

The Ethics of Piracy for Personal Use

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ABSTRACT

In recent years the dispute over the ethical status of piracy has intensified. The entertainment industry maintains that piracy is theft and extremely harmful whilst consumers maintain that many acts of piracy are in fact harmless and that the industry is unjustly exercising its monopoly over works of fiction on electronic media (F.E.M.s). At its core, this is a property dispute over who owns physical instantiations of F.E.M. such as DVDs and over what our property rights are. Both parties appeal to analogies with ordinary property to justify their views but such justifications fail because of the numerous dissimilarities between ordinary property and F.E.M.s. I outline a better argument for the ethics of piracy which focuses on harms and property rights. A cost-benefit analysis of piracy harms is inappropriate because of well-known weaknesses with such an approach. Employing a general prohibition on harm, I argue that piracy harms sales in the range of 4.1% to 12.89% and reduces employment opportunities but does not affect incentives to produce new F.E.M.s. These harms are not instances of wrongful harming because they do not violate morally justified property rights. While the F.E.M. property bundle is likely to include some moral rights, such as a right of paternity, it does not include moral exclusionary rights over experience of F.E.M.s and any such large scale special rights are only justified if they maximise social welfare. Thus the trumping power of rights in the piracy dispute is significantly weaker than thought by Himma (2008). Piracy is morally permissible in the sense that it does not violate justified property rights but impermissible in the sense that it is responsible for a collective harm to sales. Moral obligations for collective harms are complex but I outline conditions for piracy which prevent such acts from collectively harming sales and an alternative system called F.E.M. Hub which encourages agents to adhere to their moral obligations. Thus some but not all acts of piracy are morally permissible.

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INTRODUCTION

1.1 Opening Remarks

In the beginning there were coffee mugs. Humans owned and traded their mugs so that no person would have to consume coffee directly from the machine. But then there arose a human of profound intellect who constructed the perfect coffee mug. All the other humans admired and coveted the mug. They desired the sleekness of its design, the ergonomics of its handle and its strange ability to keep the coffee perfectly hot without burning the hand that held it. Conflict quickly descended upon them. Some attempted to reconstruct the perfect mug from documents but the genius forbade this. She argued that she owned both the physical mug and *its design*. Thus humans first recognised the distinction between *ordinary* and *intellectual property*, and consuming coffee would never be the same.

Today there are movies, music and T.V. shows. These and other works of fiction on electronic media such as video games are instances of intellectual property. We can access them via methods which are authorised by the owner, such as purchasing DVDs, CDs, movie tickets, watching programmes on television when they are released in our country or receiving them as gifts. Alternatively we can access them in unauthorised ways such as streaming, receiving copies from a friend or downloading. These practices are known informally as piracy and generally involve going online and experiencing an instance of electronic media without the owner's consent. This practice is currently illegal in NZ (Copyright (Infringing File Sharing) Amendment Act 2011) and decried by many as immoral on the grounds that it harms the industry, lowers incentives to create new intellectual property and violates the intellectual property rights of the owner (Himma 2008, 1152 and Yung 2009, 45).

1.2 Why Our Moral Obligations for Unauthorised Downloading Are Not Clear

Arguments that piracy for personal use is morally impermissible make our moral obligations on the matter seem perfectly clear. A common antipiracy trailer (hereafter the downloader trailer) which appears on many DVDs features the following argument.

“You wouldn't steal a car.

You wouldn't steal a handbag.

You wouldn't steal a television.

You wouldn't steal a movie. (*A physical DVD from a store.*)

Downloading pirated films is stealing.

Stealing is against the law.

Piracy. It's a crime." (MacFarlane 2008, disc one)

This is an example of a typical argument against piracy which appeals to the analogies between works of fiction on electronic media and ordinary property such as coffee mugs. The argument infers from the observation that a morally conscientious agent would not steal a car, handbag, television or physical movie to the claim that piracy for personal use is similar enough to an act of theft for it to also be wrong and thus something a morally conscientious agent should not do.

In fact our moral obligations regarding piracy are not clear at all. The use of ordinary property without consent is wrong because it either harms the owner or violates their property rights. However coffee mugs are rivalrous goods, they can only be in one place at a time (Boyle 2008, 2-3). I cannot use your coffee mug without preventing you from using it. By contrast works of fiction on electronic media are non rivalrous goods. I can experience Peter Jackson's *The Hobbit* without depriving him of his experience of the film (Gordon 1993, 1548). Because of this important difference experiencing a work of fiction without the owner's consent does not necessitate harming the owner in the same way as it would if I took their coffee mug. It may still be an instance of wrongful harming to experience a movie without the owner's consent (Gordon 1993, 1545), but this conclusion will depend on a) who owns the instances of the work of fiction and b) what their rights are over those instances.

1.3 Why Determining Our Moral Obligations Is Important

The current philosophical literature lacks strong conclusions about the ethical status of piracy for personal use. Much of the completed work focuses on either the effects of piracy or strong intellectual property rights (Himma 2008, 1152). But this approach ignores the important question of whether these harms are instances of wrongful harming or not (Gordon 1993, 1545). Other work analyses the value of strong legal intellectual property rights from a cost-benefit analysis but this approach either overlooks the possibility of moral rights or leaves it open for further discussion (Himma 2008, 1152 and Moore 2002-2003, 628). This is an important mistake because moral rights are powerful enough to trump arguments for the moral permissibility of piracy which appeal purely to the positive consequences of such acts.

Strong conclusions must be found because of the potential effects on future societies. Weak intellectual property rights have the potential to damage the entertainment

industry though a collective harm caused by agents choosing to pirate instead of purchasing (Croskery 1992-1993, 633-634). Strong intellectual property rights have the potential to damage the entertainment industry by making it difficult to produce new works of fiction, slowing the free exchange of ideas, chipping away at our private property system and heavily limiting how many works of fiction an agent is permitted to experience (Boyle 2008, 113). Furthermore, if we continue to engage the debate on purely consequentialist grounds we run the serious risk of overlooking both the moral rights of the creator and ways in which property owners can be wronged without being obviously harmed (Himma 2008, 1152).

1.4 The Scope of This Project

Intellectual Property is a vast subject covering everything from copyrightable literature such as books (Hettinger 1989, 34) to the patentability of scientific discoveries (Nelkin 1982, 704). Therefore this project will not have room to cover all the interesting questions suggested by idea ownership. Specifically this project will discuss the moral status of acts of piracy for personal use with a focus on the music, movie and television industries of New Zealand and Australia. Because of the currently illegal status of such acts there is a naturally large overlap in this project between ethical and legal issues. The issue of how to legislate piracy is a separate one from the issue of its moral status and is not one which will be covered here. In this vein, the examples discussed within this project will highlight ethical issues rather than examine court disputes. The issue of what our laws on the matter should be is an important ethical question but it is not a question which this project will directly address. I leave it to the reader to draw their own conclusions on that matter.

Aside from the issue of piracy for personal use, there are some more fundamental philosophical problems about intellectual property which are beyond the scope of this project. Specifically, the issue of original appropriation of property will not be addressed in any detail. This fiendish problem for physical property is even more diabolical when applied to original creation of an idea (Hettinger 1989, 31). For this project I ask the reader to grant me the assumption that one can own intellectual property. This project will also proceed with a broad conception of 'idea'. I do not wish to commit myself to a precise metaphysical position about what an idea is and for example, whether intellectual property consists of owning propositions (Himma 2008, 1144).

1.5 What I Will Argue in This Project

In this project I will argue that piracy for personal use is morally permissible provided that certain conditions are met. My strategy will be to stack the deck against myself at every significant juncture. In chapter two I will introduce the basics of intellectual property (IP), piracy, and property ownership before explaining how piracy is a property dispute and drawing out the two major property views which conflict over the ethical status of piracy. In chapter three I will argue that appeals to analogy between electronic media and ordinary property cannot justify the anti-piracy strong view of intellectual property rights. I will then present a master argument for the moral impermissibility of piracy which prohibits acts that cause significant harm or violate intellectual property rights.

In chapter four I will present a harm focused analysis of piracy. I will argue that the literature is converging on the claim that piracy for personal use does cause some harm but still disagrees the severity of those harms. I then assume that the harms are substantial before considering if they are instances of wrongful harming. In chapter five I will present a rights focused analysis in response to Himma's (2008) objection that a purely consequentialist approach misses the far more important rights angle. I will argue that the ownership bundle does not include a moral right of exclusion over experience. I then consider this right again as a special right which is justified via the utility it produces. I will concede that this approach justifies a partial special right of exclusion over experience but argue that this conclusion sides with the weak pro-piracy view of intellectual property rights. Piracy harms are not instances of wrongful harming although they are serious and avoidable enough to be considered significant.

In chapter six I will outline a rule based solution which describes the conditions for morally permissible piracy such that an agent who follows them may pirate for personal use without danger of contributing to the collective harm to sales. I then address the problem of agents not adhering to their moral obligations by outlining an alternative system called F.E.M. Hub which is aimed at encouraging adherence whilst achieving a larger distribution of popular material for improved profits. In the final chapter I will summarise the important conclusions of this project before discussing open questions suggested by it. I will discuss five such topics before closing with some final remarks.

PIRACY: A PROPERTY DISPUTE

2.1 Introduction

In this chapter I will introduce the reader to the piracy debate by discussing it as a property dispute. To this end I will explain the intellectual property concept as a whole and then narrow it down to works of fiction on electronic media (hereafter F.E.M.) outlining what it means to pirate an instance of those works. I will then explain the concept of property ownership as bundle of rights which an agent bears over an object. With the basics covered I frame the piracy debate as a dispute over property, drawing a careful distinction between disagreements focused on which objects the creator owns and on which rights the creator bears over that object. I then use these disagreements to argue that they generate a continuum of property views which entails a plethora of views about the ethical permissibility of piracy. Out of this continuum I will frame two opposing camps; the anti-piracy strong view of F.E.M. ownership and the pro-piracy weak view of F.E.M. ownership.

2.2 What Intellectual Property Is

The term 'Intellectual Property' may be broadly thought of as referring to the ownership of an idea where the term 'ownership' refers to a collection of rights an agent bears in relation to an object (Resnik 2003, 319). In fact the notion of owning an idea, whilst being a useful explanatory metaphor, is unhelpfully vague when pinning down exactly what is owned or what those ownership rights include. The notion that J.K. Rowling owns every copy of *Harry Potter* ever printed is intuitively less plausible than the idea that they are owned by the consumers who purchase them. Likewise it is plausible that J.K. Rowling has exclusionary claim rights against other people using her characters in their fiction without her consent but implausible that she has similar exclusionary rights over the entire fantasy genre. To give the reader an idea of the scope of intellectual property I offer here Resnik's (2003, 321) six way distinction of intellectual property: patentable ideas, copyrightable ideas, trademarks, trade secrets, confidential personal information and academic discoveries.

Patentable ideas such as inventions are physical creations which the inventor discloses in return for royalties on the patent's commercial exploitation for a limited period of time (Hettinger 1989, 33). Let us say that a young inventor creates a device for peeling potatoes with far greater swiftness and ease than a knife. A few points should be clear: we

want this invention to be distributed as widely as possible since it is very beneficial, we want to motivate inventors to keep coming up with inventions like this, and we want the inventor to receive recognition and credit (Boyle 2008, 7). To this end the inventor registers his blueprints for the potato peeler at the patent office and receives royalties for a set amount of time from the production of the peeler. After this time period has concluded the design is available without royalties to any person who wishes to use it (Kinsella and McBrierty 1998, 59).

The copyrighting of ideas began with the distribution of books and other printed materials as an attempt to protect the author's interest in their work. It grants a legal ownership to the author over the expression of their ideas. It makes far more sense to say that J.K. Rowling owns the story of Harry Potter than to say that she only ever owned the pages which held the first words and lost all her rights when she handed them over to her publisher (Resnik 2003, 320). These days copyrightable ideas have extended far past printed material to music, movies and television shows. This has led to considerable controversy in the digital age which allows for the near instantaneous reproduction of large volumes of information without loss of quality (Waldfoegel 2012, 92).

