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Beyond Representation

The Figure of the Pirate¹

Lawrence Liang

In civilizations without boats, dreams dry up, espionage takes the place of adventure, and the police take the place of the pirate.

Michel Foucault, 'Of Other Spaces'

The English live with the turmoil of two incompatible passions: a strange appetite for adventure and a strange appetite for legality.

Jorge Luis Borges, 'Chesterton and the Labyrinths of the Detective Story'

Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'.

Section 441, Indian Penal Code

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Thus our first step has been to remember the proletariat body; we have tried to translate it out of the idiom of monstrosity.

Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic*

The transformation of intellectual property law from an esoteric legal subject to a topic of daily conversation and debate has occurred in a relatively short span of time. Over the past few years, the aggressive expansion of property claims into every domain of knowledge and cultural practice has interpellated almost everyone, from the academic to the musician, into the heart of the debate. No account of the contemporary moment would be complete without an examination of the dominance of the copyright sign or the effect of the small print of the trademark notice on our lives. In many ways, the mere act of looking at, reading, listening to, making, understanding or communicating any objects that embody thought, knowledge or feeling is as fraught with danger and anxiety today as the appropriation of material wealth or trespassing onto private property were through much of human history (Bagchi et al. 2005: vi).

The anxiety and conflict are certainly not restricted to a set of geographical locations, but the nature of conflict gets configured differently as we move from the United States and Europe to parts of Asia and Africa. In the United States, the crisis is represented in terms of the shrinking of the public domain and of the commons by the extension of copyright, the linking of file sharing and peer-to-peer activities with the global war on terror, and the emergence of a new breed of criminals in the form of students sued by music companies for downloading MP3s online. In South Africa, the government is bulldozed by pharmaceutical corporations who have attempted to prevent it from declaring statutory licences that will make AIDS drugs more accessible, and in many parts of Asia, the proliferation of cheap technologies of media reproduction creates a parallel economy that threatens the monopoly of old media players (Cullet 2001). The concern over the expansionist

tendency of intellectual property has also motivated a rearticulation of the importance of the commons of knowledge and cultural production. This is exemplified by various phenomena among the increasing popularity of non-proprietary modes such as free software and open content. A number of these concerns historically have emerged from the experience of Europe and the United States. But when one attempts to translate the terms of the intellectual property debate into the contemporary experience of countries in Asia, Latin America and Africa, it is difficult to locate any easy indexical reference to ideas such as 'the digital commons'.

In a similar vein, scholarship on the concept of the public domain has opened out the debate on intellectual property and has forced us to pay closer attention to the political economy of information and the cultural politics of copyright. It has also sought to foreground public-interest considerations within international intellectual property policy. The terms established by work on the public domain enable the articulation of alternative normative claims to contest stricter intellectual property standards and the reintroduction of the public interest into intellectual property policy. They have also been very useful in challenging moves towards the greater criminalization of infringements on intellectual property rights. However, here again, while the scholarship on intellectual property and the public domain has been highly inspiring and influential for work in South Asia, it offers no easy fit with the concerns of daily life in that region and the role that intellectual property and the conflicts surrounding it play there.

The concept of intellectual property in many of these countries has been unfolded through the dual tropes of the triumphalist fantasy of harnessing intellectual property 'to catch up with the West' and an account of paralysing fear and images of the ruin, destruction and violence that surround the reality of intellectual property infringement. The latter is best exemplified by the sharp conflicts and anxieties over the prevailing mediascape (from non-legal software to cheap DVDs) that are a part of the contemporary urban experience in most countries. The dominant account of the unfolding of the new-media

experience in these countries is also marked by the hyperprofiling of the act of piracy and the emergence of the figure of the pirate (Cullet 2001).

It would seem almost paradoxical to suggest, as the title of this chapter does, that there is a representational problem that emerges with respect to the figure of the pirate in contemporary discourse. If accounts in the mainstream media are anything to go by, it would seem that the figure of the media pirate is everywhere, and the problem would seem to be one of overrepresentation. However, we are not concerned with the way in which the pirate is narrated as a figure of illegality by the usual suspects, such as Jack Valenti (the long-time president of the Motion Picture Association of America), or the RIAA (the Recording Industry Association of America), or, closer to home, the Indian Performing Rights Society, all of whom have argued for a more stringent enforcement of copyright. My focus instead is on the role of the pirate in the debate on intellectual property and the public domain that has emerged over the past few years to challenge the hegemonic account of intellectual property.

While the critical scholarship on intellectual property has been vital in the framing of an alternative paradigm, a quick survey of the range of debates also reveals the relative absence of any serious engagement with the world of quotidian non-legal media consumption and circulation – or media piracy. This is surprising, given that intellectual property plays itself out in everyday life through an extraordinary focus on the pirate. What is it about the nature of piracy that creates this uncomfortable silence around it? Or is it possible that there is instead something about the way in which the critical responses to intellectual property have been framed that makes it impossible for them to deal with piracy or for piracy to redeem itself? Perhaps we will have to start asking different kinds of questions if we are to understand the status of the pirate in contemporary intellectual property debates and move beyond it.

