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Sociology, Social Policy and Criminology

Digital Piracy, Historical Pirates, and Pirate Ontologies

by

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Thesis for the degree of Master of Philosophy

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Abstract

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This research examines why “pirate” has come to be the term used to describe such a vast set of different activities and behaviours associated with copyright infringement. Digital piracy is difficult to define due to the often ambiguous quality of digital interactions. The legal context also has become less clear, with expressed legal purposes often diverging from the application of the law. Whether civil or criminal in nature, research suggests that pirates may not perceive their actions as necessarily deviant or morally wrong. Many of the theories of digital piracy fail to adequately explain the behaviour or to address a possible absent perception of wrong-doing. Based on modern ambiguity and historical comparison, this work argues for a variety of “pirate” types; that digital pirates cannot be treated as a singular concept. Historical piracy and digital copyright may seem intuitively distinct, however, given the evidence presented, it is hoped that the similarities between the two will be seen and that these similarities will provide further support for the need for a multifaceted perspective. From a historical criminological perspective, considering modern digital piracy and its historical analogues, it seems necessary to improve our engagement with the concept of piracy if we wish to conduct accurate and relevant research.

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Research Thesis: Declaration of Authorship

Print name:	Kieran Currie Rones
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2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
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Introduction

Broadly speaking “digital piracy” refers to unauthorised access and transmission of copyrighted works. Despite a growing body of research on the topic of digital piracy and copyright infringement there remains little agreement regarding the factors that predict a person’s likelihood to engage in digital piracy. Nor is there even a comprehensive definition of what the kinds of activities, often generally referred to broadly as “digital piracy”, constitute infringement in practical terms. To research a phenomenon requires a clear definition, yet, a clear and core definition of piracy remains conspicuously absent from the literature. The aim of this work is to examine the ways in which the word “piracy” is used and has been used historically, to seek to explain how definitional issues may flow directly from more fundamental aspects of “piracy”, and to suggest that acknowledgement of these factors may help to explain the unreliability of studied characteristics to predict propensity to engage in digital piracy.

The method of this research took the form of an unstructured exploratory literature review. An argument will be put forward within this work that the vast body of existing research suffers serious methodological flaws and thereby cannot be used reliably as evidence. Given the problems that will be discussed, it was felt that the most effective approach would be to treat this research as though it were examining the field anew. The first step in the research process would thereby be an exploration of the literature that seeks to better define and bound the subject of research: digital piracy. As part of this process there is an attempt to define a pirate-ontology. This was a subjective process based on the interpretation of the researcher and attempting to differentiate the variety of types of pirate described within the existing research, reduced to the most core elements whilst also maintaining sufficient variation so as to adequately describe the phenomena being observed. The ontology is intended to be the start of a process of more clearly defining types of digital pirates.

This document deals largely with intellectual property law and concepts as they are understood and practised in the United Kingdom (UK) and the United States (US). The US in particular plays a significant role and so much so that this may at first seem disproportionate. However, the focus on the US in particular is because of the way that content producers are concentrated in the US and because of the aggressive way that the US

exports its intellectual property laws and regulations, which necessitates its consideration throughout (Bird and Jain 2008; Bowcott and Bowcott 2012; Johnston 2012).

This work takes an extremely negative view with regards to the existing research. This is due to an overwhelming proportion of research failing to utilise behavioural checks (relying on participants understanding of when piracy may have occurred). There is consistent evidence that even those informed on copyright law disagree about what constitutes infringement (Vaver, 2006; Gray, 2012; Yu, 2012). A significant proportion of studies disagree about the factors predicting likelihoods of engaging in digital piracy (including direct contradictions (Wagner & Sanders, 2001; Siegfried, 2004). Given the discrepancies in results and methodological issues it seems necessary to consider any findings produced without a behavioural check as potentially invalid. This invalidates a significant proportion of existing research, thereby requiring that perhaps the majority of the current body of evidence be largely disregarded

Chapter 1 Illegal Infringement vs. Digital “Piracy”

Broadly speaking the *historical* use of the term ‘pirate’ has referred to thieves of various kinds who operate by sea. “**Digital** piracy” is used for precision throughout this document. However, the term “piracy” has come to be associated with a variety of intellectual property infringements ranging from illegal downloads by single individuals to large-scale and organised counterfeiting operations.

The term “piracy” arguably suffers from over-broad application. Whilst it may seem reasonable to assume that a person who pirates digital movies is the same as a person who pirates video games; there is no evidence to support such a view. It is only in recent years that research has begun to look at such distinctions; early research suggests that pirates of different media may indeed represent meaningfully distinct groups (Corte & Kenhove, 2017). Research more generally has made little to no attempt to correct or control for this possibility. The lack of a clear sample-population may have led to experimental error when seeking to establish ‘causes’, ‘contributing factors’, and ‘predispositions’ that may have been incorrectly applied across distinct groups (Anning & Smith, 2012; Arli, Kubacki, Tjiptono, & Morenodiez, 2017; Brown & Holt 2018; Burruss, Holt, & Bossler, 2018; Casidy, Lwin, & Phau, 2017; Corte & Kenhove, 2017; Gray, 2012; Hashim, Kannan, & Wegener, 2018; Larsson & Svensson, 2010; Lowry, Zhang, & Wu, 2017; Riekkinen, 2018; van Rooij, Fine, Zhang, & Wu, 2017). To make this point clear, and to establish a common conceptual ground regarding the issues discussed throughout, the following section details specifically the variety of pirate behaviour seen in a modern digital context. This should give some insight into the difficulty involved in defining, and thereby in researching, digital piracy.

1.1 ‘Digital Piracy’

Whilst it may be difficult to define the grey areas of a definition of digital piracy it may be said that, at the very least, there is agreement in *colloquial* terms that digital piracy is the sharing/distribution of copyrighted works without permission (Cummings, 2013; Karaganis, 2011; Lessig, 2004; Patry, 2009). Historically, ‘sharing’ would have been an important word as

most instances of digital piracy relied on an initial pirate to make the content available. However, there now exists many ways to procure files and content, often directly from legitimate sources; doing so in a way that technically/legally constitutes “piracy”/infringement. Therefore, perhaps the easiest way to understand digital piracy is simply to understand what pirates do in practice. The possible methods of digital piracy are far too extensive to cover exhaustively. However, the most common approaches can be grouped as follows: BitTorrent, Direct Downloading/Streaming, or Stream Capture. By discussing these approaches/technologies and how they are used for piracy it is hoped that pirate behaviour can be clarified and that this will facilitate defining digital piracy more generally.

1.2 BitTorrent

BitTorrent is a peer-to-peer (p2p) file transfer protocol that facilitates the connection of large numbers of computers. Users connect to a “swarm” (group of computers) that is marked as sharing particular content. Users then leech (download) and/or seed (upload) to and from the swarm as required. The advantage of Torrent downloads is that a complete copy of the file is not required; the swarm provides connected users with whatever portions of the file each connected individual has at the time, allowing the user to download the end third one day, the beginning third the next, and wait a week for a user to join the swarm with the middle third before assembling the parts and gaining the complete file (Craig et al., 2005). This means users can disconnect and reconnect throughout, downloading and/or sharing the file in the most efficient way possible. This makes sharing large files much easier as large traditional downloads, possibly taking days, may be lost due to accidental disconnections. The lack of necessity for a sustained or reliable connection has made BitTorrent and p2p technology more generally, a sensible solution for sharing of large files. Many companies now exploit BitTorrent, p2p, or similar technologies, such as Blizzard gaming, who distributed World of Warcraft game updates (Halfacree, 2015), and Microsoft, who use p2p to distribute their Windows Updates in the newest Microsoft operating system Windows 10 (Warren, 2015). That said, BitTorrent has become so publicly associated with digital piracy that the Recording Industry Association of America (RIAA) has asked the BitTorrent INC team (responsible for the development of the BitTorrent protocol) to prevent piracy via BitTorrent (Abbruzzese, 2015; Andy, 2015b). This is akin to asking Sir Tim Berners-Lee to stop internet pornography.

Recent media discussions of piracy have most probably been referring to torrenting (the use of BitTorrent to share files). This is likely the case for two reasons. The first reason is that, because all users in a swarm share files together, they must expose parts of their identity to one another, drastically increasing the likelihood that individuals can be identified and thereby caught/punished/fined. This means that most reporting regarding pirates being “caught” typically means the individual was Torrenting. The second reason is largely the result of high profile cases such as the trial regarding The Pirate Bay (Manner, Siniketo, & Polland, 2009). Sites like The Pirate Bay maintain lists of Trackers; intermediaries who maintain lists of active torrent swarms/ the files they share. This meant that whilst The Pirate Bay hosts no copyrighted work themselves they are often seen as the most well-known enablers of piracy.

The key point regarding torrents is that they are a shared activity. Users *participate* in the swarm and there is a strong cultural imperative around seeding (uploading) and against being a leech (downloading 100% of a torrent and uploading less than 100%) (Andrade, Mowbray, Lima, Wagner, & Ripeanu, 2005; Meulpolder et al., 2010). This has a tendency to foster and support a sense of community amongst file sharers who use torrents as they depend on one another for access. Prior to content appearing in public facing trackers they are often circulated amongst more insular networks generally referred to as The Scene (Huizing & van der Wal, 2014; Opentrackers, 2015; van der Wal, 2009) which is perhaps even more community orientated to the point of outright tribalism. Many subgroups within The Scene are openly antagonistic, distributing messages alongside releases stating: “HATRED does not respect any p2p networks, NFOrcor, anything to make the scene more public.” (HATRED, 2015). Whether such community dynamics could represent further sub-categorical distinctions in the groupings of these torrent pirates has not been examined.

1.3 Direct Downloading/Streaming

Direct downloading refers to making a single connection to another computer/server that contains a copyrighted file or files and downloading the files from start to finish in a typically uninterrupted connection. Unlike torrents, because the file is not downloaded in parts, this usually means that users must complete their access of the file/s in a single session.

Unintended disconnections, either by themselves or by the file server, will often mean users will need to start their download again from the beginning

regardless of how much has been completed or how long they have already been connected. For slow or inconsistent connections, the inability to reconnect and resume downloading can make direct downloading large files prohibitively difficult. Some methods exist to help circumvent these issues via software but not all download servers support this. Sharing larger content such as HD movies is therefore less common via this method. However, as internet infrastructure has developed, access speeds have improved, and network stability has increased; direct download sites have gained some popularity (Lauinger et al., 2013). Furthermore, some uploaders have found ways to split their files into separate download parts to be reconfigured once the user has each part. Specialised services; “File lockers” host files for direct access/download by users who possess a link to the Web address of the file. Because the links themselves often offer no insight into the files hosted (often filenames themselves will even be obscured to further mislead copyright holders) websites have emerged to catalogue the locations of these file lockers. These directories often specialise in particular content such as maintaining all links to a particular TV show (Lauinger et al., 2013). These sites are often file-host agnostic. In other words, they may hold records about many file lockers that hold the same file and will update their lists as/when content is removed, should copyright holders issue takedown notices. It has been suggested that the success of file lockers in recent years has been primarily due to the involvement of pirates and unauthorised hosting of copyrighted work as opposed to legitimate/legal sharing of works owned by the uploader, including accusations of significant profitability of such services (Digital Citizens Alliance & NetNames, 2014). Users are commonly offered the ability to pay for “premium” access that removes download/speed caps and gives priority access to files. Equally, incentives are often provided to uploaders too, as users who provide popular (regularly downloaded) content may be rewarded by tokens or even monetary reward schemes which can have the effect of incentivising the deliberate uploading of copyrighted works if it can be reasonably assumed that said work will be popular and draw page views for the file locker site. These incentives have come under significant legal fire such as in the MegaUpload case that resulted in this file locker domain being seized by the FBI (BBC, 2012; Danaher & Smith, 2014; Peukert, Claussen, & Kretschmer, 2013). Finally, many of these File Locker sites offer the capability to “Stream” content: to view files within the sites’ internal player application or similar (with some sites specialising in streaming).

