DIGITAL "PIRACY:"

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DIFFERENTIATING THE MEDIUM OF TELEVISION

Trevor Smith

Marquette University

As internet technology has advanced so has the ability for users to duplicate and transfer files across this electronic medium. This increase in global communication and file sharing has raised many questions concerning the moral status of such file transfers. In many cases, where the files, or the content of the files, are protected by copyright, these file transfers are seen as theft or piracy. Much has been written - in academic journals, business publications, and legal challenges and briefs – concerning these so-called moral transgressions, but the focus of these inquiries has been primarily the piracy of music and software.[1]

It is the focus of this paper to expand this discussion to the moral status of so-called television piracy. Here, I attempt to unearth basic moral claims which might prohibit the free distribution of television programs by unlicensed and unauthorized individuals. In general, these arguments take two forms: utilitarian and deontological. Many of the basic utilitarian and deontological arguments concerning the piracy of television programs mirror and parallel the arguments made surrounding the piracy of music and software, yet it will be shown here that the unique medium of television – as given by the ways in which television is paid for, distributed, and consumed - necessitates a reevaluation of traditional moral arguments used against other types of digital piracy. While these arguments can prohibit the piracy of music and software they cannot yield any sensible moral prohibitions restricting the unlicensed piracy of television programs.

Framing the Issue and Clarifying Terms

At the outset of such a project, it is imperative to see that there is not "a television" industry. There are multiple television industries and numerous ways in which television programs are presented to the consumer. Television programing is divided between basic programming (which is "sent" to all people and can be received for free with an antenna), cable programming (which is bought by a customer from a cable or satellite provider), and premium programming (which are additional channels beyond those offered in cable programming which the customer may purchase at an additional cost).

The downloading of television programs being considered here are those which are the result of peer-to-peer (P2P) internet clients. In peer-to-peer downloads there exist no central server (or host) which data is stored upon. Peer-to-peer downloading allows users to connect directly to other users and directly transfer files.[2] In P2P downloading, a person creates a digital copy of a television show, encodes it to a computer, removes the commercials, and posts this file online for free public download. The posted files are relatively small (180,000 KB for a half-hour program, and 350,000 KB for a one hour program), easy to find (for the most part), and available for download one to two hours after original air time.[3]

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[1] Many of these cases have focused on, or drawn from, the legal presidents set by *A&M Records, Inc. v. Napster, Inc., 2000* (239 F. 3[d] 1004). This case was argued before the US Court of Appeals for the Ninth Circuit, and established and clarified important issues concerning intellectual property rights.

[2] This is in direct opposition to how server-based services such as Napster work. In the aforementioned case of *A&M Records, Inc. v. Napster, Inc.* it was argued that in server-based file a third party (namely Napster) was shares and profits from the unlicensed distribution of copyrighted material. Peer-to-peer downloading, on the other hand, uses no "third party" and there is no company or organization behind the file sharing. The files are transferred, literally, between only between peers.

[3] Interestingly, this timeline is subject to change. Some programs are "leaked" early and others (which air on a rotational basis) can be downloaded on the west coast before their local air-time because they aired earlier on the east coast. Also, some programs with international audiences are aired early in foreign countries due to differences in programming schedules, and one might find episodes (in English) days or weeks before the US air-date.

The Distinguishing Television Piracy from Other Forms of Piracy

Traditionally, two types of arguments are leveled against digital piracy.[4] One is deontological in nature and the other is utilitarian. In short, the deontological arguments focus on how piracy infringes upon (or violates) someone's rights. Most of these arguments concerning intellectual property rights find root in either the natural rights tradition, such as Locke's assessment of the natural right to property, or in contractarian documents which protect property rights. On the other hand, the utilitarian arguments against digital piracy focus, naturally, on the social benefit which protected property affords. Both the deontological 'rights' argument and the utilitarian 'benefits' argument are captured in the U.S. Constitution. Article 1, Section 8, of the Constitution outlines the scope of the legislative power of the government of the United States. Under Section 8 it is within Congress' power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Noticeably, there is an appeal to "exclusive rights" but equally noticeable is the appeal to the "progress of science and useful arts" as the sole reason for the extension of intellectual property rights.