Let's first look at the various ways in which the figure of the pirate enters the contemporary discourse of intellectual property. In the

predominant logic of intellectual property enforcers, the pirate is demonized, seen as the ultimate embodiment of evil. That evil takes a variety of forms, from terrorism and the criminal underworld to causing the decline of the entertainment industry and the evading of taxes. The figure of the pirate as criminal invites the legal attention of the state and of private enforcers. In recent times, the criminalized figure of the pirate has also become the subject of media attention, and rarely does a day go by without some sensational account of a raid.²

At the other end of the spectrum, that is, among those who work on limiting the expansion of intellectual property rights and on defending the public domain, the figure of the pirate is treated with embarrassed silence or outright disavowal. In Richard Stallman's work, for instance, it is very clear that piracy is as unacceptable to the free-software movement as it is to copyright enforcers. The significant difference is that they would not argue for more criminalization or stronger enforcement and would have a more charitable understanding of the phenomenon, based on their reading of political economy (Lessig 2004: ch. 4).

Scholars such as Lawrence Lessig and others have responded to the debate on intellectual property by looking beyond the binaries of legality/illegality that are set up by traditional copyright law; but when it comes to piracy there still has been no effort to accommodate the concept of piracy within the accepted discursive parameters of the debate. What, then, is the exact problem of piracy and why can it not be accommodated within the terms of public-domain theorists? Surely it cannot be just the fact that it is tainted by illegality, since many other acts, including downloading music, are also tainted by illegality. Yet

² A statement by the US Department of Transportation states that 'they run computer manufacturing plants and noodle shops, sell "designer clothes" and "bargain basement" CDs. They invest, pay taxes, give to charity and fly like trapeze artists between one international venue and another. The end game, however, is not to buy a bigger house or send the kids to an Ivy League school – it's to blow up a building, to hijack a jet, to release a plague, and to kill thousands of innocent civilians' (2003: 2). For a scathing critique, see also Govil 2004. This statement has been similarly followed up by the Indian copyright enforcers, led by the former commissioner of police, Julio Rebiero, who have claimed that music piracy funds jihadist terrorists (see Rangaraj 2003).

there are ways in which these acts find redemption, while the pirate cannot. Is the problem peculiar to the nature of this particular illegal act, the domain within which it operates, and the subjectivities that it interpellates?

The resistance to the concept and practice of piracy seems to be affected by several factors. First, it is seen as compromised because it is a commercial enterprise. Since piracy operates within the logic of profit and within the terms of commerce, it cannot claim the sort of moral ground that other non-legal media practices can. For critics of the copyright regime dominated by media conglomerates, it would be an embarrassment to admit that they are supporting a non-legal commercial enterprise. Their stance against piracy may therefore stem from either a strategic or an ethical position. The strategic stance against piracy may, for instance, be adopted by people who do not *per se* have any serious objections to piracy, but who recognize that it would be counterproductive, in their struggle against stricter intellectual property regimes, for them to be seen as espousing commercial piracy. On the other hand, there are a number of advocates for the free-software movement, including Stallman and Lessig, who would argue that even if a certain law exists and we do not agree with it, either we have to reform the law or create an alternative legal paradigm. However, if the law exists, we cannot encourage the violation of such a law.

Another reason for the suspicion of commercial piracy, in this case in relation to entertainment, stems from the fact that what is pirated often pertains to the domain of pleasure. Unlike access to affordable medicines and access to learning materials, piracy that provides people with low-cost DVDs, MP3s and other copyrighted content seems to lack pragmatic justification and simply fulfils consumers' desires. We will examine this in some detail later.

Yet another critique of commercial piracy is that, unlike young musicians who illegally download, then remix the music to produce new music, those who undertake piracy for purely commercial ends are unable to redeem their actions by claiming that they encourage and

support further acts of creativity. Instead, in the case of commercial piracy, there is a slavish making of copies without any transformative redemption.

Finally, any justification of piracy is seen to fall within larger accounts of the collapse of the rule of law. Scholars working on understanding the phenomenon of piracy are accused of romanticizing illegality, and a sympathetic look at piracy is equated with support for anarchy and lawlessness.

Because piracy thus has not been able to be accommodated within the terms of public-domain theory, we need to understand how the terms of representation that public-domain scholarship sets for itself operate to effect this exclusion. Although the public domain has emerged as the most viable alternative to the expansion of intellectual property, the question is whether the public domain is the only way by which we can understand both the contemporary conflicts around intellectual property and the limits of the approach with regard to accounting for the status of piracy. Can the world of the public domain and the world of the pirate be narrated as though there is a seamless web that should necessarily tie the two?

In many ways, advocates for the public domain deploy classical terms of representation that they borrow from either political or cultural theory. These terms include the classical categories of citizenship, resistance and creativity (see Coombe 1998a, 1998b; Benkler 2003). One of the problems that we have when we try to understand piracy is that it often does not fit within any of these existing categories, and there is a positivity or excess in the body of the pirate that cannot be disavowed. As we have noted, the only manner in which the copyright infringer is rescued from the accusation of being an illegal pirate is through an act of redemption, for instance, by showing that his or her acts of infringement actually result in an increase in creativity, and this redemption is formalized in doctrines such as the idea of 'transformative authorship'. But what happens to entire realms of non-transformative authorship or 'Asian piracy', which does not necessarily transform anything, but merely reproduces ceaselessly using cheap technologies?