Though users typically think of streaming as watching a file on their screen that exists elsewhere, the file does still have to be downloaded in order to be displayed and is both legally and practically still a form of downloading, piracy, and of copyright infringement. Here the file is simply proactively removed once the user has viewed it (or even downloaded in segments as the user moves through the file to watch it). So again, whether direct downloaders are distinct from torrent users is rarely addressed. Deeper still, whether “downloaders” vs “streamers” represent distinct subgroups remains equally unexamined. Downloaders may have compounding hoarding behaviour that streamers do not but as this research has not been conducted we simply don’t know.

1.4 Stream Capture

As modern media has developed, there has emerged a relatively new form of piracy: stream capture. Stream capture refers to the ability of pirates to intercept streaming media so as to access/view/store the information whether or not the underlying data is made available. To clarify:

Data: the computer code that makes up a video file.

Information: the movie that the code represents.

The degree of sophistication of stream capture-approaches varies wildly but largely these techniques exploit a fundamental characteristic of the Web/internet architecture. As Lessig has stated, “[on The Web] every single use ... produces a copy” (2007). What is being conveyed here is that when a user sees something on their computer screen then this must have been downloaded from a provider (web site or streaming service), and stored (however briefly) for presentation to the user. In the case of modern streaming services like Netflix or Spotify, providers may take measures to ensure that content is removed after it has been viewed or even that it is encrypted in storage; locked such that only the authorised “official” applications can open it. However, if at any point the *information* contained within that encrypted *data* is intended to be rendered sensible to a user then this provides an attack vector to a pirate who can strip out the information even if the underlying data remains obscured. Though complicated methods can be used, many pirates will simply rely on automated solutions. For example, there are an increasing number of “YouTube 2 MP3” sites; services and applications that facilitate the preservation of video/music files accessed through Google’s video service and convert these into appropriate file formats (Andy, 2013; Enigmax, 2012;

Youtube2mp3, 2014). Such actions may constitute copyright infringement (civil offences), end-user agreement violations, and potentially even the circumvention of Digital Rights Management (DRM) (criminal offences) (Andy, 2015a). Furthermore, this remains true in cases where infringement may be unintentional. Unauthorised access of YouTube's content via unapproved third-party applications may equally constitute a breach of YouTube's terms of service and thereby also may fall foul of the same "circumvention of DRM" laws. In 2015 YouTube launched its Music Key service (YouTube, 2015) which allowed users to listen to YouTube whilst their mobile device (phone or tablet) had the screen switched off. YouTube quickly began removing apps that offered similar functionality from their Play Store where such apps had previously been acceptable and updated their terms of service to disallow such screen-off functionality. As Google's terms of service had changed, these applications were no longer accessing the site and its content legitimately. Yet users who had already installed these applications were able to continue to use them and were not necessarily informed that they were no longer supported. Continued use of these unsupported apps may be civil or even criminal offenses (dependant on which legal system users are operating under) though users may have no knowledge that their access is no longer within YouTube's terms of service. That their access is considered infringement is true precisely because of what Lessig (2007) says above. When accessing YouTube, or any Web content, users must temporarily copy that content to their computer. If this copying is made without permission then this may constitute digital copyright infringement and if it constitutes circumvention then it may be criminal.

1.5 Ambiguity

The main problem that stems from the above sections is a real ambiguity as to who should be considered a "pirate" by others, who would legally be considered a copyright infringer, and who would consider themselves a pirate. In cases that are technically/legally clear examples of digital piracy (as in the YouTube2MP3 example above); users themselves may view this as similar to the taping of music from the radio. Furthermore, in other instances, users may be called pirates for little more than failing to read end user agreements (Terasaki, 2013). Not reading end user agreements has routinely been seen as an unreasonable expectation of consumers. Yet Australian Netflix users were branded pirates because, at

the time, “Australian Netflix” did not exist as Australian licence holders had not yet agreed terms with Netflix. As such, paying Netflix customers in Australia were using VPN services to allow them to watch Netflix appearing as an American user (Crawford, 2014). Whilst this would be both a violation of their contract with Netflix and quite likely to constitute what we would technically consider piracy, the fact that paying customers using legal services can be considered “pirates” feels at odds with a simple, singular category to which all digital pirates will belong. Digital piracy is difficult to pin down due to the flexible nature of digital representations. This makes the term “piracy” similarly susceptible to definitional issues.

Chapter 2 Existing Theories and Methodological Problems

2.1 Existing Theories

Despite the issues of defining and categorising pirate activity there does exist a research literature on the topic of digital piracy that attempts to provide accounts of why and how individuals choose to engage in piracy. This research commonly suffers specifically from expectations of participant' understanding of what constitutes piracy and the field broadly suffers from a strong presence of contradictory findings. However, given the wide-spread application of these theories; some core theoretical approaches will be highlighted briefly followed by an explanation of why it remains as yet unadvisable to consider such research as necessarily accurate given the current state of digital piracy research.

2.2 Theory of Planned behaviour

The Theory of Planned behaviour furthers the existing Theory of Reasoned Action (Ajzen, 1991) and provides an account for the progression from intention to eventual action or behaviour. Such research typically finds utility in the application of the Theory of Planned Behaviour often linking it to self-control and techniques of neutralisation (d'Astous, Colbert, and Montpetit 2005; Phau et al. 2014; Yoon 2011). In this sense, whilst the theory of planned behaviour might be said to be useful as a framework for approaching research on digital piracy, current research fails in so far as it relies upon further explanatory *mechanisms* that have their own failings as applied within the research space.

2.3 Self-control

Self-control is raised frequently with regards to a person's propensity to engage in digital piracy (Burruss et al., 2013; Burruss et al., 2018; Donner et al., 2014; Higgins, 2004, 2007; Higgins, Fell, & Wilson, 2006; Higgins & Makin, 2004; Hinduja, 2006; Tittle, Ward, & Grasmick, 2003). Research regularly finds that measuring low in self-control measures predicts a higher likelihood to engage in digital piracy. The primary and significant issue with this finding is that research has seen endorsement rates of pirate behaviour amongst participants above 90% (Siegfried, 2004). This raises the question of whether it is meaningful to categorise a group as 'low' when they may make up a vast

majority of the population. Furthermore, this says nothing of the likelihood that all individuals engage in some form of piracy without awareness, subverting self-control altogether (Tehranian, 2007).

2.4 The Techniques of Neutralisation

The Techniques of Neutralisation form the other common approach deployed in research on digital piracy and seek to explain engagement in infringement by detailing the ways in which individuals may reduce or eliminate feelings of guilt about having engaged in activities they may feel could be morally wrong (Siegel, 2008; Sykes & Matza, 1957; Topalli, 2006). There are several mechanisms by which this can take place and the approach is possibly one of the most utilised theories within the digital piracy research space (Higgins, Wolfe, & Marcum, 2008; Hinduja, 2007; Ingram & Hinduja, 2008; Kampmann, 2010; Moore & McMullan, 2009; Riekkinen & Frank, 2014; Smallridge & Roberts, 2013). The fundamental problem with this approach is that it relies on the assertion that pirate behaviours are wrong and/or are viewed by pirates as such. We see from research by Gray (2012) that it is not clear that pirates necessarily agree that their actions are morally wrong. Techniques of neutralisation offer a mechanism to simply dismiss such findings and brand reasons for disagreement as “neutralisations”. This creates a somewhat non-falsifiable premise and removes the ability of pirates to deny the immorality of their behaviour within this context. The presumption of immorality is something that will be explicitly discussed below as problematic for research in this area.

2.5 Haecceity

Finally, we have the concept of haecceity or ‘thing-ness’ which represents a relatively under-researched but increasingly relevant area of investigation (Frazier, Gelman, Wilson, & Hood, 2009; Hood & Bloom, 2008). This topic examines the way in which people conceptualise the things that they own as unique and how this relates to the concept of ownership. There is very limited research in this area examining how this psychological concept may apply in a digital space (Andersson, 2010; Chokvasin, 2011) and the assertions may have important implications in the context of digital piracy in the future, but this remains an as yet under-developed research area.

2.6 Methodological Problems

Regardless of the above, none of the research discussed really surmounts the biggest issue in the area of digital piracy research: the absence of behavioural checks. Research nearly exclusively uses the term “piracy” without clarity as to what this describes and without qualification. Where research does manage to define or describe terms like piracy it does so inaccurately, or uses ambiguous descriptions of actions, such as ‘sharing’ or ‘unauthorised copying’ (which might not be considered piracy or even constitute copyright infringement dependant on the participants location and context), or the assessments use very limited scenarios that would leave many pirates undetected/unmeasured, despite having no stated goal of such specific focus (Al-Rafee & Cronan, 2006; Brunton-Smith & McCarthy, 2016; Chiou, Huang, & Lee, 2005; Gopal et al., 2004; Higgins, 2004; Higgins et al., 2006; Higgins & Makin, 2004; Higgins, Wolfe, & Ricketts, 2008; Logsdon et al., 1994; Lysonski & Durvasula, 2008; Moore & McMullan, 2009; Peace et al., 2003; Siegfried, 2004; Taylor & Shim, 1993; Taylor, 2012; Wagner & Sanders, 2001; Yoon, 2012; Yu, 2012). Some studies make attempts such as clarifying ‘approved’ versus ‘unapproved’ access of files (Siegfried, 2004) but these still fail to match legal standards for infringement or properly differentiate digital piracy from other digital activities.

Research regularly establishes directly contradictory findings regarding factors predicting a likelihood to pirate. For example; religiosity is found to not be a factor in deciding to pirate (Siegfried, 2004) and religiosity is found to be a key influence (Wagner & Sanders, 2001). Arguably a possible explanation for the common contradictory findings may well be a lack consistency regarding sample population. By failing to properly define the group of interest, and then not ensuring this group is actually captured via a behavioural check, studies are likely not measuring the same types of samples of “pirates” between studies. Digital piracy research regularly produces contradictory findings and, whilst we can’t know for sure that such findings are the result of poor sampling, until core experimental issues like absent behavioural checks are resolved we will not be able to properly assess this. For this reason it is felt strongly that existing research cannot be used reliably as an assessment of digital piracy. Both a common definition of what constitutes a pirate, as well as behavioural checks to ensure participant understanding of the label, must be established for future research to have validity.

Chapter 3 The Legal Context

This section does not aim to provide a comprehensive legal account of the state of copyright law. Instead the intention is to walk the reader through a general history of copyright law to facilitate the later discussion and contrasting of law with the broader social context in which it operates. This section will discuss copyright but will also mention other parts of Intellectual Property (IP) law where relevant. Law in the United Kingdom (UK) (along with most law worldwide) does not treat information, digital or otherwise, as 'property' (Moody, 2014). In the context of IP, what are owned are instead a constrained set of rights; typically economic, artistic, or both. These 'copy rights' articulate the rules by which a rights holder can restrict/approve the sharing, transference, storage, use, modification, attribution, adaptation, and communication of said IP (Lessig, 2004; OECD, 2009). These rights are those that are said to be infringed when we say copyright *infringement* has occurred. Though some legislation has sought to protect a 'moral' rather than 'economic' right (such as French and European laws) (Feather, 1994; Stokes, 2001), no legislation has treated IP as directly equivalent to physical property (Lessig, 2000, 2004; Patterson, 1965). At its most basic level, this points to at least a legislative differentiation of physical and intellectual property (Bettig, 1996; Lessig, 2004; Litman, 2006; Sterk, 1996). Despite this, modern public anti-piracy campaigns often make physical equivalences (Motion Picture Association & Intellectual Property Office of Singapore, 2004).