When looking at other forms of digital piracy, namely the unlicensed downloading of music and software, it is relatively easy to see how the utilitarian provision for rights seems beneficial. It has been argued that the further development of computer software is hampered by the illegal piracy of existing software. As people share (or steal) software, and no financial restitution is paid to the company creating said software, it becomes difficult for this company to continue development on new software. It is often claimed that the sale of existing software pays for the development of the next generation of software. This is the fundamental difference between freeware/shareware and copyrighted software. Freeware and shareware computer programs are distributed without cost, and this free distribution helps further development on existing software. Copyrighted software is developed and released, and the sale of this software pays for the development of new products. So, when one pirates copyrighted software they are not only harming the company but also are reducing the ability of the company to develop new and better software. It is obvious that in a world which relies so heavily upon computers for everything from communication to business transactions, the development of new software is socially beneficial. The piracy of music works much in the same way. As music is stolen and pirated record companies have less revenue to pursue new musical artists and artists lose income on their work.

In contrast, the piracy of television programs is markedly different, and there are significant differences between the distribution of music and software and the distribution of television. The music and software which is pirated is originally sold to end users, whereas some television programs are provided for free.[5] Thus, the financial arguments prohibiting piracy do not map onto unlicensed distribution of television programs in the same manner. Also, in the distribution of software and music the money made by the distribution of these products is reaped via the sale of the music or software to an end user. Television's profits, in cases of basic programming, are not amassed via the sale of the product to the end user. Rather, the television industry generates revenue by different means. These means include (1) the sale of commercial advertising time during programing hours, (2) licensing product placement during the programs, and, (3) secondary market transactions such as DVD and merchandise sales. This difference in revenue source dictates that the fiscal arguments against the piracy of music and software cannot, wholesale, be applied to the so-called piracy of television programs as television is a unique medium with unique modes of revenue generation. Thus we must return anew to the utilitarian and deontological arguments under the lens of television piracy.

Television Piracy and Utilitarian Arguments

For the utilitarian anti-piracy argument to prohibit the unlicensed downloading of television programs it must show that not only the rightful owner of the program is harmed but also that this individual harm leads to a greater social harm. Seeing as how television is a commercial enterprise, the

[4] See Richard DeGeorge (2006) and Norman Bowie (2005).
[5] Obviously some music is free to download and some software is distributed freely, yet because these two forms of distribution are designated as "free" (by their authors or owners) their dissemination cannot be classified as piracy and they are not members of the set delineated by the phrase "music and software which is pirated."

harms caused by the unlicensed theft of this product must be traced to financial loss. One might argue that the piracy of television programs financially harms the television industry and therefore, on utilitarian grounds, constitutes a moral wrong warranting prohibition. To the contrary, I wish to argue that when the sources of revenue behind television programming are made clear we left unable to identify any financial loss or harm caused by the digital piracy of television programs and thus cannot prohibit this unlicensed distribution on utilitarian grounds.

Basic programming in television is paid for by commercial enterprises. While it is a network or channel which initially funds the creation of a program, it is by selling advertising that the network recovers their initial investment, pays for further seasons/episodes, and generates a profit. Thus, if financial harm is to be identified it must be done in reference to those advertisers who fund television's programming in return for the ability to market their products because it is their financial investment which is being taken advantage of. This is especially difficult seeing as when television programs are pirated, and downloaded via unlicensed individuals, they are downloaded without commercials. The commercials are edited out of the broadcast and the program is viewed without commercial interruption, and thus downloading affords users a way to "opt out" of viewing commercials. Yet this alone is not sufficient grounds to accord financial loss and harm to the advertisers who fund the programing individuals may pirate.