The high priest of open content and the founder of the Creative Commons movement has this to say:

All across the world, but especially in Asia and Eastern Europe, there are businesses that do nothing but take others people's copyrighted content, copy it, and sell it – all without the permission of a copyright owner. The recording industry estimates that it loses about \$4.6 billion every year to physical piracy (that works out to one in three CDs sold worldwide). The MPAA estimates that it loses \$3 billion annually worldwide to piracy. This is piracy plain and simple. Nothing in the argument of this book, nor in the argument that most people make when talking about the subject of this book, should draw into doubt this simple point:

This piracy is wrong. ...

The copy shops in Asia, by contrast, are violating Asian law. Asian law does protect foreign copyrights, and the actions of the copy shops violate that law. So the wrong of piracy that they engage in is not just a moral wrong, but a legal wrong, and not just an internationally legal wrong, but a locally legal wrong as well.

(Lessig 2004: 63–4)

How do we read this as part of an account of the public domain? While one can understand that Lessig would have to be careful about the ways in which he pitches a reform of copyright law within the context of the United States, it is also difficult not to miss the linkages in this paragraph to older accounts of illegality in Asia. In many such accounts, the urban experience in Asia – and in Latin America – has been narrated in terms of its preponderant criminality and illegality. This is particularly true not merely in the context of the colonial imagination, but also in the ways that cities and everyday life in Asia are understood. The United States has always narrated itself through the tropes of constitutionalism and the rule of law, but with the arrival of the internet, all of a sudden, the language of criminality and illegality that was used to account by contrast for much of the world arrives home in the ordinary form of the criminalization of students

downloading music. Clearly, one cannot have an account of such pervasive illegality in a country that prides itself on its constitutional tradition and its emphasis on the rule of law.

Consequently, one narrative strategy is to redeem the acts of ordinary American citizens through the discursive construction of an Other – in this case an Asian Other. The categories of the public domain serve as the neutral ground on which the two kinds of pirates are pitted, and the terms of reference of this public domain are the received notions of creativity and innovation.

Underlying much of copyright's mythology are the modernist ideas of creativity, innovation and progress. The narrative conjunction of these ideas is represented as universal, and indeed, it is shared by both advocates of stronger copyright and advocates of the public domain (Birnhack 2001: 3). By offering themselves as alternative accounts of the idea of progress and creativity, arguments for the public domain merely seek to provide a counterfactual: while copyright aspires to promote creativity, it actually fails to do this, and excessive protection has actually resulted in a decrease of creativity or a threat to creativity.

The difference between scholars who advocate for the public domain and copyright advocates lies in their understanding and interpretation of the idea of the creative. Lessig insists that we should protect some illegal works, based on the criterion of 'transformativity', but the creative subject invoked here is in fact a very particular kind of subject – a disembodied classical liberal subject. The public domain is represented as a space in which everyone can participate as citizens bearing equal rights. The linking of public-domain theories to the freedom of speech and expression is not accidental, and the model of the public domain as the sphere of rational communication borrows from existing accounts of the public/private divide (Boyle 1996; Zimmerman 1992; Benkler 2001).

Many postcolonial scholars have seriously contested the category of the citizen as the universal bearer of rights, and the representative capacity of the citizen to participate in the public sphere as an unmarked individual remains mythical, at best. In India, for instance,

the creation of the category of the citizen subject demanded a move away from the oversignified body of the individual marked by religion, gender, caste and so on to an unmarked subject position, 'the citizen,' a category based on equality and access and guaranteed rights within the constitutional framework. But the majority of the people in India are only precarious citizens who often do not have the ability to claim rights in the same manner as the Indian elite do. Instead, the manner in which they access the institutions of democracy and 'welfare' is often through complex negotiations and networks and often is marked by their illegal status (Chatterjee 2001).

In their work on 'rowdy sheeters' – individuals with a criminal record, or 'rap sheet', as it's called in the United States – Vivek Dhareshwar and R. Srivatsan suggest that 'some bodies – like the "rowdy" or the "lumpen" – will not be disincorporated', that is, made to speak and act as a citizen, 'so tied are [*sic*] their shameful positivity to their bodies' (Dhareshwar and Srivatsan 1996: 223). Thus, the project of disincorporation into citizenship almost immediately creates a discursive Other, the illegal citizen who refuses to shed his or her social excesses or who just cannot do so. Thus, while citizenship and modernity are normatively constructed as highly desirable and the grand project wills everyone into a state of modernity, there arises from the start a clear lack or inability in the bulk of the population to occupy this space. So what happens when people fall off these official maps and plans? How do they find their way back into official memory and create for themselves avenues of participation? There is a great deal of work to be done on engaging with how people create vibrant spaces outside of official plans and spaces, and, more often than not, these spaces are marked by their high degree of illegality.

Pirates are among those unable to shed these illegal excesses and play a role in or become a part of a reconstituted public domain. Pirates cannot play a role there, because they cannot claim the representative status given to the transforming creator within the productive public domain. There are very few possibilities for the pirate to occupy the normative terms established in the public domain for the creative

citizen. And yet, despite this, a look at both history and the present indicates that there is a certain stubbornness on the part of those who do not find a representative space in the public domain – those who refuse to disappear and instead coexist at the margins of civil society and the law and at the margins of the narrative dominated by the creative, innovative citizen. Historically, for instance, there is an entire realm that is inhabited by figures such as the trickster, the copier, the thief and the pirate, figures who inhabit a marginal site of production and circulation (Mason 2003). If we move away from the normative account of the creator citizen and engage with an entire set of practices that renders any straightforward representation impossible or difficult, what intellectual horizons open out? As with any journey into unfamiliar terrain, it might be useful to have a few maps charted during previous moments of anxiety to help guide us. As with any maps, these are only tentative and provisional guides.