IP law is a contentious area of law and the complexity of the space has only increased with the digitisation of media; it is common for lawyers to disagree about copyright law even beyond the courtroom environment; at theoretical and philosophical levels (Vaver, 2006). Despite the complicated nature of copyright law, understanding the history and origin of the laws themselves can go some way to contextualising the seeming contradictions and paradoxical developments of the legislations. The case will be made that, whilst the origins of copyright and IP protections more broadly may have started with aligned implicit and explicit purposes; the implicit purposes of IP protections have diverged significantly from those articulated expressly in the laws themselves. Because of the above suggested divergence, it is asserted that a simple reading of the law itself will not provide a full understanding of the way it is applied, hence the need for this history.

3.1 Early Copyright: The Statute of Anne

The creation of the first printing press is approximated at around 1450 (Briggs & Burke, 2009), however demand for printed works initially remained limited (Feather, 1994; MacQueen, Waelde, Laurie, & Brown, 2010). There were short timespans between printing and sale, a next to non-existent second-hand market, and the sale of printed works were almost completely unregulated (Feather, 1994). The payment made for books was primarily for the printing rather than for content and early printing rights, mostly for the right to print the bible, had been granted largely on the whim of royalty (Feather, 1994; MacQueen et al., 2010). Publishers or small groups would agree who would publish what or who would work with which authors via private agreement (Feather, 1994; Morris, 1963). The relatively small number of publishers made it easy to form alliances regarding who could print what, but technological developments began to place strain on these alliances and disputes were beginning to appear. These disputes were largely what the Statute of Anne attempted to reconcile (Morris, 1963).

The statute of Anne was written into law in 1710 (Bently & Kretschmer, 1710; Morris, 1963; Patterson & Joyce, 2003). The British parliament wrote the legislation outlining terms and facilitating the resolution of disputes as handled by the courts (Deazley, 2006). The Statute took what had been much like private-copy-contracts and replaced them with government granted monopolies of protection for specific creative works (Patterson & Joyce, 2003). The law was enacted specifically as a means to enhance the public good by encouraging authors to produce intellectual works with a monopoly control granted over the author's output. However, the statute also provided the public a means to benefit further from the work by way of the limited term of copyright (Morris, 1963; Patterson, 1965; Patterson & Joyce, 2003). When copyright terms ended the work would pass into the public domain where anyone could interact with it commercially or otherwise. Publishing institutions that had been managing the unregulated equivalents of these protections (the license agreements model above) fought the law. The attacks on the Statute of Anne became most virulent as the first works were about to enter the public domain (Deazley, 2006).

Somewhat ironically, the United States essentially copied the Statute of Anne wholesale and went as far as to add these protections of intellectual

works into the American Constitution (Bracha, 2010; Patterson, 1965; Patterson & Joyce, 2003). Despite America's historical distaste for governmental monopoly; in the domain of IP America chose to grant a monopoly on economic rights, though still limiting the duration, and did so in one of America's most culturally definitive documents. The decision to include these protections in the constitution would have vastly broader long term consequences than could have been originally imagined; the American constitution being a notoriously controversial document to amend (Patterson, 1965; Patterson & Joyce, 2003).

3.2 Copyright Term Extensions

Copyright terms were initially intended to last 14 years. At 14 years the rights holder could renew their copyright for a further 14 years or allow the work to fall out of copyright and into the public domain (Bently & Kretschmer, 1710; Patterson, 1965; Patterson & Joyce, 2003). The copyright provision has been repeatedly extended in an almost unfaltering trend of copyright term extension¹. In the US the total number of term extensions rapidly reached double figures and copyrights shortest possible term went from 14 years to a technical maximum of over 120 years (Cornell University, 2013; Hatch, 1996; Patterson, 1965; Patterson & Joyce, 2003; The Copyright Office of the Library of Congress, 2005). Furthermore, *all* works now serve the maximum copyright term by default as renewal is now opt-out. All works now gain copyright at creation without needing to be registered as a result of additions from the Berne Convention (The Copyright Office of the Library of Congress, 2005; World Intellectual Property Organization, 1886). It has been argued that such extensions are driven largely by the monetary incentives for the corporations whose copyrights would be extended rather than considerations regarding the public good which remain in various forms as part of the legislation (Gaylor, 2009; Johns, 2011; Lessig, 2004, 2011; Posner, 2003; Schwartz & Treanor, 2003). Though modern copyright term durations may seem long relative to the original 14 years they are not the longest to have been proposed. Some positions have been put forwards for far longer copyright terms including some researchers even positing the

¹ A selection of the highlights; the following years are presented as their total duration assuming extensions are taken: 1831; 42 total years. 1909: 56 total years. 1965; 61 total years. 1967; 63 total years. 1968; 64 total years. 1969; 65 total years. 1970; 66 total years. 1971; 67 total years. 1972; 68 total years. 1974; 70 total years. 1976; 75 total years. 1976; the lifetime of the author plus 50 years or 75 years for the creations of works owned by corporations. 1998 the lifetime of the author plus 70 years or 120 years for the creations of works owned by corporations (Cornell University, 2013; Hatch, 1996; Patterson & Joyce, 2003; Patterson, 1965; The Copyright Office of the Library of Congress, 2005).

possibility of indefinite copyright (Landes & Posner, 2003; Liebowitz & Margolis, 2004).

It may be useful at this point to explain the preoccupation with American copyright rather than that of the United Kingdom. A significant portion of publishing and distribution operates from or through America and this often means that legal disputes come to be framed within the American legal system. This Americanisation is only compounded by the inclusion of these intellectual protections in the American constitution.

3.3 ‘American’ Copyright

The Constitutional nature of the initial protections of copyright law make the law much more difficult to change and infinitely harder to reduce the protections (Eliot, 1914; Lutz, 1994; Voigt, 1999). Unlike more traditional law, the constitution has come to represent an aspect of American cultural identity (Karst, 1985; Lutz, 1994; Smith, 1988). This means an attack on the constitution, or related law, has the potential to appear like an attack on American values rather than merely on governance. It is therefore easy to frame copyright extension as an enhancement of American culture and reductions as an attack. This Americanisation is further compounded by America’s dominance in global trade and the way in which they enforce harmonisation with their laws to assure market access (Burrell & Weatherall, 2008; Heath & Sanders, 2007; Office of the United States Trade Representative, 2010; Stiglitz, 1997). Some modern changes to UK copyright law were introduced specifically to ensure the UK would remain comparable to arrangements about to be introduced in the US (Hatch, 1996; UK Parliament, 1995). Without wishing to downplay the role of EU copyright rules, US-based rights holders and legislators have a tendency to strong-arm copyright issues, essentially exporting copyright litigation. This can be seen in the raids on The Pirate Bay (Sweden) (Bird & Jain, 2008), the seizure of Kim DotCom’s assets and megaupload (New Zealand) (Johnston, 2012), and the extradition of a UK resident over the management of streaming sites in the UK (Bowcott & Bowcott, 2012). In this sense, regardless of where an infringer is based, if the copyright holder is in the US, which is often the case due to the concentration of publishers and distributors in America, then they may end up dealing with US law regardless. This tendency of US copyright law to be enforced more globally is the reason for a US focus in discussion of legislation: it is US law, or a reflection of it, that you are quite

likely to be litigated under regarding copyright infringement, even as a UK citizen.

3.4 Copyright for the Millennium

The Digital Millennium Copyright Act (DMCA) (Congress, 1998) introduces, amongst other things, a provision for digital locking technologies, and articulates restrictions regarding how digital locks can be inspected, interacted with, and communicated about; stipulating both civil and *criminal* liability for such actions under various circumstances. The DMCA categorises such locking mechanisms as Digital Rights Management (DRM). DRM technologies and the associated legislation provide a means to lock the uses of digital content and make it illegal for the locks to be broken (Litman, 2006). This has created legal consequences such that it can become a criminal offense to exercise legitimate copyrights from legally purchased content if doing so involves circumventing DRM (Congress, 1998; Litman, 2006; von Lohmann, 2005). For example, UK law has clarified and then reversed prescriptions regarding the legal status of personal copying, such as for back-up purposes, as this involves circumventing DRM (Brodkin, 2015; Kelion, 2014). Circumventing the DRM has been ruled legal under certain circumstances (Court of Justice of the European Union, 2014; United States Court of Appeals, 2010) but again, it is still illegal to seek out, discuss, or inspect DRM *generally* (Congress, 1998; Litman, 2006).

One consequence of the illegality of discussion of DRM is that certain math and even specific prime numbers may be technically illegal to distribute (Craig, Honick, & Burnett, 2005; Craig et al., 2005; Gillespie, 2007; Klemens, 2006). Most DRM is redundant against even an apathetic but technical skilled user, which leaves legislative deterrents as the main defence (Congress, 1998; Litman, 2006; Gillespie, 2007; Hewitt, 2013; Klemens, 2006). This issue rapidly spirals out of control as computer code is dependent on the correct *interpreter* to render the information sensible to humans and the data itself can be stored in a near infinite number of permutations (Klemens, 2006). As such, numbers and code have no objective meaning without the appropriate interpreter and can therefore be coded as anything. Caldwell (2013) illustrated this by coding DRM removal software that could be represented as binary, which could in turn be represented as a single prime number. As such, distribution of the prime number is technically illegal, though without the correct interpreter, it is quite literally just a number.

3.5 Summary

Copyright law started as governance of a tiny group of publishers with the goal of incentivising the creation of works that would later enrich the public domain (Bently & Kretschmer, 1710). Modern copyright law has seen a drastic growth of copyright and IP legislation that now govern most of the public rather than just a few publishers (Congress, 1998; UK Parliament, 1995). Concerns have been raised regarding the appropriateness and suitability of copyright law to adequately govern the modern copyright environment on the Web and internet (Akerlof et al., 2003; Gowers, 2006; Hargreaves, 2011; Posner, 2003). Concentrations of American rights holders have meant that whilst copyright laws have changed worldwide, individuals may be forced to face US copyright law regardless of where they live. This has produced a modern world where US based organisations legislate for a large body of the world's private citizens, including restricting their legal rights to use digital media, and in such ways that may criminalise their interactions with copyrighted works. Finally, the implementation of DRM has meant that many consumers simply no longer interact with copyright directly but as mediated by licence agreements and rights management restrictions that constrain individual use of copyrighted works instead.

Chapter 4 What is crime?

In the most simplistic of senses; ‘crime’ represents those activities which are prohibited by law. Yet, there is also a notion that laws describe and prohibit what is ‘bad’. Despite this, there are many acts that we conceptualise as wrong or even ‘deviant’, yet these actions are not illegal (Andersen, 2011; Brown, Esbensen, & Geis, 2010; Clinard, 2008; Siegel, 2010). Perhaps then, we can more clearly define criminality by simply saying that the law defines what is *currently* legally prohibited. Yet, this merely raises a different question of *how* any particular action came to be described in law (Andersen, 2011; Plummer, 2010; Siegel, 2010). Furthermore, laws and morality have changed over time which points to an unstable quality of crime and deviancy. If crime now may not be criminal in the future then a definition of ‘... as defined by law’ is simply insufficient to capture the nature of this topic. In this way, any discussion of copyright infringement or digital piracy that proceeds without first establishing a clear framework for approaching the legal and moral categorisation of such activities will find itself lacking a firm foundation. Not only that, but historical comparison will break down where the categories that define behaviour shift through history, even if the actions themselves remain largely similar. In this way, clearly framing a conception of crime, deviancy, and action is a necessary step in the examination of the conception of piracy across time. The later sections of this work, examining historical and digital piracy, depend on such a nuanced understanding of crime and deviance. Additionally, the social theories applied below are established and related now so as to facilitate their use in the later historical comparison.

