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## Enjoy your culture!

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### Abstract

Žižek is not a legal theorist, nonetheless, he has written about the law throughout his work. This essay builds on Jodie Dean's work in 'Žižek and Law' which sets out a theory of law, preferable to most critical legal theories because it retains the belief that law can serve emancipatory aims. My aim in is to apply this Žižekian theory of law to copyright, in the hopes of presenting an alternative framework that retains the initial promise of copyright: that cultural material may be dis-alienated public property. This is necessary in a music-focused issue, because copyright law dictates the forms in which music, and cultural products, are created and consumed. The argument is presented in three parts: the founding of copyright, its obscene supplement, and its paradoxical future from within. I argue that future copyright legislative proposals should not focus on extending or limiting any overall term, or what marginal increase in revenues a creator should be entitled to; rather, creators should be given a renewal right. In this way, an author has the ability to constantly renegotiate the terms on which their work is commoditized.

**Key Words:** Copyright Law; Critical Media Theory; Žižek

In November 2014, Julia Reda, MEP for the Pirate Party of Germany, was named rapporteur for the European Parliament's review of the *Information Society Directive* 2001/29/EC ('*InfoSoc Directive*') (Falkvinge 2015: unpaginated). According to Pirate Party founder Rick Falkvinge, this meant that 'for the first time, legislation on [copyright] is initiated by net liberty activists' rather than 'mail-order lobbyists for corrupt incumbents who gladly sacrifice civil liberties ... to preserve an unjust and immoral lucrative monopoly' (Falkvinge 2015: unpaginated). The unprecedented appointment of a pirate to draft copyright recommendations coupled with strong words from the party warranted high expectations for a radical proposal. Would Reda fulfill the parties' mandate for 'free non-commercial sharing', a reduction to the 'twenty years of commercial monopoly', 'free sampling', and 'a ban on DRM' (Engstrom and Falkvinge: 2012: 5-6)? Her report was delivered on January 19 2015. And in it she advocated for European legal harmonization, proposing conservatively that 'all exceptions and limitations permitted in the *InfoSoc Directive* should be made mandatory in all member states' (Reda 2015: 8) This non-attempt at copyright reform has been criticised by Swedish Pirate Party leader Amelia Andersdotter as only 'more of the same' (Andersdotter 2015: unpaginated).

Slovenian theorist Slavoj Žižek shares this pessimism towards institutional political change. Nonetheless, he wrote a book called *Living In The End Times* (2012), arguing that capitalism is fast approaching its 'terminal crisis'. And while traditional liberal democratic politics are ill-equipped to deal with this crisis, he remains hopeful for the future by reversing the 'common historicist perspective' (Žižek: 2009b: 128). In doing so, Žižek claims to see signs of an emerging utopian alternative. For example, in a recent web chat with *Guardian* readers, he identified 'free downloading' as one of these signs, and suggested that the action opened up 'a non-capitalist space' (Žižek 2014a: unpaginated). Though this space might exist, it is under ever-escalating pressure from the culture industry that aims to criminalise and abolish it; and that which legitimises both the actions and rhetoric of the culture industry is copyright law. Thus the first step to achieving the alternative future that online file-sharing may represent is some sort of emancipatory copyright reform.

A different future requires alternative theoretical understandings of the present. Žižek may not be a legal theorist, nonetheless, he has written about the law throughout his formidable oeuvre. And as Žižek's comrade Jodie Dean has remarked, 'what makes a Žižekian argument compelling is its ability to enliven, open up, or refresh what might have

become a stale or too easily accepted mode of understanding' (Dean 2004: 2). In her article 'Žižek and Law' (2004), Dean outlines the theory of law that appears in Žižek's work. She recommends it for 'those interested in a critical approach to law that does not abandon the law' (Dean 2004: 2). She argues that Žižek's theory is preferable to other 'postmodern' approaches to law because Žižek suggests that law can serve liberatory ends. My aim in this essay is to apply Žižek's theory of law to copyright, in the hopes of presenting an alternative framework that retains the promise of copyright: that cultural material may be dis-alienated public property. This is necessary in a music-focused issue, because copyright law dictates the forms in which music, and cultural products, are created and consumed. In attempting this, I follow the structure of Jodie Dean's exposition. So, following a sketch of Žižek's Lacanian-Marxism, my argument is presented in three parts: the founding of copyright, its obscene supplement, and its paradoxical future from within.

## **I Sublime theoretical foundations**

Žižek's analysis of society begins with the premise that groups of people are organised around a social antagonism. He invokes Marx and Engels and refers to this antagonism as a 'class struggle' which is the 'absolute of *any* given historical constellation' (Žižek 2014b: 103). To illustrate, Žižek discusses Claude Levi-Strauss' analysis in *Structural Anthropology* (1963) regarding the Winnebago tribe of North America. This tribe is divided around two sub-groups: those from above and those from below. When asked to draw a ground plan of their village, tribespeople's results depended on which sub-group the individual tribesperson identified with. Both groups conceived of their village as circular. But, the first sub-group depicts the village as a ring of houses organised symmetrically around a central temple. The second group sees the village as 'two distinct heaps of houses separated by an invisible frontier' (Žižek 2014b: 104). Žižek's point is that *within* the difference of perceptions there is an implied reference to an antagonism. Therefore, different representations by the tribesman are attempts to construct an illusion of a cohesive society, distorted by the inability to accept the underlying social antagonism. Thus, for Žižek, ideology acts as an operative principle that supports our conception of reality. It is an illusion that structures social relations as an escape from the traumatic social antagonism (Žižek 2009a: 45).

