Western Journal of Legal Studies

Volume 5
Issue 3 *State Encroachment on Personal Lives*

Article 3

2014

Peer-to-Peer File Sharing as User Rights Activism

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Peer-to-Peer File Sharing as User Rights Activism

Abstract
The pre-digital marketplace is no longer sustainable. With the imposition of digital rights management restrictions on the distribution of media, the Internet cannot promote intellectual freedom. Peer-to-peer file sharing technology helps expose the work of artists and authors to a much wider audience than previously possible. This provides an opportunity for more sales and a greater number of successful artists and authors. Yet corporate copyright owners continue to propagate the "piracy" label to discredit the idea of open access channels. This paper argues that as information professionals, librarians are in a position to promote policy change that revolutionizes the political economy of digital goods.

This article is helpful for readers seeking to learn more about:

- activism, civil disobedience, human rights, international law, libraries, media, policy, peer-to-peer (P2P) file sharing, digital rights management (DRM), BitTorrent, Gnutella, droit d'auteur and contrefaçon, user rights, librarians, piracy, digital technology, technological neutrality, copyright, digital goods, file transfer protocol, torrent indexes, copyright infringement, intellectual property, communicative citizen, media conglomerates, technological protection measures, information technology, intellectual freedom, metadata, distribution of works, digital vendors, exceptions to copyright, information users, Pirate Party

Topics in this article include:

- digital revolution, developments in copyright protection, balancing user rights and property of authors/ artists, file-sharing technology, duties of librarians, rivalry in consumption, technological innovation, MegaUpload, Recording Industry Association of America, home taping scare, fair dealing, fair use, pre-digital marketplace, copyright owners, political neutrality, Internet, media industry

Authorities cited in this article include:

- Digital Millennium Copyright Act (DMCA)
- Anti-Counterfeiting Trade Agreement (ACTA)
- Copyright Modernization Act
- Canadian Charter of Rights and Freedoms
- Sony v Universal Studios
- A&M Records Inc. v Napster Inc.
- MGM Studios Inc. v Grokster Ltd.
- Amstrad Consumer Electronics PLC v The British Phonographic Industry Ltd.
- Théberge v Galerie d'Art du Petit Champlain
- Voltage Pictures LLD v Jane Doe

Keywords
activism, civil disobedience, human rights, international law, libraries, media, policy, peer-to-peer (P2P) file sharing, digital rights management (DRM), BitTorrent, Gnutella, droit d'auteur and contrefaçon, user rights, librarians, piracy, digital technology, technological neutrality, copyright, digital goods, file transfer protocol, torrent indexes, copyright infringement, intellectual property, communicative citizen, media conglomerates, technological protection measures, information technology, intellectual freedom, metadata, distribution of

works, digital vendors, exceptions to copyright, information users, Pirate Party, digital revolution, developments in copyright protection, balancing user rights and property of authors/ artists, file-sharing technology, duties of librarians, rivalry in consumption, technological innovation, MegaUpload, Recording Industry Association of America, home taping scare, fair dealing, fair use, pre-digital marketplace, copyright owners, political neutrality, Internet, media industry

PEER-TO-PEER FILE SHARING AS USER RIGHTS ACTIVISM

MICHAEL A. GUNN**

INTRODUCTION

The Internet is a bastion of intellectual freedom. It is also a new global marketplace that—according to some—provides an opportunity for criminal activity to occur on a monumental scale. As the gatekeepers to information, librarians play an important part in this controversy. They must "guarantee and facilitate access to all expressions of knowledge and intellectual activity, including those which some elements of society may consider to be unconventional, unpopular or unacceptable."[1] Librarians also "facilitate access to any or all sources of information which may be of assistance to library users."[2] That said, a librarian's ability to serve patrons is limited because the corporate-media industry is lobbying for tighter restrictions on Internet use.

As information professionals, librarians must balance respect for the rights of authors with the promotion of user rights. According to Blanke, however, "America's ruling elites, under the guise of preserving the nation from ruin, have enlisted the services of librarians to combat the sociopolitical developments perceived as threatening to the *status quo*."[3] Despite their best intentions, trends in copyright law hinder librarians' efforts to promote user rights. Librarians must uphold professional values[4] and, as such, cannot violate the rights guaranteed by copyright law; despite that, digital-media vendors manipulate librarians and information users by imposing digital

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* I would like to thank Professor Samuel E. Trosow for giving me the opportunity to write this paper and for providing helpful criticism on its structure. I would also like to thank my editors for their many thoughtful improvements. This article is dedicated to those who have been wrongfully sued or arrested for sharing digital content.

[1] Canadian Library Association, "Position Statement on Intellectual Freedom" (1974), online: <http://www.cla.ca/Content/NavigationMenu/Resources/PositionStatements/Statement_on_Intell.htm> [*CLA Position Statement*].

[2] Canadian Library Association, "Code of Ethics" (1976), online: http://www.cla.ca/AM/Template.cfm?Section=Position_Statements&Template=/CM/ContentDisplay.cfm&ContentID=3035 [*CLA Code of Ethics*].

[3] Henry T Blanke, "Librarianship & Political Values: Neutrality or Commitment?" (1989) 114:12 Library Journal 39 at 40 [*Blanke*].

