

Deliberate, Principled, Self-Interested Lawbreaking: The Ethics of Digital ‘Piracy’

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Abstract— Is digital piracy – understood as illegally accessing or using copyrighted works, such as through a file-sharing platform – morally wrong? Such piracy typically falls into the intriguing category of self-interested lawbreaking, performed deliberately and in the context of a principled disagreement with the law. Existing treatments of the ethics of piracy fail to consider the full sweep of moral considerations implicated by such lawbreaking, collapsing the question into deceptively narrow enquiries. I argue there are many reasons, some stemming from quite surprising sources, for respecting copyright law, *even for those who*: think the law is unjust; are skeptical of the law’s democratic legitimacy; and are frustrated at the immoral behavior of large corporate content-providers.

Keywords— Copyright; Lawbreaking; Piracy; Intellectual Property; Rule of Law; Principle of Fairness.

1. Introduction

Is it morally permissible to illegally (and *knowingly* illegally) download or stream copyrighted works? Ethical evaluations of this type of deliberate law-breaking often center on the question of whether the law being breached is justifiable. To the contrary, I argue that such law-breaking implicates a surprisingly wide array of important ethical concerns, including concerns for legitimacy, fairness, democracy, legal personhood, human autonomy, and more. Some of these concerns involve basic and widespread principles that are capable of being endorsed by a wide plurality of moral positions. Others involve norms that are well observed in other contexts, and even in file-sharing communities themselves. These pro-law-abiding factors, however, apply unevenly to different types of piracy, and there are also context-specific mitigating factors that warrant consideration. In exploring these many subtle yet substantial layers of ethical concern, this article aims to provide an appropriately textured account of the ethics of digital piracy.

Three reasons motivate this exploration.

First, digital piracy is a large issue. If it is wrong, it is wrongness committed on a vast scale by millions of (perhaps otherwise morally decent) citizens, with substantial social and economic impacts. Alternatively, if digital piracy is morally legitimate, then we have serious criminal charges, and massive civil lawsuits, being brought against people who bear no moral culpability. Either way, digital piracy warrants ethical attention.¹

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Second, piracy (in the forms I will focus on here) makes up one member of an intriguing class of morally-loaded activities: namely, deliberate, principled, self-interested law-breaking. The action is *deliberate* in the sense that the agent knows what the law is, and knows that the actions violate the law. It is *principled* inasmuch as the agent disagrees with the law in general, or at least its application in this particular case, and that disagreement factors into the agent's ethical decision-making. Finally – and in contrast to paradigm cases of civil disobedience – the act is *self-interested* inasmuch as the act's primary beneficiary is usually the agent, or the agent's nearest and dearest. Some instances of this class of deliberate, principled, self-interested law-breaking actions are plainly justified: e.g., slaves escaping slavery, and consenting homosexual acts, where these acts violate local law. But many other acts within the class defy quick moral evaluation; such acts may include cases of squatting, illegal drug use, tax evasion and breaching environmental regulations. Many of the considerations adduced here will, with appropriate modifications, apply to ethical analysis of these types of lawbreaking.

Third, the analysis illustrates the complexity of practical ethical reasoning in concrete social and ethical situations. The challenge that moral agents face in order to work out what – in the abstract – ideally should be the law or the social rule, is not at all the same challenge they face when they make practical decisions about personal actions in the context of existing laws, previous collective decisions, cooperative practices and entrenched expectations.² Moral principles that may never have been part of the wider popular and academic debate about an issue – nor even principles reflecting standard rule-of-law-based considerations – can spring into effect once we begin to consider principled lawbreaking.³ In what follows, I aim to show the myriad layers of ethical concern that must be worked through by practical decision-makers, and how these concerns can emerge from unexpected directions.

A. Overview

The argument proceeds as follows: This first section goes on to deal with some introductory and definitional issues, and overviews the existing literature on pirate's motivations and the ethics of digital piracy. From there, the article moves sequentially through the various layers of moral consideration implicated by digital piracy. Section 2 considers the moral status of the law's content, discussing whether copyright law's obligations and entitlements are justified and/or legitimate from normative first principles. While accepting that copyright law's content may well be unjust, I argue that it is not morally intolerable or unreasonable – and that it is, therefore, a candidate for legitimacy. Pursuing this enquiry into the law's legitimacy, Section 3 turns to 'content-independent' reasons for obeying the law. These include reasons for acknowledging the normative strength of democratic law and authoritative law, and for respecting rights-holders' legal personhood. Section 4 then turns to a further source of ethical

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¹ This focus should not sideline another, distinct (but not wholly independent – see §5.C. below) question, concerning the morality of *copyright holders' behavior*.

² See Subsection 1.C below.

³ See Section 4 below, and in particular that section's summary.

concern that is rarely considered: moral factors that follow from people's contingent actions in a rule-governed context. These sections aim to establish fairly strong *prima facie* reasons to respect democratically established law that is not manifestly unjust, especially when individual's legal entitlements and society's collective creations are at stake. Countervailing considerations, however, may overwhelm this *prima facie* respect. Section 5 assesses four potential mitigating factors. While I will argue that many of the most popular defenses here provide weak justifications for self-interested law-breaking, I conclude that in at least some situations, and within certain constraints, digital piracy is justifiable.

In what follows, I will limit my analysis to the piracy of *works of entertainment*, including music, visual art, fictional novels, television series and films.⁴ However, some of what I say will also be relevant to the piracy of academic works, non-fiction, and software, and certain types of hacking.⁵

B. Definitions

Before we begin, some definitions and terminological stipulations.

(i) Piracy

Applied broadly to putatively illegal or immoral copying of published works, the accusation of 'piracy' is an old one.⁶ In contemporary usage, a variety of uses can be distilled.⁷ For our purposes, I will understand piracy as:

*Any copyright-infringing use of another's created work of entertainment that involves copying, accessing, downloading, streaming and distributing the work in its entirety, and without transformation.*⁸

⁴ To keep things manageable, I will also limit the analysis to the ethics of downloading/streaming pirates, rather than the ethics of the agents responsible for the development of platforms and distribution (uploading) of content.

⁵ See Christopher Kelty, 'Geeks, Social Imaginaries, and Recursive Publics' (2005) 20 *Cultural Anthropology* 185-214; Kenneth Einar Himma, 'Hacking as Politically Motivated Digital Civil Disobedience: Is Hactivism Morally Justified?' in Kenneth Einar Himma (ed), *Internet security: Hacking, counterhacking, and society* (Jones and Bartlett Publishers 2007); Adam Moore, 'Privacy, Intellectual Property, and Hacking: Evaluating Free Access Arguments' in Kenneth Einar Himma (ed), *Internet security* (Jones and Bartlett Publishers 2007); Gary Santillanes and Ryan Felder, 'Software Piracy in Research: A Moral Analysis' (2015) 21 *Science and Engineering Ethics* 967-977.

⁶ In fact, it pre-dates copyright itself. Adrian Johns, *Piracy: The Intellectual Property Wars for Gutenberg to Gates* (University of Chicago 2009).

⁷ See, e.g., Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press 2004) 62-72.

⁸ This definition follows the typical usage in the social science literature (see subsection 1.C below). See also Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 195 (referring to 'copying the totality of the claimant's work in an identical form'). So defined, piracy does not include all types of copyright infringement. For instance, people might engage with existing works in a transformative way that nevertheless infringes copyright. An example would be 'fan fiction', where amateurs pen and share fictional works riffing on their favorite stories. Despite the originality of some fan fiction, such works will often infringe the original author's

Naturally, in defining piracy thus – and in labelling it *piracy* – there is a risk of smuggling in tacit assumptions about the activity’s immorality. (Hence the scare-quotes around the term in the article’s title.) Whether piracy is wrongful or not hinges upon the forthcoming ethical analysis, and not on the term’s implicit normative associations, whether negatively parasitic, or – in a less common but still significant inflection – romantically anarchistic.⁹

(ii) *Types of principled piracy*

Pirates can adopt an array of different personal policies vis-à-vis their piratical activities. While content industries tend to conjure up a stereotype of rapacious, remorseless thieves, in fact many pirates pay respect to copyright law’s spirit, if not its black letter obligations. In what follows, I will employ terms describing different sorts of piratical characters and practices, as defined through the principled constraints the pirates self-impose upon their use of copyrighted content. As we will see in the following subsection, these profiles are drawn from empirical work on pirate’s actual practices, and their proposed justifications for those practices.¹⁰

Takers: *Takers* download copyrighted works to avoid paying for products they would otherwise purchase. Of course, not every one of a *Taker’s* downloads represents a missed sale. For example, music-*Takers* might download thousands of songs for every album they would otherwise have bought.

Samplers: *Samplers* are only willing to download copyrighted works under the condition they will later purchase official copies of all the content they go on to enjoy and use. I will define *Samplers* as pirates who aim to pay (at least) the same amount of money for official content as they did before taking up *Sampling*.

Non-payers: *Non-payers* are only willing to download copyrighted works in cases where they would never have paid for the content anyway. An important subset is *Poor Non-payers*, who would not pay because the cost of official content is prohibitive for them.

copyright. Caution is advised in the application of the arguments developed here for ethical assessment of these types of copyright infringement, not least because such infringements are often done in the context of ignorance of, or genuine ambiguity within, copyright law, rather than deliberate and principled disagreement with that law.

⁹ See Jessica L. Beyer and Fenwick Mckelvey, ‘You are not welcome among us: Pirates and the State’ (2015) 9 *Int’l J of Communication* 890-908, 895.

¹⁰ See: Lessig, *Free Culture* 68-69; Rong-An Shang, Yu-Chen Chen and Pin-Cheng Chen, ‘Ethical Decisions About Sharing Music Files in the p2p Environment’ (2008) 80 *J of Bus Ethics* 349-365; Mark Cenite and others, ‘More Than Just Free Content: Motivations of Peer-to-Peer File Sharers’ (2009) 33 *J of Communication Inquiry* 206-221; Szde Yu, ‘Digital Piracy Justification: Asian Students Versus American Students’ (2013) 23 *Int’l Crim J Rev* 185-196; S. R. Poneis and J. J. Britz, ‘The Ethics of Piracy in the Music Industry’ (2009) 18 *J of Inf Ethics* 14-26.