Piracy will be discussed throughout history; examining the relationships between such historically disparate categories as seafaring piracy through to modern digital copyright infringement/digital piracy. The argument will be made that the shared name of such seemingly dissimilar activities is not accidental. Furthermore, it will be argued that there is an important historical trajectory regarding the use of the term pirate and that an understanding of the nature of this label is important to understanding modern digital piracy.

Digital ‘piracy’ is a somewhat anomalous term. Digital copyright infringement is a more accurate legal term, with use of the term ‘pirate’ and ‘piracy’ even beginning to be banned in court (along with associated terms like ‘stealing’ within copyright cases) with the assertion that they are

pejorative and inaccurate (Ernesto, 2013; Williams, 2013). Digital piracy also bares little physical resemblance to the acts of historical or even modern seafaring piracy. Indeed, much like the above, the first uses of the word ‘piracy’ for intellectual violations are primarily pejorative or even humorous (Dekker, 1603). Despite the seeming lack of relevance, digital ‘pirates’ have embraced the term: “The Pirate Bay” (Klose, 2013), “The Pirate Party” (BBC, 2009; Halldórsson, 2015; Li, 2009), and communities like “/r/Piracy” (on social media sites like Reddit) (Ernesto, 2014). If seafaring piracy and digital copyright infringement are so physically dissimilar then are there other factors that can explain such ready affinity amongst infringers for adoption of the term? To properly answer such questions we must first return to the broader topic of “What is Crime?” with a view to addressing a key distinction: the difference between crime and deviancy.

4.1 Is Crime Always Deviant?

An integral concept within criminology is that crime and deviancy are two distinct descriptors (Brown et al., 2010; Siegel, 2010). A double dissociation of crime and deviancy makes their separation easily apparent:

Table 1 Dissociation of Illegal-Legal, Not Deviant-Deviant.

	Illegal	Not Illegal
Deviant	Murder	Adultery
Not Deviant	Possession of a “short lobster” ²	Breathing

There is a large portion of subjectivity involved in the designation of the deviant descriptor. With progressive legalisation of Marijuana happening across the United States (Stebbins, Frohlich, & Sauter, 2015), is marijuana deviant, criminal, locally legal but federally criminal, locally acceptable but federally deviant? An accurate answer could appear quite paradoxical. Yet in the example of murder; we may broadly perceive the act as unequivocally bad, regardless of the law. Such behaviours may seem evidently ‘deviant’, but as the scope of legality/illegality broadens then deviancy and criminality appear less intertwined.

² As in The Lacey Act (18 U.S.C. 42; 16 U.S.C. 3371-3378) which would make possession of a “short lobster” a Federal crime in the US (Duane, 2008). To quote Duane (2008), “It doesn’t matter if he’s dead or alive. It doesn’t matter if you killed it, or if it died of natural causes. It doesn’t even matter if you acted in self-defence!”

4.2 The Meaning of “Deviant”

Putting the law aside for a moment, in the context of ‘deviancy’ the evidence suggest that, much like many areas of psychology and social science broadly, definitions of deviancy are shaped partly by socialisation and partly by nature (Dawkins, 2006; Haidt, 2013; Sunar, 2002; Workman & Reader, 2014). Though the biological research is more limited, there is a growing body of evidence supporting the notion of very basic systems of morality present in the human mind (Haidt, 2012; Sunar, 2002; Workman & Reader, 2014). It is not suggested that such systems hardwire concepts like ‘murder is wrong’ but rather that there are defined structures associated with moral reasoning. There is then a broader and more general psychological assertion that structure shapes and influences function. This foundational structure may then guide most people to develop a sense that murder is wrong, assuming roughly equivalent environmental experiences. Genetic and experiential variance doubtless also plays a significant role but this partial biological account has been used to address broad similarities of moral reasoning across cultures. For instance, most cultures have general prescriptions against murder, rape and theft of personal possessions (Haidt, 2012). Regardless it remains important to note that socialisation plays an important role within these biological systems. Research suggests that digital piracy is much more acceptable within collectivist societies and this is argued to result directly from different social experience (Shin, Gopal, Sanders, & Whinston, 2004).

The above discussion may seem tangential to the criminological examination of crime and deviancy but it is not. The notion that there is a conception morality, common to humanity, is a fundamental element of law. More importantly, the notion of law as shaped by inbuilt morality offers yet another avenue for understanding where conflicts between common behaviour and the law may occur.

4.3 Ethical Systems and Moral Judgements

Morality is the individual philosophy of a person regarding what they consider to be right and wrong/good and bad. Ethics refer to the *rules* that instruct a person’s actions (Sunar, 2002). In this way, it is possible to hold a personal moral philosophy regarding right or wrong and to act within still further constraints of an ethical code. ‘Law’ therefore, defines an ethical system that establishes the rules of behaviour in specified contexts. How then are morality and ethics related?

Whilst it is not uncommon to receive some form of civic education, the law is extensive and it would be impossible to teach all citizens the complete detail of every law. Despite this, the legal maxim holds that 'Ignorantia Legis Neminem Excusat', Latin for "Ignorance of the law excuses no one" (Cass, 1975). This means that a lack of knowledge or understanding of the law is not a defence for breaking it. The basis for this notion goes back at least as far as Plato's Minos Dialogues, "noble things... are everywhere lawfully accepted ... as noble and the shameful things as shameful, but not the shameful things as noble or the noble things as shameful" (Kernahan, 2004, p. 12). In practice, we must acknowledge that some notion of inbuilt (or at the very least, generalizable) understanding of good and bad must be partially assumed by the legal process. If this were not the case it would be unreasonable to expect a universal fore-knowledge of the law without comprehensive training. People must have *some* inherent or generalisable sense of right and wrong in order to facilitate a functioning legal system. The culmination of all these factors detailed thus far is why we must consider ethics, morality, crime and deviance, when examining why individuals engage in digital piracy. It should also point to possible difficulties in moral inference around concepts that have limited relationship to the sorts of moral or immoral perceptions that were shaped by natural selection in earlier human history. Copyright is a concept not directly represented in our evolutionary past and so presents a good candidate for this sort of consideration.

As above, it may serve this work to deemphasise the designations of right or wrong, moral or immoral, with regards to digital piracy in order to more acutely examine the reasons behind why prescriptions against digital piracy have emerged as they have. Later sections will discuss how, during the Golden Age of piracy, both the moral and legal status of sea faring pirates' actions was regularly quite confused (Bradford, 2007; Land, 2007). Yet researchers such as Cakar & Alakavuklar (2012) tell us:

"No matter how romantic they may sound in stories and even in history ... pirates are a group of evil individuals forming evil organizations that harmed people. [In this study]... there won't be an idealization of their romantic pirate image. Pirates were not a bunch of freedom fighters; they were illegal people who faced a world where sky was the limit."

Concluding in this way will necessarily close off the path to certain kinds of analysis regardless of whether or not it is accurate or valuable. This was already highlighted with regards to the use of Techniques of Neutralisation (Siegel, 2008; Sykes & Matza, 1957; Topalli, 2006) above. This research is not interested in whether piracy of any kind is right or wrong but rather *how* it has been considered as such. Criminology and social research generally highlight the need for conceptualisations of deviant/illegal behaviour as simply 'behaviour', absent of qualifiers, and that actions should be considered in terms of behaviour more generally as well as in terms that deal specifically with deviance (Akers, 1968; Brown et al., 2010; Siegel, 2010). Whether civil or criminal, the research suggests piracy is not perceived as deviant (Grey, 2012; Yu, 2012). This creates tension between citizens' perceptions and the law. To this end, criminological and sociological theory will be introduced in this section by relation to crime and deviancy more generally, establishing frameworks that may be redeployed in later analysis of the topic of piracy.

Chapter 5 Theories of Crime and Criminality

The intention of this work is to address the similarities of historical and modern piracy, in part, through the lens of social theories. Relevant social theories will be described including their relevance to modern digital piracy. These accounts will serve to establish theoretical approaches and their relationship with piracy so as to be applied more broadly in assessing the historical examples to come.

5.1 Functionalist Theory

The functionalist approach reframes our earlier question of 'what' crime is to ask instead 'why'? The functionalist approach frames illegality as serving a function by providing a form of social equilibrium (Durkheim, 1982; Liska & Warner, 1991). Strain is said to be placed on society, disrupting the sense of societal balance and resulting in the labelling of aspects of behaviour as deviant (of which some may be categorised criminal/illegal) (Agnew, 1992; Merton, 1938). Functionalist theory suggests that society as a whole seeks to return to a normative state of equilibrium. This process of attempting to address the imbalance draws communities together in an attempt to form against the common enemy of crime/deviance. In this way, communities' bonds are strengthened and pro-social behaviours like adherence to the law or to social norms are reinforced (Andersen, 2011; Morris & McDonald, 1995). When examined, isolated from historical accounts, digital piracy does not seem to adhere to the functionalist perspective. Much of functionalist theory is predicated on the negative perception of the deviant act and the resultant negative feedback loop. However it is not clear that piracy is universally viewed as deviant (Gray, 2012; Lysonski & Durvasula, 2008; Yu, 2012) and so it is not clear digital piracy engenders the required response to ultimately promote a return to legal interactions with copyrighted works. Equally, many of the legal expansions of copyright law were driven by small numbers of people and organisations rather than through a society wide drive towards 'equilibrium'.

5.2 Symbolic Interactionism

Much of the later discussion of this work will centre on the nature of definitions, how labels of deviance emerge, and who assigns the labels. Symbolic interaction theory provides a description of how actions and

individuals are labelled (Andersen, 2011; Denzin, 1992). The theory posits that cycles of deviancy are maintained and/or created by the designation of members of society or acts as deviant/criminal. The process creates a kind of self-fulfilling prophecy whereby individuals begin to act out the characteristics assigned to them, forming an identity around their label. Similarly to the above, this seems incompatible with digital piracy as negative perceptions of piracy are not universal (Gray, 2012; Lyonski & Durvasula, 2008; Yu, 2012). To hint at further discussion, it should be noted that in some circumstances the pirate label has been transformed such as in politics with various “Pirate Parties” (BBC, 2009; Li, 2009), and these groups do not view their namesake negatively. This would seem like almost a reversal in the application symbolic interactionism. Like functionalist theory, symbolic interaction may seem less compatible with accounts of modern digital piracy but will become an important tool in forming analogy between historical and modern digital piracy later in this work.

5.3 Conflict Theory

Conflict theory offers a much more intuitive account of digital piracy (Andersen, 2011; Singer, 2000). The theory is built upon Marx’s earlier work on conflict and inequality and offers particular utility by way of the lack of prescriptive moral labelling (Andersen, 2011; Spitzer, 1975). Instead of labelling actions as deviant, conflict theory argues that it is those with power who are able to label those without power, much like symbolic interaction theory. However, it is not simply that the less powerful are labelled as criminals or deviant. Instead, crime is said to result from inequality. Conflict theory conceptualises power as both legal and social in nature, granting such people or groups the organisational, economic, and institutional powers necessary to label people, actions, and/or groups as deviant/criminal. This characterisation of the labelling of pirates has been made specifically with regard to copyright by Bettig (1996, p. 110) where they focus on the entrenched nature of the powers that decide copyright law,

“The pervasiveness of “ruling class views,” hegemonic media practices, and the lack of alternative and critical views helps to maintain class inequalities and undemocratic social relationships.”