Trademarks and trade secrets protect the reputation and the potential profits of the company. Kentucky Fried Chicken (K.F.C.) fiercely guard the recipe of 11 herbs and secret spices. It has a trademark over the K.F.C. brand name, which benefits both K.F.C. and the consumer. K.F.C. is the only company permitted to sell fried chicken under the K.F.C. brand name which brings it more profit and consumers can be certain when they purchase fried chicken with the K.F.C. brand name that they are getting the original 11 herbs and secret spices rather than a cheap knock off. The actual recipe itself is a trade secret which K.F.C. owns as an instance of intellectual property. This protects its profits and allows it to set whatever prices it deems appropriate since it owns a monopoly on this particular recipe (Hettinger 1989, 33).

Lastly we may consider confidential personal information and academic credit which Resnik (2003, 321) argues ought to be considered as types of intellectual property. There is some intuitive pull to this claim. At the start of this section I pointed out that 'ownership' refers to a rights bundle that an agent holds over an object (Waldron 1985, 314). Now it seems obvious that I have a collection of rights over my personal information. More specifically I have a set of rights over my personal information that is very similar to my set of rights over my coffee mug. I have the right to use, modify, give away, sell and exclude others from accessing my coffee cup; so too for personal

information such as my credit card numbers and private memories. Likewise with academic credit it seems plausible that the discoverer of an idea has some intellectual property, which explains why this thesis contains citations. Crucially though, in the case of academia, the owner may only own the discovery of an idea and not the idea itself.¹ Newton and Leibniz were involved in a dispute over who *invented* calculus and not over who was entitled to ten cents every time somebody applied calculus.

With the broad range of intellectual property laid out, it is easier to set out precisely the type of intellectual property which I will focus on in this project. For the remainder of this project I will be discussing copyrightable works of fiction on electronic media (F.E.M.). As clear examples the reader may think of these as the intellectual property instances of music, movies and television shows. These are copyrightable instances of intellectual property which are generally fictional in nature. The remainder of this project will be concerned with whether it is morally permissible to access them without the owner's consent.

2.3 What the Act of Piracy Is and How It Relates to Works of Fiction on Electronic Media

To commit an act of piracy is to experience a F.E.M. without the consent of the owner (Hettinger 1989, 32). 'Piracy' is used more colloquially to refer to the unauthorised experience of music, television and movies via the internet but in the technical sense it also captures acts of movie exchanges via methods which do not require the internet such as local area networks (L.A.N.s) and manual file transmission. Two of the more common methods of piracy are file sharing and streaming. 'File sharing' refers to the act of receiving an unauthorised copy of a digital file from another person through either an internet site such as <http://www.thepiratebay.sx> or physical transfer via a third device such as U.S.B. memory device or L.A.N (Danaher and Smith 2013, 5). The key difference between file sharing and streaming is that file sharing involves possessing a permanent copy of a digital file whereas streaming does not (FACT 2014). Provided the file is an unauthorised copy then the law considers the act of file sharing to be piracy (NZFACT 2014).

In comparison, 'streaming' refers to the act of viewing digital files online without creating a permanent copy. This happens when an agent accesses the internet and plays a

¹ Whilst this principle holds for the majority of academic discoveries, the line has become blurred as certain discoveries such as a way to synthesise interferon genes from cancerous cells have been ruled as patentable in the United States (Nelkin 1982 pp 705 & 706). For more on the subject of intellectual property in regards to academic discoveries see Nelkin 1982, McBrierty & Kinsella 1998 & Liebeskind 2001.

video or music file locked to the website. The agent's device creates a temporary copy which can only be accessed whilst the agent is connected to the website and is destroyed once the agent closes down their internet browser (Davis 2008-2009, 372). Using authorised streaming sites such as www.youtube.com is not considered piracy, provided that the uploading of the video was authorised. However streaming unauthorised digital files such as movies or T.V. shows from a website such as <http://www.free-tv-video-online.me/> or streaming it from YouTube if a fan has copied the video from an authorised source and then re-uploaded it is considered piracy (FACT 2014). The key difference between streaming and file sharing is that streaming does not involve an agent possessing a digital file over which they have any ongoing rights in the property sense.

These acts are instances of piracy because the agent or agents who own the intellectual property rights to the movies or music have not given their consent for the digital file to be experienced (Hettinger 1989, 32). Peter Jackson has only give his consent for *King Kong* to be experienced via a theatre, legal purchase of a DVD or equivalent physical medium or to wait and watch it when it is released on television. Thus if I obtain a copy of the movie online via file sharing or unauthorised streaming then I have committed an act of piracy by accessing a piece of intellectual property without the owner's consent. Some think this is as morally reprehensible as sneaking into a grocery store in the middle of the night and helping yourself to whatever you like without paying for any of it.

“And he who appropriates the author's visible expression of his mental conception without compensation wrongfully appropriates the property of the author.” (Simonds 1891 p18)

“Downloading a movie without paying for it is morally and ethically no different to walking into a store and stealing a DVD off the shelf.” (NZFACT 2012)

“A BSA brochure, for example, opens with the following statement: 'Most people would never consider stealing something that did not belong to them. But those who copy software without authorization are, in fact, stealing someone else's property – their intellectual property.’” (Katz 2005, 156)²

The theft concept is ingrained in intellectual property foundations. The New Zealand Screen Association was formerly known as New Zealand Federation Against Copyright Theft (Eaton 2013). The purpose of this project is to convince the reader that these acts of piracy are *not morally reprehensible* provided that certain conditions are met. While this project is focusing on ethical questions I have defined ‘piracy’ in terms of owner's consent to avoid a confusing conclusion. If I defined ‘piracy’ as the act of experiencing F.E.M.

² Also see Boyle 2008, 72, Halbert 2005, 74, MacFarlane 2008 and 2009, Yung 2009, 46, and the url <http://www.fact-uk.org.uk/content-theft/>.

without moral justification and I successfully argue that acts of piracy for personal use are morally justifiable then I would be forced to conclude that there are no acts of piracy. Such a claim would be out of line with the everyday use of ‘piracy’. As such I believe that it is more sensible to define ‘piracy’ as the experience of F.E.M. without the owner’s consent.

2.4 What Property Ownership Involves

I have already established that ‘ownership’ refers to a rights bundle an agent has over an object (Resnik 2003, 319 and Waldron 2012, section 1). To say that a coffee cup is my property is to say that I have a bundle of rights over it. I can break it, give it away, use it, throw it out or modify it. If my ownership rights are moral then it is an instance of moral ownership. If they are purely legal then so too is the ownership (Waldron 1985, 314-315). To say that it is not my property is to point to the fact that I have a limited say in the matter over what happens to it (Himma 2008, 1146). If somebody wishes to take it then I have no right to stop them. If somebody else attempts to sell it then I have no right to object. This is only a brief account of ownership rights. Which rights owners have over F.E.M.s and how strong they are will be discussed in more detail in chapter five. For now I will focus a general discussion of ownership rights.

The ownership rights bundle consists of some combination of the following rights: the right of use and to exclude others from use, the right of compensation if someone uses it without permission, enforcement rights over this set of rights, the right to transfer this set of rights, and immunities to non-consensual loss of this set of rights (Vallentyne 2012, section 1). A more detailed analysis of F.E.M. rights is presented in chapter five but for our current purposes the reader need only see that this rights’ set grants all the normal rights which we would expect over a piece of ordinary property. I can use my coffee mug, exclude others from using it, and demand compensation if they use it anyway. Some of these rights are molecular and consist of a further set of atomic rights. For instance the right of use refers to a set of possible uses including the right to modify, experience or destroy my coffee mug (Resnik 2003, 320). Likewise I possess the right to sell or give it away because I have the right of transfer over the set of rights.

This analysis of ownership is useful but it is not the entire story. It only refers to a single instance of full ownership which is the strongest possible set of rights which an agent possesses in relation to an object. But ownership and the rights bundle varies from case to case (Waldron 2012, section 1). Imagine that Kiwibank has mortgaged a house to Kate who is renting it to Barbara. All three of these agents can accurately use the

expression 'my house', but they each have different sets of rights over the building. Barbara possesses the rights of use and exclusion, Kate has transferred her rights of use over to Barbara but retains the right of modification and destruction, and Kiwibank has the right to repossess the house if Kate fails to make the mortgage payments (Waldron 1985, 345).

The story of a renter's house is an example of ownership without the full set of rights. There are also restrictions in the other direction; instances in which agents have some of the rights associated with ownership but not enough to qualify the object as private property. Imagine that Kate and Barbara become friends. When Kate discovers that Barbara has no coffee mugs she decides to lend some to her. Barbara has some rights of use over those coffee mugs. She cannot alter or destroy them but she can use them for their intended purpose. Yet it is clear that she does not own any of the coffee mugs. Let us further imagine that Kate and Barbara's friendship blossoms into a romance and after some time they decide to raise a family together. They certainly have a set of rights in relation to their children. They have even invested all sorts of labour into them of the kind which would typically grant property rights (Hettinger 1989, 41). However this is not sufficient justification for the ownership of children.

There are also instances of ownership rights bundles in which the rights are restricted by other ethical considerations. Imagine that I discover a long lost Van Gogh painting in my attic which I paid for some time ago. This painting has never been seen by the art community and obviously has large value to them. Like the coffee cup I have the moral right to sell the painting but unlike the coffee cup a moral right of destruction seems unintuitive (Raz 1982, 197). While the coffee cup and the painting are both my property, my specific set of property rights over each item vary because of other factors. Likewise if I possess the cure for AIDS while I may have the moral right to sell the cure, I may not have the moral right to exclude people from using it (Resnik 2003, 329). These examples are important for F.E.M. ownership because much of the justification for the moral impermissibility of piracy rests on the assumption that the F.E.M. owner has an exclusionary claim against others using the work without their consent. Since these examples show that the rights bundle varies from case to case, exclusionary rights over F.E.M. must be justified. This is especially important in light of how powerful the ownership rights for F.E.M. are generally thought to be (Palmer 1990, 818).

2.5 The Piracy Property Dispute

The piracy debate is best understood as a dispute over property because it allows us to separate out the debate over what is owned and the debate over what our rights are in relation to that owned object. Consider the following instance of Bill Gates discussing the unauthorised copying of his code.

“Who can afford to do professional work for nothing? What hobbyist can put 3-man years into programming, finding all the bugs, documenting his product and distribute it for free? The fact is, no one besides us has invested a lot of money into hobby software. We have written 6800 BASIC, and are writing 8080APL and 6800 APL, but there is very little incentive to make this software available to hobbyists. Most directly, the thing you do is theft.” (Bill Gates quoted in Boyle 2008, 164)

This conflates the disputes over what the owned object is and the nature of the property rights. If Bill Gates owns every copy of hobbyist code, it does not entail that he has a claim right against other people using it without his consent. The former does not imply the latter and vice versa. Both of these claims have to be established separately before an accusation of theft can be justified. This example shows us that paying attention to this distinction will greatly help our ethical analysis of piracy.

Returning to the downloader trailer which I mentioned in section 1.2, the reader will remember that it made a strong claim about theft. This claim is spurious at best and this distinction can explain why. It argues that F.E.M.s are similar enough to ordinary property that experiencing it without consent is theft (Macfarlane 2008, disc one). In doing so it conflates two distinct claims, that F.E.M. owners have a claim right *against the experience of F.E.M. copies* and that F.E.M. owners *own every created copy* of F.E.M. The first claim is *prima facie* more plausible than the second but both are required to make the accusation of theft work (Spencer 1984, 7-8). Even if you have rights which prevent me from experiencing some object it is not clear that I can steal property by experiencing it without your consent.

This example makes it clear why drawing this distinction is important but drawing it will also require paying careful attention to the parties who are disputing and the instances of property which they are debating over. The two parties are the creator of the F.E.M. and the consumer of the F.E.M. Thus far I have used ‘F.E.M owner’ but that is ambiguous as to whether ‘owner’ refers to ownership of a work of fiction such as *Game of Thrones* or to ownership of the DVDs. This gives us two different instances of property which consumers and creators can debate over what is owned and what our rights are over the owned objects. I will refer to ownership of creations such as the *Game of Thrones*

concept as *idea ownership*. I will refer to the ownership of DVDs, CDs, books, etc as *instantiation ownership*. An electronic copy of *Game of Thrones* is an *instantiation* of an *idea*. With this in mind I will first discuss the dispute over what is owned and then the dispute over the nature of the property rights.