Effective-payers: *Effective-payers* are only willing to download copyrighted works they have already paid for (or will in future pay for when the work becomes commercially available in their locality).¹¹

Finders: *Finders* are only willing to download copyrighted works that are inaccessible in any other way. *Finders* would pay for the official product if it was commercially available, but since it is not, they illegally access it.

In what follows, I will use these categories to tease out potential morally relevant differences between different piratical policies. Note that these practices are defined from the inside, in terms of the personal commitments consciously observed by the pirates themselves. External observers – such as judges, lawyers or copyright-holders – may struggle to distinguish between different piratical practices, such as between those of *Takers*, *Samplers* and *Non-Payers*.

C. Existing justifications of digital piracy

Are pirates really deliberate, principled law-breakers? Naturally, ordinary people – including copyright infringers – break the law for many reasons, from simple ignorance to willful wrongdoing. However, an abiding theme of the empirical literature on digital piracy is the prevalence of pirates (often a large majority of sampled groups of infringers) putting forward ethical justifications or citing relevant moral considerations to justify or excuse their actions.¹² For example, a common ethical conviction is that the piracy does no harm, with many pirates willing to constrain their behavior on this basis – moving toward conscientious practices of *Non-Paying*, *Sampling* and *Finding*.¹³ As one colorful commenter put it: “Even a foul pirate

¹¹ *Effective-Payers* may have various reasons for wanting to access illegal copies of works they have already purchased. For example, illegally downloaded work may possess more desirable features, such as with foreign works, where online fans may provide superior translations, or cases where state censorship distorts the official product (see Cenite and others, ‘p2p File Sharers’ 211, 215). *Effective-Payers* also include users who already purchased the work for a different platform (e.g., as a CD), and now wish to enjoy it on another device (e.g., on their smart-phone).

¹² These studies come in the form of quantitative social science sampling, including through survey mechanisms and interviews, as well as qualitative ethnographic practices, such as reporting on commentary on relevant websites. E.g., *ibid*; Kirsten Robertson and others, ‘Illegal Downloading, Ethical Concern, and Illegal Behavior’ (2012) 108 *J of Bus Ethics* 2015-227; Shang, Chen and Chen, ‘Sharing Music Files’; Ponelis and Britz, ‘Ethics of Music Piracy’; Yu, ‘Digital Piracy Justification’. See also n. 17 below.

¹³ See, e.g., Shang, Chen and Chen, ‘Sharing Music Files’ 351; Yu, ‘Digital Piracy Justification’; Kate Gray, ‘Stealing From the Rich to Entertain the Poor? A Survey of Literature on the Ethics of Digital Piracy’ (2012) 63 *The Serials Librarian* 288-295, 292-3. Cenite’s team found that the “vast majority of respondents (33 out of 40) said file sharers should purchase original content if they liked the work... Six respondents said people should purchase original content if it is commercially available...” Cenite and others, ‘p2p File Sharers’ 214. Consider also the gaming community’s ‘abandonware’ movement’s explicit endorsement of *Finding*: John Walker, ‘No one will sell 'No One Lives Forever', so let's download it' (*Rock, Paper, Shotgun*, 2017) <<https://www.rockpapershotgun.com/2017/07/05/no-one-will-sell-no-one-lives-forever-so-lets-download-it/>> accessed August 1, 2017.

like me will go out and buy an album... that's totally worth it."¹⁴ Similarly, the vast majority of pirates would not steal a physical CD even when success is assured – supporting the view that there is a specific ethically-infused online culture impacting on behavior.¹⁵ As well as general views about the ethics of piracy, pirates commonly express case-dependent reasons, such as ‘consumer rights’ concerns, like blaming record companies for exorbitant prices and unfair conditions, and appeals to the wealth disparities between themselves and famous entertainers.¹⁶

Other researchers highlight the significance of principled opposition to copyright law evidenced in hacker and pirate politics. Such work draws on comparative ethnographic studies of online communities, and observes the explicitly political agenda driving The Pirate Bay and the Pirate Party platforms across the globe.¹⁷ Relating the anti-copyright and anti-state moral arguments prevailing within these communities, researchers argue that “digital piracy should be considered more broadly as a challenge to the authority of the state.”¹⁸

While this quick overview cannot do justice to the full compass of this literature, I submit we have good reason to think that many pirates infringe copyright law in the context of a principled disagreement with that law, or at least with its application in their particular case. Such pirates deserve to have their position – as principled, deliberate, self-interested lawbreakers – seriously evaluated.¹⁹ In the remainder of this article therefore, I will focus specifically on this group, and limit my attention to those pirates who are *knowingly* breaking the law – though no doubt a considerable amount of copyright infringement is also done unknowingly.²⁰

Before proceeding, it must be noted that there is an existing philosophical literature on the ethics of digital piracy and file-sharing. The forthcoming arguments (especially in Sections 3 and 4) aim to demonstrate that much of this literature is flawed because of the misleadingly narrow range of ethical factors it considers. To explain: the route taken by most theorists is to focus on one moral theory and to evaluate the ethics of copyright law’s content on that basis,

¹⁴ Ponelis and Britz, ‘Ethics of Music Piracy’ 23.

¹⁵ Robertson and others, ‘Illegal Downloading’ 222. These findings align with what is known about the wider population’s attitudes, with significant percentages of people not viewing copying a book or file-sharing a song as immoral. Edward Lee, ‘The Ethics of Innovation: p2p Software Developers and Designing Substantial Non-infringing Uses Under the Sony Doctrine’ (2005) 62 *J of Bus Ethics* 147-162, 158.

¹⁶ See, e.g., Shang, Chen and Chen, ‘Sharing Music Files’; Yu, ‘Digital Piracy Justification’. These specific justificatory excuses can be referred to as ‘neutralizations’: *ibid*, 187. If so, however, care must be taken to avoid prejudicial assessment of them. Not every justificatory excuse is an illicit rationalization of wrongdoing.

¹⁷ Beyer and Mckelvey, ‘Pirates and the State’ 898-901. See similarly Kelty, ‘Recursive Publics’, and the work on Sci-Hub by Marydee Ojala, ‘Sci-Hub, Elsevier, piracy, and the future of scholarly publishing’ (2016) 33 *Info Today* 1,28, 26. (Note Sci-Hub distributes pirated academic research, which implicates somewhat different ethical issues to the ones explored here.)

¹⁸ Beyer and Mckelvey, ‘Pirates and the State’ 890.

¹⁹ As called for by Gray, ‘Entertain the Poor’ 293.

²⁰ Or at least in the context of considerable legal ambiguity. See, e.g., Shang, Chen and Chen, ‘Sharing Music Files’ 351, 358.

perhaps with reference to how that law plays out in a particular fact situation – such as how it is employed by content providers. From a finding that the law’s content does not fully accord (in general, or in the particular case) with the ethical theory’s dictates, the account concludes with a sympathetic evaluation of piracy’s ethical standing. This method occurs, for example, in Yung’s use of utilitarianism, with Santillanes and Felder’s employment of rule-utilitarianism, and with Meissner’s use of Kant.²¹ The method is also employed in Ponelis and Britz’s canvas of deontological, virtue and utilitarian ethics, though there taken towards a different conclusion.²² The problem for all these accounts is that every one of these ethical theories not only makes specific pronouncements about the content of ideal legislation, but also provides guidance on when and how law is important and warrants respect from ordinary citizens.²³ Such theories also provide guidance on social and interpersonal issues such as respecting others’ legitimate expectations and responding appropriately to the shared construction of social goods.²⁴ As a result, these treatments pass over in silence lynchpin parts of ethical theory that have direct relevance for the lawbreaking behavior under examination. This article aims to bring those considerations to light, and so to demonstrate the complexities – and sometimes the surprising sources of ethical concern – that arise for deliberate, principled, self-interested lawbreakers.

2. *Is Copyright Law’s Content Morally Acceptable?*

We begin our inquiry into the ethics of digital piracy by exploring the normative status of the law’s content. This section initially asks whether that content is morally justified, before turning to a different standard, and considering whether its content is at least tolerable, or reasonable.

A. *Justice*

Perhaps the most obvious consideration when evaluating the respect owed to a law is the normative status of the law’s content: the obligations, privileges, rights, immunities and powers it lays down. Is this content morally *justified*? Over the centuries, much ink has been spilled on the putative justifiability – and also the *un*justifiability – of literary property and copyright law. I will not add to that debate here.

Instead, all I wish to highlight is that a judgment made about this issue, while certainly a relevant factor in ethical decision-making about piracy, is not at all conclusive on the matter. As we will see, even an agent who morally disagrees with some or all of copyright law’s content, may nevertheless possess powerful reasons to respect that law. The following sections (§2.B, §3, §4) aim to show that even if an agent holds a strong, conscientious, informed and

²¹ Betty Yung, ‘Reflecting on the Common Discourse on Piracy and Intellectual Property Rights: A Divergent Perspective’ (2009) 87 *J of Bus Ethics* 45-57; Santillanes and Felder, ‘Software Piracy in Research’; Nico Meissner, ‘Forced pirates and the ethics of digital film’ (2011) 9 *J of Info, Com & Ethics in Soc* 195-205.

²² Ponelis and Britz, ‘Ethics of Music Piracy’ 22-23.

²³ As we will see in Section 3 below.

²⁴ As we will see in Section 4 below.

reasonable ethical disagreement with the substance of existing copyright law, that agent can still recognize it would be morally wrong to break that law.²⁵

B. *Reasonableness and Tolerability*

When we consider whether laws are just or unjust, we make a judgement about the precise parameters we personally would set down if given the chance to implement the most perfectly just legal regime. But if the law only acquired legitimacy from a given citizen when it accorded exactly with that citizen's pre-existing moral convictions, then law as we know it would cease to function – at least for pluralistic societies where citizens hold divergent conceptions of the good.

For this reason, a core concern of contemporary political theory is the question of *legitimacy* – enquiring into when, and under what conditions, states can possess the rightful authority to create legal obligations for their citizens.²⁶ Such legitimacy is understood as separate from the narrower question of justice, which considers the substantive values found in the law's content, and asks whether that content (the obligations, powers and entitlements set down by law) conform to the dictates of a particular normative theory or standpoint.²⁷ In contrast, legitimacy refers to a wide sweep of normative considerations about the law – not only regarding the law's content, but also its status as law, its democratic provenance, and any other relevant factors that bear on the moral obligatoriness of the rules it lays down.²⁸ In Section

²⁵ This is in fact my own position. As a rights-based copyright minimalist, I hold that natural justice requires users' rights be considerably expanded in both scope and strength. See, e.g., Hugh Breakey, *Intellectual Liberty: Natural Rights and Intellectual Property* (Ashgate 2012).

