

Forced Pirates and the Ethics of Digital Film

In this position paper, I will discuss ethical consideration regarding the advent of digital technology – precisely the Internet – and its impact on the cultural sector, especially the film sector. I will argue that, even though illegal file-sharing creates ethical problems, it is rather the actions, or better non-actions, of the entertainment industry that are morally wrong. The paper will not so much discuss ethical implications of file-sharing itself, but rather add to the intellectual discourse by presenting strategies to avoid illegal file-sharing and by discussing ethical implications surrounding those.

The Internet is celebrated as a great democratising medium that not only renders traditional individual gatekeepers, who controlled the access of information to traditional media, unnecessary (Schulz, Held, Laudien 2005) but also allows for greater choice of information and generally a much increased availability of those. Looking at it from the perspective of the filmic medium, producers are no longer dependent on the mercy of exhibitors – gatekeepers – when they want to exhibit their work. Audiences, as a result, have much greater choice without their curiosity being supervised by gatekeepers.

However, this welcomed new scenario also led to side effects that are not necessarily seen as positive.

Before the Internet, movies could be considered to be commodities in Marx' (1867) sense, by being “an object outside of us, a thing that [...]

satisfies human wants” (p.35), which can be exchanged for other commodities or money. Being a commodity was accompanied by two further characteristics. Films were a scarce product. Their availability was finite. They were hence rivalrous. Secondly, if people wanted to watch a movie, they had to purchase a cinema ticket, a VHS/DVD or a cable subscription together with, in some countries, a TV license. Films were excludable. They were what economists call a “private good”.

Digital technology, especially the Internet, changed this situation. Films are no longer rivalrous. If I watch a movie, someone else can watch the exact same copy at the exact same time. As Lessig (2008) pointed out at great length, films, at least at the moment, do not seem to be excludable any longer either. No copyright protection technology, so far, was able to completely prevent the sharing of films. Law suits against Napster, more recently The Pirate Bay and Mininova as well as against countless individuals caused a lot of public attention but never had the anticipated result of stopping, or at least decreasing, file-sharing. The Internet turned films, like other products that are based on information, into public goods, which are non-rivalrous and non-excludable. Uploading a film to the Internet means to have infinite copies of the same movie without any additional costs.

The advent of the Internet thus caused a major shift for filmic products, which are no longer private but public goods. This brought with it what economists call a ‘free-rider problem’: illegal file-sharing.

The Shift from Private to Public Good

Because nobody can be excluded from using a public good, people can theoretically use it for free. This is the free-rider problem of public goods. Riding on but not paying for a train or living in a country, enjoying protection by armed forces, using roads or a public health system but not paying the amount of taxes one is obliged to, are examples of the free-rider problem¹. In the case of film in a digital environment, the free-rider problem is polemically called 'piracy'.

There are endless studies on the impact of piracy – with contradicting conclusions. Some suggest a substitution effect, concluding that piracy costs the entertainment industry huge amounts of money due to missed sales (Liebowitz 2004, Zentner 2004, Rob & Waldfogel 2004, Hui & Png 2003). Siwek (2006), for example, argues that movie piracy alone costs the US economy a whopping \$20.5 billion annually. According to Oxford Economics (2009), the UK entertainment industry suffers a much more manageable annual loss of £500 million due to piracy².

Contrary to the substitution effect, other studies (Oberholzer & Strumpf 2004, Blackburn 2004) suggest the existence of a sampling effect, which means that people pirate media to try it out or to get to know the artist and later buy an official copy of the tried out media or, more likely, other work of

¹ Citizen exempt of taxation are, of course, no free-riders.

² Studies suggesting specific numbers should, of course, be read with caution. The assumption that every download equals a missed sale cannot be anything but wrong. But also every other study that measures the amount of downloads in order to determine the financial loss for an industry will assume some ratio of downloads to missed sales.

the artist. The sampling effect even increases media sales (Andersen & Frenz 2007).