Since the 16th century, history has been dominated by the antagonism of capitalism. Žižek refers to the capitalist social antagonism as the 'Real' of our time (Žižek 1999: 222, 276). Here he invokes Jacques Lacan's theory of ontological orders: the Real-Imaginary-Symbolic ('RIS') triad. For Žižek the Real is a traumatic kernel that resists symbolisation. Consequently, the process of symbolisation is what constitutes 'reality'; however, for Žižek there is always a lack between the Real and its symbolisation. This lack requires the Imaginary, as ideology or illusion, to conceal that the symbolic order 'is constructed around some traumatic impossibility' (Žižek 2009a: 123). As Žižek notes in *For They Know Not What They Do* (2007: xii), the entire RIS is reflected in each of its modalities. Importantly, Žižek defines the 'symbolic Real' as 'the real as consistency', whereby inherently meaningless social structure serve as the topography onto which reality is constructed. This combination of Lacan and Marx allows Žižek to recognise the 'universal status of capitalism [as the symbolic Real] and its over-determination of the totality of social relations' (Boyle 2008: 16). He adds that the 'universality of capitalism resides in the fact that capitalism is *not* a name for a civilisation, [or] for a specific cultural-symbolic world, but the name for a truly neutral economic-symbolic machine' that can operate around *anything* to be commodified and exploited (Žižek 2005: 241). But how does capitalism as Real actually determine social-political or legal events? Žižek calls this the 'Marxian Parallax', whereby capitalism is the 'absent cause' of social-political events (Žižek 2006: 383). Indeed, Žižek insists that 'we cannot properly grasp' events of everyday life without looking to the 'self-propelling metaphysical dance of Capital that runs the show' (Žižek 2006: 383).

Against this background, Žižek's theory of law is analogous to a general Marxist theory of law. Here capitalism forms the economic base of society (the Real), while the law serves as a part of its superstructure (a Symbolic institution) that reflects and reproduces the social relations prescribed by the base. Despite this intimate relationship between capitalism and law, Žižek maintains that law can serve liberatory ends. Indeed, for Žižek, legal rights keep 'a gap open ... in which others can inscribe their demands' in the struggle for hegemony (Žižek 2014b: 321). Nonetheless, he argues that radical legal and political alternatives that do not deal with the *form* of capitalism and commodity fetishism are insufficient. Regarding the law specifically, Žižek's theory requires one to address the capitalist Real that structures it.

## II Plague of the printing press

Žižek's direct engagement with law begins with Blaise Pascal's detection of the tautological conception that 'law is law', and that to reveal law's origins would bring it to an end (Žižek 2007: 203). Therefore, as Jodie Dean notes, 'Žižek's account of law's installation is synchronic' (Dean 2004: 3). That is, founding must be retroactively posited from the standpoint of when it was founded. This encloses the law in a tautology that 'precedes and presupposes itself' (Žižek 2007: 203). Thus, for Žižek (2007: 204):

'At the beginning' of the law, there is a certain 'outlaw,' a certain Real of violence which coincides with the act itself of the establishment of the reign of law: the ultimate truth about the reign of law is that of a usurpation, and all classical politico-philosophical thought rests on the disavowal of this violent act of foundation . . . this illegitimate violence by which law sustains itself must be concealed at any price because this concealment is the positive condition of the functioning of law.

In simpler terms, every installation of new law contradicts the previous legal position, which Žižek refers to as 'illegitimate violence'. As a result, this violent act must be concealed by illusion. If it isn't, the new law risks undermining the foundations of power and authority that support law itself. Then, once an ideological justification is accepted, the Real of law's founding violence becomes 'the repressed origin of the law' persistently influencing legal developments (Dean 2004: 5).

Žižek argues that this 'truth' about the law 're-emerges in those rare moments in which philosophical reflection touches its limits' (Žižek 2007: 204). He cites Immanuel Kant's *Groundwork of the Metaphysics of Morals* as an example because Kant 'expressly forbids probing into the obscure origins of legal power' (Žižek 2007: 204), the implications of which would reveal something that stains the purity of law's rule. Indeed, Kant argues that 'the subject *ought not* to indulge in *speculations* about [the origin of law] with a view to acting on them', as it would be '*quite culpable* to undertake such researches with a view to forcibly changing the constitution at present' (Kant 1970: 162). Žižek argues that Kant's position here is an 'ironic reversal' of his famous dictum, 'you can because you must!' Instead, 'you cannot arrive at the obscure origins of the law . . . because you must not do it!' (Žižek 2007: 205) Culpable though it may be, the following is such a research of copyright law, with a view to revealing its founding violence and addressing its implications.