²⁶ More carefully, 'legitimacy' can possess two distinct meanings. Legitimacy can refer to the question of *coercion*: whether a state can legitimately exert coercive political power (e.g., can the state rightfully punish pirates breaking its copyright laws?). Legitimacy can also refer to the question of *authority*: whether the state can create laws that morally require respect (e.g., should citizens obey properly-established copyright laws prohibiting piracy?). Though the questions are distinct, they inter-relate, as answers given to one carry implications for the other (meaning that while different theories may initially foreground one question, they invariably deliver conclusions about both). Given our topic, it is legitimacy-as-authority that interests us here, and I make the following arguments with that usage in mind. On the distinction, and its place in contemporary political philosophy, see Arthur Ripstein, 'Authority and Coercion' (2004) 32 *Phil & Public Affairs* 2-35; Fabienne Peter, 'Political Legitimacy' (2017) *Stan Enc of Phil* <<https://plato.stanford.edu/archives/sum2017/entries/legitimacy/>> accessed 13 March 2018.

²⁷ The distinction between justice and legitimacy is well-known in contemporary political philosophy, though it can be drawn in different ways. The distinction employed here (with justice narrowly focused on the substantive values of the law's content, and legitimacy a wider consideration of all relevant normative factors) follows one common usage. For an overview, see Peter, 'Political Legitimacy'. On the significance of legitimacy in this sense, see Burton Dreben, 'On Rawls and Political Liberalism' in Samuel Freeman (ed), *Cambridge Companion to Rawls* (Cambridge University Press 2003).

²⁸ These other sources of legitimacy can be quite diverse. E.g., in a recent work I argue that different theories of human rights highlight different (seven, in all) distinct sources of legitimacy. As well as the question of substantive rightfulness of content (i.e., justice), human rights can enjoy functionalist,

3 below, we will turn our attention to these ‘non-content’ based reasons for respecting the law. Before doing so, however, we need to consider whether there are *any* content-based standards which an agent can use to rule out manifestly unjust or unreasonable laws. Are there laws whose content is so far beyond the pale of moral acceptability that agents can refuse to grant them any legitimacy (even if they are the result of, say, genuine democratic decision-making)?

Two alternatives help delineate this boundary of moral acceptability, regarding whether a law is *tolerable* or *reasonable*. Laws that are tolerable and reasonable fall within a window of possible positions about which thoughtful and decent people can disagree. If copyright laws fall within this window, then although they might not be ideally just from any given citizen’s point of view, they are, at least potentially, worthy of respect.

Fleshing out what is meant in such cases by ‘intolerable’ or ‘unreasonable’ is much contested. While I cannot here provide a definitive answer, I will suggest that in the context of works of entertainment (with perhaps a few exceptions),²⁹ existing copyright law passes plausible standards of tolerability and reasonableness.

Moral intolerability asks whether the law’s content lies ethically beyond the pale.³⁰ One method of distinguishing laws that have intolerable content would be to turn to fundamental human rights, understood as universal human entitlements that set down a moral minimum for states to achieve basic legitimacy. While much may be said of the inter-relations between human rights law and copyright,³¹ our question here is about violations of the narrower class of *fundamental* rights – violations so serious they strip all legitimacy from the law.³² Except in

legal, democratic, consensual, pragmatic and communitarian sources of legitimacy. See Hugh Breakey, ‘It’s right, it fits, we debated, we decided, I agree, it’s ours, and it works: The gathering confluence of human rights legitimacy’ (2018) 37 *Law & Phil* 1-28.

²⁹ Even if the law’s specific prohibitions on copying and downloading of recent commercial works in their entirety are reasonable, various other parts of the law might be unreasonable. See n. 39 below.

³⁰ The idea here is that the law can acquire legitimacy and obligatoriness from non-content-based considerations (e.g., surrounding the moral value of the rule of law) only under the condition that the substantive content of the law in question does not commit egregious wrongs. Major rule-of-law theorists have long argued for this idea. See, e.g., (discussing Hart and Waldron), Mark J. Bennett, ‘Hart and Raz on the Non-Instrumental Moral Value of The Rule of Law: A Reconsideration’ (2011) 30 *Law & Phil* 603-635, 421-423. There, the idea is fleshed out in terms of ‘grave iniquities’, rather than fundamental human rights (compare my discussion, n. 32 below). Despite the different terminology, the same types of moral horrors are considered (flagrant oppression of minority classes, slavery etc.).

³¹ See, e.g., Farida Shaheed, *Copyright policy and the right to science and culture (Report of the Special Rapporteur in the field of cultural rights)* (2014) A_HRC_28_57. While the Report notes the clear links between generous copyright exceptions and the human right to cultural participation (ibid, ¶61), it is worth remark that there is no suggestion that legal prohibitions on downloading/streaming recently-produced works of entertainment, for purposes of personal consumption, creates any tension with this right. This supports the view that the laws being infringed by pirates (while perhaps unjust) are not morally beyond the pale. Note, though, that this does not mean that pirates may not be exposed to processes, restrictions and punishments that *do* implicate their human rights: ibid, ¶51.

³² The entitlements protected by human rights law have inflated over the last several decades: see, e.g., Dominique Clément, ‘Human rights or social justice? The problem of rights inflation’ (2018) 22 *Int’l J HR* 155-169, 155-57. If we are delineating standards to serve as a moral floor for law’s

exceptional circumstances, it seems doubtful whether the injustices of copyright law (as applied to works of entertainment) reach this pitch. When human rights groups compile assessments of human rights, concerns with copyright lie almost entirely unmentioned, except where states use copyright to suppress public access to materials damaging to the government.³³ It thus seems reasonable to conclude that, except perhaps in rare cases, copyright law over works of entertainment does not fall outside the window of morally tolerable law.³⁴

Unreasonableness considers the reasons that may be put forward in favor of the law's content. It asks: can sensible, coherent, factually-correct arguments be given for the law – arguments that do not rely on naked appeals to authority and power, but rather are based upon empirical evidence and moral principles understandable to all?³⁵ The question here is not whether such arguments are ultimately persuasive, but merely whether a reasonable person, acting in good faith, could agree with them. In *Political Liberalism*, John Rawls highlighted what he termed the “fact of reasonable pluralism” and the “burdens of judgment”.³⁶ Reasonable pluralism asserts that, at least in modern liberal democracies, different people and subcultures will possess different conceptions of the good and ideas about justice. The ‘burdens of judgement’ acknowledges that political philosophy is seldom dispositive. Philosophical arguments rarely conclusively settle disputes about values and norms, even amongst thoughtful people deliberating in good faith. Combined, these two features create a situation where a citizen can recognize others’ positions as different but reasonable. This appeal to reasonableness does not mean ‘anything goes’. Some positions are incoherent and arbitrary, or based on demonstrably false empirical claims. Violations of fundamental human rights (that, as argued above, are also intolerable) provide obvious candidates for unreasonableness here.³⁷

legitimacy (rather its justice), then these standards are arguably too comprehensive. A more promising route is therefore to appeal to a restricted list of ‘fundamental’ (or ‘core’ or ‘non-controversial’) human rights, usually taken to cover such essentials as physical security, basic liberties (e.g., freedom from slavery), and economic subsistence. This use of a restricted list of human rights to inform judgements about legitimacy is the route taken by, e.g., Allen Buchanan and Robert O. Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20 *Ethics & Int'l Aff* 405-37. This route dovetails with the priorities of human rights groups themselves – see n. 33 below, and accompanying text.

³³ See, e.g., Human Rights Watch (HRW), *World Report: 2017: Events of 2016* (Seven Stories Press 2015) 228.

³⁴ This conclusion is reinforced by considering factors that usually accompany intolerable state power (but are rarely seen in the context of copyright), such as widespread civil disobedience, constitutional crises and mass refugee flows. True, large public demonstrations in favor of piracy have occurred, alongside some relatively successful political movements. These are, however, the hallmarks of ordinary disagreements about the justice of a given policy, rather than indicia of policies beyond the bounds of basic moral decency.

³⁵ The tradition's seminal works include: Jurgen Habermas, *Moral Consciousness and Communicative Action* (C. Lenhardt and S. Nicholson trs, Polity 1990); John Rawls, *Political Liberalism* (Expanded edn, Columbia University Press 1993/2005).

³⁶ Rawls, *Political Liberalism* 39, 54-58. See also, in the context of Kant's legal philosophy, Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) 49-56, and on Locke: *ibid*, 75-76.

³⁷ Allen Buchanan, *Human Rights, Legitimacy and the Use of Force* (Oxford 2010) esp. 22-28.

But there are laws that do not rise to the pitch of human rights violations that are nevertheless incapable of reasonable defense. Laws designed to directly enable state corruption provide a plausible example.³⁸ Even on a small scale, such laws are a manifestation of arbitrary power, rather than legitimate political decision-making.

It may be that parts of copyright law, in certain applications, are unreasonable in this sense. Lawrence Lessig describes several cases where it is hard to resist his conclusion that *no* impartial moral observer could have wanted the resulting legal outcomes.³⁹ In these cases, the legally-sanctioned actions of corporations appear arbitrary, vindictive and even absurd. If that judgment is correct, then some aspects of copyright may be unreasonable – the sort of thing that no-one could coherently defend.

However, for the overwhelming majority of copyright obligations, sensible and informed arguments can be given on both sides. This claim is supported by the academic literature on copyright's justifiability, which offers informed and sophisticated arguments that span the full spectrum of strong-, weak-, and anti-copyright positions.⁴⁰ Indeed, Lessig himself admits as much for many of the laws he critiques, acknowledging that common-sense (initially, at least) weighs on the side of those laws.⁴¹ The laws are thus not arbitrary and wholly one-sided, with nothing to say in favor of them except a naked appeal to power.

Some marginal cases aside, we can therefore conclude that copyright falls within a constellation of tolerable and reasonable views that different citizens can hold. However, this does not mean the law is legitimate – only that it is a candidate for legitimacy. If citizens are presented with further reasons to obey the law, then the law can warrant respect.⁴²

³⁸ For examples, see Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security* (W. W. Norton & Company 2015).

