UK, contrasting with 113.2 million units in 1996. However, thanks to digital downloads, that year the UK music industry managed to show its highest ever level of single sales with 152 million units being sold (BPI, 2010) with 98% of these sales being digital downloads (BBC, 2010). During the same period, international sales of downloaded singles rose from almost nothing to 1,138 million units in 2009.

Unit sales, however, tell only part of the story of an industry successfully diversifying and generating income through a more service-orientated business model. Digitalisation has driven a shift in the nature of the market from one in which music sales were focused on physical goods, to one where digital distribution and secondary markets are the driving forces behind income generation. Income generated by live performances and merchandise sales are increasingly significant as '360 degree deals' are put in place with artists. Such artists as Radiohead and Prince have experimented with giving away music to drive other sales within their brand (Morrow, 2009).

Within a model based around a total music brand and experience it may even make sense to withdraw the sale of CDs from live performance venues so as not to cannibalise sales of more profitable goods, such as t-shirts (Sandall, 2007).

Similarly, the licensing of music across media to television, films and games is a growing market for the record industry, representing over 20% of total revenues for the music business in the UK. Music games, such as *Guitar Hero*, *Rock Band*, *Just Dance* and *Tap Tap Revenge,* had a market worth £95.1 million in the UK in 2009, with the top selling three games in the genre selling over 3 million copies (BPI, 2010).

While the case is regularly made that the music industry, associated secondary industries and government are losing revenue through piracy, it is less clear where this 'lost' money is going. Contrary to what is often suggested, international sales of music have climbed over the last decade. What has changed is the income generated from these sales, which has declined, with revenue generated per sale dropping significantly. Taken at face value, this can only suggest that if piracy does have a direct impact on the sale of music, it is not simply that pirated copies are leading to losses in legitimate sales. A substitution model would not explain growth of sales without significant additional growth in the market from some other consumer source.

So, we have a curious situation where both growth in piracy and growth in legal sales occur together. The substitution model and estimates of money lost are made more difficult to assess because of recent legal actions that the music industry internationally has undertaken. Despite successes in closing down agencies offering tools for locating or downloading pirated content – such as Grokster, The Pirate Bay and Limewire – and changing the way other companies, including Rapidshare, manage their servers, there is little evidence that this has contributed to a corresponding spike in music sales. Part of the explanation for this growth may be, as Andersen has pointed out, that the music industry has been going through one of its regular format shifts (in this case, from CD to mp3) and this will have influenced the nature and amount of sales. Global economic difficulties have not left the leisure industries unscathed. The historical correlation between economic depression and decline in music sales has been illustrated elsewhere (Koltais, 2010).

Portraits of piracy

Andersen, to my mind, persuasively demonstrates that the consumption of music (both via purchase and unpaid downloads) is a complex set of practices and that, as decisions are made about what, when, where and how to consume leisure, it becomes difficult, if not impossible, to separate the legitimate and non-legitimate user. Given that, on the Internet, every single use produces a copy, 'we go from this balance of unregulated and regulated and fair uses, to a presumptively regulated use for every single use' (Lessig, 2010). While legal and illegal consumption of music are correlated (Andersen and Frenz, 2010), we are unable to separate with any sense of reliability 'good consumers' and 'bad consumers'. Yet, there is a regular discourse that attempts to separate the music industry's sheep and goats.

This is one of the reasons I find Andersen's interest in 'blame' so fascinating. If there is significant overlap – even if only in certain markets and for particular digital goods – between valued customers and others, this blame game makes little sense. This misguided obsession by the industry is an interesting focus for investigation – and one I would like to push even further than Andersen does in her paper. I see value

in opening the issue out and recognising that the talk of blame is not just quantitative and empirical, but also discursive and strategic. The portrayal of downloaders as pirates is a marketing tactic as much as a legal issue.

This is why, coming primarily from a sociological rather than an economic background, I would like to open up a line of investigation which runs parallel to Andersen's. I want to take up her brief mention of the 'moral problems' of piracy in order to explore the discourses of harm and morality that have become so firmly entrenched in industry, media and academic discussion over piracy. What are the consequences of a pervasive discourse which frames copying as theft and downloaders as immoral? Who benefits and who loses out from its use to frame legislation which not only controls the consumption of cultural goods, but also threatens to shape access to the Internet for citizens.