[4] *CLA Code of Ethics, supra* note 2.

rights management (DRM) and their associated unfair terms of use.[5] These unfair terms of use violate the spirit of copyright laws by prohibiting the exploitation of exceptions to copyright infringement.[6] Librarians have a duty to advocate for intellectual freedom and thus should inform the public about the extent of intellectual property rights. This would enable users to make informed decisions about the information that they obtain from the Internet.

This article argues that librarians must push the boundaries of copyright protection to set an example for how Internet use should be regulated. The Supreme Court of Canada (SCC) recently favoured the application of technological neutrality to copyright law,[7] and Parliament has followed suit by enacting the *Copyright Modernization Act*.[8] In order to capitalize on this trend, librarians must demonstrate how private individuals can take advantage of user rights to promote change in the public perception of the online global marketplace. I examine in part I the mechanism for peer-to-peer (P2P) file sharing and its associated legal implications. The history of P2P file sharing in an international context will be analysed in part II. Finally, part III identifies forms of political activism that favour a revolution in information policy and connects these forms to principles of intellectual freedom. This paper argues that the strongest form of activism available to Canadian citizens is education by example. Consequently, librarians should publicly exercise the rights granted through copyright exceptions; they should do this to promote policy change that revolutionizes the political economy of digital goods.

I. PEERS VS. PIRATES: THE DEFINITION OF FILE SHARING

P2P is the transfer of a digital file from one "peer" to another. In this context, "peer" refers to computer clients. This transfer can be as simple as the File Transfer Protocol (FTP), which transfers a file directly to a visitor's personal computer through a server-hosted website. It can otherwise involve complex transfer protocols, such as Gnutella[9] or BitTorrent.[10] P2P file sharing is often associated with BitTorrent because

[5] Jason Puckett, "Digital Rights Management as Information Access Barrier" (2010) 34/35 Progressive Librarian 11 at 11 [*DRM*].
[6] Tony G Horava, "Ebooks Licensing and Canadian Copyright Legislation: A Few Considerations" (2009) 4:1 Partnership: the Canadian Journal of Library and Information Practice and Research 2.
[7] Gregory R Hagen, "Technological Neutrality in Canadian Copyright Law" in Michael Geist, ed, The Copyright Pentalogy (Ottawa, Canada: University of Ottawa Press, 2013) 307 at 307-308 [*Technological Neutrality*].
[8] *Copyright Modernization Act,* SC 2012, c20.
[9] Rebecca Giblin, *Code Wars: 10 years of P2P Software Litigation* (Cheltenham, UK: Edward Elgar, 2011) at 58 [*Code Wars*].
[10] *Ibid* at 140.

this is both the most popular and efficient file transfer protocol available. The SCC provides the following description of BitTorrent technology:

> When a file is uploaded to a BitTorrent network that is referred to as "seeding." Other P2P network users, called "peers," can then connect to the user seeding the file. BitTorrent breaks a file into numerous small data packets, each of which is identifiable by a unique hash number created using a hash algorithm. Once the file is broken into packets, other peers are able to download different sections of the same file from different users. Each new peer is directed to the most readily available packet they wish to download. Peers copy files from multiple users who may have the file available on the BitTorrent network. The peer then becomes a seeder as the data packet is distributed to other peers connected to the BitTorrent network. Once a packet is downloaded it is then available to other users who are also connected to the BitTorrent network.[11]

Technically, torrent indexes do not facilitate the download of copyrighted material because they only host torrent files. Since torrent files contain only metadata about the file and its locations in the P2P network, their reproduction cannot be considered copyright infringement. As such, this protocol—among others—has proven to be elusive to copyright sanctions.[12]

The unauthorized transfer of copyrighted digital files via the Internet infringes on the control of the distribution of a copyright owner's intellectual property. Since the inception of copyright law, publishers have labelled the unauthorized reproduction and distribution of copyrighted materials as piracy.[13] The SCC has been careful to avoid introducing into Canadian law the right of destination, which plays a greater role in the copyright regulation system of continental Europe.[14] The demonization of unauthorized reproduction through the term "piracy" serves two purposes. First, it is a scare tactic to reduce unauthorized reproductions by stigmatizing the act publicly. Second, playing the victim of copyright theft on behalf of authors is an effective way to lobby for more restrictive copyright legislation and enforcement.[15]

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[11] *Voltage Pictures LLD v Jane Doe,* 2014 FC 161 at para 12 [*Voltage*].
[12] Aram Sinnreich, *The Piracy Crusade*. (Amherst, MA: University of Massachusetts Press, 2013) at 74-75 [*Piracy Crusade*].
[13] Carla Hesse, "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793" (1990) 30 Representations 109 at 118 [*Hesse*].
[14] *Théberge v Galerie d'Art du Petit Champlain* [2002] 2 SCR 336 at paras 62-65 [*Théberge*].
[15] Laura J Murray & Samuel E Trosow, *Canadian Copyright: A Citizen's Guide* (Toronto, ON: Between the Lines, 2013) at 19.

