

Lucas Agudiez Roitman / Mark Vega

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Copyright Enforcement and Piracy Controls as a Potential Excuse for Corporate and Governmental Overreach

Lucas Agudiez Roitman and Mark Vega, Ph.D.

June 12, 2014



Wikileaks and peer-to-peer (torrenting) networks have not only allowed for piracy (illegally downloading movies and music without paying the distributors) but have also enabled free access to education in developing countries, and increased transparency for the public to control corporations and governments by making confidential information public. People can now freely distribute government, military and corporate materials without asking for permission from the original creators of those materials. This information revolution has also exposed information about various crimes such as a swiss bank Julius Baer's money-laundering documents, unreported civilian deaths in the Afghan war, and the National Security Agency's online spy campaign on American citizens. Governments and privates are concerned about these

leaks and the potential of future exposures due to the lack of regulation of the internet. This fear by powerful corporations and states has led to increased interest in controlling and limiting the free access to information in multiple ways, including the criminalization of piracy and illegal document sharing, both via websites like wikileaks and via peer-to-peer networks like torrents. Criminalizing piracy (copyright violations) when there is no profit involved, encourages monopolistic economies, limits education, and enables censorship and control of citizens, so we as users and citizens should publicly discourage policymakers from passing legislation to further criminalize and prosecute internet users who violate copyright law via piracy or document sharing when there is no direct profit involved.

The first problem with the current system is that copyright protection and intellectual property laws in the current form create favorable conditions for the formation of monopolies. Intellectual property laws were originally created to encourage authors to create and sell materials. The laws prohibit others from stealing and selling the work as their own. Copyright laws also prosecute any individual who shares copyrighted materials free of charge because doing so would discourage others from paying for these materials. For example, if a musician were to create a song, and it was later publicly and freely available on the internet, in theory, most consumers would download it for free and stop buying it. This system that protects intellectual property is supposed to encourage the production of creative works, benefiting society as a whole. However, because of widespread internet adoption and the decrease in distribution costs, the only cost for producing and distributing content to the whole world is the initial investment for creating the original copy. That means that the most popular author will reach an extremely big audience and saturate the market with very little production. The first

author that produces a popular song will receive all the profit and market share, while the less popular authors will receive no market share whatsoever, resulting in extreme poverty for most artists or creators. We see this phenomenon every day where street performers live in poverty while successful artists earn millions of dollars, even though famous artists do not have significantly better talents or artistic capability than street performers. A stroke of luck or slight difference in talent or popularity can trigger a vicious cycle where the author becomes famous across different states and countries, concentrating popularity into few artists. In order to explain this more carefully, we can look at neo-conservative economic theories, where a competitive market is self-regulated against monopolies because as the amount of items produced by a company increases, the marginal cost increases too, due to inefficiencies introduced with mass production. As the company becomes more inefficient at producing large quantities of a product, it will stop producing an item when its costs outweigh the market price for that item, and thus,

another company that is more efficient at producing items can participate in the market. This is a competitive-market cost structure, as shown in Fig. 1. However, when the marginal cost curve does not significantly increase as more items are produced, the most efficient company will be able to sell to all

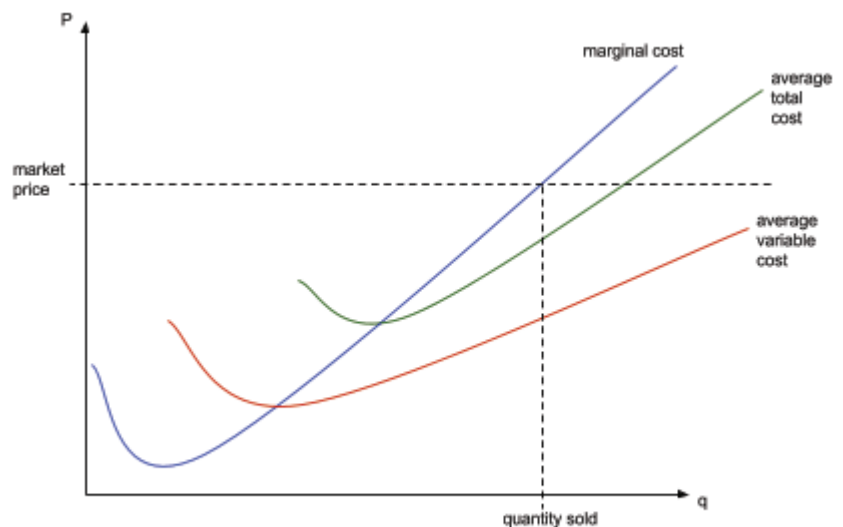


Fig. 1 - Competitive-market cost structure

customers and there will be no market share for any other competitor. This cost structure is that

of a natural monopoly, as in Fig. 2. Richard Posner discusses in his article why a natural monopoly that is not controlled can engage in abusive pricing due to natural monopoly cost structures (Posner, 548). This theory consistently explains why some authors climb to fame and stay famous while others do not: after selling their first record, for example, musicians will use their fame and fortune to advertise their next materials, all of which are