The notions of loss, theft and downloaders as immoral consumers continue to contextualise legislative (and academic) debates. In the official response to a petition (organised by Andrew Heaney, executive director of strategy and regulation of the phone and Internet service provider, TalkTalk) on disconnection from the Internet for households accused of illegal downloading, the government stated:

> It is clear that online copyright infringement inflicts considerable damage on the UK's creative economy including music, TV and film, games, sports and software. Industry estimates place this harm at £400m pa. (http://www.hmg.gov.uk/epetition-responses/petition-view.aspx?epref=dontdisconnectus, accessed November 2010)

Downloading is associated not with a range of consumption practices, but with theft, wrongful doing and harm. Within public advertising and campaigning funded by trade associations, the discourse of downloading illegal content being unethical and immoral is common. There is an explicit intention to shape consumer behaviour to benefit the industry by encouraging higher user spending on cultural goods.

The Music Matters (http://www.whymusicmatters.org/) anti-piracy campaign reminds consumers to 'make the ethical choice' – a choice which involves increasing their spending on music. There is a symbolic and semiotic linking of illegal copying of digital files and the stealing of physical goods. For example, James Murdoch claims: 'There is no difference with [sic] going into a store and stealing Pringles or a handbag and taking this stuff' (quoted in Martinson, 2010), and argues for punishment rather than better consumer relations management of those who use content without paying.

The music industry has also adopted rhetorical approaches which attempt to associate illegal downloaders with social unpleasantness. The Music Matters campaign links piracy to drink driving (Shaw, 2010); the Recording Industry Association of America claims that music pirates are responsible for 'the undermining of humanitarian fundraising efforts' (RIAA, 2010); and the Industry Trust for Intellectual Property Awareness use their Knock-off Nigel campaign (launched in May 2007) to depict the consumer who did not buy film and music from legal sources as 'a grubby little man', 'a real creep' who would 'rob his own gran'.

In such discourses, consumption without purchase is vilified. The consumer who downloads copyright material is caricatured – certainly not for the first time – as a thief who steals the intellectual property owned by companies. Previous campaigns have focused on building discourses that link the taking of physical goods with the copying of digital ones. Perhaps the most reproduced version of this is found in the

Piracy is a Crime campaign, launched in July 2004 by the Motion Picture Association of America. Here the stealing of physical goods from individuals and companies – including using force and theft from homes – is linked to the copying of electronic files. Acts of crime against the person and destruction of property are represented in an attempt to create a connection between immoral, unethical and deviant practices with the consumption of pirated content.

Although these discourses draw heavily on the metaphor of copyright as property, implying that intellectual property – like personal property – can be taken from its owner, there is a profound difference. Piracy involves copying, making more of a good rather than taking a single physical item from its owner. The impact of piracy is not theft in that it removes ownership and enjoyment of a good from one person. Instead, copying makes items more abundant and increases potential for consumption. What it does remove, however, is product scarcity, the control over the distribution of a copyright item, and the ability for the copyright owner to monetise its consumption.

Even if we disagree with the actions of those involved with the unauthorised, non-commercial sharing of digital texts, it is a problematic jump to assume that consumers are acting with full knowledge of the illegality of their actions (*Consumer Focus*, 2010). While discourses of deviance surrounding piracy often neglect or exclude these issues in order to present downloaders as wilfully unethical, such a monolithic view of consumer ethics appears to contradict research on users. Fukukawa (2002) argues that, rather than applying pre-existing universal moral principles, more than 80% of consumers make ethics-related decisions on an *ad hoc* and contextual basis, weighing factors such as cost, perceived benefit and value against ethical considerations. If consumers of pirated digital goods are violating ethical codes, they appear to be doing this through being alive to their context of consumption. Their actions may be considered unethical by some, but this does not necessarily mean the consumers are unethical by any but the most prescriptive definition. Such framing also means that talk of the role music plays in people's leisure and consumption practices is notably missing in discussions of the downloading of digital content.

As Harris and Dumas (2009) imply, the use of deviance implicit in much of the work on consumer misbehaviour is not so much a moral frame, as one that is about a breakdown in the functional, routinised and compliant behaviour of the ideal consumer. For them, dysfunctional consumer behaviour is behaviour that (negatively) impacts on the business models that companies have implemented. What is often framed as immoral or deviant behaviour is actually a central aspect of modern cultural consumption. What claims to be about ethics and morality is instead a political-economic frame concerning the commodification of the creative process into the creative industries, and the control of product and users to manage and have command of markets.