The piracy label equates the reproduction of media with theft, but theft and reproduction are not the same. In the context of copyright policy, "piracy" is defined by UNESCO as "the activity of manufacturing unauthorized copies ['pirate copies'] of protected material and dealing with such copies by way of distribution and sale."[16] Likening piracy to theft conflicts with the traditional definition of piracy found in the *Criminal Code of Canada*, which states, "Every one commits piracy who does any act that, by the law of nations, is piracy." The *Criminal Code* then lists "piratical acts," which include the theft of Canadian ships and their cargo, and any mutinous acts committed on Canadian ships.[17] Equating unauthorized literary reproductions with theft of ships is not only misleading to those unfamiliar with law and legal policy; it also serves to characterize publishers as the victims of "lost sales." In reality, it is unlikely that people who download copyrighted works for free would otherwise pay for every single work that they have procured this way.[18]

Moreover, placing fewer restrictions on file sharing is economically advantageous because, while physical books face rivalry for consumption, digital sources do not. If a person steals a physical book from a library, it is no longer available for use by library patrons. In contrast, if an e-book is copied onto a library patron's flash drive, the original copy is not lost. With the digital source, the library may possess and enjoy the work at the same time as any number of patrons.[19] Since the cost of copying digital works is essentially nonexistent, they are non-rivalrous in consumption.[20] On the other hand, digitization threatens the media industry because it undermines the exclusion mechanisms inherent to physical copies of media. Furthermore, the Internet and digitization have significantly reduced the media industry's control over pricing and distribution.[21] The Recording Industry Association of America (RIAA) has attempted to stymie the effect of the Internet. It spent two decades lobbying for the United States government to impose tighter restrictions on online distribution throughout the world; thousands of lawsuits have been served to accomplish this goal.[22] Such restrictions are problematic because they artificially limit the use of digital media to mimic the characteristics of printed media. Considering their format, digital works should be more

[16] Darrell Panthiere, The Persistence of Piracy: The Consequences for Creativity, for Culture, and for Sustainable Development (2005), online:
<http://portal.unesco.org/culture/en/files/28696/11513329261panethiere_en.pdf> at 2.
[17] RSC 1985, c C-46, s 74-75.
[18] *US v Dove,* 585 F Supp (2d) 865 (Dist Court WD Virginia 2008) at para 17.
[19] *Piracy Crusade, supra* note 12 at 127.
[20] J Bradford DeLong & A Michael Froomkin, "Speculative Microeconomics for Tomorrow's Economy" (2000) 5:2 First Monday 2.
[21] *Piracy Crusade, supra* note 12 at 127.
[22] David Vaver, "Harmless Copying" (2012) 25 IPJ 22 [*Harmless Copying*].

accessible than printed works, but digital rights management (DRM) makes these works prohibitively restrictive to use.[23]

DRM would not apply to digital works if digital media were treated as technologically neutral. The extension of copyright to new forms of media does an injustice to the public by creating a privileged system for access to culture.[24] Before the digital revolution, copyright law only protected owners against other producers of media, whereas contemporary copyright law is used by media monopolies to scare private individuals into obeying the rules of an outdated market system. Many large media corporations originally refused to adapt to the new marketplace and blamed their customers for their own inability as corporations to control distribution.[25] These corporations use DRM to artificially restrict use of digital works by treating them like print works. By granting access to only one page of a work in a browser, DRM suppresses the potential to consume digital goods. For example, it prevents a user from opening multiple copies simultaneously for side-by-side comparisons of various pages, or from conducting keyword searches in a text. Accordingly, the media industry turned its consumer base against the industry in three ways. The first way is by lobbying for restrictive copyright law amendments; second, through lawsuits against innovative distribution services; and third, through propaganda that stigmatized innovation as facilitating piracy. Users are tired of paying corporate monopolies[26] for goods that require unnecessary time and effort to use. Therefore, actions taken by the media industry to enforce DRM have prompted information users to turn to alternative modes of distribution.[27]

The effect of DRM on innovation is another reason to support technological neutrality. Extending copyright to every new media technology gives the impression that these media are made to infringe on the rights of authors and artists. This serves to punish innovation.[28] Digital technologies have improved the public's ability to access information and promote creativity, yet corporate copyright owners continue to fight against the potential development of copyright law that would accommodate innovation. David Vaver argues that "since a copyright first appeared on early 18th

[23] For instance, the ebooks available through JSTOR by Western's proxy server can only be accessed by a library user through a personal account. This extra barrier is for JSTOR's monitoring purposes to detect if works are being systematically downloaded by a particular user. Even if fair dealing would protect the use— a computer cannot detect "purpose" —JSTOR will alert the library. The library could, depending on Western's license agreement with JSTOR, also automatically restrict access to all users of Western's proxy server. See also *infra* note 71.
[24] *Technological Neutrality, supra* note 7 at 311-312.
[25] *Piracy Crusade*, *supra* note 12 at 59 - 62.
[26] *Code Wars, supra* note 9 at 61.
[27] *DRM, supra* note 5 at 12.
[28] *Technological Neutrality, supra* note 7 at 311-312.

century statute rolls, legislatures worldwide have succumbed to a seemingly irresistible impulse to protect more and more for longer and longer, and ask less and less from beneficiaries in return."[29] The compulsion to restrict distribution to the modes approved by the copyright owners has resulted in prohibitive access to information. This stifles creativity by preventing access to the "shoulders of giants" upon which every author stands.