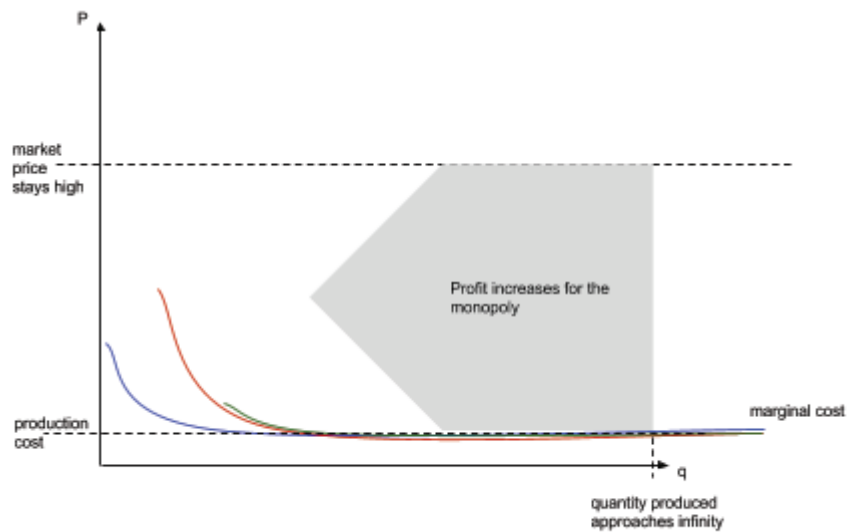


Fig. 2 - Natural monopoly cost structure

protected by copyright laws that enable artists to be the only ones with the right to reproduce their work and make a profit out of it. In turn, corporations are allowed to buy distribution rights for artists' work and thus the natural monopoly cost structure can be exploited more thoroughly by a company that includes multiple authors of different genres, with a greater amount of variety that can satisfy multiple tastes and uses. A media-distribution corporation then has the power to position more of their own intellectual property in people's minds. They can play new music in their radios and shows on TV, advertise their own products, and grow exponentially, while late players in the market simply cannot compete because of lower funding and popularity. Companies understand these playing rules and use their power to make it even more difficult for other players to enter the industry. As Merissa Marr and Kate Kelly wrote in their article, the film industry in Hollywood is increasingly spending more money on special effects and bigger-budget movies (Marr, 2). This monopolistic strategy of increasing barrier-to-entry costs

by producing expensive content, enabled by a strong protection of copyrights, makes it difficult for smaller companies to compete since they do not have the budget to produce advanced visual effects. However, when technology enabled widespread piracy, the illegal download of copyrighted materials, the biggest music industry monopolies suffered decreased revenue, as explained by Rafael Rob, and Joel Waldfogel (Rob, 2). Because distributors are no longer guaranteed to sell their creative works worldwide anymore (because part of the market will resort to piracy), big corporations see higher risks in large investments for blockbusters. Thus, one counter-argument against piracy is that allowing piracy and weakening copyright protection can discourage big companies from investing large amounts of money into blockbusters. For example, if Disney movies were legally accessible for free online, it is possible that Disney would decrease its revenue since more consumers would opt to pirate Disney movies instead of buying the originals. This effect can decrease the potential for profit out of large movie productions, and it would discourage Disney from investing in, for example, Cars 3. Instead, piracy would encourage Disney to invest smaller amounts on movies so that the investment can be paid back solely from movie theater sales, merchandising and other business models, since few people would be buying a movie. It would force large media monopolies to become more creative in their business models instead of exploiting their dominant position to sell the same kind of creative materials over and over again. It would also exacerbate the current trend of music companies moving their business model towards profiting from live concerts, and sponsors and away from direct sales. At first, this effect seems hurtful and not beneficial to the economy and society: it encourages divestment. But after more careful consideration, this effect only discourages investment in monopolies, on high-budget movies with no cultural or social