At this point, it is useful to make a distinction regarding my use of the word “film”. When I speak of films/movies, I generally speak about the whole genre of narrative moving images. The only logical distinction is between mainstream and non-mainstream titles³. Because, while for the latter, file-sharing seems to indicate a sampling effect or is simply used as a way to distribute a title (examples of films that used file-sharing “successfully” include *INK*, *Steal This Film* and *Four Eyed Monsters*), in the case of Hollywood fare, file-sharing rather implies a substitution effect (Blackburn 2004).

Ethical Implications of File-Sharing – A Brief Discussion of Kant

Does illegal file-sharing cause ethical problems? In this chapter, I will try to explore this question by discussing Kant’s works *Of the Injustice of Counterfeiting Books* (1785a) and his indisputably more influential essay *Fundamental Principles of the Metaphysic of Morals* (1785b).

In *Counterfeiting Books*, Kant describes a book as a) a physical item and b) a representation of the author’s discourse with her audience. The author holds the right to this discourse and can authorize a spokesperson, who might then, authorized by the author, distribute the author’s work (i.e. deliver the author’s speech to the audience). The buyer of the book owns it and may re-

³ The distinction between mainstream and non-mainstream is itself not one with rigid boundaries. It can rather be imagined as a range, where commercial titles from Hollywood form one pole (mainstream) and independent production without commercial intent form the opposite pole (non-mainstream). All films can be located between those extremes.

produce but not re-distribute it, for the latter can only be done if the author authorizes her. The author thus has the right to „hinder another from reading it to the public without his consent”⁴ (Kant 1785a). According to Pievatolo (2008), Kant here completely rejects the concept of intellectual property since a discourse is non-physical and thus not a property. Instead, he tries to protect an author’s right by focussing on her personal freedom to decide, who her spokesperson is; i.e. who is authorized to speak to an audience on her behalf. We thus have to consider the author’s will when making ethical judgements.

We can now follow that, in a digital environment, if the author does not have any commercial interest with her film but wants to reach a huge audience, file-sharing might very well be positive. Non-mainstream filmmakers might further experience a sampling effect, leading to more income. If income is what they are aiming at, file-sharing must, again, be seen under a positive light. Only in the case of file-sharing leading to a substitution effect – which seems to be associated to mainstream films – and maximising commercial success being the will of the author, can file-sharing be considered as ethically wrong.

In *Fundamental Principles*, Kant developed his Categorical Imperative. I want to concentrate on two of his central maxims: „Act only on that maxim whereby thou canst at the same time will that it should become a universal law“ (Kant 1785b). And “So act as to treat humanity, whether in thine own

⁴ In today's world, we can assume that „reading“ stands for all forms of distribution.

person or in that of any other, in every case as an end withal, never as means only“ (ibid.).

Kant’s second maxim asks us to never see a person as a means but always as an end. And “[t]he natural end which all men have is their own happiness” (Kant 1785b). So what then makes the audience happy? I argue, access to films⁵. The happiness of the author, on the other hand, might stem from money, recognition or impact. File-sharing must then be seen as beneficial to the producer who seeks recognition or impact as well as those who aim for monetary income and achieve a sampling effect. However, it harms those producers who seek a maximum of monetary profit but suffer a substitution effect. On the other hand, file-sharing benefits the sharers by giving access to an abundance of filmic information and entertainment.

Lets then look at Kant’s first maxim, only act in a way that you want your actions to be a universal law. We are now facing a hypothetical situation in which everybody would share digital movies. This scenario would lead to everyone having access to every film (which is a good thing). Authors who seek recognition or impact as well as those being able to harness a sampling effect would also benefit. However, if we assume that file-sharing as a universal law would lead to a complete substitution effect (which in itself is a rather brave assumption because studies have shown contradicting results), films would loose all their revenue. This would then possibly mean that films, as a commercial product, would no longer survive. Film as a medium or even

⁵ We could, or course, argue that only free access makes the audience happy. But this would, prematurely, assume that, having the choice, people will decide for the free option.

as an art form would live on. This is because creation is not only motivated by monetary rewards⁶. However, it is the blockbusters that, judged by cinema attendance, society is most interested in. Those films would most likely vanish as their making is primarily motivated by monetary profits. The positive outcome of piracy, everybody having access to everything, would no longer hold true.