³⁹ Consider, e.g., the Recording Industry Association of America's legal pursuit of student Jesse Jordan (with demands for huge payments) as a 'pirate', for doing little more than tinkering with (fixing a bug in) the search engine system on his institution's network. Lessig, *Free Culture* 48-52. Consider also some of the enormous civil penalties for copyright infringement, or the empowering of industry bodies with police-like powers. See Keltly, 'Recursive Publics' 194.

⁴⁰ To take three examples from a vast literature: Adam Moore, 'A Lockean Theory of Intellectual Property' (1997) 21 *Hamline L Rev* 65-108; Wendy Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 *Yale LJ* 1533-1609; Tom Palmer, 'Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects' (1990) 13 *Harv JL & Pub Pol'y* 817-865.

⁴¹ Lessig, *Free Culture* 11-12.

⁴² Note one point that follows from the above analysis, namely, that most of the moral positions of those who disagree with copyright are *also* reasonable and tolerable. Like copyright, these positions do not involve the violation of fundamental human rights. (There may be tensions between certain marginal piratical positions (see §5.C) and some human rights (such as the protection of authors' moral and material interests – see Shaheed, *Copyright policy* ¶12)). But if we confine our attention to *fundamental* human rights (as per n. 32 above), then any such tensions will be greatly mitigated, if not resolved.) So too, such positions can generally be backed up with sensible, informed arguments by good faith proponents. This consideration provides a further sense in which pirates' lawbreaking can be considered principled. As well as being based on a good faith moral conviction, that conviction itself may fall in the domain of the reasonable and tolerable.

3. *Is Copyright Law Legitimate?*

This Section considers morally relevant factors impacting on the respect owed to law based on its status as democratic (§3.A) or authoritative law (§3.B), or on the significance of respecting others' legal personhood (§3.C). These considerations can be referred to as 'content-independent' reasons to respect the law, as they refer to normative claims surrounding the law's status, rather than the abstract justifiability of its content.⁴³

A. Respect for democratically made law

We have already seen that reasonable disputation about norms and laws is a feature of contemporary liberal democracies (§2.B). These democracies' legislative processes provide a way for communities to settle contested ethical questions by incorporating each person's decision-making through a vote or other majoritarian process. The resulting laws can deserve respect for several reasons, including respecting fellow citizens as one's moral equals, and reflecting on the diverse knowledge that democratic decision-making can pool together.

Acceding to the results of a collective decision-making process – in cases where each vote counts for one and only one – is a way of respecting one's fellow citizens as one's moral equals.⁴⁴ Instead of arrogating to oneself decisional authority above that of one's fellow citizens, the law-respecting citizen accepts that – at least in those areas that touch on social and collective concerns – shared decision-making is required, and that a fair system for collective decision-making is one where no person is treated as intrinsically more important than others. A similar point can be made in terms of moral agents refusing to settle disputes through unilateral action, based on their sheer power, and instead searching for a way forward that respects others' interests and deals fairly with their contrary views.⁴⁵

Another reason to respect collective decision-making comes in the form of personal fallibilism. Ordinary citizens may doubt whether they apprehend all the relevant issues, and the impacts on all stakeholders, with respect to a given law. In such cases, they may respect the law on social epistemic grounds, feeling that majority decision-making, expert submissions, lengthy deliberation and stakeholder input will be better-positioned to approach a fair outcome than their own (necessarily somewhat narrow and partial) view.⁴⁶

⁴³ See, e.g., Harrison Frye and George Klosko, 'Democratic Authority and Respect for the Law' (2017) 36 *Law & Phil* 1-23.

⁴⁴ Frye and Klosko unpack this as a type of 'recognition respect'. Ibid. Many political philosophies draw on democracy's collective and egalitarian features to legitimize its lawmaking. For example, on Kant, see Ripstein, 'Authority and Coercion' 33; Paul Formosa, *Kantian Ethics, Dignity and Perfection* (Cambridge University Press 2017) 103.

⁴⁵ See Martin Benjamin, *Splitting the Difference: Compromise and Integrity in Ethics and Politics* (University of Kansas 1990) 36-38.

⁴⁶ For an appeal to legal change and parliamentary discussion as the best available means of taking into account the positions of both copyright users and authors, see Severine Dusollier, 'The Master's Tools v. The Master's House: Creative Commons v. Copyright' (2006) 29 *Columbia J of Law & the Arts* 271-293, 293. See more generally Joseph Raz, *The Authority of Law* (2nd edn, Oxford University Press 2011) 245.

For these reasons, an agent may be morally required to respect a democratically made law, even in cases where they disagree with that law. But do these considerations apply to copyright law? The answer might seem obvious. The copyright laws of contemporary liberal democratic states are legislated through standard law-making processes of representative democracy (sometimes in the context of ratification of international agreements). As such, these laws warrant the respect due all democratically created law.

In fact, there is genuine cause for wariness. The expansion of copyright law over the last several decades is as much a story of influence and lobbying from powerful vested interests, as one of democratic decision-making.⁴⁷ The recent glut of legislative activity (e.g., in the US) took place in the context of vast differentials in lobbying and campaign financing between pro-copyright and anti-copyright blocs.⁴⁸ The more such extra-democratic factors loom large, the less existing copyright law can draw on the same sources of democratic legitimacy as other laws (that, for example, may have been taken to the electorate, deliberated in public discourse, and been given an electoral mandate).

A sensible person could therefore harbor legitimate skepticism about how much existing copyright law warrants respect on the basis of democratic legitimacy. That much admitted, two cautionary points about application of this skepticism to piratical justifications warrant mention. First, the appraisal of democratic legitimacy cannot be one-size-fits-all. Distinct parts of copyright law possess different relations to democratic processes. Some legislative interventions reek of chicanery, and these provisions must be appraised in that light.⁴⁹ But for most parts of copyright law, the interweaving of democratic and non-democratic forces proves hard to tease apart. As Lessig admits in his recent work on political corruption, legislative action on copyright was bound to happen in response to the internet's extraordinary copying and distribution potentials. Such action is consistent with copyright's long-standing theme of internalizing positive externalities to creators of works of entertainment for purposes of incentivizing their work.⁵⁰ Since these longstanding principles have proven acceptable to almost every liberal democracy for decades (if not centuries), and have been reinstated in response to myriad changes in technology over that time (pianolas, radio, gramophones, television, cable, video, etc.), it seems impossible to believe that *none* of this recent legislation enjoys any democracy-based legitimacy. Pirates aiming (on the basis of anti-democratic considerations) to justify pirating just-released, commercially available, popular music, film and television works must present a convincing case that the *specific parts* of copyright law they are infringing can garner insufficient democratic legitimacy.⁵¹ I submit this is no easy task.

⁴⁷ Jessica Litman, *Digital Copyright* (New York 2001) esp. 55-62.

⁴⁸ Lawrence Lessig, *Republic Lost: How Money Corrupts Congress – and a Plan to Stop It* (Twelve – Hatchette Book Group 2012) 52-60, 147.

⁴⁹ Lessig provides an example of a substantial rule change allegedly slipped into a bill of technical corrections by the chief counsel – who shortly thereafter left government and entered into employment with a major beneficiary of that legislative change: *ibid*, 224.

⁵⁰ *Ibid*, 51-52.

⁵¹ This is not to say that laws with dubious democratic pedigree do not impact on pirates, such as with respect to disproportionate sanctions, access control penalties and so on. It is simply an observation that one of the most common types of piracy (the *Taking* of a recently produced commercial work in its entirety) involves violating a prohibition that has a comparatively robust democratic status.

In making such a case, pirates (and their defenders) must not look at this issue in isolation, and instead bear in mind the second cautionary point: the importance of moral consistency. If we demand the right to disregard disliked laws on the basis of our personal evaluation of antidemocratic influences, then – by parity of reasoning – we must accord that same entitlement to *other* citizens as they decide whether to respect laws *they* dislike (but which we might like very much). After all, accusations of undue and anti-democratic influence – on the basis of moneyed interests, cosmopolitan elites, foreign powers, self-interested bureaucrats, and/or politically savvy minority groups – could be made about tax law, environmental regulation, international treaties, immigration policy, gun control legislation, welfare initiatives, and more besides. In all these cases, moral consistency requires that the standards we demand from others to respect laws we cherish, must be the standards we accept for personally respecting laws we despise. This consideration should inject significant caution into over-hasty dismissals of the law’s democratic credentials.

In sum, copyright law cannot be assumed to enjoy unqualified democratic legitimacy. However, great care must be taken in teasing out *which parts* of copyright legislation can be impugned on this basis, and *how far such concerns* go in stripping democratic legitimacy from those laws.

B. Respect for authoritative law

Can we possess moral reason to respect even undemocratically made law (provided its content is tolerable and reasonable)? We can. Many morally significant advantages accrue to citizens that live in a rules-based order, understood as a regime where the legal system accords with the rule of law, and where citizens can generally rely on widespread social compliance with those laws.⁵² These advantages include: a greatly improved capacity to plan one’s life and projects; peace and personal security; the collective and public goods created by mutual constraints, including those that arise from coordinating norms (e.g., road rules); a level of freedom from arbitrary power unconstrained by impartial rules, independent courts and procedural justice; and being able to forgo wasteful attempts at the self-protection of one’s property, liberty and security, and of unilaterally pursuing compensation, deterrence and retribution against attacks on one’s interests. As a result, there may be powerful reasons to respect an existing rules-based order, even if it enjoys no democratic legitimacy.⁵³

True, any given act of law-breaking is fantastically unlikely to collapse society into a Hobbesian war of all-against-all. Yet deliberate law-breaking – especially in a context where legal detection and punishment is unlikely – can still inflict lesser harms on the rule-based order, and these consequences must be factored in.⁵⁴ For example, one act of law-breaking can

⁵² For an overview, see Charles Sampford and others, *Retrospectivity and the rule of law* (Oxford University Press 2006); Raz, *Authority of Law* 219-223; Bennett, ‘Moral Value of The Rule of Law’.

⁵³ Many of these considerations apply to an international order. See, e.g., Buchanan and Keohane, ‘Global Governance Institutions’.