The simplistic opposition between legality and illegality that divides pirates from others renders almost impossible any serious understanding or engagement with the phenomenon of piracy. Following Nietzsche, we should perhaps advocate the virtues of slow reading. The dizzying speed with which one is forced to respond to issues in the era of globalization can sometimes hinder any reasoned response. The first task for us is to avoid the Enlightenment blackmail, a variant of which in recent times has been the blackmail of ‘You are either for terrorism or support the war on terror’. In other words, before we jump into making normative policy interventions, which often draw black-and-white distinctions, we need to explore the various shades and depths of grey. We would only ask for patience from the scholars of the public domain and ask the same careful attention that they pay to understanding the larger politics of copyright when they look at the phenomenon of piracy.

Let us reformulate our object of enquiry. Let’s take for granted the illegal status of piracy, but let’s not stop there. Instead, it might be more useful for us to ask not what piracy is, but what piracy does. The shift in focus from the discursive and moral representation of the illegal

deed to the wider social world in which the deed is located allows us to bring to light the nature of the law that names a particular act as an illegal one.

And the naming of the deed as an illegal act indeed prevents us from reflecting on the nature of the act. When we look, for instance, at the act of sharing, it is an act immediately invested with a sense of virtue. But the same act when rendered through the prism of private property becomes an act of infringement and a crime. The debate between morality and ethics is now a familiar one, and indeed, it might even be argued that the law's monopoly over official definitions of morality does not render obsolete the question of whether an act can still be considered in terms of ethics.

The shift away from what piracy is to what piracy does enables us to consider on the same plane its linkages to the normative considerations for which public-domain advocates argue and that they are often unable to achieve. The best example is in the area of cheap books. While public-domain advocates try to reform copyright law to enable more educational exceptions, pirated books and unauthorized photocopying that is the order of the day accomplishes what they cannot. Rather than looking at the neat spaces created by the opposition between the 'legal' and the 'illegal', it might be more fruitful to consider the spaces in which piracy plays itself out, the transforming urban landscapes and the specific histories of the nooks and crannies that render this space an illegal one, along with the accumulated histories of regulation, tactics and negotiations that render this topography intelligible.

Definitions of legality do not exist in a vacuum, and they are constituted through specificities and relationships, even as they attempt to define constitutive legal and social relations.³ Similarly, stories of law and legality have to find a space in which they resonate, and often they exist as abstract, unintelligible murmurs. For instance, when the story of copyright piracy is narrated, it is usually through the language of

³ For an account of the everyday life of law and social relations, see Silbey and Ewick (1998).

statistics and figures and the narrative strategy of excess, designed to induce a 'shock and awe' response at the alarming rate of piracy and illegality that exists, especially in non-Western countries, and it rarely succeeds in its desired effect.

To understand why these stories don't work in some contexts, we will have to travel to distant cities such as Delhi and Sao Paulo and perhaps even walk through the more unfamiliar byways of familiar cities such as New York. The discipline of urban studies has made the idea of 'the illegal city' familiar to us. One reads, for instance, that an average of 40 per cent and in some cases 70 per cent of the population of major cities lives in illegal conditions. Furthermore, 70 to 95 per cent of all new housing is built illegally (Durand-Lasserve and Royston 2002; Jacobson 1994). How do we understand this older idea of illegality alongside the new illegality of the mediatized city? The task will be to pose the question of how the older form and the newer form integrate and intertwine – to interrogate our classical liberal assumptions of legality and highlight the limitations of any study based on a strictly legal understanding of contemporary urban practices.

Writing about the modernist project of planning, James Holstrom and Arjun Appadurai note:

modernist planning does not admit or develop productively the paradoxes of its imagined futures. Instead it attempts to be a plan without contradictions or conflict. It assumes a rational domination of the future in which its total and totalizing plan dissolves any conflict between the imagined and existing society in the enforced coherence of its order. This assumption is false and arrogant as it fails to include as its constituent element, the conflict, ambiguity and indeterminacy characteristic of actual social life.

(Holstrom and Appadurai 1996: 165–6)

The information era props up a master plan similar to that of modernist planning. The institutional imagination of the era relies on the World Trade Organization (WTO) as the chief architect and planner and copyright lawyers as the executive managers of this new plan, while the

only people who retain their jobs from the old city are the executors of the old plan, the police force and the demolition squad. Just as one cannot understand land tenure in terms of the classical liberal concept of legality alone, any attempt to understand the complex networks of economic and social relations that underlie the phenomenon of piracy will have to engage with the conflict over control of the means of technological and cultural production in the contemporary moment of globalization. The ways in which the illegal media city emerges and coexists alongside the vibrant, innovative and productive debris of the older city and the schizoid relationships between legality and illegality in postcolonial cities suggest that we may need to turn the gaze of the law from the usual suspects of legality to legality itself and to the relations that underlie its existence (Liang 2005).