Copyright begins around the 1710 founding of the *Statute of Queen Anne* and its enclosure of culture as property. In order to understand its violence, its history must be considered. Communications scholar Ronald Bettig (1992: 131) argues that 'the rise of capitalism and the development of the printing press are the keys to understanding the emergence of [copyright] law.' In Britain the printing press arrived in 1476, and as Elizabeth Eisenstein (1982) has famously argued, with it came the transformative dissemination of knowledge that was previously impossible. Accordingly, the English government sought a legal instrument that would enable an effective censorship to combat the information fuelling the emergent Protestant Reformation. In 1556 Philip and Mary granted the incorporation of the Stationers Company, the Charter of which gave member Stationers a 'firm monopoly over printing and publishing in England for the next 150 years' coupled with the power to seek out illegal presses and seize or burn their materials (Bettig 1992: 139). These powers allowed Stationers to police the literary material circulated around England, both for the benefit of the government and their own economic interests. Legal scholar L. Ray Patterson (1993: 11) argues that the Stationers Charter thus conferred an exclusive 'private-law copyright', to the members of the Stationers Company. However, the rights enunciated in such acts as the *Licensing Decree* of 1662, made no mention of any author's rights. Further, Stationers viewed their rights to print as flowing from the private ownership of an author's physical manuscript. In this way, British law only protected the Stationer's right to *print* a work, and the resulting economic interests. Nothing at law protected authors' rights and there was no concept of ownership in the intangible content. Nonetheless, the Stationer's Company was formed to police the organisation of *information* that came to constitute a literary commodity, and as a result bear the hallmarks of a regime aimed at the ownership of information.

The *Licensing Act* of 1662 expired in 1664, formally cancelling the Stationers Company monopoly of the book trade. Now, the Stationers wanted statutory support in order to protect their dominant market position. They petitioned parliament for these rights on the basis of continuing censorship, but these arguments failed. Notably, those who opposed the renewal of the Licensing Acts sought to eliminate the monopoly of the Stationers Company, arguing that this would create a more robust market place where 'cheaper' and 'better' books became available as 'printers all strive to out-do one another' (Bettig 1992: 143). Despite the fact that from 1664 to 1710 no laws governed the book trade, Stationers exclusively controlled the means of production and continued to reap the

economic benefits. Concurrently, Stationers Company publishers began seeking out 'original' literary works because of the growing secular bourgeoisie market. At this time, publishers began to pay authors for novel works. For example, in 1667 Milton was paid £10 in 'copy money' for *Paradise Lost* (Bettig 1992: 140). While the book trade began to compensate writers enough to make a living, a Liberal illusion was mobilised: publishers now argued that author had a natural and alienable right to their works as a result of their creative labour. In order to formalise their dominant market position, publishers repeatedly petitioned the House of Commons for new legislation, on the basis of necessarily transferable authors' rights.

The English Parliament responded in 1710 with an 'Act for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof', or the 1710 *Statute of Queen Anne*. Seen this way, the *Statute of Anne* functions to create copyright as 'an economic right of capital' serving the interests of the publishers of literary material (Bettig 1992: 140).

The *Statute of Queen Anne* provided for the 'sole right and liberty of printing 'books or other writings' for 14 years. As a result, neither music nor musical scores were protected by law. Musicologist Martin Kretschmer (2000: 207) has argued that eighteenth-century music publishers felt that a fourteen-year statutory protection 'was unnecessary, as most musical works would not remain in fashion for that long.' During this time, Scottish publishers began entering the London market with cheap editions of literary works whose term under the Act of Anne had expired. London publishers then lobbied parliament to recognise a 'natural right' of perpetual copyright under common law. Ultimately, this claim failed at the House of Lords in *Donaldson v Beckett*. However, this litigation prompted composers Johann Christian Bach and Carl Friedrich Abel to test the limits of the *Statute of Anne* further. In 1777 Lord Chief Justice Mansfield held that because scores can be written and published 'a musical composition is a writing within the meaning of [The Statute of Anne]' (Kretschmer 2000: 209). The result was the formal recognition that a musical work was something that could be owned and distributed exclusively by industrial interests.

The above developments serve as the foundation for the expansion of copyright into complex web of law that further encloses the commons whenever a new form of cultural creativity is developed. Importantly, however, it does so by vesting a proprietary right in an

author's literary work *before* the work is taken to a stationer for publication. For the first time, the intangible *information*—once the collective property of the cultural commons—that embodies a material work is enclosed as private property. L. Ray Patterson has argued that this is an incorrect view of copyright. He suggests that, if copyright recognised ownership of a work, 'this would be like giving legal title to daydreams' (Patterson 1993: 40). Instead, because copyright necessarily requires a material production to be invoked, 'copyright relates only to *that* copy and is no more than a statutorily created and limited right to regulate the sale of additional copies' (Patterson 1993: 40). However, this conception of copyright fails to appreciate provisions such as s 17(2) of the *Copyright Designs and Patents Act 1988* (CDPA) whereby a work is protected against 'reproducing the work in any material form' so long as the reproduction is 'objectively similar', regardless of the reproduction's *form*. Therefore, protection is extended beyond a single manifestation of a work, and encloses the intangible *information* that constitutes any of its physical manifestations. Thus, echoing anarchist Proudhon, we might say that copyright's violence is a *theft of information from the commons*. Copyright's traumatic kernel is ownership.