Typically, today's media users want to sample content freely before they decide to purchase it;[30] a demonstration reel or a 30-second preview does not allow for proper appreciation by the user. Aram Sinnreich states that free access to music through P2P file sharing has positively influenced the music industry:

> . . . among online adults who liked music, *Napster was actually helping music sales*. Although some were no doubt using the service as a replacement for traditional music retail, others were using it as a vehicle to discover and sample new music, increasing their enthusiasm about music products and driving them to purchase more.[31]

Free access to music files allows consumers to sample works before they commit to purchase. From this perspective, P2P file sharing of copyrighted works is an economic model where people purchase content as a way to support their favourite authors and artists. Several prominent artists in the music industry, such as 50 Cent and Lady Gaga, see this economic model as a way to promote and advertise their art.[32] In this way, artists can attract people to their live performances—a viable stream of revenue for them.[33] Despite these benefits, corporate copyright owners find fault with all forms of P2P file sharing. They continue to combat technological innovation and intellectual freedom, engendering their own misfortune in the process.

II. THE HISTORY OF ONLINE PIRACY

As the primary home of the global entertainment industry, and an influential voice in Internet policy, the United States is central to the digital copyright narrative. Important copyright cases date back to the 1980s, beginning with the "home taping" scare. In the United States, Universal City Studios sued Sony Corporation for designing

[29] *Harmless Copying, supra* note 22.
[30] This point is evident by the fact that file sharing of copyrighted works is such a common practice: *Code Wars, supra* note 9; *Hesse, supra* note 13.
[31] *Piracy Crusade, supra* note 12 at 78.
[32] *Ibid* at 85-90.
[33] *Ibid*.

the videocassette recorder, which allowed users to make tape recordings of television broadcasts. The United States Supreme Court ruled that recording a television broadcast for the purpose of time shifting constituted fair use.[34] Meanwhile, in the United Kingdom, the British Phonographic Industry sued Amstrad Consumer Electronics for selling dual-cassette recording machines.[35] The Industry argued that Amstrad's advertisement drew attention to the potential of copying protected works in a manner that authorized infringement. The House of Lords unanimously dismissed this claim based on a narrow legal interpretation of "authorization."[36] By giving courts a theoretical basis for interpreting copyright infringement committed by private individuals, these cases formed the foundation for copyright law in the digital age.

During the 1990s, the Internet expanded rapidly and became accessible to a wide audience of private individuals. The United States amended its copyright statute in 1998 with the *Digital Millennium Copyright Act*[37] (*DMCA*) in order to comply with World Intellectual Property Organization (WIPO) standards. This legislation made it illegal to circumvent DRMs, or to be associated with the production or distribution of circumvention technologies. The timing of this legislation was ideal for the media industry, as private individuals were soon capable of wide-scale copyright infringement through the use of software such as Napster

The digital movement intrigued the music industry. Distributors favoured selling music in the CD-ROM format because it forced customers to purchase new music players and new copies of their albums. The pursuit of profit was so great that the industry ignored analysts' warnings about the lack of security of audio files on CD-ROM discs.[38] By making audio files freely available for copy through the sale of music in unprotected CD-ROM format, the music industry enabled Napster to obtain its collection of music files. Released in June 1999, Napster was the first online P2P file sharing service to receive global recognition and use.[39] The service was a collection of server-hosted MP3 files that could be downloaded by anyone who installed Napster's free client software. The widespread activity of Napster outraged the American music industry, which had been enjoying a century-old cartel on artists, labels, and distribution of music.[40]A&M Records sued Napster after A&M failed to claim the online marketplace first. In its decision, the United States Court of Appeals for the Ninth

[34] *Sony Corp of America v Universal City Studios Inc*, *464 US 417* (1984) [*Sony*].
[35] *Amstrad Consumer Electronics PLC v The British Phonographic Industry Ltd,* [1986] FSR 159 (CA (Eng)) [*Amstrad*].
[36] *Code Wars, supra* note 9 at 107-109.
[37] Pub L No 105-304, 112 Stat 2860 (1998).
[38] *Piracy Crusade, supra* note 12 at 58.
[39] *Ibid* at 74.
[40] *Ibid* at 9-10.

Circuit shut the P2P file sharing service down on the basis of secondary copyright infringement.[41]

Rather than stifle P2P distribution channels, the RIAA's legal action led to a proliferation of P2P file sharing software. Having gained knowledge of the legal implications associated with P2P file sharing through the *Napster* trial, new creators used Napster's open source code to develop software that would be difficult for the RIAA to control. This second wave of P2P file sharing software was based on more sophisticated protocols, such as Gnutella.[42] These protocols prevented secondary liability by using the host server to transfer metadata on the location of files, thereby protecting the P2P developer from infringement charges.[43]As a result, *MGM Studios Inc. v. Grokster Ltd.*[44] was much more complex than *Napster*. The former case was dismissed at trial and on appeal before the decision was upheld by the United States Supreme Court. The *Sony* and *Napster* cases were brought up as possible comparisons, but all three courts were convinced that "mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves."[45]