2.5.1 The Dispute Over What Is Owned

The dispute over what is owned focuses on what the object is which is owned by the F.E.M.'s creator and whether consumers, creators or both own instantiations of the F.E.M. As I discussed in section 2.4, property ownership is a rights bundle which an agent has over some object (Waldron 1985, 314). However in the instance of F.E.M. it is difficult to determine what the object is that the creator has rights over. It is largely accepted that the creator owns the idea rather than a single instantiation of the idea. Writing *Game of Thrones* means that George R.R. Martin owns the ideas expressed in the pages rather than only the first copy of the book that he sold to a publisher (Resnik 2003, 320). However we need a more concrete way to make sense of idea ownership since ideas have so little in common with objects. One such way is to argue that ideas are abstract objects (Himma 2008, 1154).

Abstract objects are objects whose only presence in space time is through instantiations of that object (Rosen 2012, section 3.2). Objects like numbers, concepts, propositions and sets have no presence in space time (Rosen 2012, section 3.1). I cannot discover them by digging through the ground or take them outside and play catch with them. However I can write them down and use them to work out things about objects that exist in space time. This is an example of an abstract object being instantiated. On this approach *Game of Thrones* is an abstract object which George R.R. Martin has ownership rights over. Because this abstract object can only be interacted with through concrete instantiations, George R.R. Martin also owns all the instantiations of *Game of Thrones* even if he has severely restricted rights over the instantiations which have been purchased by consumers.

The only shortcoming of this approach is that it requires the existence of abstract objects. Whilst the concept of such objects is useful tool, it is often remarked that they are too abstract to explain our interactions with them. Since abstract objects have no presence in spacetime it is extremely difficult to explain how they can causally interact with concrete objects such as human beings (Rosen 2012, section 3.2). For this reason a more conservative approach is to argue that idea ownership is understood as ownership of the

contents of the idea and remain agnostic about whether idea contents are abstract objects, merely propositions or something else. The net result is the same; ownership of idea contents necessitates some kind of ownership over the F.E.M. instantiations which contain the ideas. So F.E.M. creators in some sense own the instantiations of their ideas.

There are some dissenting theories which argue that by their very nature ideas cannot be owned. The information should be free movement (hereafter I.S.B.F) argue that ideas will naturally move towards being free. Ignoring the implication that information is an autonomous agent *pace* Himma (2008, 1147) a charitable version of this argument argues that the intangible and non rivalrous nature of ideas means that any rules we could set up to govern their exchange are ultimately fruitless (Wagner 2003, 999). Such a position is at the extreme end of the dispute over what is owned but it still allows the creator of a F.E.M. to own something. Regardless of how the I.S.B.F. movement feels about the exchange of ideas for money, they do allow that an idea's creator is at least entitled to be credited for their work. Such a claim is far less convincing if ideas cannot be owned at all. Even if the I.S.B.F. movement only allows for ownership of the discovery/creation of an idea rather than the idea itself the net result will still be the same. The discoverer/creator of an idea is likely to have some property in the instantiations of the idea because it is the best explanation of the rights which the creator has over the instantiations.

Having outlined three different views on what the creator of a F.E.M. owns, I will now consider the different views on what the consumer owns. The general consumer view is that we own F.E.M. instantiations as instances of private property. The DVDs and Blu-rays in my home became my private property when I purchased them from the store. The industry view is that instantiations of F.E.M. are still the property of the creator (FACT 2014). Piracy is theft because instantiations of F.E.M. are the property of the creator and you took that property without consent. The industry view does not entail the negation of the consumer view so there is nothing inconsistent about both views being correct. Property is diverse enough that dual ownership of private property is possible (Waldron 1985, 345). It would be difficult to accommodate such a theory with ordinary property because of its rivalrous nature but the intangible nature of ideas makes such a view more plausible.

There is a dispute over what is owned but regardless of whether creating F.E.M. necessitates ownership of abstract objects, idea contents, or just the F.E.M.'s discovery/creation I have argued that all these views require that the physical instantiations

of these ideas are in some way the property of the creator. This conclusion is central to the industry view of what is owned. The consumer view of F.E.M. ownership argues that consumers can and do own instantiations of F.E.M. as instances of private property. These views may both be true but we must now consider the dispute over what the rights are over the owned object. This is essential because the rights which agents have over their property affect whether we can justifiably claim that it is an instance of private property. I may claim that a coffee mug is my private property but if I have no rights over it then it simply is not my property. Likewise the consumer view may argue that F.E.M instantiations such as DVDs are instances of private property but if they have practically no rights over that DVD then we should not consider it to be private property.

2.5.2 The Dispute Over the Nature of the Property Rights

The dispute over the nature of the property rights is varied across many factors. There are at least two distinct property bundles, one for the consumer (hereafter F.E.M. instantiation bundle) and one for the creator (hereafter F.E.M. property bundle). There is disagreement over the nature of the rights in this bundle since they could be moral, legal, natural or special rights (We will not get too far into the technical machinery of rights here, such machinery will be outlined properly in chapter five). There is also disagreement over which rights in the logically strongest set are included in the bundle and over how those rights may be exercised. Even if the F.E.M. property bundle includes a moral exclusionary right over experience, it may not be ethical for that right to be exercised if doing so would result in, for example, the death of an agent (Himma 2008, 1160).

Beginning with the nature of the rights there is a dispute over whether the rights in the F.E.M. property bundle are instances of moral or purely legal rights.

“On economic grounds, the Review concluded that there was little evidence that extension would benefit performers, increase the number of works created or made available, or provide incentives for creativity; and it noted a potentially negative effect on trade. . . It gives the impression, however, of being conducted *entirely* on economic grounds. We strongly believe that copyright represents a moral right of a creator to choose to retain ownership and control of their own intellectual property.” (quoted in Boyle 2008, 227-228)

This is important for the piracy debate because of the trumping power of moral rights (Dworkin 1981, 153). If the rights in the F.E.M. property bundle are instances of moral rights then they are inalienable and carry hefty trumps which make acts of piracy for personal use morally impermissible in all but the most extreme situations (Himma 2008, 1160). If however, they are purely legal rights then they are fallible and only justified if

they meet the goals of legal rights. For example if the goal of legal rights were to produce the greatest utility in society and exclusionary rights over experience did not serve that purpose then such legal rights would not be justified (Murphy 2007, 45).

Putting aside the nature of the rights in the F.E.M. bundles, there is also disagreement over which rights are included in those bundles. The range of views allows for any combination of the logically strongest set of property rights: the right of use and to exclude others from use, the right of compensation if someone uses it without permission, enforcement rights over this set of rights, the right to transfer this set of rights, and immunities to non-consensual loss of this set of rights (Vallentyne 2012, section 1). The rights in the logically strongest set are themselves sets of possible rights. For instance rights of use for F.E.M.s include rights of experience, modification, destruction. This vastly increases the number of possible views on F.E.M. rights. One such possibility is the view that the rights in the F.E.M. property bundle include a claim right of paternity that people credit the creator for their work (Strauss 1955, 508) and a temporary legal right of exclusion for the purpose of increasing incentives to create new F.E.M. (Moore 2002-2003, 607) but no claim right whatsoever against other agents using the F.E.M. as part of their own work.

In this plethora of possible views there are a few which have gathered large attention. The I.S.B.F. movement employs a copyleft licence which allows any person to access work for free and use it in creating their work provided that the derivative work is also published under a copyleft licence (Ganguly 2007, 305). The I.S.B.F. movement is inferring from the fact that consumers own instantiations of software to the claim that consumers have a right to alter the source code in the instantiation. A similarly, fast and loose argument for the moral legitimacy of piracy is that DVDs etc are our private property so once we have purchased a movie or C.D. we are entitled to do anything they want with it, including copying it and giving it away (305). This argument conflates claims about what is owned and about what our rights are over the owned object but it does highlight an unusual feature of F.E.M. instantiations, that if we take copyrights seriously then we have barely enough rights over our DVDs to consider them private property.

Copyrights are a legal matter but for the sake of argument I will assume that the typical copyrights exercised over F.E.M.s represent another possible view on the rights in the F.E.M. instantiation bundle. I will refer to this view as the strong copyright view. Here is a typical set of rights which the strong copyright view allows.

“Warning: The copyright proprietor has licensed this DVD (including its soundtrack) for private home use only. All other rights are reserved.

The definition of home use excludes the use of this DVD at locations such as *clubs, coaches, hotels, oil rigs, prisons and schools*. Any unauthorized *copying, editing, exhibition, renting, exchanging, hiring, lending, public performance diffusion and/or broadcasting* of this DVD, or any *part thereof*, is strictly prohibited and any such action establishes liability for a civil action and may give rise to criminal prosecution. This DVD is *not to be exported, distributed and/or sold by way of trade* outside the EU without a proper license from Twentieth Century Fox Home Entertainment, Inc. Sales and/or rental rights for this DVD are specified on the original packaging of this DVD (MacFarlane 2008, disc one, emphasis added).”

This makes for a poor comparison with an instance of ordinary property such as a coffee mug. I have the right to alter a coffee cup but not the movie. I can exchange a coffee cup but not the movie. I cannot lend the movie to a friend, and if I had purchased the movie as a digital download rather than as a physical DVD then I could not even give it away since D.R.M. locked files cannot be transferred between devices. I can display a coffee cup but not the movie, I can sell a coffee cup but not the movie, and I can dismantle a coffee cup to make something new out of it but not the movie since I do not have the right to access or alter the code in the electronic copy (Boyle 2008, 95).

The remaining rights over a F.E.M. instantiation (a heavily restricted right of experience and right of destruction) are not sufficient for the instantiation to be private property. The likely truth is that we do not so much purchase F.E.M.s as we purchase the right to use them (Davis 2008-2009, 373 and McGrail and McGrail 2010, 76). Thus the strong copyright view implies that the consumer view (that we own F.E.M. instantiations as private property) is false. The reader may accept this implication and argue that DVDs and other F.E.M. instantiations are just instances of rented property but I struggle to see the sense in a F.E.M. system which takes a potentially infinite resource and creates so much scarcity that private ownership of instantiations of that F.E.M. are not permitted (Palmer 1990, 861). I also struggle to see the sense in a F.E.M. licence to experience/rental system which only permits the consumer to experience the F.E.M. on preapproved formats and fails to replace access to the F.E.M. if the physical format is damaged.

A more sensible view of the rights over F.E.M. instantiations is the first sale doctrine which claims that once an instantiation has been purchased all rights which the creator had over it are exhausted except for the right of reproduction (Davis 2008-2009, 366). Thus consumers have sufficient rights over their DVDs for them to be considered

private property but have no right to reproduce the F.E.M. without further consent (Byer 2013, 392). This is an important view because it highlights the power of strong F.E.M. idea rights. Rights over ideas necessitate rights over every instantiation of that idea. Not just a hundred or a thousand or even 10 million copies of *Harry Potter* but over *all of the possible copies* (Yung 2009, 45-46). This is why the notion that we can have strong rights over an idea is so controversial. In the sense of property which this project is using, it seems plausible that Beethoven has a set of rights over the music he composed which is sufficient for us to consider it his property. But the issue grows steadily more complex from there. It is far less plausible that Beethoven owns a single note and may insist that he has the right to exclude any other composer from ever using it without compensation. But then it also seems plausible that he should have the right to exclude other composers from using a specific sequence of notes.

There are a plethora of different views about which rights are included in the F.E.M. bundles but for the purpose of this project we need only focus on exclusionary rights over experience. Since piracy involves experiencing F.E.M.s without the consent of the owner, it is this right which acts of piracy for personal use violate. If such a right is morally justified then acts of piracy for personal use are morally impermissible. Since there are infinitely many possible views of property involved in the piracy dispute it would be beneficial to outline two opposing views, one which entails the moral permissibility of piracy and which entails its moral impermissibility.

2.6 A Continuum of Property Views

There is some consensus that the F.E.M. creators own the ideas which they create³ and I have argued that this requires that they also own the instantiations of that F.E.M. in some sense. Common sense suggests that consumers own their F.E.M. instantiations as private property but it is possible that the F.E.M. purchases are better understood as purchases of licences to experience the F.E.M. Despite the consensus on what is owned there is still considerable debate over what our rights are over the owned objects. The contrasting views disagree on the nature of the rights in the F.E.M. bundles for both consumers and creators. At this point in the project it is still unclear which rights are included in the F.E.M. bundles, whether the rights are moral, and in which instances it is permissible for those rights to be exercised.