So despite being legally inaccurate, terms like “piracy” and “theft” are

applied regardless to digital copyright infringement (Motion Picture Association & Intellectual Property Office of Singapore, 2004) and this is possible only because of the institutional power that such organisations control (Deazley, 2006; Feather, 1994; Griffey, 2004; Litman, 2006, 2010). Conflict theory has clear application to modern digital piracy but the utility of this theory grows further still when looking later at the similarities between this modern framing of digital piracy with the historical.

5.4 Hegemonic Control

The next theory is already identified in the quote above by Bettig (1996): Hegemonic control. Similar to conflict theory (Andersen, 2011; Singer, 2000), the case is made that institutions and organisations leverage power in order to shape the world-view with regards to morality and ethics (Sampson & Laub, 1990, 1992). The idea of biological influences has already been raised above and the degree to which social vs biological factors interact is strongly debated within the context of this theory (Workman & Reader, 2014). Whatever portion the social component accounts for, it is asserted that hegemonic forces are powerful influences within the domain of moral and ethical beliefs, handing the capacity to shape much of the discourse to a powerful few. Where conflict theory offers a method, hegemonic power explains the mechanism: those in society with institutional power can exploit inequalities (political or social) to control the information in a society and thereby shape it across many domains (Litowitz, 2000; Plummer, 2010; Spitzer, 1975). This is essentially in line with Bettig's (1996) quote above. In fact, the notion of entrenched institutions (primarily distributors and rights holders) exploiting social and political power (law and advertising) to dictate the discussion on issues of copyright is a relatively consistent narrative in the copyright space (Feather, 1994; Lessig, 2000, 2004, 2004; Litman, 2010). However, a counter narrative would be that, despite the above, piracy is ubiquitous (Gray, 2012) and research regularly indicates piracy may not be viewed as deviant (Assenova, 2007; Cooper & Harrison, 2001; Gray, 2012; Karaganis, 2011; Lessig, 2007; Lysonski & Durvasula, 2008; Yu, 2012). One way to integrate this discrepancy may be to view this as a process seeking equilibrium and pirates as engaged in the hegemonic process as well, pushing back from their side. Hegemony may retain more relevance if the process is framed more from the perspective of property.

It is asserted that the power-inequality in hegemonic control, in conjunction with the power to pronounce what constitutes 'deviant', can be used to describe and thereby shape perception (Wirtén, 2006). One such example may be evident in the use of the words 'intellectual property' or IP. Previously it was noted how the 'property' component of IP is a designation driven largely by IP rights holders (Stallman, 2004; Wirtén, 2006). It is a set of rights that are said to be owned when referring to copyrights. Intellectual works, data, and information more generally are never considered to be "property" (Derclaye, 2009; Feather, 1994; Patterson, 1965; Pinsent Masons, 2014; Lessig, 2004; Stokes, 2001; World Intellectual Property Organization, 1886). In this sense it is easy to frame the emergence and prevalence of 'Intellectual Property' terminology as a direct result of the hegemonic control exerted by entrenched industry powers (Lessig, 2000, 2002, 2004, 2011; Litman, 2006; Stallman, 2004; Sterk, 1996; Torr, 2005). It can be seen that whilst hegemonic control may offer a useful tool for examining pirates themselves its explanatory utility grows dramatically as it is applied to the domain of digital piracy and copyright infringement more broadly.

5.5 The Necessity of History

There are several theories that seem to offer insight as to the nature of the tension between pirate self-perception and the law. These vary in degrees of applicability. However, the most relevant/applicable appear to be those theories that focus on the use of language and how it is controlled. The social theories above are often based in or drawn from the work of those far further back in history. Historical perspectives are adapted and adjusted over time and modernised for application in modern scenarios. The use of such historical perspectives to approach current events in a novel way is common, such as using Marxist typologies to examine the 2011 London riots (Kawalerowicz & Biggs, 2015). These theories are often thought to have broader historical relevance across time. This leaning on a wealth of history within social and criminological research has led some to suggest a wider trend of convergence between history and criminology (Godfrey, Lawrence, & Williams, 2007). In some sense, all research looks to the past as a means to interpret the present and to hypothesise about the future. Yet still, researchers like LaFree (2007) have suggested that, core to improving the practice of criminological research, is to take a broader and better look at historical information and data rather than simply drawing on historical theorists.

This work takes the view that history is particularly relevant to the modern study of “cyber” crime. The World Wide Web is often perceived as having spawned many “new” crimes that people have sought to understand in new ways. Jaishankar (2007, pg. 1) suggests that, “Cyberspace presents an exciting new frontier for criminologists... new forms of deviance, crime, and social control”. Certainly the Web and internet *do* facilitate behaviours that may not have been possible before the advent of such technologies. But it’s possible that this perception of ‘newness’ misses the importance of the historical perspective that criminologists have commonly referred to, ignoring that ‘cyber’ crimes are still crimes after all. The ‘newness’ of cybercrime is perhaps the very thing that should focus a more deliberate effort to engage in a practice of revisiting both the rich historical tradition of criminology and the incorporation of the ever growing body of historical data.

There is often a common thread in criminological theory that crime doesn’t ever stop but instead simply changes; that new laws make new criminals but the underlying activities often remain largely similar over time (Brown et al., 2010; Clinard, 2008; Godfrey et al., 2007; Hirschi, 2011; Siegel, 2010; Webber, 2010). This semi-static nature of criminality is worth thinking about when examining any ‘new’ crime. Are these actions adaptions of previous behaviours or ‘new’ ‘cyber’ crimes? Do they have historical analogues, will these analogues always be obvious and direct, and what do these historical analogues tell us about modern comparators, if anything? This work takes the view that, whilst historical and digital piracy is doubtless different in many respects: they have similarities and these similarities are important for our understanding of the broad topic of piracy; past and present. The following sections will attempt to justify a broader historical examination of the term ‘pirate’ and present historical evidence as an integral part of the process of establishing what it means to be a modern digital pirate.

Chapter 6 Pirates, “Pirates”, and *Pirates*

‘Piracy’ as used to describe the act of infringing copyright, is a contentious term. Piracy is not a legal term (Ernesto, 2014; Williams, 2013). Digital piracy equally lacks a physical similarity to seafaring pirates. Yet ‘Piracy’ has become widely recognised to describe digital copyright infringement (Patry, 2009). The reality may be that whilst the practical similarities are minimal, there remains a shared thread of some form with seafaring pirates (Cakar & Alakavuklar, 2012; Land, 2007). The term ‘piracy’ established and maintained a place in vocabulary of speakers around the world and this may be because of similarities of culture, cause, and motivation shared between digital and physical pirates, despite very different actions in the world. This may also explain the tendency of digital pirates to reclaim the ‘pirate’ label as their own (BBC, 2009; Gray, 2012; Halldórsson, 2015; Li, 2009).

In a historical context ‘Piracy’ is typically associated with what is known as the “Golden Age” of piracy (Kuhn, 2010; Rediker, 2005; Sherry, 2008); the piracy of *Pirates Of The Caribbean*. This was Piracy that took place roughly between the 1650s and the 1730s in the Caribbean and other shipping lanes. The qualifier of “age” is necessary as there were many other ‘types’ of piracy spanning human history (Wombwell, 2010).

The word itself derives from the Greek “peira” –to attack. The modern association with the term tends to reflect specific connection with the Golden Age where historically the term simply labelled people who commit attacks via boat/ship against others at sea or even on land (Mejia, Kojima, & Sawyer, 2013). Historically this would include those who attack via the sea, attacking boats, and/or raiding along the coast. This is to say that historically the term pirate differs somewhat from our modern association (Cakar & Alakavuklar, 2012; Kuhn, 2010). Prior works examining piracy by analogy have relied more heavily on the images portrayed in popular culture than in history (Cakar & Alakavuklar, 2012; Egloff, 2015; Land, 2007).

In fact, the word itself is a difficult topic to examine historically as not everyone who ‘pirates’ is a ‘pirate’. Inconsistency of definition is one of the many ways that it will be argued that digital pirates are like their historical name-fellows. What follows is an examination of two historical ‘Pirates’. The second historical piracy discussed will be the well-known piracy of the

Golden Age. The first will be one that is less commonly associated with the word ‘pirate’: the Vikings.

6.1 The Vikings

The word ‘Viking’ as used *means* ‘pirate’ (Crawford, 2015; Heide, 2008; Richards, 2005). Though rarely applied; the Vikings certainly fit the historical characterisation of pirates. Some definitions do restrict ‘piracy’ to ‘...one boat to another’ but others define it more generally as ‘attacks along the coast’ or something akin to ‘...facilitated by boat’ (Logan, 1983; Richards, 2005). The broader definition would seem more in line with historic accounts where ‘Pirates’ are not discriminatory in their pursuit of profit. In fact, Henry VIII broadened the legal definition to include criminal acts committed at sea but also in any haven, river, creek or place where the Admiral or Admirals have power, authority or jurisdiction (Rickards, 1864). This is perhaps a reflection of Henry’s closer temporal relationship to the Vikings. Though Viking does mean ‘pirate’, the etymology of the word, particularly the root “Vik”, has been suggested to refers to creeks, possibly a reference to Viking longboats that could sail inland through shallower waters, creeks, and rivers and were even light enough to be carried through sections that were too shallow (Heide, 2008; Logan, 1983; Richards, 2005).

The “Vikings” would not have known themselves as such; their title did not appear until later on in history (Crawford, 2015; Ferguson, 2010; Richards, 2005; Winroth, 2014). The term “Viking”, as used to describe these people, emerged later in Old-English, with 11th century roots in Old Norse (Heide, 2008; Logan, 1983; Richards, 2005). Historians sometimes avoid the use of the term ‘Viking’ broadly, choosing instead to reference the specific Germanic tribes, wider Nordic groups, individuals, or geographic areas relevant to their discussions (Christiansen, 2006; Clements, 2005; Logan, 1983; Richards, 2005; Roesdahl & Wilson, 1992). The more accurate phrasing is in fact “The Viking Age”: typically stated as A.D. 793-1066, encompassing the Viking raids in Europe and beyond (Logan, 1983; Richards, 2005; Roesdahl & Wilson, 1992). This is perhaps one of the more overt similarities we see between digital pirates and ‘Vikings’: the vagueness and lack of clarity regarding who they actually are. To facilitate easier communication, “Vikings” will be used rather generically within this piece but specifying individuals and groups where appropriate.

“Viking” then, refers broadly to Europeans and Northern Europeans who went raiding during the Viking Age (Christiansen, 2006; Clements, 2005; Crawford, 2015; Ferguson, 2010; Logan, 1983; Richards, 2005; Roesdahl & Wilson, 1992; Winroth, 2014). Thus, of the older Germanic tribes, Nordic peoples etc., not all would go ‘a Viking’ though all are often labelled/mislabelled as Vikings. This conflation of group identities will also come to bear on an even deeper relationship to digital copyright infringement; are all infringers necessarily ‘pirates’?