It is on the grounds of being a universal law that file-sharing could cause ethical problems⁷. This is exactly the argument of the commercial film industry, claiming that films like *RocknRolla* or *Star Trek*⁸ are shared so often that their monetary success suffers. On the other hand, filmmakers who seek recognition or impact or those who are able to harness a sampling effect clearly benefit from file-sharing, as does the audience that has access to an abundance of information and entertainment. Films like *Four-Eyed Monsters*, *Sita Sings the Blues*, *Steal this Film*,⁹ *Rethink Afghanistan* or even Michael Moore's *Slacker Uprising* used a form of file-sharing to reach huge audiences, establishing their authors' careers or, like in the case of *Steal this Film*, *Rethink Afghanistan* or *Slacker Uprising*, bringing their message to millions of people. Encouraging such outcomes and avoiding the substitution effect

⁶ On the other hand, the making of films, due to digital technology, became so affordable that it does not need to cost anything, or only very little, to produce a film. Hence, film as an art form would not vanish just because of missing funding.

⁷ „Could“ because for piracy to cause ethical problems, we have to assume that piracy as a universal law would lead to a complete substitution effect.

⁸ According to TorrentFreak (see Gardner 2009), *Star Trek* was the most pirated movie of 2009. Besides almost 11 million downloads, the film grossed over \$385 million at worldwide box offices. *RocknRolla* was the third most pirated movie of 2009. It was downloaded 9.4 million times and only managed to gross a little under \$26 million from worldwide box offices.

⁹ *Steal this Film* was accessed almost 3 million times through p2p file-sharing.

would thus be desirable.

There are a number of proposed ways to enable the positive sides of digital technology without encouraging illegal file-sharing. I will concentrate on two. Accepting that information goods are public goods leads to one group of strategies. Another is Chris Anderson's (2009) approach of giving information goods away for free.

Resolving the Free-Rider Problem

There are a number of strategies for public goods to avoid the free-rider problem. In the case of film, the most promising are the Coasian solution, turning a public good into a club good, embracing payment as a social norm and government provision or government subsidies. Since government funding and tax subsidies for filmmaking are already in place, I would like to concentrate on the possibilities the market has to avoid free-riding.

The Coasian solution argues that in a situation in which the transaction costs¹⁰ between parties are very low, the market would regulate the desired amount of production (compare Coase 1960)¹¹. In case of films this would mean that if it is easy for beneficiaries to find each other, they could pool their money and thus pay for the production of the desired filmic output.

¹⁰ Transaction costs are costs required for an economic exchange. This could include getting to the place of the exchange and back, comparing best prices and finding out where one can get the preferred deal, waiting for the other party of the exchange, contractual costs and so on.

¹¹ It needs to be added that Coase did not believe in a world without transaction costs. However, the Internet might have changed this and, though probably not abandoned, immensely decreased transaction costs.

Making payment a social norm calls upon audiences to recognize that creators deserve compensation for their work because it is of value to the audience.

Turning public goods into a club good means to try to make a non-exclusive product an exclusive one. Copyright protection was one such attempt. However, those technical barriers did not prove to be effective (Doctorow 2009). It further has to be considered if not the costs for developing ever-new technologies to exclude free-riders exceed the profits gained when free-riders are turned into paying customers. However, as Doctorow (2009), Cuban (2009), Kelly (2008) and Bahanovich and Collopy (2009) suggest, the answer might just lie in the coasian solution itself. By providing a place on the Internet where people can go and find every movie they want – a one-stop shop – and then purchase those films with as little effort as possible¹², the shift from film as a public good to film as a club good might succeed¹³. Kelly (2008) stated that people might not want to pay for a public good online but they will pay for immediate access and findability, which a one-stop shop for filmic products would provide. Findings of Bahanovich and Collopy (2009) support such a one-stop shop by stating that people would restrict themselves from illegal file-sharing, if legal alternatives would offer a greater choice of products. Further, Casadesus-Masanell and Hervas-Drane (in Silverthorne

¹² Roettgers (2010a) sees subscription fees, user donations or an advertising supported model as possible ways of financing such a one-stop shop. Micro-payments might yet be another option.

