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THE POLITICS OF PIRATES: JONAS ANDERSSON SCHWARZ'S “ONLINE FILE SHARING”

Gautam Bhatia[†]

The international debate over file-sharing is defined by polarities. Consider, for example, the confrontation between The Pirate Bay and the Swedish legal authorities, as documented in the film *TBP-AFK*.¹ The Pirate Bay is an online website facilitating peer-to-peer file-sharing, and the uploading and downloading of torrent files. The Pirate Bay has long been embroiled in numerous legal cases turning upon its facilitation of copyright violations. These include the arrest and imprisonment of its founders, the website itself being taken down, and its domain name being seized.

Some view this conflict as a battle for internet openness against the efforts of the film and music industry to bring about a second Enclosure Movement, this time against the worldwide digital commons. Others, however, consider it to be a legitimate law-enforcement operation against wilful facilitators of large-scale copyright infringement. Such characterization of the issue – as a zero-sum game – was (perhaps unwittingly) affirmed by the European Court of Human Rights, when it heard the appeals of the Pirate Bay founders against the hefty fines and prison sentences imposed against them. The ECHR, too, framed the issue as a clash between the interest of the freedom of expression (in sharing information) and the interest of protecting the rights of the copyright holders.² The Court stressed the importance of copyright, denigrated the strength of the expression interest because of its “apolitical” nature, and echoed the Swedish Courts in taking a dim view of the applicants’ refusal to remove the torrent files despite being asked. In so doing, it too placed itself firmly on one side of a division that now appears almost Manichean.

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¹ <http://watch.tpbafk.tv/>, visited on February 22, 2014.

² *Neij and Kolmisoppi v. Sweden*, Eur. Ct. Human Rights, Feb. 19, 2013.

In his book, *Online File Sharing*, published in early 2014, Jonas Andersson Schwarz argues that this dichotomy is a deeply flawed way of understanding the file-sharing dispute. Using tools from critical theory and political philosophy, Schwarz aims to break down the binaries, and to demonstrate that the reality of file-sharing is simply too complex, and too nuanced, to be captured by way of dualities, no matter which side projects them. To the intellectual defenders of the Pirate Bay and other such operations, who base their case on values of openness, freedom and unlimited access to culture, Schwarz presents a series of internal contradictions that remain unresolved under all present models; on the other hand, the defenders of copyright must face up not only to an absence of credible evidence of harm, but also to the reality that unquestionably *legal* enterprises like Spotify have been built upon the concept and tools of file-sharing.

The task is particularly important because – as our overview of the ECHR discussion indicated – the debate right now isn't so much a debate as two sets of participants talking past each other. At the heart of the issue is the crucial – and often overlooked – point that freedom has never been a value-neutral term. As critical Marxist and feminist theorists of all stripes have pointed out over the years, it is socially and normatively constituted. Ultimately, the meaning of freedom depends on the default position that you take.³

For file-sharers, that default position is unhindered exchange of cultural products. And if that is the definition of freedom, then by stipulation, copyright and IPRs are freedom-inhibiting. On the other hand, if freedom is the freedom to exploit the fruits of your created (or validly purchased) product, then file-sharing assaults that freedom. Without a shared language or background, it isn't even possible to disagree.⁴ Schwarz's project is to bring to the fore the shared context that he believes exists.

As the first point of departure, Schwarz calls into question file-sharers' positioning of themselves as pursuing an activity *alternative* to the capitalistic mode of production, distribution and consumption of culture. Schwarz points out that the demand that file-sharing is designed to sate is created and sustained by the very film and music industries that it sets itself against. Thus, "*file sharing, as a means of cultural exchange, can therefore never be equated simply with resistance – because it thrives on the same capitalist system of cultural exchange that it forms part of.*" (163) In other words, file-sharing is *internal* to a capitalist structure. A modified account of the

³ See, e.g., G.A. Cohen, *The Structure of Proletarian Unfreedom*, 12(1) PHIL & PUB AFFAIRS 3 (1983).

⁴ Ranciere, DISAGREEMENT (1999).

activity, then, would present it as what Schwarz calls “escalationist” – that is, file-sharing is about “*harnessing desires generated by capitalism but implementing them in ways that are not capitalist.*” (21) The music and the films and the other cultural products that are circulating for consumption are generated by capitalism, but it is the *manner* of their circulation – free or unregulated, whichever word you prefer – that is the very antithesis of capitalism.

