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Ann Cronin

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**University of Limerick
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Does file sharing really offend our collective conscience? Exploring the relationship between societal versus corporate interests in the criminalisation of file sharing.

Ann Cronin

Psychology and Sociology

This paper discusses the motivations behind the criminalisation of file sharing, drawing on sociological theory to uncover its relationship to societal versus corporate interests. Although we may perceive that the law responds to those acts which offend society, I argue that legislation prohibiting Peer to Peer (P2P) activity primarily serves the interests of corporate groups. Drawing on a conflict theory approach as well as empirical research regarding user behaviour and economic imperatives it is argued that, in this case, the interests of the music business are favoured over those of users by government.

The social basis for legal prohibitions

A functionalist perspective on the law traces the basis for legal prohibitions back to social norms. Norms exist in all societies and can be defined as the expectations of behaviour both written and implied that control members (Macdonis & Plummer 1998). Sociologists working from a functionalist perspective hold that the law responds to the violation of social norms. A sociological definition of crime would cite the violation of norms formally enacted into the legislation or laws of a country. Acts which run contrary to norms are labelled deviant (Lloyd 2007, p.317). An act or a person is labelled as deviant because they run contrary to the rules, understandings and expectations of a society. The viewpoint from which the behaviour is seen is often the main platform for the construction of deviance and, in some cases, the subsequent criminalisation of behaviours (Lloyd 2007, p.312). This perspective holds that

the law reflects a societal consensus as to acceptable and unacceptable behaviours.

Deviance according to Durkheim is necessary for the social system to function, and generates a collective morality (Macionis & Plummer 1998). The Functionalist approach to the study of society concedes that everything that exists within a society serves a purpose to society as a whole, otherwise it would cease to exist. Kai Erikson proposes that each time an act of deviance is punished it serves to sharpen and define the boundaries of acceptable behaviour and in doing so also attenuates this phenomenon among certain sections of society (Erikson 1966, p.22 cited in Shaw 2002, p.78).

In contrast a conflict theory approach offers a different perspective on norms and deviance. Marx asserts that “the law is little more than a control tool used by the powerful to protect their assets” (Macionis *et al* 1998, p.209). Deviance then is a reaction to the lack of opportunity to achieve in a society where the interests of one group hold precedence over the interests of other groups. In this regard we may see the music industry as possessing power, they control the means of production. It is important to note that musicians are only one (and in many cases less powerful) part of this industry, which also consists of large record companies, distributors and broadcasters for example.

File sharing reduces the control of the music industry over its intellectual property. Since inception, the internet was a forum for the sharing of information and data (Svensson & Bannister 2004). The development of peer to peer networks, which permit the sharing of files, including music files, directly between people rather than through a centralised distributor was an organic and natural progression for the internet. The move away from stationary servers to a network of equal hubs sharing their content for the use of all presents us with a

Marxian utopia. However this presents a dilemma for the owners of intellectual property and the capitalist ethos of control over production and copyright. “Copyright is not a natural right, not ahistorical, but rather a political artefact of modern capitalism” (May 2003, p.19).

Arnold Plant suggests that the power of legislation is to artificially create a sense of scarcity and maintain and raise prices. It is argued that copyright legislation globally has been concerned primarily with the rights of the commodifiers of music, the more powerful arm of music industry. Four major companies, shortly to become three, control 80% of all music distribution (Frost 2007, p.3)

Albert Cohen’s work on deviant youth points can be applied to understand P2P users as having become a deviant subculture “That defines as meritorious the characteristics they do possess, that kinds of conduct of which they are capable” (Macionis *et al* 1998, p.212). The deviant is someone to whom that label has been successfully applied: “deviant behaviour is behaviour that people so label” (Becker 1963 p.9), however the norm for file sharing networks is ‘thou shalt share’ - no free riding or leeching (Svensson & Bannister 2002). The case of file sharing juxtaposes the music business definition of music file sharing as theft and the sub cultural perspective of file sharers who propose that file sharing is not theft.

File sharers aspire to the development of what Laurence Lessig refers to as a read-write internet where users are in control of, and active participants in, the creation and development of the medium. This stands in stark contrast with capital’s interest in maintaining a consumption focused top down internet, whereby a big media led read-only internet favours the interests of industry over those of users (Lessig 2005). Those involved with file sharing do not view their

actions as deviant, and the current norm among file sharers is that it is not deviant behaviour.