¹³ Examples of already existing one-stop shops for commercial movies include Voddler (financed by advertising and including mainstream titles), Jaman (financed by advertising and micro-payments), Lovefilm (subscription model) and a variety of special interest sites like onlinefilm.org, Nomadsland, JoiningTheDocs.tv or Mubi.com.

2007) studied the interactions of iTunes and peer-to-peer file-sharing and came to a similar conclusion: “to compete effectively against p2p, online digital distribution must strive to become accessible and attractive to consumers.” The attraction of a one-stop shop lies in embracing its strengths (being legal, fast, reliable, easy to use and offering metadata) and imitating the strengths of peer-to-peer networks (variety of content, no restrictions like Digital Rights Management) (Casadesus-Masanell and Hervás-Drane in Silverthorne 2007).

Chris Anderson’s (2009) concept of offering entertainment products for free but charging for things that cannot be copied is another strategy to avoid piracy while still encouraging universal availability of films¹⁴. Anderson observed that media products are no longer scarce but infinite goods, which triggers a few economic mechanisms:

- The marginal costs of entertainment products on the Internet are almost zero.
- Free market competition drives product price to its marginal costs.
- Online entertainment prices will hence drift towards zero.
- When giving things away for free, those things stop generating income. They can no longer be considered a product. But they become a free resource for other products, which then can create new markets.
- Scarce goods can be sold for a price above their marginal costs.

¹⁴ See also Locke’s (1690) argument that non-scarce goods do not have a value and can hence not be sold.

Anderson hence sees an economic opportunity in not charging for creative content but building a business around it by selling scarce goods. Kelly (2008) logically deduces “when copies are free, you need to sell things which can not be copied.” He lists eight ways to earn money online with products based on information:

- Immediacy: People want to discover creative works as soon as they are published. Premiere has more appeal than a free copy weeks later.
- Personalization: Normal version is free. Individual tailor-made version costs money.
- Interpretation: Product is free, but user manual or user services are charged for.
- Authenticity: If it really comes from the artist, people will value it more.
- Accessibility: People want everything, everywhere, all the time. iTunes made this their business model.
- Embodiment: A physical copy, a real event – something none-digital. Books have more value than PDFs. Films are worth more on a big screen than on a laptop.¹⁵
- Patronage: Audiences want to support artists. But they need to be certain that the money reaches the artist and that it is a fair amount they pay.¹⁶
- Findability: Art needs to be found. For an audience, there is more value in things they are confronted with than in things they never get to know.

¹⁵ Kai Kimppa (2010) pointed out to me that 3-D technology follows the same principle of embodiment, making people pay for something they cannot recreate on their computer.

¹⁶ Again, I am indebted to Kimppa (2010) for the example of micro-payments. If 1 million people each donate £1 to an artist (possibly via PayPal), an artist’s life could be a very good one.

Anderson (2009) adds:

- Freemium: Give out free samples/version and charge for a premium/advanced version.
- Advertising: Giving things away for free creates audiences, who express needs that advertisers want to fulfil.
- Cross-subsidies: By giving something away for free, consumers are lured into buying something else.

Both strategies, the one-stop shop as well as giving products away for free, can of course be combined.

Ethical Implications of Piracy-Avoiding Strategies

What are the ethical implications of the two suggested alternative distribution strategies? Let us quickly remind ourselves that file-sharing causes, for some authors, a problematical substitution effect. It is easy to see that giving films away for free would avoid a substitution effect. Since the film does not cost anything, it can also not be substituted for a free version of it. As discussed above (see Bahanovich and Collopy (2009) and Casadesus-Masanell and Hervas-Drane (in Silverthorne 2007)) a one-stop shop also helps decreasing the substitution effect by offering audiences a legal alternative to file-sharing.