According to Žižek's theory, for copyright law to function, this Real of violence must be concealed. Without illusion, its claim to authority is only its violent imposition. And according to Žižek, 'we cannot assume the historical origins of the law in some lawless violence *and* still remain its subjects' (Žižek 2007: 205). As Dean notes, 'Žižek is not making a facile point regarding stupid subjects duped by a malevolent legal order. Rather, he is emphasising the fact that law involves more than the violent, arbitrary, control of people' (Dean 2004: 7). Thus the Imaginary serves to attach subjects to the Real violence of law through *belief*. The dominant fantasy that accounts for the rise of copyright in Britain is that of its economic incentive, which is embodied in the full title of the *Statute of Queen Anne* as it provides for the 'encouragement of learning.' According to Bettig (1993: 131), this idea 'reifies economic rationalism as a natural human trait'. In doing so, the founding of copyright law presupposes in advance what it requires—productive individuals who act according to the economic conditions that copyright law imposed. Nonetheless, this fantasy attaches to it a positive belief and a promise: that creators will be deservedly remunerated and as a result the public will receive desirable cultural material. This fantasy both attaches subjects to copyright law, while concealing its traumatic violence.



If copyright law is no more than an economic right of capital, and is sustained by fantasy, should we not just advocate abolition? Žižek answers that there is more to law than violence and illusion. Indeed, he contends that ‘the advent of Law entails a kind of ‘disalienation’: insofar as the Other itself appears submitted to the ‘absolute condition’ of Law, the subject is no more at the mercy of the Other’s whim, its desire is no more totally alienated in the Other’s desire’ (Žižek 2007: 265). Further, Žižek conceives law ‘as an agency of dis-alienation and liberation: it opens our access to desire by enabling us to disengage ourselves from the rule of the Other’s whim’ (Žižek 2007: 265). So, while the imposition of copyright law stole information from the commons, it nonetheless formally created the ‘author’, who had a right to their creations. And even though this right was designed to be sold back to the emerging culture industry, it nonetheless created a space for an individual to create autonomously.

Prior to the Stationer’s Company, the *Statute of Anne*, or in those societies with no copyright law, information may have been ‘free’ but cultural materials were produced through patronage. The result is that both the form and content of cultural material was alienated to the Father: either God or State. For example, ancient Greek oral traditions may well have practised a communal culture by passing down works from one generation to the next, but there was no space for religious dissent. Additionally, despite the ‘viable trade in literary works’ in ancient Rome (Bettig 1993: 134), following Augustus’ example of commissioning the *Aeneid* to legitimize his reign, successive emperors overwhelmingly supported authors with political views agreeable to them (De La Durantaye 2007). As a result ‘the need to compose a text which would not displease the emperor necessarily influenced authors’ choices of genre, form and content’ (De La Durantaye 2007: 47). This model of patronage would continue throughout the middle-ages in Europe, giving the Roman Catholic Church a monopoly on knowledge, until the rise of the bourgeois market, and with it, the Stationer’s Company (Bettig 1993: 135).

Following the above, we ought not to be nostalgic for the pre-history of the commons. Copyright law formally liberated the author and culture from the tyranny of God and State, enabling cultural works to embody individuality and dissent. As James Boyle (2008: 7) notes in *The Public Domain*, this is the promise of copyright: ‘a self-regulated cultural policy ... [that allows] a decentralized and iconoclastic cultural ferment in which independent artists, musicians and writers can take their unique visions, histories, poems or songs to the world.’ It is this liberatory aspect of copyright law, which must be defended

and retained. However, for Žižek, there is a twist. The liberating aspect of copyright law is a symptom of the Real of the ownership of culture. Copyright's subjects are implicated by the law's prohibitions, but also by the 'punishing demands' of the superego to enjoy (Dean 2004: 11). Copyright allows its subjects to think that they could satisfy their cultural desire, were it not for its prohibitions. As a result, copyright law is fundamentally split between its public prohibitions and the subject's wish to fulfill their cultural desire.