During the *Grokster* trial, the Unites States managed to compel the Netherlands to shut down another company offering services based on Gnutella protocol. The Amsterdam District Court issued an ultimatum that the P2P file sharing company KaZaA halt its operations. It was difficult to find the owners of this company, as the creators had quietly relinquished KaZaA to Sharman Networks Ltd., an Australian corporation. Once contacted, Sharman argued that it was impossible to shut the service down by virtue of its architecture.[46] In the end, the United States Supreme Court chose to uphold the *Sony* verdict on the grounds that it was a landmark case. The rejection of secondary liability was echoed in both British and Canadian case law.[47]

Due to their lack of success in attacking P2P file sharing developers, the RIAA turned its attention towards private individuals who were using the software. The RIAA served court orders to over 35,000 United States citizens, including minors, the elderly and the deceased.[48] These actions were received negatively by the public, and,

[41] *A&M Records Inc v Napster Inc,* 239 F (3d) 1004 (9th Cir 2001) [*Napster*].
[42] *Code Wars, supra* note 9 at 58-61.
[43] *Ibid* at 58-59.
[44] *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd,* 545 US 913 (2005) [*Grokster*].
[45] *Ibid* at para 34.
[46] *Code Wars, supra* note 9 at 104-105.
[47] *Grokster, supra* note 44 at 26-36*; Amstrad, supra* note 35; *CCH Canadian v Law Society of Upper Canada*, 2004 SCC 13 [*CCH Canadian*] at para 7.
[48] *Piracy Crusade, supra* note 12 at 61-62.

consequently, encouraged more people to participate in P2P file sharing.[49] By 2008, the RIAA ended its legal battle against the public and has since worked with information technology corporations—such as Apple and Google—to distribute the RIAA's digital works.[50] The RIAA continued its war against piracy. For example, in 2012, the United States government shut down MegaUpload for streaming copyrighted material.[51] The RIAA had also simultaneously lobbied for the international *Anti-Counterfeiting Trade Agreement* (*ACTA*).[52] Provided that the government of the country in question passed the bill, *ACTA* would allow the government to arbitrarily shut down websites for hosting infringing works. *ACTA* was entirely lobbied for and drafted by the media industry, without the support of public interest groups.[53] Internet activists, however, managed to prevent the enactment of these bills by using social media to inform the public of the dangers associated with the proposed legislative changes.[54]

As the United States and the Commonwealth were dealing with the civil consequences of P2P file sharing, Europeans were addressing the implications of criminal sanctions for copyright infringement. Following the French Revolution, Napoleon Bonaparte implemented the *droit d'auteur* system, which was later replicated by many Scandinavian and continental European nations.[55] While the copyright system attempts to strike a utilitarian balance between economic incentives that promote the rights of authors and users, *droit d'auteur* is primarily concerned with protecting the author's natural rights.[56] In France, information piracy is a criminal act and using P2P file sharing technology to distribute protected works is punishable by fines and imprisonment. Currently, many Europeans find *droit d'auteur* contemptible. People are actively working towards reforming copyright laws to better accommodate changes in the nature of information and changes in communication methods resulting from the digital revolution.[57]

David LeFranc traces contemporary French public disdain for *droit d'auteur* back to the historical treatment of *contrefaçon*. In the sixteenth century, *contrefaçon*

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[49] Rebecca Giblin, "How Litigation Only Spurred on P2P File Sharing" (11 November 2011) online: itnews For Australian Business <http://www.itnews.com.au/Tools/Print.aspx?CIID=279763>.
[50] *Piracy Crusade, supra* note 12 at 44.
[51] Davide Balzarotti & Salvatore J Stolfo eds, *Research in Attacks, Intrusions, and Defenses* (London: Springer Heidelberg Dordrecht, 2012) at 185.
[52] "Anti-Counterfeiting Trade Agreement" (2012) online: Ministry of Foreign Affairs of Japan <http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf>.
[53] *Hesse, supra* note 13 at 164-171.
[54] Tony Chavira, "ACTA: A government-Approved International Conspiracy" (31 January 2012) online: FourStory <http://fourstory.org/posts/post/acta-a-true-american-conspiracy/wsdindex.html>.
[55] *Hesse, supra* note 13 at 117.
[56] *Code Wars, supra* note 11 at 17-24.
[57] *Ibid* at 182-188.

referred to criminal theft of intellectual property by an unauthorized printer.[58] At the time, the king granted perpetual monopolies to printing companies because French copyright law was not yet codified.[59] Traditional forms of media production required significant investment that only corporate bodies could afford. Today, most private individuals can afford the technology to print a book or to reproduce an electronic document. As such, "the participation of the public in acts of reproduction and dissemination introduces a new element: from the first privileges until the end of the twentieth century, the legislature has always considered the person exploiting the work to be a professional."[60] *Droit d'auteur* was not designed with the knowledge that private individuals would have the means to reproduce and distribute works on an industrial scale. *Contrefaçon*—a criminal sanction punishable by considerable fines or imprisonment—is no longer a practical mode of enforcement. Despite historical precedent protecting the author in *droit d'auteur*, there is a noteworthy social movement that advocates for the decriminalization of P2P file sharing in Europe. A significant number of Europeans view the Internet as a public good that should not be controlled by the government or by wealthy corporations. Many of these people have joined the piracy movement as a response to the erosion of user rights on the Internet.[61]