6.2 Pre-“Vikings”?

The Viking Age is a relatively small portion of a larger history of European peoples and the demographic groups they became. Earlier in history, some of these groups were “The Germans”, as described by Roman authors, sometimes grouped as the Goths, Suebi, Vandals, etc. (Craughwell, 2008; Halsall, 2007; Todd, 2009). Of “Viking” history, Gods, and heroic tales; some are detailed in stories and poems that have later been collected into the Prose Edda (also known as Snorri’s Edda) and the Poetic Edda (Cook, 2001; Crawford, 2015; Lindow, 2001; Richards, 2005). Generally termed ‘Norse Mythology’, these stories detail the exploits of Odin, Thor, Loki, Freya, and Balder (amongst others) (Crawford, 2015). In a modern context, these are often thought of as the ‘Gods of the Vikings’. In reality, these are just *some of* the pantheon of Gods, Giants, and heroes worshiped by the various Germanic, European, and Nordic peoples throughout a much longer history. In this sense, much of what we conceive of as ‘Viking culture’ has older (in some cases, more modern) roots and again, like in a digital context, we see the external application of culture to groups where it may not be appropriate or accurate. In particular, the Romans noted ferocity of the earlier German tribes they encountered both as a risk and a possible benefit. The Romans saw the potential to employ the formidable tribal peoples as mercenaries (Craughwell, 2008; Halsall, 2007; Todd, 2009). This was extremely successful; Todd (2009, p. 60) in particular notes that, “In the later fourth century it becomes difficult to identify holders of the most senior [Roman] military posts who were certainly *not* Germans” and that several Germans achieved the highest military rank possible. The adoption of ‘barbarian’ culture to support ‘traditional’ operations is something that will be discussed later in relation to corporate adoption of pirate techniques.

6.3 Vikings and the Shaping of Culture and Religion

The area in which the Vikings would ultimately change dramatically was through their religion. Upon encountering Christianity they often adopted the new faith, though their ‘adoption’ of Christianity was often less than full (Brink & Price, 2008; Ferguson, 2010; Kristjánsdóttir, 2009; Richards, 2005; Todd, 2009). This resistance would eventually acquiesce and many Vikings fully embraced Christianity (Brink & Price, 2008; Holman, 2007) though components of the pagan religion remained for some time. An important component to this process of Christianisation was the time the Vikings spent settled in early Britain and France.

Several Viking settlements would come to exist in Britain during the Viking age, shaping the politics as they supported or interacted with the culture and with the monarchs of the time (Holman, 2007). At the same time, the adoption of Christianity amongst the Vikings was growing, including in Scandinavia and France, further supporting the adoption of the religion and in particular in the British settlements (Brink & Price, 2008; Holman, 2007). This is not before they are suggested to have shaped aspects of early British language and cultural makeup (Brink & Price, 2008), political and economic history, monuments, burials sites, inscriptions, houses and even genes (Holman, 2007), along with many Christian churches that stand today (Collingwood, 1927). In fact it is possible to utter whole ‘English’ sentences where every word stems from Old Norse (Brownworth, 2014). From Rome to the Viking Age to the later settlements in England and France; the ‘Vikings’ become ‘pirates’ as a result of what is essentially a changed perspective of the victims/beneficiaries of their actions. This reversal of role is not dissimilar to what is seen with the pirates of the Golden Age.

6.4 The Golden Age of Piracy

The Golden Age of Piracy refers to the period of time of approximately the 1650s to 1730s. This is the ‘piracy’ most common in recent Hollywood depictions (Bradford, 2007; Kuhn, 2010; Sherry, 2008). The pirates of the Golden Age (GA hereafter) pose a tension for those wishing to align their social or politics ethics with ‘piracy’. On the one hand, GA Pirates had, in some respects a very egalitarian society, possibly more equal as compared against the wider society of the time (Rediker, 2005). On the other hand, GA pirates remain largely composed of people engaged in overtly criminal and

often exceptionally ‘deviant’ activities (by both historical and modern standards) (Land, 2007; Turley, 1999). Greater equality between genders and for minorities was more common, yet horrific acts of violence and mutilation were also not unprecedented (Turley, 1999). It is therefore important to establish details of the GA Pirates before historical comparison is made.

In thinking about how names, labels, and terms are applied it is worth quickly examining the terms below as they have been used to describe various ‘pirates’ throughout history and in media/fiction.

Table 2 Terms commonly used to refer to pirates and their definitions based on Kuhn (2010).

Term	Definition
Brigand	General term for a robber.
Privateer	Mercenary ship with Royal approval to pirate only enemies of the crown; percentage of plunder paid back.
Corsair	Anglicised French term for privateer
Buccaneer	English, Dutch and French game hunters who lived in Hispaniola. A common place for pirates generally hence the relationship of the term. Preserved meat in a buccan (smoke house) and smelled of the meat hence the nickname Buccaneers. Primarily attacked Spanish ships in Caribbean Sea during 17 th century.
Freebooter or Filibuster	Multi-lingual root combinations from translated privateer/pirate/buccaneer
Swashbuckler	16 th century Armed Brigands, then 17 th century swordsmen, then picked up by fiction/Hollywood as synonymous with Pirate.

The point to make here is that for Buccaneer, Freebooter, or Brigand in particular; it is actually quite hard to establish whether an individual was engaged in behaviour that constituted ‘piracy’. This is not dissimilar to the situation that exists for modern digital pirates.

6.5 Privateers

Nowhere is the problem of definition more evident than in the case of Privateers. As mentioned already, Henry VIII updated piracy laws (Rickards, 1864) but this did little to clarify the definitions. Where the early European tribes engaged in many of the same behaviours that would later see their descendants branded as “Vikings”; we see a similar definitional problem at play in the case of the GA Pirates.

Privateers raided ships at sea; attacking and boarding them, killing many or all of their crew, and stealing their cargo (Antony, 2007; Bradford, 2007; Kuhn, 2010; Sherry, 2008). They were pirates in every sense but with the addition of paperwork from their monarch or government; a letter of marque, that authorised their attacks on foreign vessels only (Bradford, 2007). In many ways this meant privateers could form a profitable self-funded army for their country of origin; the privateers paid a portion of their earnings back to the government or Crown (Cakar & Alakavuklar, 2012). ‘Pirate’ could therefore be a label applicable based on whether you shared a homeland with the passing ship or not. Complicating matters further; many ships forged documents or pirated with the assumption they would be pardoned or ignored so long as they didn’t attack the wrong ships (though they often did anyway). There is debate amongst historians regarding figures like William Kidd (Alexander & Richardson, 2009; Sherry, 2008), who was executed for piracy though alleged he acted only as a privateer.

6.6 Social Organisation

As noted above, there is some evidence that the pirates of the GA were more egalitarian than their common alternative; the Navy (Kuhn, 2010; Land, 2007; Rediker, 2005). Counter to this egalitarianism, some work has highlighted the graphic nature of many of the actions of pirates, explicitly calling them “evil people” (Cakar & Alakavuklar, 2012). Certainly there is a romanticism of GA pirates; they are one of the most popular subjects of erotic novels (Rexroth, 2014).

Likely due to the naval background of many GA pirates, there remained a strong social order/hierarchy and approximate rule-set that was to be followed by GA pirates (Kuhn, 2010; Robinson & Robinson, 2015). It is difficult to determine the level of adherence to the rules and principles given their already anti-authoritarian tendencies (Rediker, 2005). However, GA Pirate rules were espoused regularly enough to reach modern historians,

suggesting at least their status as a set of ideals even if they were not rigidly followed.

Though popular culture has portrayed an ‘equal share’ amongst GA pirate crews, the reality is closer to a ‘proportional’ share. There were well established percentages for the splitting of ‘booty’ which extended to rudimentary insurance policies for the loss of limbs (Kuhn, 2010; Sherry, 2008). To quote Bradford (2007, p. 86)

“Once they had prepared the boat, they voted where to cruise and they worked out the finances: they calculated a fixed sum of money to be paid to the captain and to anyone who was severely injured—who lost a limb or had a wound that pierced his body—and then captain and crew calculated the shares, six or seven shares to the captain and his boat, one share or more depending on his specialty to each member of the crew, half a share to the ship’s boys, and so on. Each member of the crew swore an oath on the Bible that he would not sequester any piece of plunder—the punishment for violating the oath was banishment without a share. Differences of opinion were settled by duel. If the duel was considered unfair—a shot in the back, for instance—the perpetrator would be tied to a tree and shot to death by a man he selected himself.”

Though unpleasant, pirate life must be considered in context. Democracy and equality seem more common as compared to the navy and there is even suggestion of a handful of women Captains (though these histories are subject to much scrutiny) (Bradford, 2007; Kuhn, 2010; Rediker, 2005). Regardless, GA pirates do appear to have been more socially liberal and their treatment of minorities such as ethnic minorities, women, and the disabled was unusual for the time (Bradford, 2007; Rediker, 2005). Though GA pirates were criminals in their time, they would not all have been involved in the worst offences. In many instances, it must be considered that the ‘pirates’ may not have been criminals at all and this is compounded by the complications of privateering.

6.7 What Makes a Pirate?

Discussion thus far has focused on what digital piracy typically entails in a practical sense. However, as noted earlier, the pirate label equally conveys little in a formal context. ‘Pirate’ is not a legal term and has been banned in court cases as pejorative (Ernesto, 2013; Williams, 2013). Its practical legal value is limited; when *digital* pirates ‘steal’ someone’s

copyrighted work the originals remain; something the victims of ancient seafaring pirates might have appreciated (Craig, Honick, & Burnett, 2005; Johns, 2011; Lessig, 2004). If creators are said to be deprived in *some* sense then the process by which they are deprived is clearly more complex than traditional theft. The question of whether piracy represents a “lost sale”, or pirate consumption relative to paying customers, is subject to debate (Givon, Mahajan, & Muller, 1995; Koh, Murthi, & Raghunathan, 2014; Peitz & Waelbroeck, 2004; Stevens & Bell, 2013). And yet still, ‘pirate’ appears in the Berne convention (World Intellectual Property Organization, 1886) and the use of ‘piracy’ to describe intellectual infringements is recorded back to the 1600s (Dekker, 1603). Charles Dickens, upon reaching America, only to find his works already published without permission, called the American publishers ‘pirates’ (Tomalin, 2012). Even in reference to law, use is ambiguous and inconsistent; from branding unlicensed (but paying) Netflix customers ‘pirates’ (Crawford, 2014; Geist, 2014; Turner, 2013) to the daily changing legality/illegality of copying personal CDs (Brodkin, 2015; Kelion, 2014). A purely pragmatic description like ‘a person who infringes copyright’ falls short too: estimated naïve (without awareness/intent) infringement for a single day has suggested potential individual liability for up to \$12.45M and possible criminal charges (Tehranian, 2007). This estimate is not targeted at those deliberately engaged in infringement.

Chapter 7 Typologies of Digital Pirates

To address what it means to be a digital ‘pirate’ several suggestions for organisation will be made. These will be developed as to potential typologies of digital piracy. Finally, a comparison will be made between modern digital copyright infringers and their historical counterparts discussing the typologies as well as historical similarities. It will be suggested that the complexity of the label of ‘pirate’ is a function of how the term is used and has been used across time.

Though producing this pirate ontology was a subjective process, based on the researcher’s interpretation of pirate behaviour, this was done based on the evidence described throughout the research literature as well as guiding methodological principles. Multiple authors and researchers highlight the different ways that pirates behave in practice (Craig, Honick, & Burnett 2005; Crawford 2014; Geist 2014; Johns 2011; Lessig 2004; Turner 2013). Equally, it has been highlighted throughout this report the different ways the pirates may conceptualise their activities, and the levels of awareness of their actions that pirates may have (ASBIT CO.,LTD. 2015; Danaher and Smith 2014; Gray, 2012; Mitchell 2012; Peukert, Claussen, and Kretschmer 2013; Stryker 2011; Van Hoorebeek 2003; YouTube, 2015). By combining understanding of motivation, awareness, and action, and guided by methodological approaches regarding the organisation of information (classification, typology, and taxonomy) (Marradi, 1990), the following descriptions were developed. This process was guided by an intent to form the simplest typologies that could reasonably describe the complex variability of pirate activity. What follows is intended as a starting point and an initial way for researchers to conceptualise pirates and help guide how researchers may approach examining different kinds of digital pirates.