### **III The metastases of piracy**

According to Jacques Lacan (1988: 102), 'the superego is at one and the same time the law and its destruction.' For Žižek, the superego takes form as the subject's inner compulsion to satisfy desire and to 'Enjoy!' This is a senseless and insidious injunction. Žižek writes that 'The superego is thus the properly obscene reversal of the permissive "You may!" into the prescriptive "You must!", the point at which permitted enjoyment turns into ordained enjoyment' (Žižek 2009: 133). With respect to copyright, and its creation of the subject's cultural desire, individuals must consume as much material as they can. For if they do not, they have failed and 'are guilty, inadequate' (Dean 2004: 14). Žižek (1995: 54) argues that superego in contemporary society 'represents the "spirit of community" at its purest, exerting the strongest pressure on the individual to comply with its mandate of group identification.' Given that the symbolic Real that provides the topography for society is capitalism, what binds together individuals culturally is their consumption of culture. Seen this way, copyright law is ambiguous: at once it encourages consumption and subjects believe it creates cultural material to fulfil their desire; yet it also prohibits certain ways of interacting with culture. And here is where the Real of the ownership of information haunts it. With the rise of the digital, information escapes the artificial scarcity imposed by copyright. This confronts the public law's prohibition to make a copy with the superego's injunction to consume.

Žižek (2009: 93) argues that the normative power of any legal system relies on an 'obscene supplement' of sanctioned transgression to laws. Subjects 'must experience [themselves] as not fully in [law's] grasp' by seeking out ways in which they can systematically transgress society's rules (Žižek 2009c: 99). However, Žižek (2009c: 99), insists that, 'far from undermining the rule of Law, [certain] "transgressions" in fact serve as its ultimate support.' Here, law prescribes certain actions, but also surreptitiously codifies

ways to break its own rules, so long as these violations reinforce the dominant order. As Jodie Dean (2004: 17) notes, ‘the end result is a formal equivalence between the injunction of law and the injunction of superego.’

To elucidate this principle, Žižek points to a scene in *Monty Python’s The Meaning of Life*. Here a group of students, waiting for their teacher to arrive, begin to act out, so that when the teacher returns she may reassert her superiority. Thus, that which appears as transgressive ultimately is staged for the gaze of the dominant Other. Is this not the case for so called online music and film piracy? How else to understand the curious fact that the most prolific of online infringers, tend to spend more on legal content by 60% compared to moderate infringers, and three times the amount of those who never infringe (Ofcom 2013)? Or that the entertainment events sector is worth well over \$20 billion USD annually, roughly three times what it was in the early days of online piracy (Sinnreich 2014: 8)? While transgressing copyright law, pirates nonetheless perform affirmatively within the logic of capitalism.

Since 2006, there has been a significant decrease in the amount of lawsuits against illegal online file-sharers (Sag 2015). Unwittingly enunciating a Žižekian argument, law professor Robert Merges (2007: 1262) contends that ‘low-volume... file sharing is “effectively legal”, in the sense that no one needs to worry about being penalized for it.’ Because copyright holders face ‘severe practical limits in enforcing their rights’ file-sharing can and will continue, thus it becomes tolerated (Merges 2007: 1263). But there are more conspicuous machinations at play. An entire new industry has emerged, providing ‘intelligence’ to copyright based industries, which analyses the sharing, commenting, and linking of content on the internet. Most notable are firms such as Music Metric, Next Big Sound, and Big Champagne—the first company to monitor illegal P2P file-sharing (Sinnreich 2014: 83). Accordingly, piracy has been recuperated into the capitalist system as a result of the information good’s use/exchange value being ‘transmuted into sign-value’ (Baudrillard: 1981). Here every download potentially increases the value of what any information good *signifies*. This increases a sort of affective surplus, which can be appropriated in novel ways.

Less abstractly, data of this behaviour provides real-time feedback to the culture industry, influencing the production of relevant content or other licensing opportunities. For example, after confusing television spectators in the 1990’s, David Lynch’s *Twin Peaks*

found resonance online; averaging around 100 downloads per-episode-per-day since the dawn of the Pirate Bay, and cementing itself as a cult-classic (Ernesto 2014: unpaginated). With each share, the potential for a profitable revival increased until it was announced that Showtime would bring the show back in 2016. In light of this news, downloads of *Twin Peaks* on the Pirate Bay have jumped to around 10,000 per day (Ernesto 2014: unpaginated).. How this affects future sales of a *Twin Peaks* DVD box set remains to be seen; nonetheless, a zealous fan base will assure Showtime of profitable advertising revenue, compared to the risk of novel programming. The point is that within the P2P network, an accumulation of sign-value can be transduced *back* into exchange value for the culture industry. And so, far from undermining the culture industry, P2P provides a valuable channel for market research, while at the same time reproducing the logic of capital.