³ For example see Hettinger, 1989, 31, Resnik 2003, 320, Roeder 1940, 556, Simonds 1891, 17, and Strauss 1955, 507. For a dissenting opinion see Wagner 2003.

The possible combinations of these factors yield a continuum of infinitely many property views in the piracy debate. I have already mentioned a few well known views such as the I.S.B.F. movement, the copy right view, and the first sale doctrine but none of these represent a complete view of F.E.M. property which is focused directly on the ethical status of piracy. For the sake of brevity and to provide contrasting property views which cannot be considered straw men I will outline two opposing views of F.E.M. property; the strong view of F.E.M. property which entails the moral impermissibility of piracy and the weak view of F.E.M. property which entails piracy's moral permissibility.

2.6.1 The Anti-Piracy Strong View of F.E.M. Property

We will take the anti-piracy strong view of F.E.M. property (hereafter the strong view) to be the set of the following propositions.

- 1) F.E.M. creators own the idea instantiated in concrete objects. Idea ownership is to be understood as the ownership of every possible instantiation of the F.E.M.
- 2) Consumers rent instantiations of F.E.M. when they purchase them but do not own them as private property.
- 3) The morally justified F.E.M. property bundle contains strong exclusionary rights over experience.
- 4) The morally justified F.E.M. instantiation bundle includes only a heavily restricted right of use which permits the consumer only to experience the F.E.M. under the conditions set forth by that particular instantiation of the F.E.M.

The dispute over the nature of the F.E.M. property rights has greater implications for the ethical status of piracy than the dispute over what is owned but I have outlined propositions 1) and 2) in the interest of providing a comprehensive account of the two main conflicting views. 'Morally justified' is required in propositions 3) and 4) to distinguish the claims about the *de facto* state of legal rights in the F.E.M. property bundle from claims about which rights obtain or ought to be included in the bundle. Proposition 4) references the conditions set forth by that particular instantiation of the F.E.M. We will understand this to refer to the copyright statement or E.U.L.A. which appears on F.E.M. instantiations. We will also understand 'strong exclusionary rights over experience' to mean the right to exclude agents in all but the most extreme circumstances as described in (Himma 2008, 1160).

2.6.2 The Pro-Piracy Weak View of F.E.M. Property

We will take the pro-piracy weak view of F.E.M. property (hereafter the weak view) to be the set of the following propositions.

- 1) F.E.M. creators own the idea instantiated in concrete objects. Idea ownership is to be understood as the ownership of every possible instantiation of the F.E.M.
- 2*) Consumers own instantiations of F.E.M. as private property when they purchase them.
- 3*) The morally justified F.E.M. property bundle contains weak exclusionary rights over experience.
- 4*) The morally justified F.E.M. instantiation bundle includes all the typical rights of ordinary property including rights of experience, lending, sale, modification and destruction.

There is nothing inconsistent about propositions 1) and 2*) since ownership rights vary from case to case. The bank, house owner and renter can all truthfully use the expression ‘my house’ (Waldron 1985, 345). While it is tempting to argue that sold instantiations of F.E.M. are no longer the creator’s property it would make it difficult to explain how the creators still have rights over that instantiation. While the weak view implies that it is permissible for agents to experience F.E.M. without the consent of the owner, it in no way suggests that it is permissible for an agent to reproduce instantiations of a F.E.M. and sell off the reproductions or claim that F.E.M. as their own work. Questions of what is owned are separate from questions of the nature of the property rights but I am inclined to think that the best explanation of this observation is that both the consumer and creator own instantiations of F.E.M. in a dual system similar to that of the mortgaged house being rented out. We will also take ‘weak exclusionary rights over experience’ to mean rights which do not grant a claim against acts of piracy for personal use but are strong enough to grant a claim against an agent reproducing the instantiation and selling off the reproductions. In this way the weak view will only allow acts of piracy for personal use rather than for profit. The weak view contrasts with the strong view in that consumers may possess instantiations of F.E.M. as private property and that creators have less claim rights against the uses of instantiations of their ideas.

2.7 Conclusion

In this chapter I introduced the reader to the scope of intellectual property and explained what the act of piracy is. I then outlined the rights bundle account of property ownership. Property ownership varies from case to case. In the instance of F.E.M. there is agreement in the literature that the owned object is the abstract idea itself but disagreement

about whether that necessitates private ownership of all the physical instantiations of the idea. There is also disagreement over which rights are included in the F.E.M. property bundle, how powerful those rights are and whether such rights are better understood as moral ones or special rights which are justified by the total utility that they produce. For the sake of brevity I have framed two opposing camps which summarise the opposing views. The anti-piracy strong view of F.E.M. ownership argues that the owner's rights are and should be strong enough to justify the moral impermissibility of piracy for personal use. The pro-piracy weak view of F.E.M. ownership argues that the owner's rights are and should be weak enough to permit acts of piracy for personal use. In the next chapter I will discuss a common justification for the strong view; appeals to analogies between F.E.M.s and ordinary property.

WHY ANALOGIES WITH ORDINARY PROPERTY CANNOT SETTLE THE PIRACY DISPUTE

3.1 Introduction

In this chapter I will argue that analogies between F.E.M.s and ordinary property such as coffee mugs cannot settle the piracy dispute because they fail to justify the strong view of F.E.M. ownership. I will explain the analogy strategy and then examine the analogies and disanalogies of F.E.M.s and ordinary property more closely before drawing two lessons from the analogy strategy: the analogy strategy fails because there are too many disanalogies between F.E.M.s and ordinary property, and we require a better ethical argument against piracy. I then outline such a master argument before explaining how the rest of this project will proceed.

3.2 The Analogy Based Justification for the Strong View

A common approach to the piracy dispute is to reason by analogy with ordinary property.⁴ “ASCAP (The American Society of Composers, Authors and Publishers), in an early pamphlet describing the importance of copyright, calls music a “raw material” much like wheat or cotton on which the music industry depends.”(Halbert 2005, 70) We compare F.E.M.s to ordinary property to argue that since ordinary property bundles includes moral exclusionary rights, so too does the F.E.M. property bundle as the strong view of F.E.M. property claims. In general arguments from analogy reason from the properties that members of a sample have in common to argue that the target also has that property. Imagine that Sally has previously enjoyed watching comedy television shows and wishes to know if she would enjoy watching *South Park*. In this case all the comedy shows she has watched have the property of being enjoyable which justifies her prediction that the comedy show *South Park* will also be enjoyable. In the instance of piracy the sample is the set of ordinary property and the target is F.E.M. property. The property in question is strong exclusionary rights over experience. I will first discuss the reasons to trust this strategy and then discuss the reasons to doubt it.

3.2.1 Reasons to Trust the Strategy

There are three reasons to trust this argument from analogy between F.E.M.s and ordinary property: the size of the sample that we are inferring from, the diversity of the sample that we are inferring from, and the similarities between ordinary property and

⁴ For an example of this see MacFarlane 2008 and NZFACT 2012 but it is also an implicit assumption in arguments such as those highlighted in footnote three which conclude that piracy is theft. For an interesting discussion of how analogies with ordinary property mislead us see Boyle 2008 chapter two.

F.E.M.s I will explain each one in turn beginning with sample size. Sally is still attempting to determine if she will enjoy watching *South Park*. We know that she has previously enjoyed comedy shows. If she has only watched two comedy shows then her inference is less reliable than if she has watched 316 comedy shows. The greater the sample size in an argument from analogy, the more reason she has to trust her conclusion that she will also enjoy watching *South Park*. Returning to ordinary property and F.E.M.s we can see that since the sample we are reasoning from consists of every instance of ordinary property, the sample size is extremely large which gives us good reason to trust the strategy.

The more dissimilarity in the sample of an argument from the analogy, the more reliable the conclusion is. If the sample of comedy shows that Sally has been watching only includes British television shows then her prediction about the enjoyableness of *South Park* is less reliable than if her sample includes comedy shows of many different types such as satire, parody, blunt and subtle humour. The variety in the sample gives us good reason to believe that Sally will enjoy practically any kind of comedy. Considering the sample of ordinary property, we can see that it involves a good deal of diversity including instances of: owned property, rented property, borrowed property, appropriated property and created property. While the rights in each of these bundles vary from case to case (Waldron 2012, section 1), they all include an exclusionary right over experience without consent which gives us good reason to believe that the F.E.M. property bundle also includes an exclusionary right over experience.

The more similarities there are between the sample and the target in an argument from analogy the more reliable the conclusion. *South Park* is produced by Matt Stone and Trey Parker and is a distinctly American show (Parker and Stone 2006). If the shows which Sally has already seen are also distinctly American shows produced by the same people then she is far more likely to enjoy *South Park*. The few similarities between F.E.M. and ordinary property are a reason to believe that the F.E.M property bundle includes a strong exclusionary right over access but they do not form a strong reason. The similarities are: that both instances of property involve rights over physical objects and that the moral intuitions we have about our ordinary property rights are similar to those we have about our F.E.M. property rights.

It is true that both instances of property involve rights over an object but this is a minor similarity because of the differences in the ownership set up. Ordinary property is simpler because we own a concrete object. F.E.M. property is more complex because the creators own an idea which is instantiated in multiple objects (Resnik 2003, 320). So it is a

similarity between F.E.M.s and ordinary property that they both involve having rights over an object but it is at best a minor similarity which gives us little reason to trust the argument from analogy. Of more interest are the similar moral entitlements we feel for both ordinary property and F.E.M.s. “I have control rights over this car because I built it and I am entitled to do what I want with the products of my labour” becomes “I have control rights over this song because I am entitled to do what I want with the products of my labour” (Resnik 2003, 322). Conversely the same consequentialist restrictions on rights occur. “It doesn’t matter that you own all the land, you can’t prevent people from using it because of how it affects the rest of the world” becomes “It doesn’t matter that you own this undiscovered Van-Gogh portrait. You can’t burn it because of how it affects the rest of the world” (Raz 1982, 197). A painting is a physical object, but the art expressed on the canvas is the intellectual property of the artist.

The point here is twofold. We share moral intuitions between ordinary property and F.E.M. about what our rights are over that property. Conversely we also share moral intuitions about what constitutes an unethical exercise of those rights. Imagine that Peter Jackson employed his exclusionary rights of *The Lord of the Rings* to prevent small children from recreating the movie in their parent’s back yards with smart phones. Or that the comic and graphic novel company D.C. exercised their exclusionary rights over the merchandise from movies to hand out cease and desist notice to fans receiving tattoos containing images from their F.E.M.s, which they did (Nash 2011). It seems that whichever rights carry intuitive force for ordinary property also do for F.E.M. When I purchase a coffee cup I have the right to deny others the use of it (Gordon 1993, 1550). Likewise If I purchase the intellectual property rights to an unpublished movie, intuitively I also have the right to deny other people the chance to use it if I should so decide. When I create a coffee cup I have the right to sell it on, as does J.K. Rowling seems entitled to sell on her Harry Potter creation. However moral intuitions require justification and I will have to outline the reasons to doubt the strategy before we can be confident that appeals to analogies with ordinary property give us good reason to believe that the F.E.M. property bundle includes strong exclusionary rights over experience.

3.2.2 Reasons to Doubt the Strategy

The less analogous the objects in the sample are to the target object the more reason we have to doubt the conclusion of an argument from analogy. If Sally is attempting to predict whether or not she is likely to enjoy the taste of a muffin then it does

not matter how large or diverse her sample of watched televisions shows is because muffins are not very analogous to T.V. shows. F.E.M. property is ownership of ideas and ordinary property is ownership of concrete objects. Unfortunately ideas are about as analogous to concrete objects as muffins are to T.V. shows. Ordinary property like coffee mugs are physical objects; they have finite places in spacetime. By contrast, F.E.M. idea ownership is of concrete instantiations of that idea. The concrete objects have presence in space time but the ideas which they are expressing do not (Resnik 2003, 321). Ideas such as numbers, propositions, language and concepts are understood to be abstract objects (Rosen 2012, section 1) but I will restrict myself to discussing idea ownership to avoid unnecessary metaphysical commitments. Ideas are simply not analogous to concrete objects. Idea ownership can be understood as the ownership of the set of all possible concrete objects which the idea instantiates but even then concrete objects are not analogous to sets of possible objects.