The transformation of the urban experience in the past few years and the proliferation of the labyrinth experience of media forms have made pirate cultures a significant part of the experience of our contemporary era. What is perhaps different about the media experience in non-Western countries is the fact that there are no clear lines between the old and the new media, between physical and virtual experience, and often, the virtual extends from high-end shopping malls to low-end cybercafés to pirate markets. This comfortable moving to and fro between different mediatized spaces creates a sensorial experience in which different classes actualize the global experience differently.

Piracy transforms the technological experience, which traditionally has been rooted either in monumentalist visions of development (the discourse on information and communication technologies for development) or in the aspirational imagination of the elite in India (Bangalore's aspirations to be Singapore), and it provides an entry point for a much wider array of people to experience on their own terms the 'information era'. The cheap CD or DVD supplements the experience of cyberspace while at the same time being rooted within diverse spaces in the city. Even as the urban landscape is being transformed and older media spaces such as movie theatres give way to high-rise malls with multiplexes, and even as the spaces of traditional mass media begin to

shrink because of their prohibitive prices, you see the emergence of a widely distributed chain of the circulation of media commodities that challenges the regime of intellectual property. The crisis of intellectual property is narrated into the crisis of South Asian cities in general, and interventions in implementing property rules sit alongside lamentful pleas for reworking urban imaginations. The critical difference between this world of everyday media and the celebratory approach of radical new-media activists or scholars of the public domain is that the world of a quotidian media experience does not articulate itself in the terms of resistance or appropriation. Piracy obviously does not stake a claim in the world of official creativity, either. It remains what it is: a culture of the copy that exists alongside livelihood and labour, profit and pornography.

Rethinking creativity: Pirate infrastructures

A world of everyday media that transforms our contemporary experience and yet paradoxically does not make a claim to creativity as it is commonly understood invites us to revisit our ideas of creativity's relation to the copy.⁴ The reproducible work that brings into play a network of circulation also inaugurates a series of cultural possibilities and readings.

Roland Barthes and Michel Foucault have already enabled us to shift our understanding of the locus of originality and creativity from the text and look for it instead in the process of consumption. What would happen if we also extended the search for creativity into the domain of circulation? The production and circulation of the ubiquitous pirate DVD, that prized commodity of pirate aesthetics, helps us understand

⁴ Ravi Sundaram (2007) has suggested that it might be fruitful for us to revisit the histories of the copy, from early print culture to the forger in art history through the crisis in aesthetic experience precipitated by the 'age of mechanical reproduction' as a way of understanding the current transitions and conflicts. It is also a useful way in which to understand the general anxiety about the consumption and circulation of cheaply reproduced media commodities.

the possibility of creative acts outside the domain of what is traditionally considered 'creative'.

To do so, we need to consider the conditions under which DVDs, these new products of digital reproduction, are pirated and circulated. Brian Larkin's work on piracy in Nigeria, for example, forces us not merely to look at and listen to the onscreen content of videos, but also to focus on those conditions of appropriation and circulation. Larkin demonstrates the critical importance of paying attention to the infrastructures of production in developing countries, where the process of cultural production is tied to the relative lack of infrastructure and becomes the basis for the transformation of the conditions of production by generating a parallel economy of low-cost infrastructure. He says that

a cycle of breakdown, repair, and breakdown again is the condition of existence for many technologies in Nigeria. As a consequence, Nigeria employs a vast army of people who specialize in repairing and reconditioning broken technological goods, since the need for repair is frequent and the cost of it cheap.

(Larkin 2004: 305)

This economy of recycling, which Ravi Sundaram describes as 'pirate modern' (2005: 47), becomes the arena for all sorts of technological innovation and extends further to experiments with cultural forms such as parodies, remixes, cover versions and so on. In a sense, Larkin's invocation of the importance of infrastructure contrasts with the obsessive fixation with content that one sees in most Western accounts of creativity, although in fact, on a metaphorical level, infrastructure frequently gets the figure of the pirate invoked in Western discourses as a way to understand the public domain of ideas, with references to 'the well of ideas', 'bridging the information gap', 'the information superhighway' and so on. In piracy, however, the content also has to be filtered through the regime of its own production. Piracy imposes particular conditions on the recording, transmission and retrieval of data. Constant copying erodes data storage, degrades image and

sound, and overwhelms the signal of the media content with the noise produced by the means of reproduction. Larkin says that since pirated videos are often characterized by blurred images and distorted sound, they create a kind of material space 'that filters audiences' engagement with media technologies and their senses of time, speed, space, and contemporaneity. In this way, piracy creates an aesthetic, a set of formal qualities that generates a particular sensorial experience of media marked by poor transmission, interference, and noise' (Larkin 2008: 218–19). Larkin uses the question of pirate infrastructure to open out the debate on intellectual property and to foreground the importance of addressing the question of content while looking at the legal aspects of culture. If infrastructures represent attempts to order, regulate and rationalize society, then breakdowns in their operation and the rise of provisional and informal infrastructures highlight both the failure of that ordering and the recoding that takes its place.