If online piracy is a secretly tolerated obscenity, what exactly is prohibited? Žižek: 'Obscene unwritten rules sustain power so long as they remain in the shadows; the moment they are publicly recognised, the edifice of power is thrown into disarray' (Žižek 2009: 93). Thus, what is actually prohibited is to make a public declaration that online piracy is acceptable; or, to publicly act *as if* information was free. In December 2011 digital 'storage locker' service, Megaupload, uploaded a viral marketing music video to YouTube. This video featured a number of popular musicians including Will.i.am and Kanye West 'singing the services praises' and encouraging their friends to share files around the world (Sinnreich 2014: 90). Within minutes '#megaupload' was a trending Twitter topic, with millions having viewed the video. And then it was gone. Universal Music Group ('UMG') filed a DMCA takedown notice, despite not owning any copyright in Megaupload's original musical work. Within a month, Megaupload's founder Kim Dotcom was arrested by New Zealand's counter terrorism police the Special Tactics Group, armed with M4 556 semi-automatic weapons, two helicopters and four police vehicles. Dotcom was then indicted by the US Department of Justice for 'running an international organized criminal enterprise allegedly responsible for massive worldwide online piracy of numerous types of copyrighted works' (Sinnreich 2014: 90). Alternatively, over the course of a few weeks in 2010 and early 2011, Aaron Swartz liberated a number of academic articles from JSTOR via a code which automatically downloaded content. These articles were freely available from MIT's *public* access library. Nevertheless, Swartz was arrested with charges of breaking and entering with intent to commit a felony. Swartz's maximum penalty for these

actions was 50 years in prison and a \$1 million fine—all for the ‘crime’ of attempting to provide free access to otherwise costly academic material. Here Žižek’s theory attests to a ‘double displacement’ of law. The obscene supplement of piracy is transgressive insofar as it violates the explicit rules of copyright law. Yet at the same time, the unwritten rules prohibiting the public recognition of its tolerance is coercive insofar as it prohibits the possibilities of fundamentally altering copyright law for the benefit of the public.

Thus, for Žižek, ‘far from undermining the rule of Law, codified piracy “transgressions” in fact serve as copyright’s ultimate support’ (Žižek 2009: 99). Ultimately, online file-sharing remains illegal, and is able to be denounced as a crime. This provides a convenient justification for copyright’s expansion. But why, despite these systemic and prolific transgressions, do individuals still recognize themselves as subjects of copyright’s rule? For Žižek, the answer is guilt. As he writes:

[W]e are again at the tension between the public Law and its obscene superego underside: the ideological recognition in the call of the Other is the act of identification, of identifying oneself as the subject of the public Law, of assuming one’s place in the symbolic order; whereas the abstract, indeterminate ‘guilt’ confronts the subject with an impenetrable call that precisely prevents identification, recognition of one’s symbolic mandate (Žižek 1995: 61).

Here, the obscene supplement’s transgressions produce a feeling of guilt as a result of betraying copyright law’s prohibitions. This guilt is what grounds support for contemporary copyright regimes, as we identify ourselves as subjects of law in order to escape from this guilt (Dean 2004: 19). To be clear, this guilt manifests itself not just in those who participate in online file-sharing, but all those who identify as subjects of copyright law. For those who do not participate in the online supplement, copyright law provides a release for the ‘superego’s unyielding demands’ to consume the cultural material that copyright is alleged to support (Dean 2004: 20).

Based on the above considerations, copyright presents a vicious circle of violence and fantasy, prohibition and attachment. The stains of enjoyment and guilt make it especially difficult to overcome its founding transgression as they attach subjects to the law. Regarding the obscene supplement, Žižek reminds us that ‘one should avoid both traps and neither glorify it as subversive nor dismiss it as a false transgression which stabilizes the power edifice’; instead, we should ‘insist on its *undecidable* character’ (Žižek 2009: 93). All we are left to do is enjoy our culture to the point of copyright’s suspension.

That is, to hysterically over-identify with our desire to consume cultural products. One could argue that this will simply reinforce the consumer society, and render the general alienation of culture more tolerable. However, it is imperative to stress the hyper-consumption inherent in pirate practice. Here, the ideology of cultural capitalism is rendered in an ecstatic form. And it is here the contours and limits of any new copyright possibilities are realized. But, if the violence of copyright's imposition is too much, and its obscene supplement doesn't negate it, how then can we propose to move radically beyond copyright law?

#### **IV Dreaming dangerously**

In attempting to formulate an emancipatory alternative to copyright law, it is important to return to Žižek's position on radical politics. As discussed above, Žižek notes that any alternatives that do not question the form of capitalism are insufficient. This means that a critical reformulation of copyright law must address the Real that structures the legal order: the private ownership of information. Then, it must also attempt to 'uncouple' copyright's obscene supplement: freeing legal subjects from the guilt of their codified transgressions.

Lee Edwards et al. (2015) note that what underpins the contemporary copyright debate is a battle of discourse. It is here that the Real persists in the Symbolic and reinforces the significant advantages that rights-holders maintain. For example, by appealing to the presupposition of copyright ownership, opposing parties simply legitimate existing economic arrangements. As a result, parties can only rearrange a chain of signifiers pre-determined by the symbolic Real. Thus, no novel arguments are put forward and much of the contemporary debate does not contest the ownership of rights holders. As will be demonstrated, this infected discourse has prefigured even the most promising of copyright alternatives.