⁵⁴ While Raz denies a general obligation to obey the law, he observes many specific areas of law, and types of legal breaches, where citizens have a prima facie obligation to obey, such as where the legal breach can become known and encourage others’ rule-breaking. Raz, *Authority of Law* 237-8. The ensuing social costs described in the main text above can be thought of as utilitarian concerns, but

elicit further acts of law-breaking – either through sympathetic contagion (‘People like me think it’s fine to break these sorts of law’) or antagonistic contagion (‘Others break the laws I care about, so I won’t respect the laws they care about’). As well, otherwise harmless acts of law-breaking can facilitate organizations, methods and technologies that other people can use to perform more serious law-breaking. There are also social costs in the time and resources of police, regulators, and courts as they investigate and respond to law-breaking. Finally, law-breaking that infringes on others’ projects opens the possibility of wasteful ‘arms-races’, as citizens employ extra-legal tools to protect their interests.

The extent to which each of these considerations apply to copyright-infringing acts vary. However, the overall amount of piratical law-breaking going on is quite visible, even if who exactly is doing what is unknown. This fact lays the groundwork for many of the above consequences. Sympathetic contagion certainly occurs, as peers create social contexts that excuse piratical law-breaking.⁵⁵ Antagonistic contagion is at least possible. Industries and copyright-holders might fashion their own retaliatory use of law and technology in response to pirate’s actions – just as some pirates defend *their* law-breaking by reference to industry conduct (see §5.B-C below). As well, the large amount of piracy in the moral grey-zone – such as performed by *Samplers*, *Finders*, and *Effective-Payers* – makes it harder to police the more damaging piracy performed by *Takers*. Piratical acts also infringe on the projects of copyright-holders and creators, who may shoulder costs to protect their interests, such as through software development of Digital Rights Management protections. In turn, content-industries recoup these costs through their customers (meaning ordinary consumers pay more).

The overall advantages of a rules-based order are collectively created by a law-abiding citizenry, creating a further, *fairness-based* reason for contributing. As Noam Gur argues: “As I expect others to obey the law and I gain essential benefits from the fact that they do, it is only fair that I do the same, instead of acting as a free rider.”⁵⁶ While pirates may disavow the justice of existing copyright laws, they inevitably receive benefits from other citizens obeying the laws – even in cases where those others possess principled disagreements with the law. As such, it is only fair (in a common-sense notion of fairness to which we will return), that they swallow their concerns in their own area of disagreement.

C. Respecting others’ legal personhood

Legal personhood protects human dignity. As Jeremy Waldron argues, even though law deals in sanction and coercion, there are many ways in which it treats its subjects as dignity-possessing individuals – that is, as individuals that can: plan their lives and regulate their behaviour on the basis of reasons; give an account of themselves and their actions, and; demand

they can also play a major role in deontological political moralities. Consider their central part in the Lockean social contract: John Locke, *Two Treatises of Government* (Hafner 1690/1947) II:77-131.

⁵⁵ Yu, ‘Digital Piracy Justification’ 193.

⁵⁶ Noam Gur, ‘Actions, Attitudes, and the Obligation to Obey the Law’ (2013) 21 *J of Pol Phil* 326-346, 333. A similar line of argument was advanced, and tied to the notion of legitimate expectations (see §4.A below) by John Rawls, *A Theory of Justice* (Rev. edn, Harvard University Press 1999) 275.

that others take seriously their agency.⁵⁷ Conscientiously respecting others' legal entitlements acknowledges that they, like all other citizens, possess dignity. To step outside the law, and treat others as if they do not warrant that treatment, can amount to a rejection of that moral status and dignity.

Kant's moral philosophy articulates a specific version of this concern. For Kant, right necessarily includes a system of law, where people can be assured that they (and their rights) will be treated on the basis of a determinate standard, and not others' particular judgments, and where compliance is not secured on the basis of strength or power, but a larger authority. As Ripstein puts it: "if people are to have rights, all must be subject to the same limits. Otherwise, my attempt to enforce what I take to be my rights will be, from your perspective, simply my unilateral imposition of my will upon you."⁵⁸

Copyright piracy does not merely breach the law, but infringes specific people and group's legal entitlements, and it does so on the basis of the sheer power to perform the piracy, and the inability of the copyright-holder to prevent the act. Irrespective of any material or other impacts from the breach, such law-breaking thereby shunts aside the claims of those subjects to equal protection and respect under the law, and the dignity and freedom that the law provides them. This type of law-breaking can be particularly significant when the infringed entitlements include property-rights, which often attach deeply to people's moral identity.⁵⁹ It can be more significant again when those property rights attach to literary and artistic creations, which can possess a uniquely intimate connection to the creator's personality.⁶⁰

4. Respect for Actions Taken Under the Law

This Section explores two types of obligations that arise because citizens, on the basis of the over-arching system of law structuring their environment, have changed their behavior, in particular by taking on costs, burdens and constraints, in order to pursue personal projects or to contribute to collective achievements.⁶¹

⁵⁷ Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 *Cambridge LJ* 200-222, 202. Waldron argues that myriad features of law, some internal to its very nature, work to protect dignity, so defined. With relevance to copyright, drawing on Hart and Dworkin, Waldron notes specifically the link between dignity and legal rights: *ibid*, 204-5. See also Raz, *Authority of Law* 221.

⁵⁸ Ripstein, 'Authority and Coercion' 26.

⁵⁹ See Carol Rose, 'Introduction: Property and Language, or, the Ghost of the Fifth Panel' (2006) 18 *Yale JL & Human* 1-28, 23-25.

⁶⁰ Philosophically, this connection can be understood through a property-and-personality perspective. See, e.g., Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown LJ* 287-366, 330-64; David Troutt, 'I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons' (2010) 20 *Fordham IP Media & Ent LJ* 373-452, 381-395. Empirically, there is evidence linking creator's legal entitlements with their perceptions of being respected. See Melissa de Zwart and Beatrix van Dissel, *Australian Creators and Online Intermediary Liability* (2015), 13; David Lowery, 'Meet The New Boss, Worse Than The Old Boss?' (*The Trichordist: Artists For An Ethical and Sustainable Internet* 2012) <<https://thetrichordist.com/2012/04/15/meet-the-new-boss-worse-than-the-old-boss-full-post/>> accessed 1 May 2017; Troutt, 'I Own Therefore I Am' 388-91.

⁶¹ Both cases will be burnished in force if the existing law is itself legitimate and its duties inherently obligatory (apropos the discussions above in Sections 2 and 3). However, these two concerns can

A. Respect for legitimate expectations

Law forms the basis for citizens' legitimate expectations. These expectations then undergird plans, negotiations, contracts, agreements, investments, strategies, alliances, partnerships and labors. These contingent acts, and the legitimate expectations upon which they are based, layer over the law with their own moral significance.

These 'legitimate expectations' possess three features: they are *predictive* (they involve beliefs about what will happen); they are *prescriptive* (they involve an expectation about what an agent or agency should do); and they are *epistemically justified* (the holder has appropriate evidence for them).⁶²

The benefits arising from a system where citizens have legitimate expectations, and these are respected, are morally substantial, especially when those expectations apply to personal entitlements like rights, liberties and property.⁶³ Here, I note just two of the most obvious benefits.⁶⁴ First, a system that establishes and respects legitimate expectations prevents citizens' investments of time, energy, work, prudence and resources being wasted by arbitrary decision-making by those in power, helping them avoid the sting of frustrated ambitions and the debilitating fears of future losses. Second, following from the first, respecting legitimate expectations allows citizens to plan their lives and make long-term decisions. While the law's stability cannot guarantee a venture's success, citizens can be confident in their knowledge of the reigning structure of entitlements, protections and obligations, and in the (often slow and piecemeal) processes by which particular laws are subject to change. This stable framework

operate at least to some extent independently of the larger question of the law's legitimacy or inherent obligatoriness. See, e.g., Alexander Brown, 'A Theory of Legitimate Expectations' (2017) 25 *J of Pol Phil* 435-460, 438-40 (arguing that legitimate expectations can be based on illegitimate (e.g., ultra vires) acts by government agencies), and Raz, *Authority of Law* 247-49 (arguing that the moral obligations can derive from the social practice of cooperation itself, rather than from the law that institutes and maintains that practice).

⁶² Brown, 'Legitimate Expectations' 435-6.

⁶³ As Jeremy Bentham and other thinkers have highlighted, property is paradigmatically a resource that people build their lives around, and one which fundamentally structures their expectations (and therefore their motivations, projects and plans of life). Jeremy Bentham, 'Principles of the Civil Code' in C. B. Macpherson (ed), *Property: Mainstream and Critical Positions* (University of Toronto 1978/1802); See also Jeremy Waldron, 'The normative resilience of property' in Janet McLean (ed), *Property and the Constitution* (Hart publishing 1999). Hayek drew a similar link between property, expectations and law's purpose: F. A. Hayek, *Law, Legislation and Liberty* (Routledge 2013 (1982)) 103.

⁶⁴ These are drawn from: Locke, *Two Treatises* II:57, 137; Hayek, *Law, Legislation and Liberty* 96-105; Bentham, 'Principles of the Civil Code'; Nancy Rosenblum, 'Bentham's Social Psychology for Legislators' (1973) 1 *Pol Theory* 171-184; Raz, *Authority of Law* 214-16, 220-22. As well as these benefits, there are other moral issues potentially involved in respecting legitimate expectations, such as fairness and justice implications. See n. 56 above, and Brown, 'Legitimate Expectations' 458-9; Raz, *Authority of Law* 221-22.

allows citizens' personal decision-making horizons to expand beyond the near future, empowering their autonomy and dignity as authors of their own life plans.⁶⁵

In political theories valorizing such benefits, the focus centers on how the state should respond to legitimate expectations.⁶⁶ However, if – as Raz puts it – “respecting people’s dignity includes respecting their autonomy, their right to control their future”, then this must impact on ordinary citizens’ moral decision-making.⁶⁷ To deliberately breach established laws (especially about others’ property and rights) can sunder others’ legitimate expectations and, in concert with like infringements by others, can upset their plans of life, shifting the material and social risks of prior investment, training and work.