It is becoming more culturally acceptable for families and friends to download artefacts from the internet and utilise them in new and possibly unintended ways. Lessig talks of how the internet has become a common ground where people can create and mix cultural artefacts to produce something new. (Lessig 2005) In a recent survey of Irish Internet users “Respondents...stated that their parents frequently downloaded music or videos illegally” (European Commission 2007, p.9). So the concept of taking information from the internet and utilising it is becoming a common practice and is not seen as a violation of norms by those who partake in this practice.

The hacker community views file sharing as an act of civil disobedience, with the development of P2P sites and networks developing as a subculture unfettered by geography, language or age (Soderberg 2002). Society encourages acts of charity and sharing among its children, they are encouraged to share and selfishness is often accompanied by sanctions, but socialisation into these values runs in opposition to the capitalist ideal of self preservation and acting in ones own interest to the exclusion of all others. The arguments that support the criminalisation of file sharing echo John Locke’s idea of reward for effort in improvement, in this way people are manipulated to believe that people will only work, innovate and develop new ideas in the pursuit of gain for themselves. It creates a hegemonic assumption that the only motivator of humans is profit (May 2003, p7). By this rationale musicians will only make music in the pursuit of profit.

I would argue that the sharing of files in a gift economy (that being a place where items are exchanged freely between people for the mutual benefit of all is

in keeping with Marx's concept of surplus value, in the case of the music industry the amount of profit garnered after payment of all involved with the manufacture of the product. In the case of CD's the production costs per unit is about €0.38, and of that €0.09 goes in royalties to the artist. The average price of a CD is €13.99. Even taking into account the cost of packaging and retail mark-up and transport the costs per unit are a mere €6 (Frost 2003, p3) This information raises questions about the prices charged on Amazon, iTunes and other download sites which incur neither production, packaging nor retail costs but still charge in the region of €10-12 euro per album. P2P networks have their roots in socialist anarchist principals, thus incurring the wrath of capital (Soderberg 2002).

In the case of file sharing within Ireland, recording companies and related corporate interests are represented by Irish Recorded Music Association (IRMA). Accordingly this organisation must try to counter the assumption that file sharing is not a crime. The music industry is seeking to achieve this goal by influencing the legislative process in order to establish this practice as a violation of norms.

The bourgeoisie concept of individuality and property paved the way for the first copyright laws in the 16th century. This has expanded in the global TRIPS agreement (i.e. the International Agreement on Trade Related Aspects of Intellectual Property Rights) signed in 1994 to further protect the increasing value of 'information' (Soderberg 2002, p.16). It is my assertion that just as with other productive forces of old, information is produced for and within a market for capitalist gain. In this respect I argue that the digital publishing realm has come to occupy the same social space as the cotton mills of Marx's era.

“The malleability of the new technologies means that their design and application becomes a site of conflict and holds unprecedented potential for recapture” (Dyer-Witheford 1999 cited in Soderberg 2002, p.23). In the past, Capital has used machinery to reduce the demand for labour, thus suppressing the power of the workforce. Marx points to power being ultimately effective when the labour power to capital expenditure on a product is as small as possible (Soderberg 2002) therefore capital must strive to make as much as possible with as little expenditure as possible in order to make the greatest profit. I argue that this effectiveness is achieved through the internet, where the actual costs of production and maintenance of sales points such as iTunes are out of proportion with the costs incurred by consumers in accessing the information. Thus capitalist interests are best served if information is treated as if it is a scarce or finite commodity.

Numerous attempts have been made by the music industry to protect its products through technology, most notably when Sony Corps embedded malware (i.e. malicious or unwanted software) in its products in 2005. This ended in lawsuits and apologies after the corporation admitted to knowingly infecting customers’ computers with tracking software (May 2003). Another example was the Dutch government’s failed plans to introduce an iPod tax to compensate music industry rights holders for their supposed losses due to the existence of MP3 format (Faultline 2005).

Using the internet has benefited Capitalism in the production of such goods for the market; the costs of downloading are barely calculable versus the price of such downloads. Given the repeated failures to assure profit margins through controlling the dissemination of information by technological means, Capitalists have now reoriented towards concerted efforts to convince the public that the costs of file-sharing are affecting artists (Oberholtzer & Strumpf 2004, p.1).