First there is Copyleft, or the Creative Commons ('CC'). This system attempts to negate copyright law by authorising the use of copyrighted works for purposes that would constitute infringement under traditional copyright law, thereby fostering wider use of creative content. There are seven different Creative Commons licenses. These range from the most accommodating CC BY license, which 'lets others distribute, remix, tweak, and

build upon' a work, even commercially, so long as the original author is attributed, to the CC BY-NC-ND—the most restrictive of the licenses—that only allows others to download a work and share it with others so long as attribution is given to the author. No modifications of commercial uses are permitted. This licensing system has proven effective: Today, there are over 882 million pieces of CC-licensed content on the Internet. Roughly 56% of that content is shared under CC licenses whose terms allow both adaptations and commercial use (Creative Commons 2015: unpaginated). Perhaps what is most appealing about CC is that it allows amateur creators to easily navigate copyright law, while ensuring that their disseminated work is protected. Nevertheless, creators still retain ownership of their work.

Problematically, CC gives 'no indication of how a vast diversity of artists across the entire world, their producers and the parties who release their work can earn a reasonable income' (Smiers and van Schijndel 2009: 35). As a result, it appears unable to provide the desirable cultural content that copyright promises. In order to overcome this hurdle, some argue that CC needs to take control of the means of production and become CopyFarLeft. Dmytri Kleiner proposed a CopyFarLeft licensing model in 2007. CopyFarLeft distinguishes between commercial usages enacted by *worker-owned collectives* that distribute profits easily among its workers, and those enacted by corporations whose businesses are based on the exploitation of wage labor. Collective commercial exploitation is generally allowed under CopyFarLeft licensing; but corporate exploitation is prohibited, unless negotiated outside of the license. Peer-Production scholars Vieira and De Filippi (2014: unpaginated) argue that the CopyFarLeft model is advantageous because it 'allows for certain commercial exploitations of licensed works that could help sustain creators and foster a decentralized "ecosystem" of self-organized, commons-based producers which own their means of production.' And by precluding all corporate exploitation, CopyFarLeft achieves the potential for a meaningful stream of revenue to creators. As compared to CC, 'it considers commerce an important element for the long-term viability of commons-based production' (ibid). CopyFarLeft could be supported with Neil Netanel's (2003) proposal for a 'Non-Commercial Use Levy'. This levy would extract a tax primarily from Internet Service Providers and be distributed among copyright holders in proportion to the popularity of the work, as monitored digitally. If combined, CopyFarLeft could be an interesting strategy to redress the fundamental inequality between the creator of a work and the cultural industry while still retaining a significant productive capacity.

Unfortunately, however, CC is not concerned with ownership but only with regulating the usage of private property. Though a better solution, CopyFarLeft only encourages a shift in the ownership structure, whereby a collective-based economy may commercially exploit the work of a creator. And so, neither CC nor CopyFarLeft poses a challenge to the dominant copyright framework and the industry it supports. German commons advocate Stefan Meretz argues that CopyFarLeft still precludes a true commons because it does not negate ownership, and considers production itself to be neutral. For Meretz, 'the reappropriation of the means of production is, of course, a necessary step to promote a more equal distribution of wealth' (see Vieira and De Filippi 2014: unpaginated). But he argues that, without a further change in the mode of production, 'worker-owned collectives tend to succumb to external pressures and end up behaving quite similarly to wage-labor based companies.' Indeed, both CC and CopyFarLeft rely 'on the private ordering scheme of property rights and licensing contracts', thus neither will 'operate differently than some of the copyright industries that [they] repudiate' (Dusollier 2006: 292). Seen this way, CC and CopyFarLeft are the mirror of copyright. They attempt to 'dismantle the master's house, with the master's tools', which ensures no meaningful revolution. Ultimately, however, these systems can only exist voluntarily, and as it stands, rights-holders owning the most (commercially) desirable of contemporary cultural content will likely opt-out.

Media theorist McKenzie Wark argues that the way out 'is to push beyond the compromise functions of things like CC' (Wark 2012: 27). We should not aim to 'liberalize' copyright, but rather to conceive of a world without it. So, Wark asks, 'what would it mean to really think and practice the politics of information as something that is not scarce and has no owners?' One option is to abolish copyright altogether. This is what Joost Smiers and Marieke van Schijndel invite us to do in *Imagine There is No Copyright and No Cultural Conglomerates Too* (2006). They argue that because a small number of cultural conglomerates control cultural communication through copyright, democracy is undermined. And that 'bestsellers, blockbusters and stars of the big cultural enterprises are having a disadvantageous effect' by suppressing the iconoclastic ferment that is central to an ideal cultural sphere (Smiers and van Schijndel 2006: 36). Taken together, copyright and the culture industry constitute a subtle censor, affecting the public's interaction with meaningful cultural material. The only way to solve this problem, according to Smiers and van Schijndel, is by eliminating copyright protection, and insisting on competition law to regulate monopolistic corporations.