When we subject the material operation of piracy and its social consequences to scrutiny, it becomes clear that pirate infrastructure is a powerful mediating force that produces new modes of organizing sensory perception, time, space and economic networks (Larkin 2004). Doing so also forces us to acknowledge the material linkages between content and infrastructure. One of the significant approaches used by scholars of the public domain is an emphasis on the ability to create new content building on existing works. This overemphasis on the creation of new content raises the question of who uses the new content and what the relationship is between such content and the democratization of infrastructures. In most cases, the fall in price of computers and other electronic goods and the increase in access to materials via the increase in photocopiers and the general infrastructure of information flows are not caused by any radical revolution such as free software or open content, but by the easier availability of standard, mainstream commodities such as those produced by Microsoft and Hollywood. When Stallman and others castigate people for pirating Hollywood's productions, it is only because they are in the position of being able to disavow the global economy. But for many people, finding their

place within the global economy includes engaging with a world of counterfeit commodities, replicating the global economy's output.

We can play the game of seizing the higher moral ground and speak of the real information needs of these people, or we can provide crude theories of how they are trapped by false consciousness. Or better yet, we can move away from these judgemental perspectives and look at other aspects of globalization, such as the impact that the expansion of the market for these grey-market goods has on the general pricing of goods, on the spread of computer/internet-technology culture, on lowering the price of consumables such as blank CDs and DVDs, on the popularity of CD writers and so on. I find it a little strange and messianic that people who preach about access also preach about the kinds of access that should be allowed.

Pleasurable transgressions

Such prohibitions take many forms. As I noted before, one of the objections to piracy seems to lie in the fact that it is associated more with the world of pleasure and desire than with meeting 'pure needs'. Let me begin to discuss this objection in greater depth with an interesting story about the intersection between the world of desire, subjectivity and the experience of piracy. It is a typical example of interventions in the field of the digital divide. An NGO in Bangalore that works in the field of information and communication technologies for development was conducting a workshop on accessing the internet for the information needs of rural women working to empower other poor rural women in India. The facilitator guided the women through the basics of the internet, including how to access information relevant to their work, which ranges from providing access to credit to promoting women's health. The training was highly appreciated, and all the women volunteers seemed to be enjoying themselves while fiddling with the computers and exploring the internet. At the end of the

training, when the NGO started cleaning up the computers, including the browsing histories and the cached copies of the sites accessed, they were a little aghast to find that most of the women volunteers had been surfing pornography – and a range of pornography at that. So while the trainers were holding forth eloquently about the real information needs of the poor, the poor were quite happy to access their real information needs.

The links between pleasure, desire, aspiration and trespassing have always been complicated, and the closer that the transgressive act is to the domain of pleasure, the more difficult it seems for it to be redeemed socially. Thus, while one finds easier justifications for transgressions that deal with questions of livelihood and survival, and in the case of intellectual property, easier justifications for transgressions that appeal to claims to free speech and access to information, when the matter involved is about new subjectivities and pleasurable transgressions, the issue gets framed very differently. In particular, the terms set up by existing scholarship on the public domain end up excluding the ability to engage with practices guided not as much by necessity as by curiosity. The rhetoric of inclusiveness that is implicit in discourse on the issue of the public domain is necessarily accompanied by the prospect of exclusion, an exclusion that relies on either piety or pedagogy. What happens when we move towards the realm of non-legal media practices, where all of a sudden the transgression is highly pleasurable, but not in any way connected to the essential character of what Gayatri Spivak calls the 'subaltern subject' (1988: 284)? The sheer proliferation of these practices, both within the elite and also by the traditional subaltern classes, forces us to question our own assumptions about the terms in which people engage with the global economy of information and go about finding their place in the global economy. What critical conceptual resources can we draw on to address the question of pleasurable transgressions and subjectivities that resist easy framing?

Jacques Rancière paves the way for us to start thinking seriously about the hidden domain of aspiration and desire of the subaltern

subject while at the same time thinking about the politics of our own aspirations and desires. Rancière examines an unexplored aspect of the labour archive of nineteenth-century France: small, obscure and short-lived journals brought out by workers in which they were writing about their own lives. But they were not necessarily writing about their work, and if they were, they were not writing about it in glorified terms, but with immense dissatisfaction. For the most part, however, they were interested in writing poetry, writing about philosophy and indulging in other pleasures in which non-workers or intellectuals were entitled to indulge. Of course, from the other side of the class divide, intellectuals have been fascinated with the world of work and the romance of working-class identity. Rancière asks, 'what new forms of misreading will affect this contradiction when the discourse of laborers in love with the intellectual nights of the intellectuals encounters the discourse of intellectuals in love with the toilsome and glorious days of the laboring people?' (1989: x–xi). Rancière's motley cast of characters includes Jerome Gillard, an ironsmith tired of hammering iron, and Pierre Vincard, a metal worker who aspires to be a painter – in other words, people who refused to obey the role sketched out for them by history and who wanted to step across the line and perform the truly radical act of breaking down the time-honoured barrier separating those who carry out useful labour from those who ponder aesthetics. Rancière says:

A worker who has never learned how to write and yet tried to compose verses to suit the taste of his times was perhaps more of a danger to the prevailing ideological order than a worker who performed revolutionary songs. ... Perhaps the truly dangerous classes are not so much the uncivilized ones thought to undermine society from below, but rather the migrants who move at the borders between classes, individuals and groups who develop capabilities within themselves which are useless for the improvement of their material lives and which in fact are liable to make them despise material concerns.