The more dissimilarities between the sample and the target in an argument from analogy, the more reason we have to doubt the conclusion. Reasoning about television shows cannot help us determine if we will enjoy a muffin because television shows are nothing like muffins. There are too many dissimilarities between the two just as there are too many dissimilarities between F.E.M.s and ordinary property. There are too many to list exhaustively here so I will instead focus on two crucial differences: the non rivalrous nature of F.E.M.s compared to the rivalrous nature of ordinary property and how F.E.M.s are experience goods but the majority of ordinary property is not.

F.E.M.s are non rivalrous goods but ordinary property is not (Boyle 2008, 2-3).⁵ A rivalrous good is one which cannot be consumed by multiple people at the same time. If you are holding a coffee mug and I take it out of your hand then you cannot still be holding that coffee mug. F.E.M. is non-rivalrous (Croskery 1992-1993, 632). If you have a movie then I can take a copy of it without depriving you of it. The reader should bear in mind that particular *instantiations* of F.E.M. are exclusive. If there is only one copy of a movie then we cannot both possess it at the same time. However the *F.E.M.s themselves* are non-exclusive which means that we can have identical copies of the movie in different places at the same time. Physical property is rivalrous because we only own particular instantiations rather than a set of all possible instantiations. With physical property it is nearly

⁵ Hettinger (1989 p34) uses the general property of non-exclusiveness but the majority of authors I have encountered employ a further distinction in this category between rivalrous goods and excludable goods as in Boyle 2008, Croskery 1992-1993, Himma 2008, and Moore 2002-2003.

impossible to perfectly replicate something so there are always some differences between the original and the copy. This is not so with F.E.M.s. The expression of electronic media on digital files can be reproduced and circulated *ad infinitum* without loss of quality (McGrail and McGrail 2010, 70).

The second major dissimilarity is that F.E.M.s are an experience good but the majority of ordinary property is not (Chandra, Goel and Miesing 2010, 9). Experience goods are goods that we do not know the value of until we have already experienced and paid for them (Chellappa & Shivendu 2005, 400). If I go shopping for some jeggings (jean leggings) then I can pick out a pair, try them on, and check out how they look on me all before I ever pay for them. By comparison if I go to buy a new burger then I must pay for and consume it before I can determine what its value is. This is what makes a burger an experience good. Likewise, movies, music and television shows are experience goods. We must pay for them before we can experience them and determine their value. There are some sampling methods available that allow us to roughly approximate the value of a F.E.M. We may listen to a few songs on the radio or watch an episode on T.V. but the majority of DVD and CD purchases will be made by consumers who have been unable to experience the intellectual good. This remains a dissimilarity because the overwhelming majority of F.E.M., specifically the types which we are interested in here, are experience goods. It follows that non-experience goods are mainly physical property. This gives us good reason to doubt the conclusion of the analogy based justification for the strong view of F.E.M. property. In the next section I will argue that the analogy based justification fails.

3.3 Lessons From the Analogy Strategy

There are two important lessons from the preceding analysis: that an argument from analogy with ordinary property is an unreliable way to draw moral conclusions about piracy, and that this project requires a stronger ethical argument

3.3.1 Why the Analogy Based Justification for the Strong View Fails

The analogy based justification for the strong view fails because the reasons to doubt the conclusion vastly outweigh the reasons to believe the conclusion. The reasons to trust the strategy: that the inference reasons from an extremely large and diverse sample, and that there are some similarities between ordinary property and F.E.M.s are heavily outweighed by the reasons to doubt the strategy: that abstract objects are not analogous to concrete objects and that there are overwhelmingly many dissimilarities between ordinary

property and F.E.M.s. Despite the reliability of the original sample the target object is barely analogous to the sample objects. Thus appeals to analogy with ordinary property give us little reason to believe that the F.E.M. property bundle contains strong exclusionary rights over experience. There may be other reasons to believe that there is such a right in the F.E.M. bundle but justification for that belief cannot be provided by appeals to the analogies of F.E.M. and ordinary property.

It becomes clear how different ordinary property is to a F.E.M. when we consider how people treat their property. Assume that F.E.M. is like ordinary property and that using it without consent constitutes an act of theft. Now we have to explain why so many people are content enough with their F.E.M. being stolen to leave it lying around for people to take with great ease. We tend to protect our ordinary property: we lock our cars, microchip our pets, install trackers in our phones and pay for expensive alarm systems for our houses. However many people encourage others to use their intellectual property. Songs are given away, television shows can be streamed legally and much computer software is given away for free (Katz 2005, 156). A disposition to give away ones property does not prove that using it without consent is not an instance of theft. However it is still extremely difficult to reconcile the claim that ordinary property ought to be handled in the same way as F.E.M.s with the observation that so many F.E.M. owners (including ones who are have a strong interest in maximising profit) have little interest in excluding people from experiencing their work.

The important lesson to draw from the analogy based justification for the strong view of F.E.M. property is that it is a mistake to treat F.E.M.s in the same way that we treat ordinary property such as coffee mugs (Boyle 2008, 7). Despite the fact that many intellectual property organisations rely on the analogies between ordinary property and F.E.M. to justify claims of theft they do not treat or expect others to treat instantiations of F.E.M. in the same way as ordinary property. The reasons to doubt the conclusion of the analogy based justification for the strong view vastly outweigh the reasons to believe it so we ought to accept that the justification fails. This conclusion does not entail a proof for the moral permissibility of piracy so this project now requires a stronger argument against the permissibility of piracy.

3.3.2 Why We Need a Better Argument Against Piracy

Pro-piracy arguments are made stronger by strong opposition. Thus far the main argument has been that F.E.M.s have enough features in common with ordinary property

that the strong view is correct and they should be treated in the same way to ordinary property. Unauthorised use of one is as morally impermissible as unauthorised use of the other. After a closer analysis of the analogies and disanalogies I have argued that at best analogies with ordinary property provide a useful explanatory metaphor for the issues surrounding piracy and at worst they mislead the debate completely. They overlook the many disanalogies between F.E.M.s and ordinary property, and imply obviously false propositions such as the claim that F.E.M.s should be treated exactly the same way as ordinary property.

This project requires a better argument against piracy to engage with. Defeating a weak anti-piracy argument is not the same thing as proving that piracy is morally permissible. It just demonstrates that the original argument was faulty. In the interest of creating the best possible case for the moral impermissibility of piracy I will offer examples of arguments provided by intellectual property foundations and create a stronger argument against piracy which better captures the appeals to harms and the trumping power of rights in the debate. This argument will be more in line with the current academic literature which focuses on the harms caused by piracy and considers the rights angle. It will also take a further step by considering the nature of the rights over F.E.M.s and what kind of harms piracy causes.

3.4 The Master Argument Against Piracy

If we look at the bulk of anti-piracy trailers and websites we quickly see that the majority of arguments against the moral permissibility of piracy focus on the alleged harms that it causes.

“Australia makes great films but with film piracy now costing 230 million dollars a year, expect to see a lot less. Burning, buying or downloading pirated films may seem harmless but what you’re really burning is the future of Australian films.” (Stallone 2010)

These arguments are consequentialist focused in that they point to the harms of an act as grounds for its moral impermissibility. This is similar to much of the academic literature which either analyses piracy in terms of harms or applies a cost-benefit analysis to strong intellectual property rights.⁶ While this is a strong argument, I do not believe that it is the strongest possible one for the impermissibility of piracy. Focusing entirely on

⁶ For examples of harm based or cost-benefit focused analyses see Croskery 1992-1993, Hettinger 1989, Moore 2002-2003 Palmer 1990, Posner 2002 and Resnik 2003, Smith and Telang 2012, and the reports on harms to the Australasian industry available at <http://www.screenassociation.co.nz/resources.php> and <http://www.screenassociation.com.au/resources.php/>.

consequences overlooks the question of whether the harms are instances of wrongful harming and misses the important angle of ownership rights (Himma 2008, 1152). Ownership rights are very powerful (Waldron 1981, 122) and must be carefully considered in an ethical analysis of piracy. I do not wish to suggest that the consequences of piracy are ethically null and void. If it can be shown that acts of piracy are instances of wrongful harming then I will happily accept that it is morally impermissible. Rather I wish to suggest that the strongest possible argument against the moral permissibility of piracy should take both into account. The argument which follows is an attempt at such a construction.

The Master Argument for the Moral Impermissibility of Piracy

- 1) Acts which produce significant harm are immoral (Feinberg 1973, 25).
- 2) Acts which violate justified property rights are immoral (Gewirth in Waldron 1984, 92).
- 3) The act of piracy produces significant harm or violates justified property rights (Himma 2008, 1152).

Therefore: The act of piracy is immoral.

This is the argument which I will engage with for the remainder of the project. It is valid so my strategy will be to question the truth of one or more of the premises. I take for granted the truth of premises 1) and 2) since this project is not engaging with questions of normative or meta-ethics. I will interpret ‘significant harm’ to mean an instance of wrongful harming or an act which produces serious and avoidable merely instrumental harms. Premise two may seem dubious because there are clear instances when I am justified in not upholding a person’s right. If I need to drive a dying person to the hospital and there is no other option then I am justified in stealing a car. However this is an instance in which a right is *overridden* rather than *violated*. To violate an agent’s right is to not perform your duty without moral justification (Gewirth 1981, 92). I have also indicated that the violation must be of a justified property right to avoid the conclusion that piracy is unethical because it violates the *de facto* legal rights on the matter. This project is primarily concerned with the moral justifications of strong property rights rather than potential justifications of legal rights.

My strategy for the rest of this project will be to deny the truth of premise 3). I will argue that acts of piracy for personal use do not produce significant harm or violate justified property rights *provided that certain conditions are met*. Premise 3) may sit uncomfortably with readers who dislike disjunctive premises but in this case there is a

good reason for it. By phrasing premise 3) of the master argument like this I have stacked the deck against myself. It will not be enough for me to conclude that acts of piracy are permissible because even though they violate some rights, they increase overall utility. Instead to show that acts of piracy for personal use are permissible I must convincingly argue that there is a way for them to be performed without causing significant harm *or* violating intellectual property rights.

3.5 How the Rest of This Project Will Proceed

The rest of this project will proceed by presenting a detailed ethical analysis of piracy focusing on the two crucial angles of harms and rights. At every step in this analysis I will stack the deck against myself so that my arguments for the moral permissibility of piracy have engaged with the strongest possible arguments against it. In chapter four I will first offer a cost benefit analysis of piracy and argue that it will nearly always predict that piracy is morally permissible. For this reason I argue that we should prefer a more careful analysis of the harms produced by piracy discussing first what the actual harms are and then whether these are instances of wrongful harming.

Once the angle of harms has been addressed I will move on to the rights angle. In particular I will focus on the moral rights angle which is less commonly addressed in the literature. This is important for the piracy dispute because rights have a trumping feature which would allow owners of intellectual property to deny access to their product even if piracy produces no significant harm (Himma 2008, 1152). After considering F.E.M. property rights as instances of moral rights I will consider them as special rights which are justified by the total utility which they produce for society. In the penultimate chapter I will outline conditions for piracy that prevent significant harm or violation of justified property rights. I will argue that acts of piracy for personal use which comply with these conditions are morally permissible.

3.6 Conclusion

In this chapter I considered the analogy based justification for the strong view of F.E.M. property rights. After analysing the analogies and disanalogies I concluded that there are too many disanalogies between F.E.M. and ordinary property for the inference to be reliable. I then argued that this anti-piracy argument was too weak to be engaged with further as the main argument against the moral permissibility of piracy. Instead I outlined a master argument against the moral permissibility of piracy which relies on two important ethical angles: significant harms and the violation of property rights. I then explained how

the rest of the project will proceed, pointing out that to argue convincingly that piracy is morally permissible I must demonstrate that it neither causes significant harms nor violates justified property rights. In the next chapter I begin the ethical analysis by first engaging with the harms angle.