7.1 Described Pirates

As above, a pragmatic approach may be to simply categorise any behaviour that constitutes digital copyright infringement as piracy. This is arguably the most common definition of ‘pirate’ amongst the public (Bishop, 2004) but this ignores the ambiguity of much of the copyright legislation. Regardless, there remain those that view piracy, along with concepts like IP, as deliberately misleading and/or inaccurate (Bell, 2007; Lessig, 2004, 2011; Patry, 2009; Stallman, 2004; Sterk, 1996; Wirtén, 2006). The suggestion is that the Described Pirate is the result of deliberate authoritative control of language by corporations and moneyed interests. In

a modern context such a view does seem credible. Campaigns like “don’t copy that floppy” (Moores, Nill, & Rothernberger, 2009), “knock-off Nigel” (Parkes, 2012), and “Piracy, It’s a Crime” (Motion Picture Association & Intellectual Property Office of Singapore, 2004) were arguably attempts to shape the public consciousness regarding the moral status of digital piracy. Ironically, it was later discovered that music in some of these adverts had been ‘pirated’ (Mick, 2012).

Australian Netflix viewers were at one point called ‘pirates’: their payment for the service was equated to downloading films illegally via BitTorrent (Crawford, 2014; Turner, 2013). This is because, at the time, there was no Australian Netflix and so Netflix was required to block any internet connections originating from Australia. Customers/pirates used Virtual Private Networks (VPNs) to appear to connect from countries where Netflix had licensing. Customers/pirates paid for **both** Netflix and a VPN in many cases. Though Described Pirates are sometimes infringers in some technical sense the definition seems to miss aspects of motivation and context. Colloquially, ‘piracy’ may serve its purpose to communicate some measure of copyright infringement and Described Pirates are likely those associated with “piracy” in the public consciousness. But, in an academic context, a definition that may be practically inaccurate and perhaps not even vaguely reflective of a legal reality seems incorrect. This lack of coherence with reality could stem from passive acceptance of the label rather than a description that a ‘pirate’ themselves might adopt. With this in mind the next pirate to be discussed will be those that label themselves as such.

7.2 Self-described Pirates

Self-described-Pirates are deliberate digital copyright infringers. These represent individuals who would characterise their own behaviour as “piracy”. There are differing explanations for why an individual might choose to pirate despite comprehending its illegality (Peace, Galletta, & Thong, 2003; Higgins, Wolfe, & Marcum, 2008). Some pirates may dispute the im/morality of piracy (or view it as a-moral) (Gray, 2012; Yu, 2012). The Pirate Bay can be used to perform legal activities (sharing Linux distribution ISO files). However, an individual using The Pirate Bay to download a new movie seems likely to understand their actions as “piracy” even if they would dispute aspects of the moral characterisation or fail to understand the legal scope in their specific context. Self-described-Pirates would group those pirates that have at least some understanding (for practical purposes if not

some legal understanding) of their actions as illegal/prohibited and yet ‘pirate’ regardless. Equally, this group must be distinct from the “Described...” group as it cannot be assumed that all forms of piracy that individuals achieve will be detected and categorised. Similarly, the “Self-Described...” group would also seem to miss another important element: those who are unaware they are engaged in digital piracy yet remain undetected.

7.3 Naïve Pirates

Naïve pirates are arguably the least understood and perhaps the most important for the academic setting. The massive potential for naïve infringement was detailed above (Tehranian, 2007) yet “Naïve Pirates” are essentially absent from research on pirates themselves. Naïve piracy covers acts that copyright holders would seek to prevent, or that would be legally infringement (legally and technically piracy), but for which the ‘pirate’ is naïve to having engaged in. One example would be the PVSTAR+ phone application that continued to serve content to users, circumventing the access restrictions updated by YouTube (without agreement to YouTube’s terms of service/licensing). These sorts of technical infringements have been branded ‘piracy’, and likely legally constitute infringement (possibly “circumvention”; criminal). However, they differ from the daily naïve infringements in Tehranian (2007), as those are typically infringements of content production rather than content consumption. It could be argued that some Naïve Pirates signed End User Agreements but this is not evidence that they know or understand the legal status of their actions (Hern, 2015). The lack of understanding of their behaviour as piracy is the prerequisite for membership of the Naïve Pirate group. Importantly, many members of this group would also be largely undetectable to rights-holders and so it is even easier for such pirates to remain naïve to the status of the actions.

7.4 Model Pirates

Model pirates can be thought of as those who drive change in legal markets either directly or indirectly. Research is slowly beginning to suggest that some forms of piracy have driven technological change or illustrated unknown market demands (Halmenschlager & Waelbroeck, 2014; Maggiolino, Montagnani, & Nuccio, 2014; Stevens & Bell, 2013). The archetypal example would be Napster, an MP3 sharing program that made music piracy mainstream; illustrating demand irrespective of supply (Winter,

2013). Whilst Napster users were clearly infringing, examples like BitTorrent INC, who are regularly accused of supporting piracy (Andy, 2015) are less clearly Model Pirates. Piracy probably *did* illustrate the viability of BitTorrent but many companies now exploit the fundamental technology for digital distribution (Halfacree, 2015; Paul, 2012; Warren, 2015). In this way, Model Pirates are perhaps one type that could seem to have overlap with others. Where this group distinguishes itself is the focus on the approaches to piracy rather than individuals' conception of it, with as yet no specific examples of individuals as model pirates, but rather providing a type for specific behaviours and approaches.

Some businesses have explicitly acknowledged a competitive relationships with piracy: both Steve Jobs of Apple and Gabe Newel of Valve/Steam state that pirate services should be treated as competitors to be outperformed (Mudgal, 2011; Sky, 2004). Though perhaps less strictly defined than previous categories, the need for this grouping stems from industries tendency to apply what might otherwise be the Described Pirate label to what are arguably competitors more adapted to new technology. BitTorrent INC are not a pirate organisation, re-writable media is not used exclusively for piracy (Masnick, 2011a, 2011b; Tinnefeld, 2014), and (though laws may have needed to be updated) there was a strong case that Napster was legal and specifically exempt from responsibility for its users under section 5129(d) (Fantaci, 2001) when it was shut down.

It may seem odd to argue types of piracy that don't necessitate infringement. Yet, this is not just how the term is used but arguably how it is used most commonly. Fundamentally, language is defined by its use and therefore, pirates can come in several types in line with the variety in uses of the label. In a typology of piracy it may simply be that copyright infringement is relevant but actually not the most important element.

7.5 Political Pirates

If Described Pirates are the most present in public consciousness then Political Pirates may be the least. Regardless, Political Pirates are worth addressing for two reasons.

1. The Pirate Party, a global political movement/party, owes much of its inception to copyright infringement, cementing the relationship between digital piracy and politics.

2. Both historical and digital piracy share political characteristics and tendencies that will be discussed in the historical comparisons section (Land, 2007; Rediker, 2005).

The origins of the Pirate Party movement come largely from events surrounding The Pirate Bay's early activity and trial, and because of applications of copyright law in Sweden (Li, 2009; Miegel & Olsson, 2008). Though now a fully-fledged political group, the Pirate Party started largely as a single issue party seeking to address the way that copyright was being handled in Sweden (BBC, 2009; Beyer, 2014; Erlingsson & Persson, 2011; Halldórsson, 2015). Or to be more accurate, the way that American copyright was perceived to be influencing its Swedish counterpart. However, copyright law and its application is now one of many key focuses of the Pirate Parties.

Throughout the discussion above it has been highlighted how various types of Pirate may exist. It may already be evident that several of the proposed types could be applied simultaneously as well as in isolation. It is suggested that the reason why so many pirate types exist, and that several can be accurate at once, is a reflection of the fact that the topic of piracy is complex, beyond the point that "piracy" can be reasonably characterised by a single definition or term. Future research, such as that of Corte & Kenhove (2017), may confirm the assertions here and throughout that specification and detail of the actual behaviour is necessary for accurate research. Behavioural checks may be necessary for assuring valid research but so too will be clarity regarding the type of pirate/piracy the researchers wish to investigate.

Chapter 8 The Modern and The Historical

Historical patterns of the pirate label exhibit similar patterns of control as seen in modern digital piracy. This may suggest that digital piracy is a modern permutation of a broader historical trend, both supporting the notion of a broader linguistic control theory, and providing a supporting historical account. Digital pirates and historical/seafaring pirates are very different practically speaking. Digital pirates don't kidnap. Seafaring pirates *do* generally attempt to deprive owners of their goods. However, both groups have been branded with, adopted, and/or even appropriated the term 'pirate' for themselves. While this may represent a generalised desire to appropriate insults, there appear to be features of piracy historically that do bear resemblance to modern digital pirates (Cakar & Alakavuklar, 2012; Land, 2007). The following section will attempt to place the modern digital "pirate" within the context of the broader historical application of the term. In doing so, this should establish the similarities between modern and historical pirates. It is hoped that this will support the argument posited by (LaFree, 2007) above regarding the importance of the broader historical context of crime. In part, this historical comparison will occur via specific analogies where certain events or pirate activities bear clear resemblance. Other comparisons will be more general, interrogating how pirates share similarities across time. The most obvious parallel is the one highlighted throughout: defining piracy.

8.1 How to Define a Pirate

As repeated, piracy is not a legal term (Ernesto, 2013; Williams, 2013). Still, 'piracy' predominates as the term for describing individuals perceived to be accessing/sharing content without permission (Gray, 2012; Patry, 2009; Turner, 2013). This may be a marketing/branding ploy in some sense (Mick, 2012; Motion Picture Association & Intellectual Property Office of Singapore, 2004; Parkes, 2012); 'Pirate' invokes a more powerful image than 'digital copyright infringer'. Despite this, accurately categorising digital copyright infringement is difficult (Vaver, 2006), yet rights holders seem comfortable labelling more ambiguous actions 'piracy' (Andy, 2015). So who is a 'pirate'? Are pirates those who deliberately infringe copyright? If so, does their location and local law matter? Can unintentional infringers be considered part of the 'pirate' group? What about those discussed earlier, whose legal access could become criminal without awareness (ASBIT

CO.,LTD., 2015; YouTube, 2015)? Can history offer any further insights regarding such questions?

8.2 Labels vs. Names: The “Vikings” and The “Pirates”

Most “Vikings”, as the term is used in modern times, would either never be aware of their title as ‘pirates/vikings’ or wouldn’t qualify for the label. The actual Vikings themselves would have understood themselves as raiders, though whilst their moral system would have prohibited theft, it did leave significant leeway for relieving weaker foes of their burdens (Logan, 1983; Richards, 2005; Winroth, 2014). In modern times we refer to a much broader historical/geographic group as “Vikings” than is accurate. As stated, not all Nordic/European peoples went “a Viking”, nor were they likely as homogenous as often presented (Todd, 2009). This is very similar to how digital ‘pirates’ are branded together by one name as well (also possibly without awareness). Australian VPN Netflix users quite likely did infringe (Crawford, 2014; Geist, 2014; Turner, 2013) whether they were aware of this or not, and whether or not it would make intuitive sense to infer pirate-status (‘ignorance of the law excuses not’). Regardless, are paying customers ‘digital pirates’? The suggested rate of accidental infringement (up to \$2.45 million daily) should suggest that not all infringers can reasonably be ‘pirates’ (Tehranian, 2007). Whether we choose an industry driven perspective or a perspective more aligned with those who self-identify as pirates; it doesn’t seem accurate to categorise paying customers similarly to those who copy files without any payment at all. Just as not all those we refer to as Vikings went actually ‘a viking’, pirates too are caught in a similar definitional dragnet.