(Rancière 1988: 50, quoted in Reid 1989: xxix)

The moral dictates that govern the lives of the poor are not imposed only by the state ('Don't steal', 'Don't beg') but equally by those who theorize the lives of the poor ('Be aware of your class', 'Don't get trapped by false consciousness'). And when people start moving out of the frame of representation that has been so carefully and almost lovingly crafted for them, they either have to be shown their true essence or their transgressions have to be brought within the terms of their representative class. Thus, when Victor Hugo was shown a poem written by a worker, his embarrassed and patronizing response was, 'In your fine verse there is something more than fine verse. There is a strong soul, a lofty heart, a noble and robust spirit. Carry on. Always be what you are: poet and worker. That is to say, thinker and worker' (Rancière 1989: 13). This is a classic instance of what Rancière would term an 'exclusion by homage' (2004: xxvi). Thus, the aspirations and desires of the poor have to be 'something more than fine verse', and the information needs of the poor have to be something more than wanting to watch a film or even dreaming of becoming a filmmaker. These injunctions certainly tell us more about the fantasies of the state and of the intellectuals than they do about people engaging in the fulfilment of their aspirations and desires, and we may do well to start rethinking the terms in which the scholars of intellectual property engage the language of access.

Revisiting the history of the commons and dispossession

Prominent among the terms employed in recent scholarship on intellectual property and the public domain has been the metaphor of the modern commons and the threat that it faces from this limitless expansion of intellectual property. More often than not, the commons is allegorized as a mythical ideal governed by principles of sharing, access and collaboration that was lost after the first enclosure movement. The argument proceeds to caution against a similar enclosure, a

second enclosure movement in the realm of information ecology that threatens to privatize every aspect of information, thereby threatening creativity. The invocation of the commons is indeed a useful starting point in discussions of intellectual property regimes, but it would be incomplete if we did not acknowledge the histories of contestation, conflict and violence that accompanied the first enclosure movement and its subsequent history.

Social historians of crime, for instance, have rigorously alerted us to the intertwined histories of property and criminalization. It may therefore be insufficient for us to invoke the commons only in allegorical terms, and it may be more fruitful to look at current conflicts as part of a wider historical continuum in a way that interrogates the nature of contestation over the definition, the contours and the enforcement of what constitutes 'property'. The history of the commons is also a history of criminalization and of the definition of the ideas of trespass and encroachment.

In *The Many-Headed Hydra* (2002), as a way of thinking about the challenges faced by the world of capital, Peter Linebaugh and Marcus Rediker begin with an invocation of the twin myths of the Hydra and Hercules' task of slaying it. Confronted with the monstrous, many-headed water snake, the Hydra, Hercules found that as soon as he cut off one head, two grew in its place. With the help of his nephew Iolaus, he used a firebrand to cauterize the stump of the beast's neck. Thus they killed the Hydra. Hercules then dipped his arrows in the blood of the slain beast, whose venom gave his arrows a fatal power.

Using the allegory of the Hydra to characterize the various obstacles that capital has faced and, like Hercules, overcome from the eighteenth century to the present, Linebaugh and Rediker start with the material organization of many thousands of workers into transatlantic circuits of commodity exchange and capital accumulation and then proceed to look at the ways in which they translated their cooperation into anti-capitalist projects of their own. The first enclosure movement resulted in the expropriation of the commons, freed large territories for capitalist agriculture, logging, mining and speculation in land, and

at the same time created a vast army of the dispossessed, who were then freed to become wage earners in new industrializing areas at home or abroad or who were criminalized by harsh laws that imposed penal servitude in the colonies. Those dispossessed from the land also became the bulk of the workforce for the new engine that transported commodities across continents, the ship. Sailors and ships linked the modes of production and expanded the international capitalist economy. The ship was also the site of the coming together of diverse forms of labour and of diverse labourers from different ethnicities, bound together by a pidgin tongue. The solidarity of this motley crew, like many others in the era, was forged by their shared situation of dispossession and their shared labour.

Linebaugh and Rediker document in detail the very difficult conditions under which these sailors worked and the dangers to which they were constantly exposed, which at the same time created the conditions for solidarity among those who would challenge the smooth flow of capital: pirates. The first pirates in this sense were often 'the outcasts of the land' who mutinied against the conditions of their work and created an alternative order challenging the division of labour and capital. In fashioning what Linebaugh and Rediker call their 'hydrachy', these buccaneers often drew from the memory of utopias created by theoreticians in which work had been abolished, property redistributed, social distinctions levelled, health restored and food made abundant. By expropriating a merchant ship (after a mutiny or a capture), pirates seized the means of maritime production and declared it to be the common property of those who did its work. Rather than working for wages using the tools and larger machinery owned by a merchant capitalist, pirates abolished the wage and commanded the ship as their property, sharing equally in the risks of common adventure.

Piracy's redistribution of wealth was considered to be a massive international problem, and pirates were declared to belong to no nation. In fact, piracy emerged as one of the earliest crimes of universal global jurisdiction in a time when nation states were still carving out

their own local absolute sovereignties. But piracy was not merely a problem of the failure of the implementation or enforcement of the laws of property. Piracy also established an alternative ethic and an alternate mode of being. Piracy was democratic in an undemocratic age and egalitarian in a highly unequal age. Linebaugh and Rediker provide various accounts of instances in which the pirate ship inverted all rules of social hierarchy and in which, for brief spells, the laws of private property were suspended to allow for experimentation with alternative social imaginaries, even if only very briefly.