value, but encourages investment in smaller productions such as currently amateur or semi-professional productions like youtube short film creators or street performers, as well as independent movies, which usually have stronger educational, artistic, cultural or social value. While forcing large companies to find new ways to generate returns, without resorting to direct sales to a captive audience, this effect would also allow smaller firms or independent film producers to compete, encouraging a more decentralized market, leading to more socially-optimal outcomes. It could provide amateur artists the chance to compete by creating their own movies, music and content without having to sign contracts with well-established corporations that abuse their monopolistic power. All these smaller producers are tremendously encouraged by decreasing the barrier-to-entry to the market when causing Disney, for example, to create lower-budget movies. Smaller producers would now have a chance to make similar content that the audience could potentially identify as mainstream media without disregarding it as a “low budget film” anymore. This effect would as a result encourage the development of technologies to aid film recording and visual effects for amateur artists and small productions, and provide a decentralized market for media, technology and information, creating more jobs and decreasing wealth inequality. In few years, the film industry could grow faster than ever because of a decentralized market, if we as a society can stop these large monopolies from slowing down the industry and keeping talented filmmakers out of business. The most common excuse for strongly protecting copyright and banning piracy is that mass media corporations would stop investing in the film industry, ignoring the fact that these companies are the ones that currently limit the industry by saturating the market with few expensive pieces of content with low artistic value in the first place. In practice, the same excuse against piracy should be an

argument in favor of piracy. As we have seen, piracy can be a tool to limit monopolies, change their business models, and encourage independent artists and a decentralized market.

The second problem that copyright laws introduce is the fact that content distributors can restrict access to information and education in developing countries where users cannot pay an arbitrarily high price for content. When companies (specifically monopolies) want to maximize their profits, they have to find a pricing point for their product that produces the highest revenue. Often times, this profit-maximizing technique results in higher prices, with lower benefits for consumers and a higher portion of the population excluded from accessing these contents. As

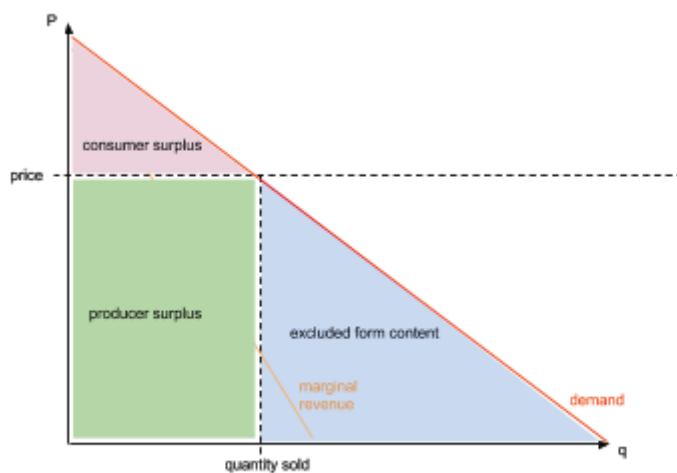


Fig. 3 - Profit-maximizing exclusion

shown in Fig. 3, because a media-distributor company tries to maximize its “producer surplus”, consumer surplus is decreased and many potential clients are excluded from the content (and often have to resort to piracy to access these

materials). If the company set a lower price for its products, it would sell a higher quantity at a lower price-point, decreasing its profits (producer surplus) but increasing consumer surplus and including more consumers. The best outcome for society is not the best for the monopoly. For example, when the creators of software like Photoshop, Fireworks, Illustrator, After Effects and others, sell their distribution rights to Adobe Inc., this company then has to set a price for their products. Since these pieces of software are widely used in professional environments, Adobe

can use a high-price strategy to market their technologies. Because the market is saturated by Adobe technology, there is no incentive for other companies to compete against them, creating similar software: Adobe, the industry standard, is simply too far ahead from competitors. This leads to a very powerful monopoly. However, because of this same effect, Adobe can choose whatever price it prefers to maximize their profit. Since there is a high demand for the software at high prices, it would be less profitable for Adobe to sell it at a low price point (even if costs are minimal). This effect leaves millions of potential consumers of lower resources such as students, amateurs, semi-professionals, and people in developing countries out of the market. This pricing model excludes disadvantaged people from learning new technologies and further exacerbates inequality. That is why copyright laws not only encourage the formation of natural monopolies, but also encourage sub-optimal solutions with great amounts of exclusion (of low-resource individuals) from information and educative materials. This system leads to an ever-increasing wealth gap and inequality between developed nations and underdeveloped countries that cannot access these copyrighted materials by paying the standard rate. One example of this issue in practice for the field of education is the case of scientific magazines. Many authors in the scientific community publish their papers to popular private magazines in order to popularize their works and increase their papers' or personal academic reputation. However, after giving exclusive distribution rights to these papers, other scholars need to pay for subscriptions in order to access the papers. The consequence of this decision is that private companies have the power to distribute the knowledge and information, excluding a portion of the world from it: developing countries where students and faculty do not have access to a subscription. Aaron Schwartz, a hacker and activist fighting for free speech at Harvard and MIT,