A HARM FOCUSED ANALYSIS OF PIRACY

4.1 How This Harm Focused Analysis Will Proceed

The purpose of this chapter is to provide an ethical analysis focusing on whether acts of piracy for personal use cause significant harm in response to premise three of the master argument against piracy. I will answer this question in three stages. First I will consider whether piracy produces overall harm by comparing the potential costs and benefits. The analysis will clearly side with the weak view of F.E.M. property but I will argue that this is due to the shortcomings of a cost benefit approach and that we should prefer a general prohibition on significant harm in which ‘significant harm’ refers to serious and avoidable instrumental harm or instances of wrongful harming. Second I will appeal to recent empirical work to determine what the actual harms caused by piracy are. I will conclude that acts of piracy for personal use are responsible for direct harms to sales in the range of 4.1% - 12.89% and indirect harms to employment opportunities but deny that they have significant effects on incentives to produce new F.E.M. Thirdly I consider whether the harms caused by piracy are merely instrumental or instances of wrongful harm. I then argue that they are instrumental but accept that there are enough of them to be considered serious and avoidable. Thus this analysis will conclude that the morally permissible instances of piracy are ones which do not contribute to this collective harm.

4.2 A Cost-Benefit Analysis of Piracy

In this section I will present a cost-benefit analysis of piracy. The analysis will be speculative but in section 4.4 I will use some of the latest empirical evidence to establish what the actual harms of piracy are. The potential costs of piracy are: that it causes serious and avoidable harm to sales, employment opportunities and incentives to create new F.E.M, that through a collective harm problem has the potential to cripple our intellectual property system, and that it increases exposure to malware and high risk digital content. The potential benefits are: that it provides a sampling method for consumers who wish to purchase an experience good, that it creates an explosion of free advertising, that it can increase sales, that it preserves our F.E.M. culture, that it provides a source of competition against the monopolies created by idea ownership, and that it produces a limitless source of utility to agents.

4.2.1 The Potential Costs of Piracy

A long standing claim by the F.E.M. industries is that piracy causes serious and avoidable harm to sales (Chellapa and Shivendu 2005, 400) but many industry figures

assume that nearly every instance of piracy would have been a purchase (Halbert 2005). Necessarily the only acts of piracy which have a negative effect on sales are those in which the act causes an agent not to purchase an F.E.M. which they would have otherwise purchased if piracy had not been an option (Waldfoegel 2012, 95). The actual relationship between piracy and sales is complex and difficult to determine because economics predicts that rational consumers will not pay for a product which they could get for free (Harbaugh and Khemka 2010, 309). We now have more evidence to doubt this prediction because work in behavioural economics has compiled large amounts of evidence that people do not behave as economic theory predicts (Boyle 2008, 230). I will discuss the empirical evidence for sales harms in section 4.4, for now the reader needs only to see that piracy has the potential to harm F.E.M. sales.

Direct harm to sales has the potential to cause indirect harms to employment opportunities and incentives to produce new F.E.M.s since the profitability of a F.E.M. depends on its ability to sell movie tickets, DVDs etc. Less profit from the release of a F.E.M. means a lower projected budget for the next related F.E.M. meaning less employment opportunities for workers in the industry. This also has the potential to lower incentives to invest in new F.E.M.s since funding minor projects is more risky and investors may enjoy lower financial rewards (Waldfoegel 2012, 92). F.E.M.s are judged as an investment and like most investments those which return a sizable profit are far more likely to be reinvested in than ones which lose money.

Piracy has the potential to cripple the F.E.M. property system through a collective harm problem (Halbert 2005, 66). A collective harm problem occurs when agents all rationally pursue their own interests and end up making outcomes steadily worse until the market is irreparably damaged (Feinberg 1973, 53). Piracy has the potential to cause such a problem because as a whole people prefer to get things for free than to pay for them. Unfortunately if a large majority of agents opt for this approach then F.E.M.s make steadily less money, lowering incentives to produce new F.E.M.s and leading to less reinvestment until the products of our F.E.M. system are significantly lower in quality.

I consider this possible harm to be unlikely. Ten or even fifteen years ago this argument would have been convincing but in our digital age there are too many counterexamples. Most major songs, at least the ones which make the most money, are available for free on YouTube. Wikipedia is a free access collective encyclopaedia which managed to perform as well as the encyclopaedia Britannica on anonymous tests (Boyle 2008, 196). Furthermore many artists who are attempting to increase their name

recognition quite happily give away their music over the internet and enjoy great financial success because of it (Mortiner, Nosko & Sorenson 2010 cited in Smith & Telang 2012, 12 & Waldfogel 2012 p106). Finally, the producers of *South Park* have argued that their decision to circulate episodes of the show for free on the internet led to a huge boost to their consumer base.

“Obviously Artists need to get paid for what they do and we get paid really well for what we do but . . . Southpark was one of the first shows to get downloaded on the internet and be like, all over the place and everyone getting it for free over the internet and it didn’t hurt us at all. It actually helped the show.” (Trey Parker 2006, disc two)

Lastly the file sharing websites in which the majority of piracy takes place increase exposure of the agent to spyware, malware, and high risk advertising such as pornography and online gambling. Speculation on the cause of this in the literature has begun to agree that these are most likely how the file sharing sites are funded (Watters 2014, 21). This is a minor harm to agents who pirate for personal use since informed agents can rationally accept the risks which go along with the activity. Furthermore it is entirely contingent on the illegal status of piracy. If the free downloading of F.E.M. were a legal activity, then it could be conducted on government approved websites which exercise better control over advertising.

4.2.2 The Potential Benefits of Piracy

Acts of piracy for personal use offer a sampling method for consumers to help determine the value of the product which they are considering purchasing. For some people there is little other recourse to determine the value of the F.E.M. (Chellappa & Shivendu 2005, 413). Without piracy every F.E.M. purchase is a gamble. Sometimes as with *In My Father’s Den* this gamble pays off, other times as in *The League of Extraordinary Gentlemen* it does not. Piracy removes the associated risk by allowing the consumer to sample the product before committing to the purchase. If piracy were to be removed completely then consumers would be less well equipped to determine the value of the product which could actually *reduce* sales. Piracy can also reduce the F.E.M. gamble through the practical advantages of copying. If two people value the new Taylor Swift album at no more than \$8 dollars each but it costs \$15 then they can pool their money, purchase the album and copy it once. This creates a way for agents to purchase F.E.M.s collectively if they would not have otherwise purchased it by themselves (Waldfogel 2012, 96).

If you have a quality product which is not well known then piracy is an ideal method to increase awareness of your F.E.M. This is possible because piracy has the potential to create a huge system of free advertising and circulation saving distributors the cost of expensive promotions (Chandra, Goel and Miesing 2010, 9). If I can access a movie for free then I can experience the product, determine its value and recommend it to people accordingly (9). Combined with the internet and social networking sites, this means that information can spread faster than ever before. Since digital entertainment is an experience good (Chellapa and Shivendu 2005, 400) downloading the new *Fall Out Boy* CD for free is a highly effective method for getting a consumer to try and to recommend their music to others. This consumer may become a fan and start purchasing other *Fall Out Boy* music. Consequently piracy creates an explosion of free advertising which may have a positive effect on sales (Chen, yang, Farn and Wang 2009, 83).

The biggest way in which piracy may benefit society is through access to and the preservation of its own culture. The 20th and 21st centuries have seen an explosion of artistic content through film, television and music. Piracy permanently preserves this culture in online digital files. Putting aside their illegitimate uses, file sharing websites are also massive digital archives storing copies of our entire digital culture of the last century or so. Museums and archives typically require government funding and staff to care for both collections and the buildings but acts of piracy for personal use preserve our F.E.M. culture at no cost to the taxpayer. The free circulation of F.E.M. preserves our culture and enables us to access it more easily.

Piracy also provides an important source of competition to the monopolies which are created by F.E.M. idea ownership (Khouja and Rajagopalan 2009, 372). Because the owner of a F.E.M. has an exclusive right to profit commercially, they have a monopoly over that resource (Yung 2009, 53). Such a right creates a scarcity and a monopoly over that potentially infinite resource (Palmer 1990, 861). There is some competition between monopolies since *Fallout Boy* are unlikely to market their album for ten times the price of the next best music equivalent. Despite this, F.E.M. does create monopolies over a specific intellectual resource. For a long time record companies only sold hit songs on CDs with multiple tracks for the full price rather than just a single by itself (Waldfogel 2012, 94). This is partially a more cost effective way to justify the creation and transport of a physical CD but it is also an application of monopoly power. Most consumers will pay the additional price for musical tracks that they have no interest in for the sake of owning a copy of the major hit. Piracy provides a natural counterpoint to this kind of monopoly

power. If the song is available by itself to download off the internet then companies are far more likely to sell the song as a digital download to get the best possible sales from their product.

Lastly piracy of F.E.M. creates an essentially bottomless utility fountain. Assume that we are discussing a morally conscientious agent who contributes regularly to the F.E.M. industry. At some point this agent will have spent as much money on F.E.M.s as they reasonably should. If they spend any more we would consider him to be a F.E.M. addict of sorts. Through piracy, this agent who has already made a supererogatory contribution to the F.E.M. industries would still have free access to the remaining F.E.M. This is physically more F.E.M. than he could experience in his lifetime. Created F.E.M. persists online and has the potential to continually increase the happiness of future generations and inspire future agents to create new F.E.M. (Waldfogel 2012, 93). The utility which free access to F.E.M.s generates is enormous when we take into account the amount of F.E.M. which exists and its potential positive effect on future generations. Thus, it would take considerable harm to outweigh this benefit.

4.3 Why the Analysis Sides With the Weak View

A purely consequentialist style analysis of costs and benefits predicts that acts of piracy for personal use are morally permissible, siding with the weak view of F.E.M. property. The benefits of a sampling method, free advertising, potential sales increase, the preservation of our F.E.M. culture and the limitless source of utility to agents simply outweigh the costs of damage to sales, job reduction and a minor danger of exposure to dangerous digital media. The only exception to this conclusion would be if agents all choosing to pirate could cripple their own source of F.E.M. through a collective harm. I accept that such an outcome is possible but deny that it is probable based on the many examples of free access F.E.M. that are still extremely profitable for their creators. This analysis has been speculative but its conclusions are sensible enough to be convincing. However this analysis should not be understood as an argument for the moral permissibility of piracy. Rather its conclusions are a product of the common weaknesses of a cost-benefit approach.

4.3.1 Some Weaknesses of a Cost-Benefit Approach

A cost-benefit analysis is essentially a utilitarian approach. Utilitarian approaches such as act consequentialism argues that acts are right if and only if they produce the best consequences (Jackson 1991, 466). The theory may be formulated as so. It is right for an

agent C to perform an act A if and only if no total state of affairs implied by the failure to perform A is better than those implied by A (Sosa 1993, 101). There are many different ways to approach the formulation of such an ethical theory. I could interpret ‘best consequences’ to mean an act which produces the least unhappiness rather than producing the most happiness (Sosa 1993, 117). I could also frame it as the conjunction of both. However it is framed, it quickly runs into the well-known problems of justifying harms with benefits, the demandedness objection, and harmless wrongs.

Acts such as murder which we normally consider to be wrong can be justified on a consequentialist approach by appealing to enough positive consequences to create an overall benefit (Jackson 1991, 467). The classic example of this in the literature is the story of Jim and the Indians. Jim arrives in town to discover that a general is about to execute 20 prisoners. The general notices Jim and explains to him that if Jim shoots one of the captives, he will let the remaining 19 go. As a good consequentialist Jim prefers 19 live agents to 20 dead agents so he ought to comply. However this conclusion runs counter intuitive to our moral intuitions. Even if Jim kills one person to save 19, it does not seem like the right thing to do.

In point of fact any moral theory which attempts to determine right and wrong by totalling up units will run into a similar problem. This counterexample can even be formalised as ‘to get an agent to do evil X threaten to do evil Y if they do not perform X where Y is slightly more evil than X’ (Gewirth 1918, 101). Let us imagine that I wish you to cook and eat a human. Then all I must do is threaten to cook and eat two humans if you do not cook and eat a single human. As a good consequentialist you prefer one dead human over two dead humans so you will comply. Regarding piracy the massive benefits produced by F.E.M.s will always trump the harms to sales. This indicates that we require a more careful analysis of piracy harms.