Thus we have seen IRMA spokespersons threatening music fans with the inevitable withdrawal of all new music if they continue to share files, as such “illegal” behaviour “threatens to prevent the music industry from reinvesting in innovative Irish music acts” (Smyth 2005). In 2007, the Director General of IRMA went on the state that ‘They are stealing from our artists and affecting the livelihood of many people in the music industry’ (Doyle 2007). Yet there is strong evidence to counter such claims with Oberholtzer & Strumpf (2004, p.1) demonstrating that “downloads have an effect on sales which is statistically indistinguishable from zero”.

IRMA has repeatedly blamed file sharing for the decrease in profits experienced in recent years. However Liebowitz (2003 cited in Oberholtzer *et al* 2004, p.5) points out that file sharing is blamed without giving consideration to any other explanation. The initial peaks in music sales were seen during the introduction of the new medium of the compact disk, when many consumers updated their collections to the newer and ‘better’ medium. The advent of the DVD again saw a huge surge in sales that has never been repeated (Oberholtzer 2004, p.23). I argue that music corporations are holding these sales figures up as examples of potential / expected ongoing sales rates when in reality they represent only a specific and unique time in sales history.

Additionally, Oberholtzer *et al* (2004, p.23) point to growing alternative sources of entertainment as well as the consolidation of radio and media giants, which exclude new music in a quest for maximum profits as alternative reasons for the decline in music sales. It is argued that some music fans are responding negatively to the disproportionate amount of airtime provided to acts owned by major industry players at the expense of independent artists (May, 2003). A stickering campaign by Downhill battle and RIAA Radars campaign sought to highlight this by covering CD’s with “WARNING ! This record labels pays

radio stations to keep independent music off the air” stickers. If more consumers were aware of the practices of the music industry then perhaps this resistance would be even more in evidence.

The actions of the music industry as well as the state in legislating to protect the interests of capital and control the actions of individuals are presented to the public as unproblematic. Current legislation is framing the issue as a matter of fairness to musicians and retailers, however in the case of recording artists “economic rewards are concentrated at the top and fewer than one percent achieve this level” (Oberholtzer *et al* 2004, p.25). Few if any upcoming artists will receive any profit from album or track sales, only artists whose name and brand can be shown to produce sufficient profit can be assured of any share in the product they produce. I argue that only platinum selling artists who have negotiated a contract entitling them to a share of profits are actually affected by this practice, other small, new and less well known bands do not gain from mass sales as their fixed contracts prohibit this, they are paid to record albums but do not gain from the sales or airplay of their work. It is noteworthy that artists capable of negotiating a share in sales of their albums account for only 2% of all artists recording today (Oberholtzer *et al*, 2004, p.24).

In the construction of norms and their subsequent transmission to the next generation, although expectations may not be presented as rules they are implied and learnt none the less. From a conflict perspective these messages are disseminated through public discourse, from those with power to those without. Government funded campaigns against file-sharing have not sought to stimulate debate or present all of the information, instead through their use of language they seek to modify peoples behaviour in a pre-determined direction. For example, I would argue that the language of the Safer Internet report (resulting from a European Union initiative to enhance the safety of young people online)

is biased, in that all file sharing is referred to as piracy or stealing, for example the report determines that “piracy was evident on mobile phones” and “parents and other adults who engaged in this online activity are setting a poor example” (Central Statistics Office 2007, p.31). I contend that such rhetoric, together with the similar labelling of such acts by the music industry serves as an attempt to change public opinion by constructing file sharing as an act of deviance. A functionalist approach suggests that societal demands lead to the progression from informal sanctions to governmental / legislative control of deviant acts. Yet I contend that in the case of file sharing the clamour for legislation against the use of p2p networks and users is being lead by pressure from one group in society (the music industry), which finds it to be contrary to their interests (Svensson & Bannister 2004).

The control which capital exerts over legislation is downplayed by a government seeking to hide behind the fallacy that the definition of file sharing as theft is unproblematic and inevitable. A Marxist approach seeks to discover the basis for the criminalisation of behaviour within the economic workings of the system. Thus, the process of constructing acts as crimes, and the role in this process of the interest groups whom this labelling and subsequent punishment affects, must be considered. The designation of certain kinds of behaviour as ‘criminal’ is the outcome of the dominant class successfully enshrining its definition of crime in legal statutes (Bilton *et al* 2004, p.393)

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