downloaded millions of articles from JSTOR, a private paper distribution company and made the content public. His objective was to allow free access to documents from any country and to ensure that no private company or government could later restrict access to them. Aaron was then heavily prosecuted by JSTOR and MIT (he used MIT University's facilities to connect to the internet, by evading university security and hacking the terminals) and was facing legal charges carrying a potential prison term of 35 years and a fine of up to one million dollars (Sims). The strong prosecution and verbal threats he received during the process finally resulted in his suicide.

The third problem with the current copyright legislation is that it creates a system that facilitates censorship. With the excuse of copyright infringement, the U.S. government and others are trying to censor the free access to information. Aaron Swartz had reasons to suspect that he was being prosecuted not only for his minor crime of releasing copyrighted content from JSTOR, but mostly because he was working with the free speech organization Wikileaks. This organization and torrenting networks allow for the public to monitor government and corporate transparency. Many times, interested parties are exposed by transparency and do not want information to be known, and these parties might exert pressure to criminally prosecute people like Julian Assange or Aaron Swartz, as well as block access to Wikileaks. For example, in the case of the bank "Julius Baer" in the Cayman Islands and Switzerland, a document has been leaked suggesting the bank helped its clients in money laundering and tax evasion. Because of that, the bank, with judge Jeffrey White, blocked Americans from accessing wikileaks.org. The ability to censor this website was facilitated by the already existing and functioning DMCA. The Digital Millennium Copyright Act was passed in 1998 and was intended to control piracy

(copying video tapes and music discs). However, in the modern world, the DMCA requires every website to provide a legal representative and allows for any person or company to file a complaint to ask a website to remove a copyrighted material. In the case the material is not removed, the website can be legally blocked via a lawsuit. The bank “Julius Baer” filed a lawsuit against Wikileaks (because wikileaks did not present a legal representative for filing DMCA complaints) and successfully blocked access to the whole website from the United States, with the intent of censoring access to its leaked money-laundering documents. As we have seen, this piece of legislation has been abused to interfere with our right of free speech. The problem that the bank faced with DMCA is that it is too slow for big corporations or governments to file lawsuits for every single website that contains the copyrighted information: in this case, after wikileaks.org was banned in the United States, wikileaks.info (which is a mirror/backup website) still contained the files, and the decentralized torrenting network allowed regular internet users to send the documents to each other directly, making the documents public, incriminating the bank. In fewer words: the internet is too decentralized to be successfully restricted by the DMCA. Companies and governments could block access to specific websites but they cannot prevent people from sharing files with each other. Whoever has access to a movie, music, books, or documents can simply upload the files via torrenting systems to other users, and the content will remain publicly accessible for any other user connected to the internet. Multiple governments have also been publicly exposed by wikileaks. In particular, leaks from the United States government revealed unreported civilian deaths in the Afghan war. Julian Assange, creator of wikileaks, helped soldier Chelsea/Bradley Manning leak the documents that publicly exposed the military killing civilians in Afghanistan. These civilian deaths had been hidden from the public

by the military and the government. After these events, Chelsea Manning was sentenced to military prison and the journalist Julian Assange was accused with “sexual assault” by two different individuals and asked for extradition, after which Assange became a political refugee at the U.K. embassy for Ecuador. In addition, Edward Snowden, a hacker and spy working for the C.I.A., recently stole and published countless documents exposing an online spy campaign by the National Security Agency. The files described how the United States government has been spying on U.S. and foreign citizens, monitoring emails, social networks and messages sent online. The leaked documents are now uploaded to wikileaks and its decentralized network as well as to decentralized torrenting networks. Multiple users have copies of the documents on their own computers and are currently sharing those files with other users. The nature of the internet, a decentralized network created by the military to be difficult to block communication with, is now a useful tool in democratically securing transparency. However, there are many cases in which government intervention on internet communications is justified. One problem that the internet faces today is criminal activity: David Herold, explains that the fast growth of the internet came with increased unlawful activity such as drug cartels, paid assassins, and illegal online markets, which brought attention from the media, the government and public opinion to the issue of controlling the online world (Herold, 10). After the 2001 World Trade Center terrorist attack, the American congress passed the USA PATRIOT act, a counter-terrorist act which helped restrict and monitor internet communications inside the nation, enforce stricter money laundering controls to counteract terrorism internationally, and took advantage of the situation and the shock produced by the terrorist attacks of 9/11, to impose higher controls in most areas of US citizens’ daily lives, as well as in foreign citizens’, compromising individual