The demandedness objection works by pointing out that there is nearly always something better you could be doing with your resources to improve the amount of happiness in the world (Sosa 1993, 115-116 and Timmons 2002, 134). Imagine that you want to buy a coffee which costs \$3. That \$3 could produce far more happiness in starving children overseas which would improve overall utility so you should give that money to charity. Now just repeat the reasoning process until you have no money left in your bank account whatsoever. The ‘give until it hurts’ principle is a demanding one but with act consequentialism we have a ‘give until you are as destitute as the people you are giving to’ principle. For owners of F.E.M. circulating their intellectual property for free will always

produce better consequences than selling it to only a handful of people (Waldfogel 2012, 93) and so a great demand is placed on them to create ideas at their own expense. Such a conclusion suggests that we require a more careful analysis of harms.

Finally there is the problem of harmless (in the sense of no obvious hurt) wrongs. These are instances in which no person seems to be harmed and the total happiness in the world is increased but the act in question still very much feels like it is the wrong thing to do. As an example, imagine that an agent decides to view his neighbour undressing. Assume also that the neighbour will never find out, or be harmed by this action in any way and that this is a one-time action. Such an act arguably causes no harm and increases the total happiness in the world. But even if viewing your neighbour undressing without her knowledge does not harm her, it is still not right. This is an important problem for the piracy debate because despite the common theme of appeals to utility based principles in anti-piracy arguments (Himma 2008 p1152), piracy may be an instance of wrongs without damage. Even if acts of piracy do not actually damage sales, they are still immoral if they are instances of wrongful harms.

4.3.2 The Lesson of the Cost-Benefit Approach

Despite its prevalence in the literature, the key lesson to be drawn from the cost-benefit analysis is that such an approach is an inappropriate test for the moral permissibility of piracy. The analysis sides with the pro-piracy weak view but the conclusions are heavily affected by well-known problems with purely consequentialist analyses, namely the justification of costs via overall benefit and the demandedness objection. Such an analysis also overlooks the possibility of wrongful harms which can benefit agents without producing costs. This is not to say that a cost-benefit analysis has no value whatsoever, it may be useful but it ought to be a secondary concern once the questions of wrongful harms and the violation of justified property rights has been answered (Waldron 1989, 137). In the following sections I will ignore the overall benefits of piracy and focus on the harms. After I have provided sufficient evidence to establish what the actual harms of piracy are, I will discuss whether they are instances of wrongful harming.

4.4 What Are the Actual Harms Caused by Piracy?

Having the discussed the potential costs and benefits of piracy we will now focus purely on the actual harms appealing to the most recent empirical work available. I will consider harms to sales and argue that while it is difficult to determine what the exact

relationship between piracy and sales is, the academic literature is converging on the conclusion that piracy is causing harm to sales (Smith and Telang 2012, 18). Based on *Economic Consequences of Movie Piracy* (Ipsos and Oxford Economics 2011) and the most recent research from *Sycamore* (2013 and 2014) I will calculate a rough estimation of piracy sales harms. I will then consider the indirect harms to employment opportunities and incentives to create new F.E.M. I argue that piracy does not harm incentives to create new F.E.M. but that it does harm employment opportunities noting that this still leaves open the question of whether these are instances of wrongful harming.

4.4.1 Direct Harms: the Damage to Sales

The only way in which piracy can harm sales is if the agent's decision to pirate a F.E.M. changes the decision they would have made to purchase the F.E.M. if piracy were not an option (Waldfoegel 2012, 95). Imagine that Selina pirates *Sharknado* and watches it at home. She knows what the movie is about and has no interest in viewing it if it costs money. This act of piracy does not harm the sales of *Sharknado*. Alternatively imagine that she is curious enough about the movie that she wants to see it quite badly and would probably purchase it if she spots it for a cheap price. She decides to pirate it and after watching *Sharknado*, hates it and vows never to pay for it. Such an action does harm the sales of *Sharknado*. Even though the movie was not good enough to justify purchasing, if piracy were not around then Selina's curiosity would have tempted her to purchase a copy. Piracy can also harm sales in more subtle ways such as lowering an agent's curiosity and thus their motivation to purchase the F.E.M.

Because we are attempting to measure the counterfactual effects of agent's actions it makes it extremely difficult to determine what the actual harms to F.E.M. sales are. The economic studies on this subject produce interesting but conflicting results. One study finds that piracy has a more severe effect on digital goods which don't live up to their advertising hype (Chellappa & Shivendu 2005, 414). Another study finds that it has no effect on sales (Boyle 2008, 74). Still others find some sales loss due to piracy.⁷ To some extent the conflicting results can be explained by the differing empirical methods (Waldfoegel 2012, 96) but the set of economic results are beginning to converge on the conclusion that piracy does harm sales. The studies which find that piracy boosts sales have been subject to heavy methodological criticisms (Smith & Telang 2012, 8). The following studies (among others) have reported harms: 7.8% reduction of CD sales

⁷ See for example Chellappa and Shivendu 2005, 414, Chandra, Goel and Miesing 2010, 12, Khouja and Rajagopalam 2009, 372, and Zentner 2006, 86.

(Zentner 2006, 86), 20% reduction overall for purchases by American college students only (Rob & Waldfogel cited in Smith and Telang 2012, 11), 5% to 7.6% sales reduction (Hong 2004 & Michel 2006 cited in Smith and Telang 2012, 11), 42% reduction (Hui & Png 2003 quoted in Smith and Telang 2012, 11). These studies show that the debate is slowly shifting from whether piracy causes harms at all to a debate over how severe the harms caused by piracy actually are.

I will provide an estimate of the actual harms caused by piracy by combining data from the Ipsos (and Oxford economics 2011) with figures from the Australian Bureau of Statistics and the annual press release of the Motion Picture Distributor's Association of Australian (hereafter MPDAA). The Ipsos (and Oxford economics 2011) study on the impact of movie piracy on the Australian economy concluded that acts of piracy for personal use were responsible for \$575 million in harms to retail trade in Australia in the 2010 year ending in the third quarter (Ipsos and Oxford economics 2011, 3). The methodology of this study is precise and careful. Working from a survey of behaviour the authors were careful to only include damages to sales in instances in which the respondents indicated that they would have purchased F.E.M. only if they had been unable to pirate it (Ipsos and Oxford economics 2011, 7). The authors were also careful to apply a conservative multiplier to the lost sales figure to account for agents who claimed that they would have purchased legitimate copies of the F.E.M. without piracy but may have been 'over claiming' (Ipsos and Oxford economics 2011, 10).

I have only been able to identify one drawback in the methodology of this study. While the authors removed piracy which led to purchases from the calculation of lost revenue, they also did not add the purchases back in as a sales increase due to piracy. This is a mistake because a presentation on the economic consequences of piracy must also take into account beneficial consequences of piracy (Chandra, Goel and Miesing 2010, 9). Secondly, while the authors calculated the ripple effects of the damages, they did not calculate the ripple effects of the benefits. As an example, imagine that an agent pirates a copy of *The Fast and the Furious 4* but does not purchase a legitimate copy of it. However that same agent is now a fan of the franchise and will want to see *The Fast and the Furious 5* when it debuts in theatres. Such an action will appear in this study as a harm to sales when it should appear as either neutral or a benefit, if the agent is now committed to supporting future instalments of the franchise.

Putting aside the minor drawback, we can use the \$575 million to estimate the sales loss by comparing the direct harm to ticket sales to the total box office revenues for

Australia in 2010. Of the total harm to retail trade in 2010, \$167 million was to box office ticket sales (IPSOS & Oxford economics 2011, 5). Since the total box office revenue for Australia 2010 was \$1.128 billion (Flekser 2011) and without piracy it would have been \$1.295 billion it follows that ticket sales were 12.89% lower. But as I said this study did not factor the positive effects of piracy back into the harm calculation. 45% of participants in the study would have paid for the movie if piracy were not an option which translated to \$167 million of harms to box office sales. A further 32% pirated and subsequently saw the authorised version. If these instances of piracy caused agents to pay for authorised versions which they would have not otherwise have paid for then they are responsible for a positive effect of sales in the amount of \$118.75 million. Total harms to sales minus positive effects yields a net harm value of \$48.25 million which amounts to a reduction of around 4.1%.

It is highly unlikely that every instance of an agent pirating and then purchasing F.E.M. would have been an extra sale due to piracy since many of the participants would have been likely to take the gamble and purchase an authorised copy of the movie even if they had been unable to use piracy to determine the film's value. Thus the actual harm to sales caused by piracy is most likely somewhere in the range of 4.1% - 12.89%. For the sake of caution I will assume that the far right end of this range (12.89%) is the level of actual harm to sales. This is a more cautious assumption since it is more likely to exceed the actual level of harm. It safely exceeds the minor conclusions regarding harms to music sales without capturing the outliers such as the 42% reduction found by Hui & Png (2003 quoted in Smith and Telang 2012 p11). It is a safe estimation of the harms to the other F.E.M. industries since due to their single use nature movies are more vulnerable to piracy harms than music or television shows (Boyle 2008, 102). It is also in line with recent work on piracy harms. Danaher and Smith (2013) recently studied the effect of shutting down piracy websites on the film revenues. Megaupload.com was a site which allowed for transmission of huge volumes of pirated material (3). Danaher and Smith (2013) find that following its shutdown, digital revenues for three major motion picture studios rose by 6.5% - 8.5% (24).

In the interest of stacking the deck against myself, I have assumed that the 12.89% figure I have calculated is representative not only of ticket sales but also of other harms to other F.E.M. sales. I consider this to be a conservative assumption but I believe that it is better to err on the side of caution in this case since it can only strengthen the conclusions of this project. The total retail trade in Australia during the same period as the Ipsos (&

Oxford Economics 2011) was \$24.07 billion (A.B.S. September 2009 - August 2010). In relation to the total trade of Australia in 2010, the \$575 million harm to retail trade represented a 2.33% harm to sales. While this amount seems negligible, it has a much larger impact to the movie industry in relation to the industry specific retail figures and the numbers of forgone jobs.

The Oxford study finds that acts of piracy for personal use are responsible for 6,100 forgone jobs (IPSOS & Oxford economics 2011, 6). Combined with other ripple harms such as lowered incentive to create new intellectual property and lost tax revenue, the study concludes that acts of piracy for personal use are responsible for a total harm of \$1.37 billion. We can tentatively conclude that NZ is experiencing similar harms in terms of percentages to its retail trade. The research indicates that NZ has slightly higher rates of piracy than Australia (Sycamore 2014, 5) but my assumption of 12.89% lies at the far end of the range of likely harms and so is more likely to safely exceed the actual level of harms to sales in N.Z.

4.4.2 Difficulties with Identifying the Sales Damage

To highlight the problems with identifying piracy harms I will discuss American music sales as a case study. As sales of physical CDs have been around for much longer than DVDs, it will give us a clearer picture of how piracy is actually affecting the entertainment industry. Between 1999 and 2008 sales of physical CD's in the United States fell from 12.8 billion to 5.5 billion (Waldfogel 2012, 91). If this drop is entirely due to piracy of music as the recording industry claims then this is a significant harm. There is some anecdotal evidence that the industry may be right about lower sales due to piracy. When the popular file sharing site Napster was first released, CD sales fell first in areas closer to Universities (Zentner 2006, 67). Universities had two main properties, reliable limitless internet and large numbers of students who were discovering Napster. Thus CD sales dropped by more than 10% from 1997 to 2009 (Chen, Farn, Wang and Yang 2009) but concert revenue increased during the same period (Waldfogel 2012, 106).

The two main difficulties with identifying piracy harms by looking at the sales drop in the music industry are that the sales may have just shifted to other markets (Zentner 2006, 85) and it is likely that much of piracy would not have been purchases otherwise (Waldfogel 2012, 95). Regarding a market sales shift, it is true that for the American music industry physical sales went from 7.5 billion in 1990 to 14.6 billion in 1999 to 8.5 billion in 2008 (Chandra, Goel & Miesing 2010, 6). But massive outbreaks of music file sharing

sites were not the only thing that happened post 1999. In the same time period there was both a DVD market which emerged and a rapidly developing video games industry. These industries exploded out of nowhere bringing in huge amounts of sales. Some consumers may have very well shifted their money to purchasing DVDs (Zentner 2006, 85) or to the video game industry which increased in worth from 48 billion in 2008 to 68 billion in 2012 (Chandra, Goel & Paul 2010, 25). In 2013 the release of *Grand Theft Auto V* outsold the entire music industry, reaching one billion in sales within 3 days (Bleeker 2013).