But are the suggested strategies supporting the positive sites of file-sharing – access, recognition, impact and a sampling effect? Again, giving a film away for free is not so much trying to oppose file-sharing but to imitate its effects. If films were freely available, of course, people would have access to

a great number of titles. This would then positively influence an author's chances for recognition and impact. A possible sampling effect would also not be endangered because, once discovered, an author might earn money by selling things that cannot be copied (see above).

One of the biggest problems in today's distribution environment is restricted availability. The 2010 blockbuster *Alice in Wonderland*, for example, opened in US cinemas on 5 March 2010, in France on 24 March 2010 and in Brazil on 23 April 2010. If a person wanted to watch the film at home, waiting time further increased. Trinh Minh-ha's influential documentary *Surname Viet Given Name Nam* is only available through her distributor for an educational price of \$495. The Malaysian documentary *The Big Durian* costs much less but is only available as DVD shipped from Asia or the USA. We are living in a world that is based on immediacy. We can immediately access information of those films online. Reading US film blogs or scanning websites like imdb.com means that advertising campaigns of commercial titles easily reach us. The availability of information/advertising on the Internet does by no means match the legal availability of the films. Global information/advertising for movies is like the carrot on the stick and illegal file-sharing is a way of finally reaching this carrot. Film distribution is based on a pre-internet world. It doesn't make use of the positive opportunities the Internet offers (richer catalogue of titles, easier and further dissemination and location). A one-stop shop, now, would drastically increase availability and with it the possibilities for recognition and impact of authors. Once an audience discovers an author through a one-stop shop, the author might further experience a sampling effect.

I further want to strengthen my argument by briefly applying Fieser's (2009) deontologist and consequentialist principles "most commonly appealed to in applied ethical discussions." Those are:

- Personal benefit (beneficial consequences for the individual)
- Social benefit (beneficial consequences for society)
- Principle of benevolence (help those in need)
- Principle of paternalism (assist others in pursuing their best interest when they cannot do so themselves)
- Principle of harm (do not harm others)
- Principle of honesty (do not deceive others)
- Principle of autonomy (acknowledge a person's freedom over her own actions and body)
- Principle of lawfulness (do not violate the law)

As every transaction, giving things away for free or selling products through a one-stop shop are agreements between seller and buyer. Since the seller sets a price and the buyer can agree to this price or not, consequences for both people will, on a personal level, be beneficial when it comes to a transaction – the seller will earn the money she hoped for and the buyer will gain the product she wanted. Further, such a transaction is honest, lawful and non-harmful, because, again, the seller sets a price that is acceptable for herself and the buyer can agree or not. It also acknowledges a person's freedom over her own actions, by not forcing anybody to take part in such

transactions – audience members could still obtain their movies directly from the author or in cinemas or decide to not purchase a movie at all, authors can offer their work for free or through a one-stop shop or decide to publish their work through alternative channels.

However, a one-stop shop might always create the danger of a monopoly. Such a monopoly might then lead to an increase in prices¹⁷, which will exclude individual members of the audience. Monopolizing a one-stop shop must be avoided because it goes against the reasons of its own creation. Following the goal of universal availability of filmic goods, a one-stop shop must ensure to be universally available itself in order to fulfil its function. If a number of one-stop shops exist (possibly according to filmic genres), aggregator sites might step in and serve as the point of entry for the audience.

In the popular discussion, Anderson's model of giving products away for free was criticized of possibly leading to a situation in which big commercial corporations let people produce works for free and then use those works to earn huge profits through advertising or other business models. YouTube could be an example. But, again, this is a negotiation between the corporation and an individual producer. If the producer freely agrees to the terms – and the motivations for such might not be monetary – no ethical principle was harmed.¹⁸

Consequences on the society level, as mentioned above, would be an

¹⁷ Kimppa (2010) argues that a monopoly might not lead to higher prices. He uses Keynes' call for government intervention into the market in order to control it.