privacy concerns and human rights, such as indefinite detentions of immigrants, the permission to search homes and businesses without the owner's consent, the ability to read emails without a court order, and others, according to Eric J. Gouvin (Gouvin, 981). Author Gabriella Coleman says that governments currently have a "schizophrenic" relationship with computer experts or "hackers" such as Aaron Schwartz, Julian Assange or Edward Snowden, all of whom are linked to different leaks of information (Coleman). Officials worry about terrorism, loss of control, and national security, and are thus afraid of the consequences that a truly free internet could have in the world. Another author, Mark Fenster argues that, besides controlling criminal behaviour as other authors have mentioned, free disclosure of information itself (especially in the case of confidential government or military papers) could "stymie" government operations and suggests that the current government system values national security over transparency (Fenster, 805). With the excuse of protecting intellectual property, other laws were suggested, such as SOPA, PIPA, OPEN, CISPA and ACTA (Dubuisson, 33). These legislation projects were supposedly going to protect copyright holders by monitoring web downloads and individual peer-to-peer connections for each user. Internet providers would be required by ACTA to inspect every package sent and received, every piece of information a user sends to another user, to make sure that the communication does not contain copyrighted material. For example, if a user were to send a movie copyrighted by Universal to their family members, the internet service provider (Comcast for example) would be required to block that user from the internet. Moreover, if a user uploads that movie to facebook, google or any other website, those websites are legally required by SOPA to delete the file. These laws would allow any company to block a website containing their copyrighted materials without going to court, and thus, avoiding the legal system

for criminalizing websites. Furthermore, sharing copyrighted materials with other users directly would become a felony and would carry a sentence of up to 5 years in jail. By posting links to illegal copyrighted material on facebook, for example, could lead to the whole social network being blocked from the internet. Also, CIPA would allow the United States government and military to collect private data from companies without a warrant as long as the government considers it a cyber threat, which includes copyright violations or piracy. Documents exposed by Edward Snowden showed that the government is currently already spying on citizens, although illegally. CIPA would enable legal means to approve what the government has already been doing. On the other hand, PIPA and ACTA would allow for governments and private parties to censor and block access to copyrighted information, which is something they currently cannot legally achieve. In the same way as the money-laundering bank Julius Baer used the DMCA complaints to individually block access to wikileaks.org, other companies will be able to automatically block access to specific documents they want to hide. Not only will they be able to prevent citizens from accessing the documents via websites but they will also be able to identify and stop users from sharing the incriminating evidence with each other, if these laws or future similar laws are passed. During a worldwide campaign against these copyright acts, the public pressured policymakers to vote against them, so these laws have not been passed. However, major internet service providers have already reached agreements with media distribution conglomerates to block repeated copyright violators from accessing the internet, without the need of government regulation. These acts are deeply connected to censorship and national security issues because, according to Yochai Benkler, these acts and attempts at legislation for censoring and monitoring the free exchange of ideas on the internet, work not only as a way to

control copyright and maintain big media corporations in power, but also as a path towards containing and administering organizations such as Wikileaks, and censoring information that could be distributed freely on the internet using peer-to-peer networks such as torrent applications. These laws are not about piracy but about restricting the free access to information for the public (Benkler, 154). This new legislation intervenes and controls user's access to information more in-depth than the Chinese great firewall because while China only blocks web domains, the United States and the European Union with these new copyright acts were trying to also block every individual packet sent or received between users themselves. For example, if one were to use torrenting peer-to-peer software to send files to a friend or acquaintance, the Chinese great firewall would not intervene, while the United States government would be legally allowed to disconnect those two users from the internet. While some governments (such as the Chinese government) respond to social protest by censoring and controlling communications, most scholars believe that censorship can have negative results and instead, the free flow of information in social networks can improve the situation in political movements by allowing individuals to better assess politics. Research has long demonstrated that social networks (both online and offline) are correlated with greater political involvement, and more thoughtful decision-making when it comes to political affiliation. For example, in their paper, Ronald La Due Lake and Robert Huckfeldt explained how social interactions in networks can provide social value and encourage political opinion exchange among the social network's members, leading to the production of social capital facilitating political engagement. When a person has connections to politically informed contacts, who have frequent political discussions, it is more likely that the person will become politically engaged (La Due Lake). Moreover, according to Antonio A