The witch hunt

Such stigmatising is useful within any discourse where the intention is to remove certain rights and privileges from a section of society. By portraying one group as separate, as other, or not behaving in a reasonable manner, it is easier to objectify those people. If the moral discourse on piracy focuses on harm, theft, unethical behaviour and lack of social conscience, then arguments that downloaders of pirated material do not deserve the full punishment the law permits become difficult to justify. Further, if downloading of illegal content by consumers is caused by lack of self control (e.g. Higgins *et al.*, 2008) or deficiency of shame and guilt (e.g. Kim *et al.*,

2009), then downloading is not a consumption choice but the symptom of a defective nature. In such a situation, we can readily see the creation of a discourse of an underclass of consumers, a piracy subculture (Rutter and Bryce, 2008) – groups of rogues and families of intellectual property thieves, social outsiders who need to be punished in order to protect others.

Within such a discourse, it appears rational that legal punishment, 'such as suspending or slowing down the broadband service' (Ofcom, 2010, p.73), can be applied following claims from agents working on behalf of rights owners that an IP address involved in illegal downloading can be linked to an ISP subscriber. This is where I rejoin Andersen's argument in being concerned about the general manner in which the punishment for the crime of downloading is applied. If, as Andersen argues, illegal downloaders actually tend to create additional value for copyright holders, then any use of the Digital Economy Act to suspend or shape household Internet access appears to be a blunt tool to punish piracy. It certainly seems curious that at a time when countries such as Estonia, Finland and Greece are declaring Internet access a fundamental, legal right for their citizens, the UK (and France through HADOPI) are putting legislation in place to curtail and remove access. There is an inconsistency between the digital optimism surrounding the potential for the Digital Economy Act to place the UK in a vanguard position in online commerce and business, and the removal of individuals from participation in this economy.

The commercialisation of a legal process (where rights agencies and ISPs manage and pay for investigation, accusation and punishment) appears to be focused on neighbourhoods of users (such as families or households sharing the same Internet connection) rather than an individual actor – one who is not necessarily the subscriber. Here we have what looks like a formalised system of guilt by association: the association of an individual with an IP address (which is at best problematic) and the association of a family in the punishment of an individual. During 2006–2009, Davenport Lyons, the solicitors, sent out more than 6000 letters threatening legal action against alleged downloaders of illegal content unless they paid out of court damages in the region of £500 each. The firm's partners are now facing a disciplinary tribunal with the Solicitors Regulation Authority, accused of knowingly targeting innocent consumers. With a recovery rate of between 20% and 35% (Anon, 2010), it appears clear that such systems have the potential to be exploited primarily as revenue generating schemes. This process takes place without the police or the courts, and is instigated by organisations with vested interests. It places the burden of proof on the individual to demonstrate innocence through a *post hoc* appeal process. Andersen's claim that the system 'can only be against the principles of basic humans rights' does not seem outrageously melodramatic.

One final issue where I think clarification is perhaps necessary – although not immediately apparent in my reading of Andersen's paper – is that highlighting problems in the process and application of the Digital Economy Act does not necessarily equate to criticism of intellectual property or the legal protection of intellectual property rights. The dominant us/them discourse of intellectual property outlined above encourages a polarity where one is either for or against the cultural and creative industries; for legal powers to protect the markets for intellectual property or advocate copyright theft. This is a false opposition.

What Andersen has successfully illustrated is that the international nature of copyright in a digital age poses significant problems when it comes to managing and balancing the rights of both user and rights owner. While these problems are not

limited to economic issues, it is clear to many that current copyright legislation does not reflect the contemporary nature of information transfer, use and reuse. Speaking at the World Intellectual Property Organization (WIPO), Laurence Lessig recently crystallised the dilemma of which legislation such as the Digital Economy Act is part. He argued that copyright legislation has:

> … failed to assure the adequate incentives in the professional culture, and it has failed to protect the necessary freedoms in the amateur and critical or scientific culture. It has failed at both of its objectives and its failure is not an accident. Its failure is an implication of the architecture of copyright as we inherited it. (Laurance Lessig, 'WIPO keynote', 4 November 2010, available from http://blip.tv/file/4341980)

While there have been attempts to explore the developing landscape of licensing intellectual property in a digital age (the most well known of these projects being the creative commons), seeking to support innovation, owners' rights and rewards, and user access, it is apparent that the Digital Economy Act has not succeeded in producing a convincing and long term solution.

The disciplinary backgrounds that Andersen and I bring to the examination of the Digital Economy Act and its impact are different. It is rewarding to see that we have reached similar conclusions about the problems the Act has raised in its managing of intellectual property and criminalising of a class of consumers. Andersen's analysis of the legislation's impact on markets for intellectual property and recent legal challenges surrounding the Act indicate the weaknesses within the process and final shape of the legislation.

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