Yet even when it comes to implementation, the issue is complicated. File-sharers split with IP-solicitous media corporations on a particular conception of democracy, or the values it represents: openness, participation and freedom. File-sharers see a right to participate in culture as central to their conception of democracy. IP-solicitous media corps, on the other hand, believe that the producers’ rights to benefit from their work, in an overall atmosphere that fosters incentives for innovation, is fundamental to democracy. Ultimately, each version engages in a circular reciprocity with the other. Schwarz himself frames this issue in the context of the “Pandora problem”: the nature of the internet is such that even the smallest leaks have the potential to go viral. Thus, to stop some leaking, one must stop *all* leaking. But to stop all leaking would require a totalitarian regime of control. Consequently, the only legitimate alternative is complete freedom. Yet *this*, argues Schwarz, creates its own “*undemocratic distributions, taking the form of extreme, long-tail curves.*” (23) The long-tail curve refers to a distribution where the unregulated internet sees such a vast amount of information that – given finite human energies and attention-spans, a minute few cultural/artistic works achieve great popularity, while a “long tail” fades into anonymity and insignificance. Schwarz questions whether – from the creator’s perspective – this is very different from the extant model, where record companies use revenues from a few certain earners to bankroll a greater number of “hopefuls”, some of whom make it, and most of whom don’t.

But whatever the normative implications of the argument, it isn’t even true *descriptively*. The argument ignores the “*the highly institutionalized protocol-governed structure of the Internet and assumes it to be akin to a natural, premodern state of similarly free flows of culture.*” (30) Indeed, as Schwarz goes on to demonstrate throughout the book, the freedom-and-openness premises upon which file-sharing is based rely upon a whole host of assumptions that are by no means universally applicable: a social-welfare State in the background, easy internet access and internet literacy in the foreground, and – especially in recent years – sophisticated computer skills to access

information on the darknet. Thus, file-sharing is constituted by both libertarian and technocratic dimensions that are in tension with each other.

Yet the tensions don't exist only at the level of theory. Comparing, specifically, Napster – which was said to be the prime example of a “disruptive” internet innovation with what follows, Schwarz points out that “*many of the things that Napster was said to disrupt – the album as an art form, unit pricing of online music – have later been recaptured by newer business models such as iTunes and Spotify.*” (63) Spotify, indeed, began life as an illegal, p2p service, which then transformed itself into a legitimate company by persuading media companies to latch on to the concept.

This leads Schwarz to question whether “*file-sharing acts to displace business models entirely or merely acts as a conduit for more efficient ways to perform consumerism.*” (63) In other words, to what extent can file-sharing legitimately be considered transformative, if its models of choice exist for a time outside the law, appear antithetical to the interests of capital – but are then appropriated *by* capital? In the realm of the purely political, this would be what Gramsci called a “passive revolution” – marked by continuations and mutations, rather than ruptures, and one that proceeds within the framework of existing institutions.⁵

Schwarz's example of The Pirate Bay makes it clear how this works in practice. The attempted sale of The Pirate Bay to an entrepreneur, and subsequently, its hosting on the Swedish Pirate Party's website, with the SPP's logo, “*shows that a service such as TBP is ontologically “sticky”... it can be seen as a conservator of a mainstream cultural supply, as well as a radical opponent to the big media corporations, as a harbinger of free media distribution, or conversely, as a hedonist absorption of mere self-gratification – having commercial capacities and political clout.*” (156)

Reading this book left me wanting more. But just at the most dramatic moment – at the cusp of the SPP – it tails off, leaving a crucial task incomplete. For all the political aspects of file-sharing itself – and Schwarz is careful to problematize accounts that assimilate all file-sharing to political resistance by virtue of its illegal character – the SPP is an example *par excellence* of the translation of file-sharing into the *explicitly* political domain. How did the SPP understand this translation? How would a political party, that is the instantiation of the values of file-sharing, seek to resolve the inherent contradictions and tensions that we have discussed above, in its political mandate – or did it simply ignore them? What specific policy prescriptions

⁵ Jon Bloomfield, *PASSIVE REVOLUTION* (1979).

– for IPR, internet governance and other related issues – did the SPP bring to the table as a political party, and how did these square with the abstract ethos of the file-sharing community? Was there a feedback loop between the pirate community and the pirate party? These things are left untouched by Schwarz.

For a book that sets out to ground file-sharing within critical theory and political philosophy, it is a curious omission. Nonetheless, insofar as it sets out to prove that we ought not to take the existing debate, with its categories, as it is given to us – but rather, understand it as a battle over “ontopolitics” (156) – that is, a struggle between two sets of organizing principles for the internet, which have commonalities as well as differences – it succeeds quite well.