Television viewers, regardless of the medium in which they view the program, are under no obligation to watch commercials. When watching a program in real time, individuals are under no obligation to stay in the room during commercials nor are they obligated to refrain from changing channels. Leaving the room during a commercial break to get a snack or use the restroom constitutes no moral wrongdoing. Not only are viewers under no moral obligation to watch commercials, advertisers have no expectation that that commercials *will* be watched by viewers. Nigel Hollis, an advertising market researcher with Millward Brown International, explains that "normal people watch television in order to relax and be entertained. Even if they do not actively screen ads out by zapping them, their minds tend to screen them out anyway" (1998). John Jones, in the same vein, points out that "all viewers… recognize what advertising is, and most people turn away from it as an immediate and automatic reaction" (1999a). Here Hollis and Jones express what I take as the commonly held expectation of the advertising industry; commercials *hope* to capture a viewer's attention, but there is no expectation by the advertising industry that any advertisement *will* (in fact) capture attention. Advertisers using the medium of television hope to catch people's attention with products or offers which will entice the viewer to pursue the product, yet all commercial advertisers know that people use commercial breaks to "surf channels" or leave the room. The downloading of a television program with the commercials removed has merely removed the meager possibility that a viewer might watch the commercials and become interested in the product. Seeing as how individuals are under no obligation to watch commercials and the advertising industry itself acknowledges this fact, the removal of commercials from downloaded programs is itself not morally problematic.

Further, because pirated television programs are copied off the air, the advertising companies whose commercials are left unviewed have already paid for the air time of their advertisement regardless if people watch the commercials. So, it should be noted that downloading an existing program does not harm the advertisers or the television station/program owner in that moment. Yet it is very foreseeable that if programs are downloaded at higher and higher rates, and viewed without commercials, then advertisers will be less likely to invest in television programming in the future. This free-rider problem is a large part of the reason that television programming has ceased to rely exclusively on commercials for generating revenue and moved towards other forms of advertising, such as product placement.[6]

Product placement is the intentional placement of commercial products within television programs (and movies) in exchange for fees or production cost decreases. Product placement has been widespread in television since its inception. The pioneering game-show *Twenty-One*, one of the most viewed television programs of the late 1950's, was "sponsored" by Pharmaceuticals, Inc. and heavily featured their product Geritol. The Geritol name was featured on the show's backdrop, featured on the

[6] A *Washington Post* article (2006) claims: "Product placement has been going on since the beginning of movies and television. In recent years, its growth has taken off in part because TV networks are looking for more ways to make up for declining ad revenue and a rapidly fragmenting audience that is finding entertainment on the Internet and on mobile devices, according to media research firm PQ Media."

host's podium, and given constant "in programming" recognition by the show's hosts Jack Berry and Monty Hall. Since the 1950's, product placement has expanded beyond sponsorship. Product placement has grown to include the use of paid products as both necessary and superfluous props used by actors, and in some instances has even expanded to the point where trademarked products play central roles in programs' stories and plots.

In some programs, there are necessary props needed for the show's action and these props are chosen in accordance with paid product placement. The *X-Files* (1993-2002) needed the show's FBI agents to drive cars in many scenes, and the show featured almost exclusively Ford cars. The American version of *The Office* (2005-present) parodies the stereotypical office environment and all of the necessary office equipment used in the show is Hewlett-Packard products. The action program *24,* which constantly utilizes computers for crime solving, features exclusively Apple Computers and products. In each of these instances the structure of the show necessitates the use of specific props, and the branding of the props selected for inclusion are the result of paid placement by advertising and marking contracts.

Beyond necessary props, many shows feature characters using superfluous props in conspicuous way. These unnecessary props are also sources of revenue via product placement. For example, the judges on *American Idol* (2002-present) and the lead character from the program *Weeds* (2005-present) drinks exclusively, and conspicuously, Coke products. These props are not necessary or integral parts of the show's story or structure, but are prominently featured in episodes and generate significant revenue.

In some instances, product placement has gone so far as to craft the content of the program's story. Famously *Sex and the City* (1998-2004) featured plot lines crafted around Absolut Vodka and Manolo Blahnik shoes. These trademarked and advertised products were not only featured on-screen, but entire episodes/story arcs were written specifically about these products.