8.3 Privateers of IP

In the Golden Age of piracy, privateering meant sailors could ‘pirate’ for their country: attack foreign ships with approval of the government or monarch (Bradford, 2007; Kuhn, 2010; Rediker, 2005; Sherry, 2008). Someone holding a piece of paper ‘legalising’ or ‘sanctioning’ their piracy/privateering could be pirate or a privateer depending on whether you were a potential victim or ally. The problem of definition gets worse still; forging the letters of marque (privateering documents) is thought to have been quite common (Alexander & Richardson, 2009; Bradford, 2007; Sherry, 2008). There are cases of ‘pirates’ who went to the gallows adamant they

were privateers (Alexander & Richardson, 2009). This definitional problem seems directly relevant to how digital pirates are defined as ‘pirates’ today. Privateers and pirates were one and the same were it not for specific paperwork. Similarly digital pirates engage in similar behaviours of consumption and distribution but absent the relevant permissions. It is the absence/presence of the proper legal permissions in both cases, not the behaviour, which categorises the action. Even the transient legal status (such as that of personal backups in the UK) accompanies both digital and sea-fairing pirates; there were many Golden Age pirates who would have been acting within the law but would still be branded ‘pirates’ based on which country caught them. The further complication of disagreement based on geographic origin and local laws only make the historical and digital more similar in this sense.

Many of the digital piracy cases that have attracted media attention concern infringement between countries (Bowcott & Bowcott, 2012; Johnston, 2012; Klose, 2013). Digital piracy can involve a ‘pirate’ in one country, an intermediary in a second, a host in a third, another ‘pirate’ (or more) in a fourth, and a copyright holder in a fifth location. Who committed infringement and under which legal system? Thereby, much like the privateers, the status of digital pirates’ illegality is subject to debate. Illegally copying a file in one country may be legal in another. The Pirate Bay references such facts regularly in their legal responses to rights holders (Enigmax & Ernesto, 2011; Rentsch Parnter, 2015; The Pirate Bay, 2013): during initial legal exchanges they would point out that file-sharing was legal in their country and that foreign laws were not applicable. This is precisely the same lack of clarity we saw with the privateers, and digital ‘pirates’ have also adopted practices similar to the forging of letters of marque: the use of VPNs. Several VPNs openly specialise in p2p traffic (though rarely explicitly piracy) (Ernesto, 2015). This allows users to select the country they wish to make their web requests from, such as countries where individual downloading is not as vigorously pursued or is legal.

Expanding briefly from digital copyright to IP generally; we now have ‘patent privateers’ (Ewing, 2012; Golden, 2013): a third-party (the ‘privateer’) will assert IP rights against a competitor to the benefit of other IP owners. Golden Age privateering was eventually made illegal as it grew out of control, causing more harm than good (Golden, 2013; Land, 2007; Sherry, 2008). Similarly, Google, Red Hat, Earthlink and BlackBerry, have

written to the US Federal Trade Commission and Department Of Justice requesting investigations of patent privateering arguing it "poses numerous perils to competition, consumers and innovation" (Davis, 2013; Decker, 2013). The assertion is that patent privateers are unfair but protecting themselves by a metaphorical letter of marque, providing legal ambiguity. So not only do we see industry foist 'pirate' on individuals of dubious infringement status (Motion Picture Association & Intellectual Property Office of Singapore, 2004; Williams, 2013) but we see this analogy maintained with patent 'privateers' with the same historical victim/ally component dictating perceived injustice.

We have 'pirates', 'privateers', and even pseudo-letters of marque. But these letters may appear primarily used by the individuals and not industry. Except, increasing accusations of fake copyright requests have been made; suggesting that companies are exploiting YouTube's copy protection to steal advertisement revenue (Cushing, 2013; Feather, 2014; Kravets, 2011). 'Pirate' companies are suggested to be asserting copyright on content not owned, hoping to monetize users' videos.

Drawing back to theories of hegemonic control; both state and businesses are defining pirates and what pirating constitutes (Andersen, 2011). Intellectual property is seen as different from physical property; necessitating its own laws and regulations (Lessig, 2004). Yet the Motion Picture Association ran adverts stating that piracy was theft (Motion Picture Association & Intellectual Property Office of Singapore, 2004). Meanwhile, the music in the advert was 'pirated' (Mick, 2012). Copyright term extensions evidence the power of the state control of IP but also highlight that rights holders were the potential instigators of the extensions (Hatch, 1996; Posner, 2003). Perhaps the best summary of all piracy in this context; whether historical or digital, comes from *Terror on the High Seas* (Alexander & Richardson, 2009, p.2):

"It is apparent that there exists a definitional and moral confusion over what constitutes "piracy," ... After all, every sovereign nation reserves to itself the legal authority to define these terms in the context of democratic and foreign affairs dictated by what is perceived as its own national interests."

Piracy is what the incumbent institutional power says it is, historically and in the present.

8.4 Pirate Competitors

The Vikings and digital pirates are/were often not exclusively engaged in their pirate/Viking activities. The Viking tolerated and eventually 'accepted' Christianity, integrating tightly into the places and cultures where they had landed (Nardo, 2011). Digital pirates undoubtedly share this characteristic too, regularly acting as traditional customers. This tension between legal and illegal activity in the copyright space has been argued to drive business innovation (Halmenschlager & Waelbroeck, 2014; Maggiolino, Montagnani, & Nuccio, 2014; Welter, 2012). Similar notions were discussed earlier regarding Apple and Steam (Mudgal, 2011; Sky, 2004), who explicitly treat piracy as a competitor. Historically speaking, the piracy of the Golden Age has equally been pointed to as a theoretical model for business innovation and in particular entrepreneurship (Ewing, 2012; Roth, 2014). Just as the Viking integrations are suggested to have ultimately bolstered populations like those of early Britain in the longer term (Holman, 2007), we can also view digital piracy as a driving force behind industry, shaping and directing robust strategies for the modern digital distribution (Andy, 2013; Welter, 2012). Choate (2007) has suggested that, in the intellectual property world, robust societies stay robust by protecting their IP but, these societies may have also 'stolen' much of this IP in the first place. In this sense, functionalist theory may mediate well the relationships between both Vikings and those they targeted and merged with, and between digital pirates and modern distribution platforms like Spotify, iTunes, and Netflix (Andersen, 2011; Liska & Warner, 1991). In the world of digital piracy we see falling rates of torrent traffic (assumed to be largely pirate content) in response to expanding Netflix availability (Andy, 2013; Welter, 2012). In this sense, though functionalism seems to fail at the micro-level, we can take the functionalist perspective to the macro/state/societal-level and show that fluctuations from equilibrium will occur.

Chapter 9 Pirates and Politics: A Second Look

Digital piracy is often framed politically (Lessig, 2004; Patry, 2009). Partly this is due to elements of legal/civil disobedience achieved through copyright infringement (Klose, 2013). Partly it may stem from the hegemonic underpinnings discussed above: pirates have even engaged with politics directly (Li, 2009; Miegel & Olsson, 2008). Earlier in chapter 4 it was quoted how previous accounts of GA piracy presuppose a status of deviancy (Cakar & Alakavuklar, 2012), establishing a normative assessment that precludes acknowledgement of motives or reason outside of this narrative. The existence of the Pirate Party, a political group centred around a historic caricature of deviance exemplify the problem or normative assumptions. Historically speaking there were some pirate groups, in particular the buccaneers, who saw themselves more like freedom fighters (Land, 2007; Rediker, 2005). Such facts play a role in why 'pirate' was as easily adopted as a namesake by those involved in digital piracy and pirate politics (Land, 2007). Historical and digital piracy share anarchistic and counter-culture elements and this is likely a component of why 'pirates' so readily self-label as such (Klose, 2013; Leeson, 2007; Patry, 2009; Winter, 2013). In some sense, labelling copyright infringement as 'piracy' may have been counterproductive, linking the term with politics and ideology in a way that could be directly positive and affirmative.

Some researchers have suggested that it is possible to view GA pirates as revolutionary (Land, 2007). This can be related back to conflict theory as we can see the GA pirates as having lost the conflict against the institutions and norms of their time (Land, 2007; Rediker, 2005). When the Vikings integrated into the lands they had initially raided there was adjustment from both the Vikings and the indigenous populations. The Vikings changed dramatically but they also changed the societies with which they integrated (Holman, 2007). Copyright law has shown no such adaption from both "sides". Instead there has simply been a large steady increase in restrictions and term extensions (Bettig, 1996; Cummings, 2013; Klemens, 2006; Lessig, 2004; Litman, 2006; Patry, 2009; Torr, 2005). This steady single directional creep has led some to conclude that digital piracy is simply a state of never-ending passive revolution (Neely, 2007).

It is argued that piracy will never succeed in supplanting the norms, but that due to the inadaptability of copyright law, piracy will never truly

integrate with non-deviant behaviour properly either. Though there are pirates for profit, some pirate for political/ideological reasons (Gray, 2012; Klose, 2013; Mahapatra, Tarasia, Ajay, & Ray, 2011). If a ‘political’ solution is to be found it seems this would necessitate some change on the side of copyright law, respective of pirates as well. Vaver (2009, p. 11) summarises this best:

“[F]or the intellectual property system to survive, it must gain and keep public respect. To be respected, it must be known. To be known, it must be understood. To be understood, it must be coherent and persuasive... But one must be prepared for the consequence that an educated public is entitled to demand greater coherence and persuasiveness from the intellectual property system than that system presently exhibits. If those calls are not met and answered, then greater knowledge will not produce greater public respect, but instead cynicism, disregard and avoidance.”

Conclusion

This research has examined why “pirate” has come to be the term used to describe such a vast set of different activities and behaviours. Digital piracy as an act itself is difficult to define due to the flexible nature of digital interactions. The legal context also has grown more ambiguous over time as the stated legal purposes diverge from application of the law. Whether civil or criminal, the research suggests that pirates may not perceive their actions as deviant. Many of the theories presented highlight the use of language as a control mechanism and this is supported by historical analogies and historical uses of the term “pirate”. Despite the modern account and the historical support for these approaches, which help to point to a varied “pirate” typology, essentially all research treats pirates as a single concept. Historical piracy and digital copyright infringement may seem intuitively distinct, however, given the evidence presented above it is hoped that the similarities between the two will be seen. Digital piracy shares similarities with historical piracy and with political and social motives. In particular, we see a long standing tradition that, to be a pirate can be more a matter of the perspective of the accuser than of the behaviours of the accused themselves. Further still, we see similarities across time in the ways that ‘piracy’ diminishes and changes, as societies integrate much of the previous activity as acceptable rather than deviant. Vaver (2009) suggests we need people to respect copyright. From a historical criminological perspective, and considering modern digital piracy and its historical analogues, it seems necessary to improve copyright rather than merely enforce it. If it is so trivially easy to infringe (Tehranian, 2007) then eliminating digital piracy seems practically impossible. Continuing the historical comparison, if we want to reduce copyright infringement it may first be necessary to have more integration, as with the Vikings, changing copyright and changing “pirates” in the process.

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