III. PROTESTING THE COMMODIFICATION OF THE INTERNET

The question of why the United States media industry spent billions of dollars to go after P2P users remains. The answer lies in understanding the capitalist system, where the marketplace is the only legitimate channel for the distribution of goods. Social support directly assaults market territory because it infringes on the opportunity for enterprising people to profit. Following this logic, it makes sense that free dissemination of culture and open access to information through the Internet would be considered threatening to the marketplace. William Birdsall summarizes this way of thinking as the "ideology of information technology," where he states:

> The commodification of information should be facilitated by government copyright policies that favor creators over users and privacy legislation aimed at promoting e-commerce rather than wider social needs. Furthermore, the distribution of information in the market should be promoted by privatizing and deregulating public services, such as libraries, broadcasting, and

[58] David Lefranc, "The metamorphosis of contrefaçon in French copyright law" in Lionel Bently, Jennifer Davis & Jane C Ginsburg, eds, Copyright and Piracy: An Interdisciplinary Critique (New York: Cambridge University Press, 2010) 55 at 56-57 [*Lefranc*].
[59] *Hesse, supra* note 13 at 111-112.
[60] *Lefranc, supra* note 58 at 64.
[61] European Pirate Party "Common European Election Program" (2014) online: European Pirates <https://europeanpirates.eu/common-european-election-programme>.

> telecommunications that were formerly required to meet universal access public policy requirements.[62]

In the context of the dissemination of media through P2P file sharing software, the RIAA refuses to give up its monopoly over music.

Rather than promote the restriction of government influence in the marketplace,[63] music producers are clamouring for more rigid legislation and for greater enforcement. This poses a legal problem in Canada, where it is accepted that the purchaser becomes the owner of the physical copy upon payment. An owner can then do whatever he or she wants with this copy, including mounting it on a new medium and reselling it.[64] But there is debate over whether the same treatment should be extended to digital works since they lack the exclusion mechanisms of their physical counterparts. The SCC states that digital works should not be treated differently from printed works by virtue of "the principle of technological neutrality, which requires that the [*Copyright*] *Act* apply equally notwithstanding the technological diversity of different forms of media."[65] Nevertheless, the DRM clauses in the *DMCA* found their way into Canada in 2012 as a part of the *Copyright Modernization Act* omnibus amendment.[66] DRM provisions are referred to as technological protection measures (TPM) in Canadian legislation. Under Canadian law, it is illegal to circumvent TPM. It is also illegal to develop, buy, sell, possess, or distribute circumventions.[67] Examples of TPM include encryption, password protection, and license key codes. Despite the utilitarian purpose of copyright law, there are no utilitarian aspects of TPM. In fact, TPM limits the creative potential of individuals through artificial exclusion mechanisms that prohibit access to information and prevent the exploitation of exceptions to copyright infringement.[68]

Computer hackers and other activists are protesting restrictive copyright laws through the piracy movement. The origins of the online piracy movement lie with a Swedish political activist group called the Piracy Bureau. The Swedish Anti-Piracy Bureau, whose mission is "to safeguard and promote the member companies'

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[62] William F Birdsall, "A Political Economy of Librarianship?" (2000) Hermes: Revue Critique at 7.
[63] See Jürgen Habermas, Sara Lennox & Frank Lennox, "The Public Sphere: An Encyclopedia Article (1964)" (1974), 3 New German Critique 49 at 52.
[64] *Théberge, supra* note 14 at paras 62-65.
[65] *Entertainment Software Association v Society of Composers, Authors, and Music Publishers of Canada*, 2012 SCC 34 at para 2.
[66] Government of Canada, "Balanced Copyright" (2012) online: <http://www.balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/home>.
[67] Copyright Act, RSC 1985, c C-42, s 41 [*Copyright Act*].
[68] *DRM, supra* note 5 at 12-13.

copyrights in their films," inspired the name.[69] The Piracy Bureau was formed soon after the *Napster* trial. Its founders assert the Bureau "was not about romanticizing pirate stuff . . . we wanted to state that we are the active part in this conflict. The Anti-Piracy Bureau is the reactive part."[70] While this group might not have had romanticism in mind, the P2P file sharing community uses the piracy label as a political statement. For example, the political "Pirate Party" in Sweden has appropriated the label in its name.[71] The Pirate Party is currently represented in 66 nations worldwide, including Canada and the United States.[72] According to the mission statement of the Pirate Party of Canada:

> A fair and balanced copyright regime that is suitable for the 21st century is an absolute necessity for Canada to remain competitive in a global economy that is built upon ideas and innovation. Copyright should give artists and innovators the chance to make money from their work; however, that needs to be balanced with the rights of society as a whole.[73]

In Europe, the Pirate Party has become so successful that it has held seats in the Parliament of the European Union.[74] The piracy movement, an international call for civil disobedience, is tied to the historical perspectives on piracy in *droit d'auteur* jurisdictions.