Casilli and Paola Tubaro, the decision to control and restrict social networks during these political movements or situations of social unrest can result in increased levels of violence, such as in the case of the United Kingdom riots, despite government officials thinking that limiting online communication could be a successful way in which to stop demonstrations or political movements (Casilli, 5). With these statements, Casilli is suggesting that censorship is not a sensible solution to social unrest created by this effect of increased political involvement that La Due Lake and Huckfeldt discovered. In the case of the U.K. riots, demonstrations were organized via Blackberry messaging, and the government (via a partnership with RIM, the Blackberry messenger company), monitored and controlled the messages being sent in order to find criminal suspects. This invasion of privacy by the government is consistent with the American N.S.A.'s way of working with citizen's data, and the laws being pushed by governments and corporations. The government seems to think that higher political involvement could lead citizens to follow rebel movements out of ignorance and increased advertising and social pressure. This is a commonly held belief by governments of multiple nations such as the UK and China, according to Casilli. The Chinese government has been filtering web content and citizen's access to multiple websites, such as Facebook, specifically to avoid unregulated access to information that would increase transparency in their government and potentially lead to a revolution. On the other hand, Ph.D. Scott McClurg claims more politicized social networks lead their members to take better, more informed decisions, considering political disagreement and differing viewpoints, and debunks the myth that people shape their political ideology to support the most popular candidate among their friends. In contrast to popular belief by governments such as the UK, China or some arab states, when the political exchange includes politically sophisticated

discussants and high levels of expertise, political participation is enhanced (McClurg, 737). Just like the Chinese government, as Herold claims that other governments have also started to control and safeguard the internet, in their national interest, as well as to avoid international money laundering and criminal activity, and the “logical endpoint” for the global internet will be a network regulated by a set of treaties between states and possibly controlled by the United Nations (Herold, 6). Much of this evidence has suggested that governments and corporations have a strong interest for monitoring and censoring the internet, which due to the current circumstances and previous abuse of copyright legislation, is reason to believe that these new copyright acts were meant to provide a legal path for political censorship. Most scholars, however, agree that the internet should not be censored. Although online criminal activity should be controlled by governments, piracy should not be criminalized because increased controls can lead to censorship.

In conclusion, although piracy has been severely criticized by governments and corporations in an attempt to use it as an excuse to legislate for their interests, piracy is in practice a system that gives democratic power back to the people. I use the word “piracy” because that is the way copyright violations without profit are commonly referred to. The use of the word is intentional, in order to resignify the word “piracy”, giving new meaning and removing the negative charge it possesses that interested parties have tried to take advantage of. Piracy is a tool that discourages intellectual property monopolies by limiting the natural monopoly cost structures created by copyright law. While Sony, Universal, Fox, Disney, Microsoft, Apple, and others have formed monopolies around intellectual property laws, the widespread use of piracy has decreased their power and monetary gains, opening the market for

weaker but more varied competitors. Piracy allows democratic access to education and non-exclusive goods such as intellectual property. Thanks to piracy, many students have free access to professional software, which has allowed for their education and further social mobility and career development. And finally, piracy strengthens transparency in democratic and nondemocratic governments and liberates the oppressed masses. Pirating documents that expose corruption, money-laundering, killings of civilians, and human rights violations. Piracy allows the public to control those in power and improve the world. Criminalizing or prosecuting piracy should be punished, since it is in practice, criminalizing democracy. It is criminalizing the power of the public to fight for their rights to free competitive markets, education, and transparency. Copyright enforcement and piracy controls are an excuse for corporate and political domination. Piracy prosecution should end immediately, and internet service providers, as well as other companies should be forbidden from arbitrarily using piracy as an excuse to block an individual's access to the internet.

There are still some open questions regarding privacy and copyright laws: How can we stop internet service providers from reaching an agreement to monitor our information? Should we pass stronger legislation or modify the constitution? Could we potentially strengthen our networks to prevent governments from intervening? For example, connecting each user to each other via wi-fi instead of using centralized internet providers. That way, it is difficult to deny access to the internet to anyone since the internet was designed to be a decentralized network for military purposes.

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