Smiers and van Schijndel rightly object to CC and CopyFarLeft for not going far enough in eliminating the ownership of cultural material. And they further denounce attempts to reformulate current copyright to 'normal proportions' for this is a view 'back to the old days', which is not 'relevant to the digital world' ((Smiers and van Schijndel 2006: 24). However, by advocating the abolition of copyright, it is their system that would entail an even more insidious return to the past: a return to cultural alienation. They argue that without the protection afforded by copyright, there is no incentive to invest in a blockbuster production. However, the desire for this content will not dissipate. It will be left to benevolent corporations to provide for the market. Far from undermining the status of the mass market, the abolition of copyright returns culture to a new master, destroying its promise of liberation. Additionally, the abolition of authors' rights enables a situation of *hyper-exploitation*. Here, those who own the means of realizing a work can reproduce and exploit the work with no compensation to the author. Seen this way, the absence of copyright risks playing into the hands of the neoliberal attempt to outsource more unwaged labor, and thus advances the agenda of the cultural conglomerates that Smiers and van Schijndel decry. It is evident then that the way beyond copyright, is not to forget it. Paradoxically, it is within it.

Returning to the fact that Žižek's account of law is split, both violent, yet liberating, then, as Jodie Dean (2004: 23) suggests, 'that which is beyond law needs to be thought of as a moment already within law'. Copyright's liberation persists the same way its Real of ownership does. As James Boyle (2008: 7) notes, 'Copyright law is supposed to fuel a vibrant public sphere.' And, 'at its best, it is supposed to allow a decentralized and iconoclastic cultural ferment in which independent artists, musicians, and writers can take their unique visions, histories, poems, or songs to the world—and make a living doing so if their work finds favor.' Žižek implores us to continue this emphasis on that utopian beyond of law that persists within it. When confronting a time where new copyright legislation is written in secret trade agreements, and strategies of subversion have been recuperated, articulating a utopian legal framework is the next radical step.

The beginnings of this alternative legal framework might be found in Wark's (2007) conception of 'copygift'. He argues that 'the relation between digitally encoded information and the material in which you find it—the page, the screen, the disc, the drive—is now perfectly arbitrary' (2007: 23). Reflecting on his experience publishing *A Hacker Manifesto*(2004), Wark notes that free content is not enough. A writer still requires the

distribution and promotion channels that publishers have access to if a work is to receive the type of attention required to enable its success. So, Wark's solution is to 'live the contradictions!' He encourages us to recognise that a cultural commodity is merely a physical manifestation of a work, whose digital spectre does not compete with it. Indeed this has been confirmed: As of January 2015, music industry group IFPI found that only 4% of individuals under 30, in Norway, are using illegal file-sharing platforms to obtain music—down from 70% in 2009 (Ingham 2015: unpaginated). While this decrease in online file-sharing is unique, overall industry revenues in Norway have remained relatively static, rising from \$75.94m in 2009 to \$77.2m in 2014 (Andy 2015: unpaginated). Accepting this not necessarily economically detrimental status, and legalising the practice, would uncouple the superego guilt that has attached the population to copyright's current incarnation. Reformulating file-sharing as a Benkler (2006) type peer-regulated public domain could retain the subject's belief in the promise of copyright law. This is because it allows for a true commons, if only digital, where creators and consumers can freely interact with culture. Unfettered access allows creators to produce that desirable content, while consumers are not prohibited from that which they desire. However, legalising piracy is not enough if ownership still persists.

## **V Liberating copyright**

In order to do address the Real, copyright law must be reformulated. It should no longer grant an author the right to make a copy, or issue copies of the work to the public. Instead, an author of a literary, dramatic, musical or artistic work should be given a transferable *right to commodify*. Here, infringement would only be triggered by commercial uses that compete with the commodity. Non-commercial uses, such as remix, parody and file-sharing would not be implicated. Thus, the public's use is unimpeded and culture is free. This negates the Real of copyright by paradoxically owning the commodity, but not the information that constitutes it. Unfortunately in this situation, an author is subject to the exploitation of the culture industry, which comes to own and extract surplus value from the commoditised version of their work. In order to remedy this, the commodity right should expire after a period of a few years, and be coupled with a *renewal right*. An exact amount of time would require an economic analysis, which is outside the scope of this essay. Nonetheless, this renewal right allows the author to gain a better bargaining position

should their work become successful. As James Boyle (2008: 11) points out, over 95% of cultural goods are 'orphaned' and lost from the public domain. However, a temporary renewal right encourages all authors to digitise their works. For example, should an avant-garde record, or iconoclastic film, not achieve commercial success within the limited time of the commodity right, an author ought to circulate it online (if they haven't already). Should the work then find an audience and increase in sign-value, the author is in a position to renegotiate their commodity right. This time, with increased bargaining power.

The above proposal is only a beginning. If we are going to move beyond the current stasis of copyright policy, we ought not to offer compromise, nor cynicism. As Žižek and Jodie Dean have argued 'finding a utopian dimension inherent in law may be truly radical' (Dean 2004: 11). According to this approach, the task for the future of critical copyright scholarship is to find ways to attach subjects to the belief of copyright's founding dream of a liberated culture. We should defend this dream, guided by those ambiguous signs from the future and so on and so on.

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