A political party could theoretically spread information of an ideology and increase its popularity among the public; however, the Pirate Party, by virtue of its misleading name and its stigmatized political identity, is unlikely to convince those who do not participate in P2P file sharing of its merits. Notwithstanding the multi-faceted mission statement,[75] the word piracy is often synonymous with criminal intent, and, as such, it is unlikely that such a party would be considered legitimate in North America. Without knowledge of Canadian copyright law, citizens are unable to defend themselves against cease and desist letters,[76] which typically threaten fines and legal

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[69] Björn Gregfelt "Om Antipiratbyrån" (2014), Svenska Antipiratbyrån, online: <http://www.antipiratbyran.com>.
[70] The Pirate Bay Away From Keyboard, "TPB AFK: The Pirate Bay - Away From Keyboard" (8 February 2013), online: YouTube <https://www.youtube.com/watch?v=eTOKXCEwo_8> [*Pirate Bay*].
[71] Jack Schofield, "Sweden Pirate Party Wins EU Seat" (8 June 2009), online: <http://www.theguardian.com/technology/blog/2009/jun/08/elections-pirate-party-sweden>.
[72] *Piracy Crusade, supra* note 12 at 181.
[73] Pirate Party of Canada, "Pirate Party Policy" (2014) online: <https://policy.pirateparty.ca> [*Pirate Party*]
[74] *Pirate Bay, supra* note 70.
[75] *Pirate Party, supra* note 73.
[76] For current regulation standards see *Voltage, supra* note 13.

action.[77] Though the Pirate Party strives to inform people of relevant legal information, its single-issue focus on copyright prohibits mainstream acceptance.

Both copyright and *droit d'auteur* jurisdictions share a public disdain for class action lawsuits and corporate lobbying. This disdain needs to be dealt with in a manner that challenges the *status quo* while retaining the principle of technological neutrality. Digital media is by nature different from print media, and users should be able to take full advantage of additional technological capabilities that come with digital works. Copyright monopolies restrict technological creativity,[78] yet both the SCC[79] and its American counterpart[80] favour the exploitation of new technologies by private individuals, even when there is opportunity to commit piracy. The SCC has held that Canadian copyright collectives have taken advantage of educational institutions. For example, consider the global offensive taken by copyright collectives that fight against private individuals for control of online works.[81] Information users should be trusted to exercise their rights when it can be justified rather than to take advantage of open access. The movement should make it clear that P2P file sharing for the purpose of gaining exposure to culture is not inherently wrong.

Librarians are trained to be advocates of intellectual freedom.[82] The digital revolution has been well received in librarianship circles because it provides the profession with the means to redefine itself.[83] If librarians do not take an active role in this change, the debate will have lost one of its most relevant voices. Henry Blanke does not support a politically neutral stance: "[B]y perpetuating the myth that their profession should be politically neutral, librarians have created a value vacuum that is easily being filled by the prevailing political and economic ethos."[84] Rather than letting the media industry dictate their practices, librarians should exercise their professional judgment to determine what is right for information users. Having said this, it is problematic for librarians to tout the pirate ideology because it appears unprofessional to violate the law, and there is a risk that the public would view it as corruption of the profession. A more diplomatic label will allow librarians to support user rights reputably. Librarians must strive to inform the online community and global conglomerates of the importance of finding balance between the rights of authors and users.

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[77] Murray & Trosow, 2013 *Canadian Copyright: A Citizen's Guide* at 106 - 107.
[78] *Code Wars, supra* note 9 at 68.
[79] *CCH Canadian, supra* note 47.
[80] *Sony, supra* note 34.
[81] *Piracy Crusade*, *supra* note 12 at 59 - 62.
[82] *CLA Position Statement, supra* note 1.
[83] William F Birdsall, "Libraries and the Communicative Citizen in the Twenty-first Century" (2005) 55 Libri 74 at 80 [*Birdsall on Libraries*].
[84] *Blanke, supra* note 3 at 40.

One possible solution is to turn the focus of librarianship from serving the informed citizen to serving the communicative citizen. An informed citizen possesses information with which to form opinions. The communicative citizen is distinguishable because he or she has the means to express, discuss, and collaborate with other citizens in a horizontal social hierarchy.[85] File sharing is a communicative process involving the free and mutual exchange of information; this fits within William Birdsall's model of the communicative citizen. For this to become a prominent model for librarianship, citizens must be given a communicative human right:

> Consequently, it is necessary to develop a new concept of the library and librarianship in a human rights context that contributes to the transformation of a political economy currently dominated by a mass media mentality. Alternatively, librarians must work to establish the principle that it is the responsibility of the state to insure resources are available to allow citizens to exercise their right to communicate.[86]

The *Copyright Modernization Act* started this process with the non-commercial user-generated content exception.[87] This uniquely Canadian exception allows for works to be reproduced online for non-commercial purposes. It provides legal justification for the creation of works such as Internet memes, mash-ups, and incidental montages, which would otherwise infringe copyright protection. This exception can also be used to legally protect fan-created adaptations of popular intellectual properties, such as amateur covers of music and fan fiction.