This concern for defeating legitimate expectations impacts on the ethics of piracy. Artists, authors and creators have legitimate expectations that their legal entitlements (like everyone else’s) will be respected by other citizens and protected by the state. That said, the extent of piracy’s impact upon their life plans depends upon pirates’ material and economic impact. As I have defined the practices, *Samplers*, *Non-Payers*, *Effective Payers* and *Finders* have negligible impact upon *Creators*’ economic prospects. While their piratical actions may be objectionable on other grounds, these acts of piracy do not undermine others’ economic plans made in reliance on the law. The actions of *Takers*, however, violate the legitimate expectations set down in established law, upon which authors and artists were entitled to rely in planning their lives and pursuing their livelihoods.

B. Fairness-based respect for social and public goods

Earlier (§3.B), we noted a ‘fairness’ argument applying to law-abiding behavior. The underlying principle (sometimes called the ‘principle of fairness’ or ‘principle of mutual obligations’) can be expressed thus:

If a number of people are producing a public good that we benefit from, it is not morally acceptable to free ride on their backs, enjoying the benefits without paying the costs. We owe them our fair share of the costs of the production of that good.⁶⁸

This principle has widespread and flexible application, potentially applying to any case where people are shouldering burdens (in the form of investments or labor, or complying with action-constraints) in order to conserve, deliver or produce some public good. The good then having been successfully achieved, the principle of fairness prohibits others from free-riding by accessing the good without shouldering their share of the burdens. The principle is least

⁶⁵ This empowerment brings further, corollary benefits; it, a) prevents domination through limiting others’ arbitrary power over one’s life plans; b) obviates the need for self-help protective measures against arbitrary intrusions into one’s projects, and; c) encourages industry, enhancing personal and social prosperity.

⁶⁶ E.g., Brown, ‘Legitimate Expectations’; Sampford and others, *Retrospectivity*.

⁶⁷ Raz, *Authority of Law* 221.

⁶⁸ Idil Boran, ‘Benefits, Intentions, and the Principle of Fairness’ (2016) 36 *Canadian J of Phil* 95-115, 95.

controversial when there is a settled scheme outlining how the burdens are to be shared, and when those benefiting are voluntarily choosing to access the goods.⁶⁹

Copyright provides an example of precisely this case, as the terms of burden-sharing are set down in law, and the socially created goods are deliberately accessed by pirates. On this footing, the potential wrongdoing is not only being done to the agents that create, market and deliver the good, but to every community member that plays their allocated part in the good's construction. *Takers* therefore wrong not only those creating works of entertainment, but ordinary citizens who obey the rules of the scheme – either by paying for such works when they access them, or by conscientiously eschewing such works until and unless they purchase them.

The principle of fairness is largely absent from the literature on the ethics of copyright. And for good reason. It is too flexible and indeterminate to provide an *a priori* justification for any specific intellectual property regime.⁷⁰ After all, the creation of intellectual, artistic and cultural goods can be collectively pursued in many different ways.⁷¹ Once established, the principle of fairness could in principle apply to each of those arrangements. However, in a society that *has* selected intellectual property as the central mechanism for constructing socially valuable cultural goods, then the principle of fairness' obligations apply to its burden-sharing rules.⁷²

Tellingly, the principle of fairness is, itself, a norm within p2p communities. That is, some p2p users – including *Takers* actively involved in piracy – acknowledge a norm that says that: given they are downloading and taking from the system, it is only fair for them to upload

⁶⁹ Some argue the principle still has purchase when the benefits are not voluntarily accessed. We saw this form employed by Gur (in §3.B above): many of a law-governed society's social benefits – such as peace and security – are not ones its citizens must voluntarily access. For a defence of such applications, see Garrett Cullity, 'Public Goods and Fairness' (2008) 86 *Australasian J of Phil* 1-21.

⁷⁰ There are more determinate notions of fairness that *can* provide foundational justifications for specific political distributive regimes – the most famous being Rawls, *Theory of Justice*. (Rawlsian justice-as-fairness does not preclude acknowledging the more general principle of fairness. Indeed, Rawls himself employs the principle, as noted in n. 56 above.) These more determinate notions of fairness can be used to justify specific copyright regimes – though even here these are not prevalent in the copyright literature. See Nicholas Suzor, 'Access, progress and fairness: Rethinking exclusivity in copyright' (2013) 15 *Vanderbilt J of Ent & Tech L* 297-342, 329.

⁷¹ E.g., from Confucian-era China, see Yung, 'Piracy and IPR'.

⁷² Finer-grained moral distinctions may be possible on the basis of the principle of fairness. Let 'destructive free-riding' refer to cases where the maintenance or production of the public good actually suffers from the pirate's defections. *Taking* provides an example: as well as breaching the regime's burden-sharing rules, *Taking* actively erodes the material rewards that help incentivize and sustain content-producers. Rule-breaking unfairness, however, also occurs even if the defections do not impose a material cost. We might call this 'unfair free-riding'. For example, it remains *prima facie* unfair to contributors if *Non-Payers* deliberately help themselves to a work of entertainment, that other (perhaps similarly-placed) users only access through paying the set price, in accordance with the burden-sharing rules. While such an action may be unfair, it is not actually destructive to the collective production of the good, since the *Non-Payer* was never going to purchase the work anyway.

content for others to download.⁷³ This is a straightforward example of the principle of fairness: a scheme has been set up and delivers goods through the contributions of some members (those making the content available on the platform). Other members voluntarily partaking of those goods (by accessing and viewing that content) are then taken to be under a moral obligation to reciprocate. As such, one of the norms operative within functioning p2p communities itself constitutes a reason for respecting established copyright obligations.

Summary

This section has shown that digital piracy implicates moral considerations that arise from quite surprising directions – ‘surprising’ not only because they are quite absent from the literature on the ethics of copyright, but also because they can be unconnected to questions of the law’s legitimacy. This is because these considerations arise on the basis of contingent actions taken in a context that may – *or may not* – be determined by law, and whose ethical significance is not reducible to the mere fact of that law.⁷⁴

Summing up so far, Section 2 argued that – except in some exceptional cases – copyright law (while it may not be fully just) is neither intolerable nor unreasonable. This result opened the possibility of copyright gaining legitimacy from other normative sources. Section 3 canvassed an array of these sources, including: respect for authoritative law, respect for democratically-made law, and respecting others’ legal personhood. Section 4 turned to consider respect for the expectations, investments and life-plans made on the basis of established rules, and fairness-based reasons to contribute to regimes that deliver socially valuable and voluntarily accessed goods.

These considerations do not legitimize all parts of copyright law to the same degree. At the law’s margins, such as with respect to recent expansions in copyright’s scope and strength, less legitimacy could be taken from moral sources like democratic provenance, and respecting others’ law-based expectations. As well, the arguments applied unevenly to different piratical acts. Most of the arguments applied fully to *Takers*, especially when they were helping themselves to recently created commercial content. Conversely, *Samplers*, *Effective Payers* and *Finders* often skirted the boundaries created by the foregoing arguments. For example, *Finders* have no impact on copyright-holders’ economic prospects, suggesting negligible impact on their expectations and investments, or on the collective production of such works.⁷⁵ Because of this, it is doubtful that the copyright-holder will see the action as an attack on their moral status, improbable that it will drive wasteful legal pursuits or ‘arms races’, and unlikely that other citizens will see it as unfair free-riding. Compared to *Taking*, *Finding* is innocuous in all these ways.

⁷³ Shang, Chen and Chen, ‘Sharing Music Files’ 353 (Hypothesis 2: partially supported). Cenite et al found around a third of uploaders cited such in-group obligations: Cenite and others, ‘p2p File Sharers’ 209-210, 214.

⁷⁴ See n. 61 above.

⁷⁵ Recall that *Finders* only access works not otherwise available to them; they would purchase the work if it was commercially available.

5. *Mitigating Considerations*

Sections 2 to 4 outlined the positive case for respecting copyright law. This Section considers four factors that might be seen to mitigate – and perhaps even annul – the moral blameworthiness of digital piracy.

A. *Victimless-ness*

Our earlier discussions have largely dealt with the claim that piracy is ‘victimless’. Even if *Samplers*, *Non-Payers*, *Finders* and *Effective-Payers* avoid direct economic impacts on copyright-holders, they may still face moral charges on the basis of respect for law, legal personhood and fairness. That said, the lack of direct economic impact does mean such practices dodge several of the most serious ethical concerns outlined above.

For *Takers*, at least some of the pirated content is replacing sales that the copyright-holder would otherwise have made. Of course, the actual non-payment of any given *Taker* (relative to what they would have spent if they had purchased the work) is typically quite small. Could it not be therefore argued that these *Takings* were *de minimis* – too insignificant to merit our moral, much less legal, attention?

To the contrary, the copyright regime is built on exactly these types of individually small payments.⁷⁶ These are the very types of payments by which the copyright holder aims to make their living and recoup their costs and labors, either by exploiting the copyright themselves, or by on-selling their copyright to distributors. Equally, these are the very types of payments which other contributors acquiesce to pay. Both groups have every reason to see the amounts, while small, as significant enough for moral sanction.

B. *Piracy as ‘Just Deserts’ (Retaliation)*

Copyright holders and their representatives, wielding enormous power as multinational corporations or well-resourced industry bodies, can engage in many forms of morally worrisome behavior. They can attempt to exercise undemocratic control over copyright law’s content by influencing international law-making processes, engaging strategically with courts, and aggressively lobbying politicians.⁷⁷ They can exploit the law to secure profits far beyond normal earnings, such as by litigious practices of ‘speculative invoicing’, and by pursuing accidental pirates for vast sums.⁷⁸ And for all their righteous talk about protecting artists, distributors can direct meagre proportions of their earnings towards content-creators.⁷⁹ Sometimes corporate wrongdoing can be directed towards their own customers, where marketing and pricing strategies feel like price-gouging, and restrictions on access and timely

⁷⁶ The situation parallels other cases of collective maintenance of public goods, where individual free-riders (such as environmental polluters) make individually small defections from the system’s obligations.

⁷⁷ Litman, *Digital Copyright* esp. 55-62.

⁷⁸ Lessig, *Free Culture* 50-52.