In each of these ways the advertising industry has pushed and expanded the range and depth of product placement used in television programming, and advertisers know that good product placement can reach more viewers than commercials alone. Thus, the trend of "paying" for programming via product placement is on the rise, and more investment dollars are being spent on this type of advertising each year.[7]

What makes product placement, as a source of revenue, relevant here is that this form of advertising is not at all changed if the medium by which the viewer watches the program is altered. If a show is watched as it airs, or is downloaded and viewed at a later time (even without commercials), the placed products are still viewed. If advertisers have offset costs of the program, in effect paying for the show, then the downloading of a program steals no product placement revenue.[8]

It might be argued here that product placement advertising is on the rise because the medium of television is changing due to revenue theft by pirates. This objection, *prima facie*, might be true, yet as a source of moral prohibition this line of argumentation ultimately fails. Reasoning such as this relies upon the underlying assumption that the advertising industry has a proactive and normative claim towards shaping television programming. This assumption is ultimately false. In each of their canonized books on advertising, both Jones and Ivan Cury point out that the history of advertising is a history of adaptation, change, and reaction (1999, 2005). The advertising industry has been built around reacting to market forces and capitalizing on changes and trends in these markets. It is not the case that trends in advertising determine the medium of television programming, but, rather that the changing medium of television determines advertising trends. Thus, most advertising literature and academic course work is devoted to understanding and predicting the next market or the newest strategy for creating and capturing

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[7] It is estimated that by the end of 2009 that product placement will increase 15% per year above the annual 2005 mark of $2.44 billion. Matt Soar, of LoyolaUniversity, claims that in 2007 the product placement industry was worth $3.9 billion and could reach $9 billion by the end of the decade. Bartlett (2007).

[8] Product placement, as a form of advertising, reaches even further then explained here. Product placement allows for advertisers to reach new audiences when shows are syndicated or re-aired. Also, product placement allows for advertisers to continue the product's advertising when the show is released on DVD. While commercials are removed for DVD releases of programs, the placed products in the show are not (nor cannot) be removed. This "continuous advertisement" provides some of the driving force behind increased trends towards product placement in television programming.

market shares. This internally understood vantage point of the mode and method of marketing and advertising helps show that the advertising industry is one which is engaged, fundamentally, in reacting to changing markets and changing mediums. Thus, the move towards emphasizing product placement, as compared to traditional commercial spots, as a marketing strategy might seem 'forced' upon the advertising industry. However, the advertising industry accepts that market forces such as this exist prior to any marketing strategy which the industry concocts.

In addition to direct marketing (such as commercials and product placement), there also exists secondary markets which provide sources of revenue for television programming. This secondary marketing can take the form of DVD sales and/or merchandise sales (such as t-shirts, pictures, posters, ring-tones, or calendars). These after-market sales are a source of revenue which return profits back to producers, directors, actors, writers and companies at large. While this source of revenue is important in the distribution of television, it too remains unchanged by the means by which people view the program. If viewers watch and enjoy the program then they will be equally likely to purchase secondary products relating to the program regardless if they downloaded the show or watched it in real-time. Thus, revenue generated by secondary markets is unharmed by so-called television piracy.

Given these varied sources of revenue, the utilitarian foundation of financial harm caused by digital piracy becomes difficult to defend. On simple utilitarian grounds, given the increased trend of product placement as a central form of revenue gain, and, that secondary marketing is not negatively affected by television downloading, it appears impossible to find financial harm caused by downloading television programs. Not only does the so-called piracy of television programs fail to cause financial harm, it could be argued that downloading television programs actually leads to increased revenue. This can be seen in two ways. First, someone who downloads a television program might be more inclined to watch a program which they would not otherwise have watched. This increases the potential value to be reaped from product placement, and increases the actual market share for secondary merchandise. Secondly, expanded viewership made possible by internet downloads increases the number of people who watch a program. Increased viewership can lead to greater longevity of programs, and can also lead people to watch other programs.[9] For example, if one downloads episodes of *Alias* (which was created and produced by J.J. Abrams and is now off the air) and enjoy the episodes, they might be inclined to begin watching other currently airing programs created and produced by Abram's (such as *Lost,* and *Fringe*). Television relies upon ground-swell advertising, whereas word of mouth and product hype create and expand existing markets. This form of promotion is, again, not hampered by television downloads, and is actually increased.