Summarizing the characteristics of this hydra of the era of early capitalism, Linebaugh says:

It was landless, exploited. It lost the integument of the commons to cover and protect its needs. It was poor, lacking property, money, or material riches of any kind. It was often unwaged, forced to perform the paid labours of capitalism. It was often hungry, with uncertain means of survival. It was mobile, *transatlantic*. It powered industries of worldwide transportation. It left the land, migrating from country to town, from region to region, across the oceans, and from one island to another. It was *terrorized, subject to coercion*. Its hide was calloused by indentured labor, gallery slavery, plantation slavery, convict transportation, the workhouse, the house of correction. Its origins were often traumatic: enclosure, capture, and imprisonment left lasting marks. It was *female* and *male, of all ages*. (Indeed, the very term *proletarian* originally referred to poor women who served the state by bearing children.) It included everyone from youth to old folks, from ship's boys to old salts, from apprentices to savvy old masters, from young prostitutes to old 'witches.' It was *multitudinous, numerous, and growing*. Whether in a square, at a market, on a common, in a regiment, or on a man-of-war with banners flying and drums beating, its gatherings were wondrous to contemporaries. It was *numbered, weighed, and measured*. Unknown as individuals or by name, it was objectified and counted for purposes of taxation, production, and reproduction. It was *cooperative and labouring*. The collective power of the many, rather than the skilled labour of the one produced its most forceful energy. It moved burdens, shifted earth, and transformed the landscape. It was *motley*, both

dressed in rags and multiethnic in appearance. Like Caliban, it originated in Europe, Africa, and America. It included clowns, or cloons (i.e., country people). It was without genealogical unity. It was *vulgar*. It spoke its own speech, with a distinctive pronunciation, lexicon, and grammar made up of slang, cant, jargon, and pidgin – talk from work, the street, the prison, the gang, and the dock. It was *planetary*, in its origins, its motions, and its consciousness. Finally, the proletariat was *self-active, creative*; it was – and is – alive; it is onamove.

(Linebaugh and Rediker 2002: 332)

It is in the struggles of these multitudes that Linebaugh and Rediker see the hidden history of revolutionary ideas of freedom, entitlement, dignity and everything else claimed in the name of rights and citizenship. The multitude was limited neither by the narrow allegiances of ethnicity nor by the vulgar claims of nationhood, and yet ironically, the moment of the formal institutionalization of a number of these rights was also the moment that resulted in the exclusion of the very class that had suffered to gain them.

Linebaugh and Rediker say that:

[T]he new revolts created breakthroughs in human praxis: the Rights of Mankind, the strike, the higher-law doctrine, that would eventually help to abolish impressments and plantation slavery. They helped more immediately to produce the American Revolution, which ended in reaction as the Founding Fathers used race, nation, and citizenship to discipline, divide, and exclude the very sailors and slaves who had initiated and propelled the revolutionary movement.

(Linebaugh and Rediker 2002: 328)

There is perhaps a lesson to be learned here for those of us interested in looking at the linkages between the multitudinous experience of living through the consolidation of intellectual property. Intellectual property is also created through transnational networks of new forms of capital and labour, made in virtual vessels that pass each other in the global night on the high seas of data. The tall ships of our times fly many flags of convenience. They are the software sweatshops, the media

networks, the vast armadas of the culture industries and the lifestyle factories. They produce high-value primary commodities, stars, stories, sagas, software, idols, lifestyles and other ways of ordering meaning in an increasingly chaotic world. Typically, even though they sell the fantasies of place and identity in an increasingly enmeshed world, they are produced in a global everywhere and delivered through electronic pipelines everywhere, when necessary, more or less instantaneously, through telecommunication networks.

Their ubiquity and their global reach are also hallmarks of their greatest vulnerability, for like their precursors the tall ships of the new economy are freighted with cargo that is just as vulnerable to attacks of piracy. The new electronic pirates are located in the interstices of the global culture economy, which are the nodes that make the network viable in the first place. We cannot imagine a global media industry without the technology that made possible the phenomenon known as peer-to-peer networking on intranets, but it is precisely the same technology on the internet that renders any attempt to police the distribution channels of media content in the interests of proprietary agencies almost impossible. Just as the piracy of the past disturbed the equilibrium composed of slavery, indentured labour, the expropriation of the commons, the factory system and penal servitude, the electronic piracy of the present is destined to wreck the culture industry, either by making the economic and social costs of policing content prohibitive or by ushering in a diversity of new protocols for the use, distribution and reproduction of cultural and intellectual content that will make the whole enterprise of making vast sums of money out of the nothing of data and culture a difficult business (Raqs Media Collective 2003).

Conclusion

Any account of the conflicts over access to knowledge and culture in the contemporary world will have to be aware of the complicated

terrain that knowledge occupies. Our examination of the figure of the pirate has been an attempt to chart out the ways in which familiar issues of political economy, inequity and reform meet with aspirations, desires and creativity in unlikely encounters in unexpected spaces. As scholars and activists interested in a more just information order, it might well be the case that we need to abandon any simple, one-size-fits-all approach to reforming the public domain. We need instead to be aware of the fact that there can be no accounts of access that are not simultaneously accounts of exclusion, and it is in the awareness of this productive tension that we may be able to engage with a wider set of practices through which people can access knowledge and culture.

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