¹⁸ I assume that no monopoly exists.

increased availability of films – for free and/or in a one-stop shop. This benefits audiences. Films inform, educate and entertain. They add to science and journalism by working on an emotional level. As Brynjolfsson, Hu and Simester (2007) showed, digital one-stop shops do not only decrease search costs but, as a result, also distribute income more evenly across the range of entertainment products. When in an offline world 80 per cent of revenue was made by 20 per cent of the titles, lower search costs allow for an easier location of non-hit titles and hence shift this principle towards 20 per cent of titles accounting for 72 per cent of revenue. More evenly distributed revenue will allow for more diversity, which will also benefit audiences. Further, a more evenly distributed income supports the principles of benevolence and paternalism, by helping those with smaller income to pursue their interests.

Conclusion

A one-stop shop or the business models surrounding the giving away for free of filmic content are meant to benefit society as a whole without hurting the individual filmmaker. It is clearly beneficial for society to have access to a wide range of filmic products. This, however, makes a compensation of the producers necessary. Both suggested models could account for such compensation. They would avoid negative impacts of piracy (the substitution effect) without eliminating its positive aspects (access, recognition, impact, sampling effect).

The installation of above models, however, is incumbent on the film industry, since it is the mainstream titles that seem to suffer most from file-

sharing and because only big players, not the individual filmmaker, have the market power to implement the proposed solutions. By failing to apply those piracy-avoiding strategies, the industry causes what it claims is destroying it.

Piracy, if anything, clearly indicates an audience desire for entertainment products. The entertainment industry fails to fulfil this desire. The industry now has the choice to a) turn a huge part of their audience into criminals or b) implement models that avoid the free-rider problem. However, the film industry dismisses not only what society desires but also what has proven to be possible¹⁹. The actions, or better non-actions, of the entertainment industry put their own interest above the interest of society.

Trying to find new models that are more compatible with audience desires would be the morally preferred way since it would benefit society without hurting the individual producer – or the entire entertainment industry.²⁰

Since the technological possibilities to fulfil the desire of society exist, it can only be assumed that the industry is trying to protect old revenue streams without embracing new ones²¹. This conservative and clearly selfish act

¹⁹ iTunes and YouTube are successful examples. Both are profitable. Giving away content for free has already created profits for musicians such as Nine Inch Nails (Anderson 2008).

²⁰ It is necessary to understand that giving products away for free or providing a one-stop shop will not necessarily destroy traditional revenue streams. It will rather be an additional income stream. It might become a substitute for DVD purchase/rental but theatrical movie viewing is a totally different experience and hence a different market. Studies by the UK Film Council (UKFC 2009) even show that, while online revenue for film is increasing, so too was theatrical revenue between 2006 and 2008. This is what Kelly (2008) talked about when he stated that Embodiment is not an infinite good. The cinema experience is an embodiment of the filmic medium.

²¹ Or, to suggest a more sinister explanation, because the entertainment industry is earning good money with lawsuits against single file-sharers (see Roettgers 2010b)

values the personal benefit of the film industry (profit) higher than the societal benefit of making films more available. It further breaks with the principles of paternalism since it is the film industry that is in a position where it can help others (the audience) to fulfil their desires. The audience cannot do so themselves (at least not in a legal way). Only the film industry can decide to apply above strategies. Hence, the ethical wrong of the industry must be considered as being of greater degree than the ethical wrong of the pirating audience.

Above suggestions for piracy-avoidance will possibly not “kill” piracy. But it will decrease it. And, more importantly for this discussion, it will pass on the ethical responsibility for illegal file-sharing from the film industry to the individual who takes a free ride.²²

²² Presented strategies and ethical implications are by no means unique to digital film. They can, at least partly, be discussed and applied in most, if not all, other fields of information products, including literature, music, games, applications and imagery.

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