In all these cases, we see that downloading television programs causes no harm to advertisers in their commercial markets and actually increases advertisers markets for product placement. Further, downloading television programs also fails to harm writers, directors, actors, and crew members in that their product is being produced and distributed. Further still, downloading television programs also fails to harm studios or production companies in that advertising remains a viable source of revenue regardless of downloading. Not only is financial harm not caused by downloading television programs, but the downloading of television programs actually increases the ability of a company to market secondary merchandise to an increased number of viewers. Since this extensive list constitutes no harm, and actually increases certain benefits, it appears that downloading television programs in this manner fails to create the social and financial harm which would warrant a prohibition on utilitarian grounds.

Turning to Deontological Arguments Concerning Television "Piracy"

If one grants that utilitarian arguments prohibiting the downloading of television programs fails to show substantial harm, one cannot, on these grounds alone, claim a complete lack of moral prohibitions concerning television piracy. One must still address and answer the demands of property rights as asserted by deontology. It seems that the real force of deontological arguments concerning property

[9] This may be seen as an expansion of the "community of memory" as described by Michael Einhorn (2002).

rights must transcend the legal precedent set forth by copyright law, and must be rooted in an understanding that property, be it intellectual or physical property, is a basic and natural right.[10]

If we grant, for argument sake, a basic position of property rights, we must also hold that the violation of these rights is theft. If one has an exclusive right to the ownership of their property and someone takes that property without permission or consent, then they have committed and act of theft. Concerning theft, the deontological positions are quiet clear. On classic Kantian grounds, theft represents an internally inconsistent maxim, and is thus morally prohibited. On broader deontological grounds (such as in the deontological theory put forth by W.D. Ross (1973)) theft might represent either a violation of our duty to justice in terms of the right to livelihood or our duty to promise-keeping. Yet, both of these deontological interpretations beg the question of who one would be stealing from in the case of television piracy. The theft of television programs via unlicensed internet downloads cannot be seen as theft from writers, producers, directors, or even actors. All of these persons are contracted with a distribution company whereas that which they produce is owned by the distribution company.[11] Thus, piracy must take the form of theft from a distribution company.

Cases of downloading television programs which appear on premium or cable programming, without being a subscriber, seems an obvious case of theft. If one has paid for the service and is downloading programs which otherwise come to their home, then the question of theft seems equally obvious; they have already "purchased" the program from the cable/satellite provider and are now watching the program in a new medium, albeit a medium which the provider has not sanctioned. Here, these actions of changing the manner with which one views a program that they have previously paid for appears to be captured by notion of "time-shifting" and thus falls under the doctrine of "fair use." In 1983, Sony Corporation of America was sued for the creation of the Betamax (the precursor and competitor of the VCR) by Universal Studios. Universal Studios argued that the Betamax (and therein the VCR) were devices which promulgated copyright violations in that end users were able to create unlicensed copies of television programs. In this case, the US Supreme Court ruled that non-commercial instances of "time-shifting" (which is the recording a program at one time and then watching it at a later time) was not a violation of copyright and that simple recording without commercial advantage was well within the bounds of "fair use." This concept of "time-shifting," originally used in reference to VCR's, has been technologically expanded and has allowed for the creation of DVR's and TiVo. Following this reasoning, there is no reason that digital downloads of television programs, where the end user has previously paid for the programming, should be prohibited and this new medium operates within the same criteria of "time-shifting" and "fair use."