⁷⁹ Debora J. Halbert, *Resisting Intellectual Property* (Routledge 2005) 82; Ponelis and Britz, ‘Ethics of Music Piracy’ 17; cf. Lowery, ‘Meet the New Boss’.

availability of products betray scant concern for foreign jurisdictions.⁸⁰ In response, pirates may feel that their actions constitute a justified response to industry malfeasance.⁸¹

Even if we grant that unilateral adjudications of ethical performance are in principle able to trump legally established entitlements,⁸² several points may be made in response. Immediate queries concern the extent of corporate/industry wrongdoing. The above-mentioned acts vary considerably in their ethical status, and for at least some of the acts the allegation of wrongdoing appears quite subjective. After all, the usual – and morally straightforward – response to a product’s perceived excessive pricing (emergency and monopolistic cases aside) is simply to purchase alternative products. Questions also arise about the pirate’s epistemic position in making judgments about these acts. Pirates may have vestigial knowledge about the costs and risks of creating content, the extent of market pressures from other content-producers, the challenges involved in switching distribution methods, the labor that goes into developing artistic skills and writing craft, and so on.⁸³ In many cases, it is hard to see how prospective pirates can claim to be sufficiently cognizant of the relevant facts to render a genuinely informed moral judgment.

A further worry is one of collateral damage. On the basis of considerations of retributive and procedural justice, caution is required from an agent infringing legal entitlements that may be held by people who were not complicit in wrongdoing.⁸⁴ This danger collapses into outright hypocrisy if the pirate’s moral outrage stems from industry’s poor treatment of artists and authors. While only a small percentage of the retail cost of most creative products goes to creators, *Takers’* piratical practices deliberately strip their own contribution down to zero.⁸⁵

More broadly, this phenomenon of two self-righteous antagonists (*viz.*, technologically savvy pirates and well-heeled industry power-brokers), each justifying their morally dubious activities by allegations of the other’s immorality, triggers the worry about the social costs of each side arming itself against the other’s excesses. While the descriptor ‘copyright wars’ may not imply a Hobbesian war of all-against-all, it may hint that we are moving towards the perils of Locke’s state of nature,⁸⁶ where citizens can no longer rely on established rules and independent judges. Instead, the capacities for protection, compensation and retaliation increasing lie in the hands of the technologically or financially powerful. In this environment,

⁸⁰ Studies have found that such ‘consumer rights’ concerns correlate with piratical behavior. Shang, Chen and Chen, ‘Sharing Music Files’ 353, 359-360. Note also Ponelis and Britz, ‘Ethics of Music Piracy’ 18.

⁸¹ See, e.g., Shang, Chen and Chen, ‘Sharing Music Files’.

⁸² For some concerns, see, e.g., Rawls, *Theory of Justice* 273-77, as well as §§3.C, 4.A above.

⁸³ In the context of music piracy, see Lowery, ‘Meet the New Boss’.

⁸⁴ This is a general issue in concerns with attributing corporate agency and moral blameworthiness. My claim is only that concerns with collateral damage should be weighed carefully – not that they are a definitive reason to reject corporate punishment per se. On the issues involved here, see Tracy Isaacs, ‘Corporate Agency and Corporate Wrongdoing’ (2013) 16 *New Crim L Rev* 241-260, 254-56.

⁸⁵ Lowery, ‘Meet the New Boss’. Even with a clear-eyed understanding of the exploitation of recording artists by music industries, one can still be skeptical about reform packages and consumer practices that leave artists with weaker entitlements; see Troutt, ‘I Own Therefore I Am’ 444-452. Compare Halbert, *Resisting Intellectual Property* 79.

⁸⁶ See n. 54 above, and accompanying text.

legal tools are used to bludgeon and intimidate, and piracy and hacking are used to breach and exploit. Well-heeled multinational distributors and techno-savvy pirates do what they can, and ordinary artists and entertainers suffer what they must.

In sum, the ‘just deserts’ mitigating factor involves such a hornet’s nest of ethical concerns that the retaliatory pirate risks committing as many wrongs as the subject of their ire.⁸⁷

C. Piracy as ‘Resistance’

Instead of mere piecemeal retaliation targeting a specific corporation’s or industry’s wrongdoing, the piratical action may be understood as constructive resistance to injustice, aimed at making the world a better place. In this case, the mitigating factor rests its defense on a larger claim about the social and cultural goods that will flow from a new technologically-driven age of freedom, sharing and creativity.

This consideration cannot be brushed aside as fanciful. Deliberate, principled, self-interested law-breaking can create pressures to reform law, often by providing society with a clearer knowledge of an activity’s risks and benefits, and by demonstrating the resilience of citizens’ moral convictions on the matter.⁸⁸

Following this line of thought, some commentators make the point that piracy aids society by providing it with enriched information on the opportunities for human flourishing, creativity and interaction opened up by innovative technologies.⁸⁹ In the fullness of time, lawmakers may choose to balance various interests by allowing activities that are currently infringements – and (as has happened before) the maligned pirates of today will become the trail-blazing heroes of tomorrow.

Nevertheless, serious problems beset this ‘resistance’ line of justification. Defenses of morally worrying behavior, on the basis of predictions about utopian (or at least, significantly improved) futures being furthered by that behavior, hinge upon three separate moral considerations. First, the harms or costs immediately imposed by the action must be considered. Resisting actors must clearly and objectively consider whether the means justifies the ends. In the case of piracy, this question of harms and costs will hinge on the concerns laid out in Sections 2-4 above. Second, the envisaged utopia itself must be appraised. Is the utopia really feasible and desirable? Third, is the piratical action the most effective and morally appropriate action available to advance that utopia? The following subsections explore these last two considerations.

(i) Is the promised utopia feasible and desirable?

If the desired future is to be able to morally overwhelm the existing wrongful factors in piracy, then we need to have substantial confidence in its feasibility and desirability. Whether this confidence is warranted will depend upon what sort of future the pirate envisages. Not all post-

⁸⁷ Note the similarities with: Himma, ‘Hacktivism’.

⁸⁸ For example, citizens’ ongoing illicit use of marijuana clearly contributed to recent decriminalization initiatives. Ashifa Kassam, ‘Canada introduces long-awaited legislation to fully legalise marijuana’ *The Guardian* (UK) <<https://www.theguardian.com/world/2017/apr/13/canada-marijuana-legalisation-legislation>>

⁸⁹ Lee, ‘Ethics of Innovation’; Lessig, *Free Culture*.

copyright futures are the same, and some may be more plausible than others. In any case, however, it can be difficult to get robust evidence about what the future might look like.

To be sure, piratical communities do clue us in to some important goods potentially available in a copyright-free world. *Samplers* illustrate the possibility of a world where content-producers are reimbursed for their work, yet users enjoy the invaluable opportunity to freely access works so as to deepen their cultural breadth and inform their purchasing decisions. *Takers* allow us to glimpse a community and practice of human interaction wherein members recommending, reviewing, sharing and helping each other's access allows for highly engaged aficionados able to appreciate, sample and develop expertise upon a giddy diversity of cultural works. These aficionados may enjoy such cultural and aesthetic riches despite very limited financial resources. In these ways pirates help show some of the possibilities of a new milieu of informational and cultural freedom.

But the vexing question remains whether a copyright-free future would unfairly strip back artists' and creators' economic and life prospects, or problematically chill their production of desirable cultural goods. Here, evidence is hard to come by. Suppose it was established that existing piracy actually impacts little on creative artists' and industries' overall economic prospects.⁹⁰ Does this provide persuasive evidence for a future environment where these currently piratical actions were legalized, and yet creative industries still flourished? It does not.⁹¹ Piratical practices that take place within a context that is legally (and to some extent socially) non-permissive will inevitably issue in different effects from those created in a permissive context. If *Taking* were legalized (in a post-copyright future), there is good reason to expect most current law-abiding citizens would cease paying for works they can now access for free. Equally, there is good reason to expect many of the existing morally-constrained pirates – like *Samplers* and *Finders* – to shift to unrestrained *Taking*. Such shifts would undoubtedly impact upon the prospects of creators. There are, thus, significant limits to drawing inferences from the current environment about the behavior of actors in a legally and socially different environment.

There are further worries regarding the feasibility and desirability of the politically-motivated pirate's future state, indicated by the lack of a unifying goal held by this group. To be sure, politically-motivated pirates have a coherent enough political program: they all want a reduction in copyright's potency.⁹² The question concerning us here, however, is whether pirate's law-breaking can be justified by the clear prospect of a feasible and morally desirable future political arrangement. And here the radically different ideal future states envisaged by pirates suggest caution. Politically-motivated pirates may want to:⁹³

⁹⁰ E.g., Lessig, *Free Culture* 69-71.

⁹¹ Consider an analogy with environmental protection. The fact that an ecosystem flourishes despite a small amount of defection from environmental regulation provides scant evidence that the ecosystem would flourish if those regulations were altogether repealed.

⁹² Beyer and Mckelvey, 'Pirates and the State' 899.

⁹³ See the political positions recounted in: Yu, 'Digital Piracy Justification'; Robertson and others, 'Illegal Downloading'; Halbert, *Resisting Intellectual Property*; Kelty, 'Recursive Publics'. On the more anarchistic objectives: Beyer and Mckelvey, 'Pirates and the State'. For a related case, where the act's political point is similarly unclear: Himma, 'Hacktivism'.

Break the existing entertainment industry's centralization. The corporate industries controlling entertainment should wither, letting decentralized artists connect with their fans in a disintermediated way. Changes to copyright law may be neither necessary nor sufficient for achieving this goal.

Fix copyright. The spirit of copyright law is legitimate. However, the existing law is too industry-orientated, and needs user-orientated reform.

Destroy copyright. Copyright is irredeemably unjust and should be eliminated.

Destroy state authority online: The online environment should be purged of all state intrusions, including through copyright, censorship and surveillance.

Destroy state authority period: Freedom against intellectual property is just the first step towards the goal of genuine anarchism: a world without state authority.

These are very different ultimate goals. As a result, one can harbor reasonable doubts about the feasibility and moral attractiveness of any promised utopia. Feasibility can be questioned because any new regime seems likely to be plagued by continued law-breaking from those whose desires are not even approximately realized. Attractiveness can be questioned because none of the alternative futures enjoy widespread endorsement, even across the small proportion of citizens who are resistance-based pirates.

(ii) Is the piratical act the proper means to further the utopia?