There is a need for private individuals to procure works for personal use, the purpose of which could fall under the fair dealing exception to copyright. Physical copies of works can be borrowed from a Canadian library without having to remunerate the copyright owner. By contrast, digital copies are more difficult to disseminate. Legislative restrictions placed on how librarians use e-books and non-negotiable DRM features introduced by vendors[88] are prominent factors that impede distribution,[89] but librarians can step into the patron's shoes to help them take advantage of user rights.[90] David Vaver recommends that information users "engage with or work around the law

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[85] *Birdsall on Libraries, supra* note 83 at 76.
[86] William F Birdsall, "A Progressive Librarianship for the Twenty-first Century" (2007) 28 Progressive Librarian 49 at 57.
[87] *Copyright Act, supra* note 67 s 29.1.
[88] Tony G Horava, "Ebooks Licensing and Canadian Copyright Legislation: A Few Considerations" (2009) 4:1 Partnership: the Canadian Journal of Library and Information Practice and Research 2 at 1.
[89] *Copyright Act, supra* note 67, s 31.2.
[90] *Grokster, supra* note 30 at 26-36; *Amstrad, supra* note 24; *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13.

by relying on current user rights or expressive freedom under the *Charter of Rights and Freedoms*."[91] To this end, a reference librarian could obtain protected digital media using open P2P file sharing channels on the patron's behalf, the use of which may fall under fair dealing or another copyright exception. Librarians can also lead workshops to teach patrons how to use P2P file sharing software to procure their own private copies of digital media. Neither librarian nor patron need remunerate the copyright owner or pay for the copy in any case.

The digital era has given librarians in Canada the opportunity to provide the public the widest range of free materials ever in existence. Furthermore, it falls within the legal rights of librarians to empower patrons with the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[92] Librarians should routinely inform patrons of the rights afforded to them through exceptions to copyright protection, such as that of fair dealing.[93] It is appropriate for librarians, who are supposed to promote intellectual freedom, to facilitate the exercise of these fundamental rights.

This approach does have legal and professional risks. That being said, the Government of Canada criminal prosecutions are rare; copyright is primarily used in civil law.[94] In addition, collective lawsuits against P2P file sharing services are undesirable in Canada for several reasons: it is impossible to ascertain the value of lost sales,[95] the cost of a lawsuit is greater than the maximum award for damages, and chasing private individuals leads to negative publicity.[96] This results in copyright owners' inability to enforce the exclusivity of their distribution channels. Notably, there is no evidence to support the notion that every download is a lost sale.[97] To the contrary, there is evidence that free access to media through P2P file sharing actually improves the information market.[98] For example, consider how the media industry has managed to maintain profits in light of the existence of these new distribution channels.[99] The modern conception of piracy is an unfounded demonization of private individuals who are simply exploiting distribution channels that the media industry chose to ignore.

[91] *Harmless Copying, supra* note 24 at 21.
[92] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(b).
[93] *CCH Canadian*, *supra* note 47 at para 51.
[94] D Gervais & E Judge, *Intellectual Property: The Law in Canada,* 2d ed (Toronto: Thomson Canada Limited, 2011) at 241.
[95] Samuel E Trosow, "Law and Technology Theory: Bringing in Some Economic Analysis" (2010) 30:1 Bulletin of Science, Technology, and Society at 31.
[96] *Piracy Crusade, supra* note 12 at 133.
[97] *Harmless Copying, supra* note 22.
[98] *Piracy Crusade, supra* note 12 at 78.
[99] *Ibid* at 76-79.

Therefore, no harm should come from librarians professionally advocating P2P file sharing for the distribution of works protected under copyright.

CONCLUSION

It has taken three decades for the American media industry to realize that the model of the pre-digital marketplace is no longer sustainable and that modern information consumers do not desire it. The imposition of restrictions on the distribution of media goes against the purpose of a free and technologically neutral Internet. Though librarians should see the Internet as a way to promote intellectual freedom, most private individuals fear the legal consequences of challenging the global marketplace. This gives digital vendors the advantage in their dealings with libraries and other customers. Rather than quietly obeying the corporate elite, librarians should make every attempt to challenge these copyright owners. As Denise Troll Covey argues:

> The time has come for librarians to protest and to resist not just in intellectual debate, but in our behaviour and to do so openly. Faced with the disrespectful demands and dishonest assertions of self-serving publishers, we must exercise and foster civil disobedience and moral courage in the border dispute over open access. Civil disobedience, disobeying a law on grounds of moral or political principle to influence society to accept a dissenting point of view, is not mere passive resistance. It is action in a value-laden situation in which the conscience objects and hardship lurks.[100]

The archaic licensing practices employed by publishers and media producers serve to debunk the myth that they are fighting for the rights of authors. Through these practices, they obtain economic rights from content creators and limit the potential for authors to benefit from the work of their peers and intellectual predecessors. If these middlepersons were instead cut out from the business, a new copyright regime would form naturally through the Internet. This new regime would enable artists and authors to disseminate works freely, resulting in the possibility of receiving payment from a much larger audience. Such a regime redefines the global economy as a communicative network of private individuals using the Internet to engage in a public sphere. Channels that distribute works through P2P file sharing without DRM restrictions promote intellectual freedom. They allow information users to take full advantage of exceptions to copyright without fear of legal retribution.

[100] Denise Troll Covey, "The Ethics of Open Access to Research: A Call for Civil Disobedience and Moral Courage" (2009) 33 Progressive Librarian 26 at 31.