If we take this argument and extend it beyond cable and premium programming to basic cable it appears that everyone with a television has a claim to fair-use of these programs. Basic programming is provided at no charge to all people. Thus, downloading programs which are broadcast as part of basic programming falls under the provision of "time-shifting." Further, because these programs are offered free of charge it seems impossible to steal them. One cannot steal something which is delivered to them at no cost. After all, you cannot steal a free sample mailed to your house. Thus, downloading these programs is well within the bounds of copyright and constitutes no violation of property rights. Subsequently, the only type of digital downloading which violates deontological prescriptions concerning theft would be in cases where non-subscribers download programs. Yet this conclusion, that there can be theft if one does not subscribe to the service, rests upon understanding intellectual property rights devoid of all utility arguments. This is, assuredly, a weak position for property rights to rest upon. The basic rights outlined by historical social-contractarians were devoid of intellectual property rights, and this might not be an oversight. For example, the property rights which Locke famously defends are natural

[10] The motivation behind this claim is to avoid slipping back into utilitarian arguments of harm. Article 1, Section 8, of the Constitution (and thus the backbone of copyright law) is rooted in the social good which protecting intellectual property can promote. Thus, the rights outlined here are merely instrumental rights and a discussion of such rights can devolve back to utilitarian claims.

[11] Richard DeGeorge appears to claim the opposite of this when he claims "if someone expends a certain amount of time or money or energy into developing some expression or application of an idea- be it in the form of written work or application of an idea- it is unfair for some else (sic) to copy and profit from its sale before the original author or inventor" (2006, 30-31). While this seems true, it must be pointed out that contractually created programs (from the creators to the writers to the actors) all work at the behest of the production company. The television program is owned by not the "inventors" or "authors" but by the company which contracts the creator(s) and writers. This differentiates television from music ownership and even some software ownership.

and existent within the state of nature. Yet, as individuals move into contractual governments further rights are extended to citizens which are not natural rights but purely contractual rights. These contractual rights can be as varied as the 'right to form collective bargaining units' or the 'right to due process' but no matter how varied, they derive their value from shared usage. This seems to be at work in Article 1 of the US Constitution pertaining to intellectual property rights; while intellectual property is protected, it is protected as a right which achieves a further end, and this further end is utilitarian in nature.[12] If this is true, then strict deontological arguments, devoid of all utility concerns, pertaining to theft via internet piracy are, at best, suspect. In providing deontological responses to piracy, this paper has attempted to remove them from utilitarian considerations seeing as how utilitarian considerations fail to provide a clear prohibition against television piracy. If the deontological argument against digital television downloading rests upon utility considerations, as expressed by the US Constitution, then the failure of utilitarian considerations to expressly prohibit television piracy should overshadow the minimal claim that deontology can make concerning downloading without prior subscription. One is therefore left with no clear moral prohibition against the illegal and unlicensed downloading of television programs.

Conclusion

The utilitarian arguments concerning television piracy not only fail to expressly prohibit the so-called piracy of television programs, but may in fact explain how this form of so-called piracy enhances and furthers social, as well as private, utility. Using deontological reasoning, one can see that arguments concerning theft and property, in relation to some television piracy, can yield a prohibitive imperative, even if this prohibition is narrow in scope. Yet the prohibitive imperative generated by deontological reasoning seems only to work when one posits intellectual property rights as basic rights; and this starting place is tenuous at best. A deontological understanding of intellectual property rights works best when done in conjunction with utility concerns (as found in the U.S. Constitution, Article 1, Section 8). Yet once we tie the deontological concerns back to utility we see that the permissive stance of utilitarian arguments to television piracy prevails. In the end, it should be clear that so-called television piracy violates no obvious moral dictum. This might be a surprising outcome given the accepted moral prohibition of music and software piracy. Yet it is precisely because of the differences in distribution, medium, and revenue generation that television is fundamentally different from music and software. Thus, the moral and legal literature concerning the piracy of music and software cannot be extended to the so-called piracy of television programs, and we are left with a decidedly different moral answer to the unlicensed downloading of television programs.

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[12] Again, DeGeorge (2006): "… more social good is promoted by recognizing intellectual property rights than by not doing so" (31). Here DeGeorge seems to be outlining the utility basis for contractual rights.

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