Even if a future informational environment is indeed desirable and feasible, there are reasons to question whether piracy provides the most effective and appropriate means to realize that end. After all, reformist law-breakers *can* demonstrate respect for the rule of law. By employing conditions like publicity, forewarning, taking responsibility, and eschewing personal violence, dissidents practicing civil disobedience break the law in a way that respects law's larger ideals, and that demonstrates (through personal sacrifice) the dissident's deeply felt convictions.⁹⁴

However, most piracy – even that performed by self-styled resisters – bears little resemblance to civil disobedience.⁹⁵ Rather than openly shouldering serious short-term sacrifices by infringing public law for their ideal, pirates secretly access immediate personal benefits by infringing others' entitlements. As such, the action publicly demonstrates neither the courage of the pirate's convictions, or their respect for the rule of law.

Worse still, there are two ways piracy can actively undercut the vision of a copyright-free utopia where there would still be sufficient incentive (financial or otherwise) for creators of works of entertainment to create high-quality works.

First, let us define *sharing* practices as the online collective communication of content that is not subject to copyright's legal exclusions. This content includes works that were never subject to copyright, those available through a Creative Commons (or similar) license, and

⁹⁴ William E. Scheuerman, 'What Edward Snowden can teach theorists of conscientious law-breaking' (2016) 42 *Phil & Soc Crit* 958-964; Himma, 'Hacktivism'.

⁹⁵ There are exceptions. See Ojala, 'Sci-Hub, Elsevier, piracy'. Conformity to civil disobedience conditions does not automatically mean such piracy is justified, but it does mean the act is entitled to be evaluated on that basis. See, relatedly, Himma, 'Hacktivism'.

those that have fallen out of copyright protection. Sharing practices, platforms, communities and technologies invite no retributive response from existing industry and artists. While both copyright-using artists and established industry might recognize a threat to their business plans by the proliferation of sharing communities, they have no moral or legal complaint to level against sharing practices.

But once the p2p environment came to include *Taking*, social and legal pushback was all but inevitable. Sharing practices became socially stained by the *Taking* occurring within their midst, threatening their social legitimacy and obfuscating their potential. Worse, the inevitable legal and technological attempts to confront *Taking* were bound to create problems for such practices – in just the way any larger activity suffers when it is more rigorously regulated to police law-breaking within its midst.⁹⁶ Far from piracy helping expand a new sharing environment, it actively created social, legal and technological impediments to that happy result.

The second way piracy betrays the advance of a sharing regime is by demonstrating the regime's failure to supply a sufficient amount of high-quality works of entertainment so as to satisfy demand. Users who only access the internet's vast amount of free material provide evidence that it *is* possible for people to be satisfied with the quantity and quality of works of entertainment supplied freely by sharing creators. Contrariwise, resisting pirates engaging in *Taking* provide evidence for the reverse thesis; namely, that even the sharing regime's most vigorous enthusiasts still cannot get by without the types of big-budget and highly professional works incentivized and supported by copyright. Such piracy suggests that the sharing world is not made up primarily of creators willing and able to devote time and resources to develop quality content for free, but rather of an audience who continues to desire products beyond those created within the free-sharing environment. If this is right, piratical *Taking* actually provides evidence that the sharing utopia – like, perhaps, many utopias before it – fails to sufficiently incentivize the hard individual and collective labor required to provide society with the goods it values. Far from advancing the envisaged utopia, *Taking* suggests that sharing norms are worryingly demand-driven, and that they one-sidedly favor users, not creators.⁹⁷

Summing up, ordinary acts of piracy garner little moral justification from resistance-based mitigating claims. Resistance-based pirates can downplay the current wrongs being performed as means to their ends, even as they over-represent the feasibility and desirability of those ends. Even in cases where resisting pirates avoid both these faults, it is still an open question whether acts of piracy *really are* the best means of advancing these noble goals, and whether personal sacrifice, as distinct from convenient consumerism, might prove a more constructive approach.

D. *The 'Robin Hood' Factor*

A final mitigating consideration defends the actions of economically poor pirates. As one study subject asserted: "Yes, it is stealing, but I claim the Robin Hood cause. Take from the rich and

⁹⁶ This is not to justify *Sharers* being punished as collateral damage in the pursuit of *Takers*. See Halbert, *Resisting Intellectual Property* 84.

⁹⁷ A possibility some commentators have independently aired: see Dusollier, 'Master's Tools' 287-291.

give to the poor (me and my friends).”⁹⁸ The wealth disparity between entitlement-holders and prospective users may be employed to justify any of the piratical practices (*Taking, Sampling* etc.), but it applies most strongly when defending *Poor Non-Payers*, especially in a developing/developed country context implicating larger questions of international (in)justice and (in)equality.⁹⁹ In a study into Singaporean pirates, half of the respondents, “suggested downloading may be one of few sources of entertainment content for people who may have hardly any entertainment budget at all”.¹⁰⁰ These infringing practices of *Poor Non-Payers* may infuse cultural literacy and enrichment into otherwise economically (and so culturally) straitened lives. These economic issues interact with another relevant source of concern: the fraught democratic legitimacy of copyright law in many developing countries.¹⁰¹ While these considerations defy swift treatment, it may be that for these *Poor Non-Payers*, copyright law’s comparatively weaker democratic legitimacy combines with the stronger moral concerns created by vast economic inequality to overwhelm any remaining moral concerns.¹⁰²

Outside the developing-world context, claims of piratical justification through appeal to wealth disparity look less convincing, as legal legitimacy increases in strength, relative inequality becomes comparatively less stark, and greater opportunities for lower-cost alternatives (like advertising-supported content, libraries and free-to-air radio) emerge.¹⁰³ It is also worth noting that, apart from the superstars who attract the headlines, artists and entertainers themselves are often relatively poor, even if the companies publishing their work are not. Even quite successful creators can struggle to make a living from their work, and often battle to stay economically viable across their lifetime.¹⁰⁴

⁹⁸ Ponelis and Britz, ‘Ethics of Music Piracy’ 17. As we saw in Section 1, issues of wealth disparity are raised by pirates and by academic work justifying piracy.

⁹⁹ Thomas Pogge, ‘The International Significance of Human Rights’ (2000) 4 *J of Ethics* 45-69. For an illustrative case of the situations created by international copyright in developed countries, see Lucas D. Inrona, ‘Singular justice and software piracy’ (2007) 16 *Bus Ethics: A European Rev* 264-277.

¹⁰⁰ Cenite and others, ‘p2p File Sharers’ 213 (though note Singapore is a high income country). Relatedly: Inrona, ‘Singular justice and software piracy’.

¹⁰¹ See, e.g., Shaheed, *Copyright policy* ¶19; Lessig, *Free Culture* 63-64.

¹⁰² Presumably, on the basis of the remaining moral concerns, it would still be morally laudable, in a supererogatory sense, for such *Poor Non-Payers* to avoid piracy where other options are available. Various means for avoiding *Taking* are noted by Santillanes and Felder, ‘Software Piracy in Research’ 975-76. While their focus is on software, the broader ethical insight that agents can have responsibility for actively searching for legally available alternatives (and seeing if these prove sufficient for their needs) applies to all areas of piracy.

¹⁰³ It must also be borne in mind that, as distinct from certain cases of patent piracy, the stakes here are not life-or-death. Stealing bread for one’s family is, after all, not only an issue of inequality, but an immediate and overwhelming priority that attaches directly to widely-acknowledged moral duties to ensure the survival of one’s dependents.

¹⁰⁴ See, e.g., Lowery, ‘Meet the New Boss’; Richard Lea, ‘Most UK authors’ annual incomes still well below minimum wage, survey shows’ *The Guardian* (UK, 20 October 2016) <<https://www.theguardian.com/books/2016/oct/19/uk-authors-annual-incomes-below-minimum-wage-survey-average-earnings>> ; DHA Communications, *The Working Musician* (2012), 16; Troutt, ‘I Own Therefore I Am’ 432.

Section Summary

This section's treatment of these four types of mitigating considerations has been necessarily truncated, and there doubtless remains more to be said. Performing a 'first pass', I argued that the situations of *Poor Non-Payers* in developing countries may well stand as a compelling mitigating factor for digital piracy. However, I concluded more skepticism was necessary in the face of retaliation- and resistance-based excuses, and poverty-based exceptions in developed countries.

If we overlay these results upon the moral wrongdoing established for different types of digital piracy (as per Sections 2-4 above), the picture acquires further complexity. Few one-size-fits-all rules can be laid down in the face of such intricate moral topography, involving different types of piracy, breaching different parts of copyright law, accompanied by different mitigating factors, as manifested in different personal situations.

Conclusion

The foregoing analysis has shown how multi-layered ethical decision-making must be when it occurs in the face not only of pre-existing law, but of contingent individual and group actions that occur within a legally-infused social and political context. In such situations, I have urged, ethical decision-makers must consider far more than a particular law's abstract justifiability – or even its democratic pedigree. They must pay heed to quite novel moral concerns, such as those based on fairness and respect, that spring to life in the complex and ongoing moral workings of rule-governed communities.

In terms of the ethics of digital piracy specifically, we have reached a measured but largely critical standpoint. The most damaging type of piracy (*Taking*) turns out to be morally wrong, at least absent exceptional circumstances. In contrast, *Finding* and *Poor Non-Paying* (for developing country citizens) appear largely justified.¹⁰⁵ Somewhere in the contested middle ground lie the piratical practices of *Sampling*, *Effective Paying* and *Non-Paying* (for locals). While these practices provide important personal and social gains to pirates, and mitigate the most worrying damage to creators, there remain significant concerns. These concerns are strengthened by the problem that, to an external observer aware only of the piratical act itself, such acts might be indistinguishable from *Taking*.

In closing, I would like to highlight one recurring principle that can be endorsed across a wide plurality of moral perspectives, and which applied to many of the different moral layers: the principle of consistency. The principle requires that: Whatever entitlements one morally claims for oneself, those are the entitlements one must morally grant to others. If one asserts a license to break the law and infringe others' legal entitlements for self-interested benefit, based on allegations of corrupted democracy, retaliation against perceived wrongdoing, promoting future utopias, or spurning the law's perceived injustice, then that is the license one must grant to others in similar circumstances – in particular, when one's own cherished entitlements are at stake. I submit that, before electing to pirate a work, this is perhaps the single most pressing question moral agents should place before their eyes: 'Would I accept other people infringing

¹⁰⁵ See §4(summary) and §5.D.

my legal entitlements – entitlements that may be important to me and my plans – on the basis of the types of reasons I now act?’