It is a dramatic presumption to assume that the initial spike in music sales predicted how those sales would continue to rise or at least the minimum level they would hold to. The tip of the sales spike may indicate the end of a natural golden age of music sales rather than the vengeful wrath of piracy. As we can see on figure one from Zentner (2006, 64) sales of physical music

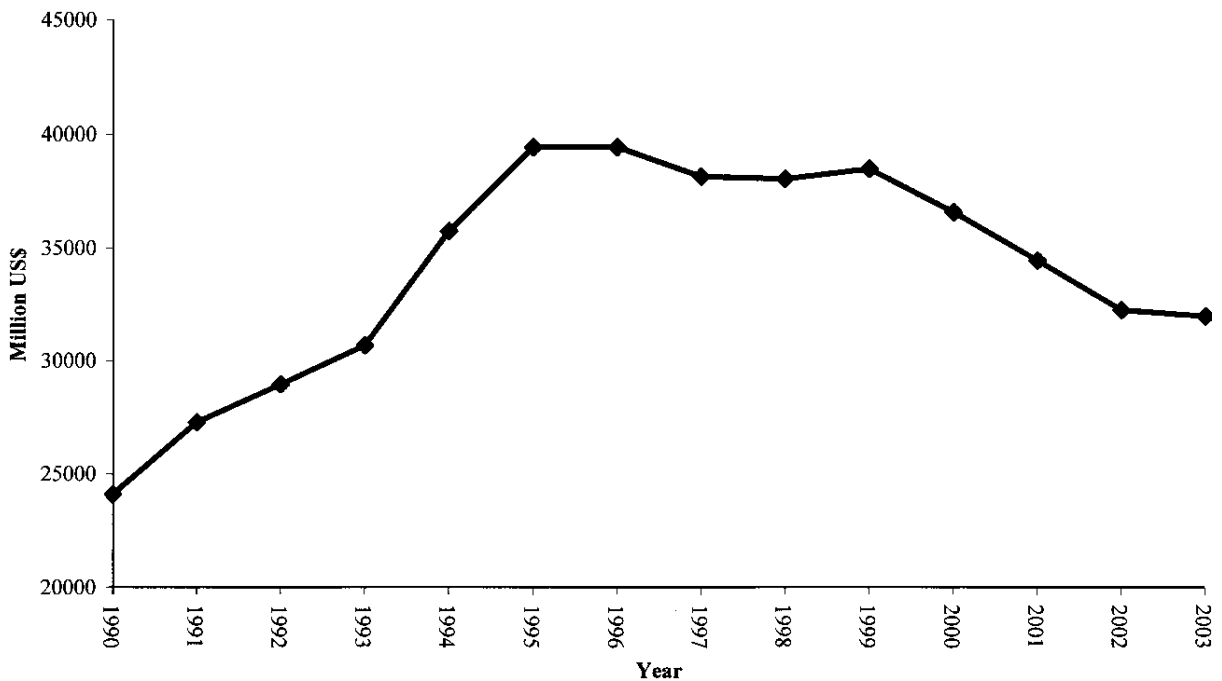


Figure One: Global Sales of Physical CDs

have fallen but good reasons are required to justify the claim that they would have continued that way without piracy.

An equally plausible explanation is that the sales have shifted to other F.E.M. industries. This figure from (Smith and Telang 2012, 14) shows that when we take other F.E.M. expenditures into account in figure two, sales have only increased in the period of 1995-2004.

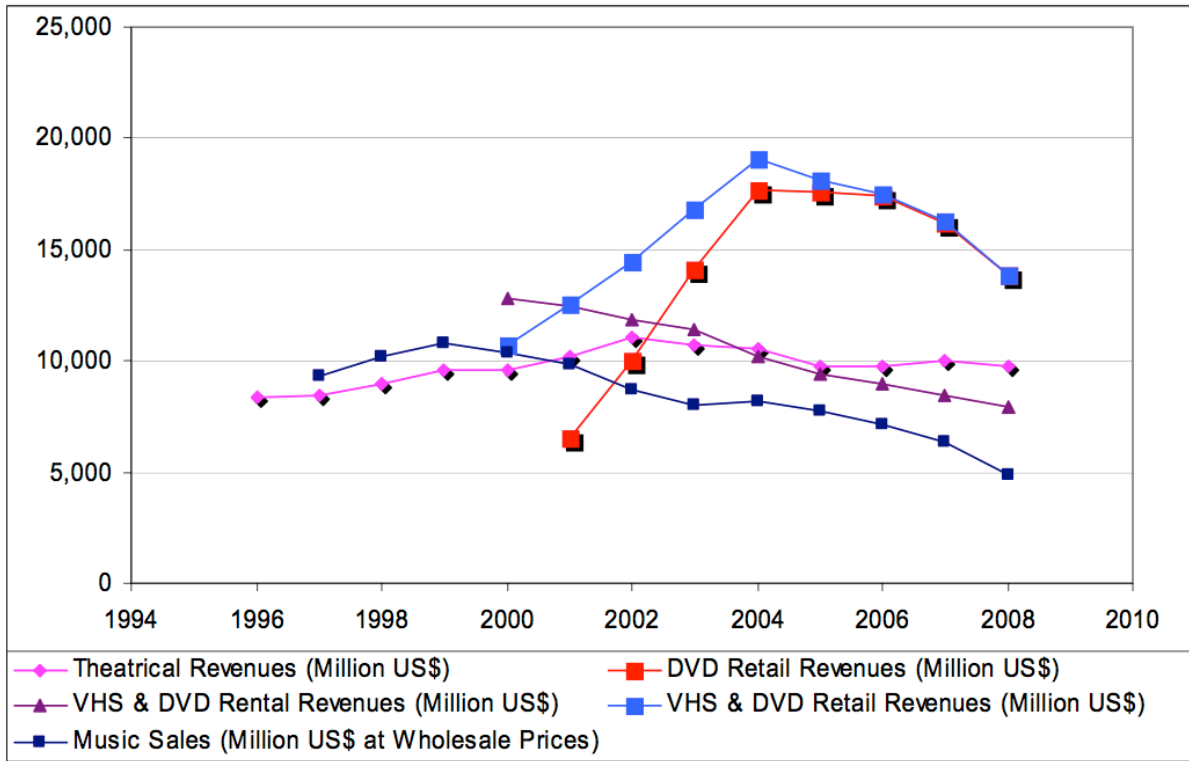


Figure Two: DVD and CD Sales in the United States

The sales do begin to lower after 2004 but figure two does not show the revenues from the video game industry, these are taken into account on figure three.

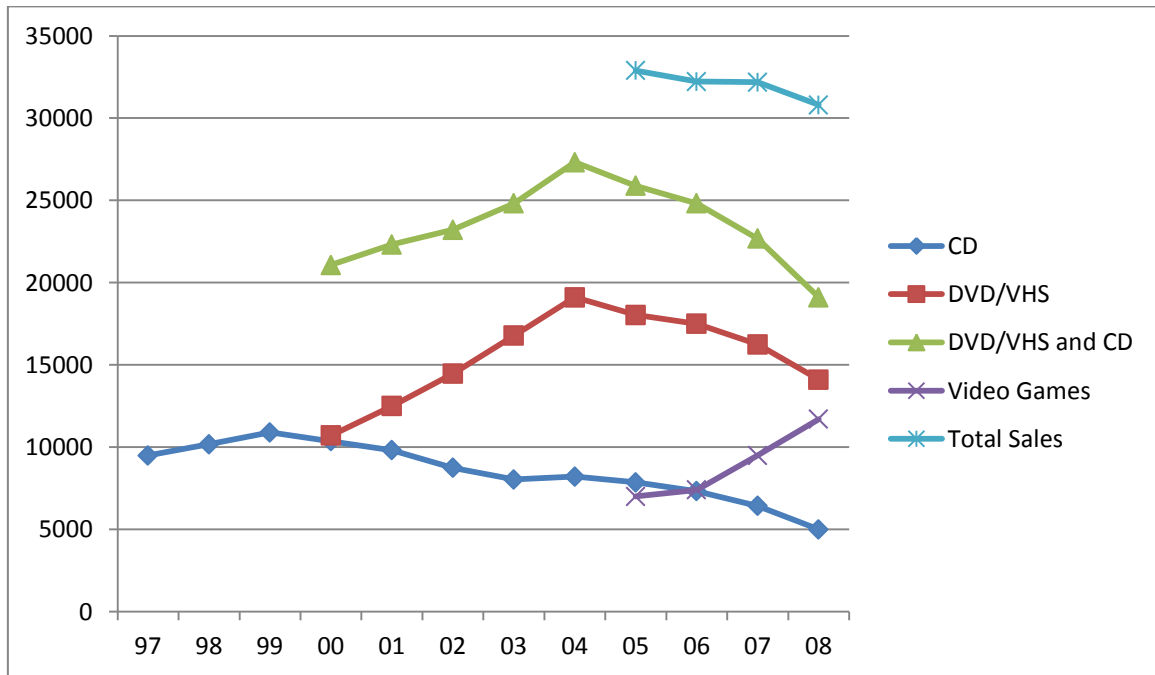


Figure Three: Sales of F.E.M. Instantiations in the United States 1997-2008

In 2008 sales from the video game industry in the US were roughly \$11.7 billion (Siwek 2010, 3) putting total US sales of F.E.M. instantiations in that year at close to \$31 billion. This indicates that total F.E.M. expenditure has only increased so it seems sensible to conclude from these figures that while piracy is most likely responsible for some sales loss, it is not entirely responsible for the dramatic decrease in music sales.

The F.E.M. industries counter this point by arguing that although goods such as movies and video games are experiencing sales increases, they are still experiencing massive losses due to piracy. Sales would be even higher if piracy were not occurring. The industry claims losses of around \$22 billion over the games, movies and music industries combined in non U.S. markets alone (Chellapa, Shivendu 2005, 400). There is something suspiciously ad hoc about this reply. No matter how high sales get the industry can always claim that it would have been higher without piracy. The response is also suspect because of its size. Losses of \$22 billion imply that without piracy the industry sales would have been \$52.81 billion which is 71.4% higher than the actual sales of \$30.81 billion.

The problem at hand is that we have two possible explanations for an empirical observation that we need to choose between. We can argue that the sales have gone to other industries, are lost to piracy or some combination of both. I believe that the preferred explanation is best determined by the size of the sales loss. It is plausible to argue that piracy has caused a loss to sales but less plausible to argue that it is entirely responsible for a \$22 billion sales loss. At least part of this must be due to competition among the entertainment industries.

There are other complicating factors that make identifying the actual figure of sales harm difficult to identify. Claims about losses due to piracy assume that piracy occurs instead of purchasing (Waldfogel 2012, 95) and the non-rivalrous nature of F.E.M. as an experience good mean that piracy has the potential to increase sales through sampling methods (Chellappa & Shivendu 2005, 413). Consequently piracy creates an explosion of free advertising which may have a positive effect on sales (Chandra, Goel and Miesing 2010, 9). In support of this claim is the observation that revenue from concerts went up after the release of Napster (Waldfogel 2012, 106). The best explanation of this observation is that Napster increased product awareness in the marketplace for no cost to the music industry. Since advertising and promotions are extremely expensive, piracy not only has the potential to save the industry money but also to boost record sales through exposure.

Despite the difficulties with determining the exact relationship between piracy and sales, a general picture is emerging in the literature. Piracy is responsible for some harm to sales but is not solely responsible for the sales drop in music and movies. Based on the IPSOS (and Oxford economics 2011) study I was able to calculate a rough estimate of the harm to sales that piracy causes. I calculated that the actual harm level lay somewhere in the range of 4.1% - 12.89% and then assumed the far right end of that range for the sake of argument. This is the percentage that piracy reduces F.E.M. sales and while it is not as large a figure as the \$22 billion loss claimed by the F.E.M. industry it is still a serious and avoidable harm. This harm forms a *prima facie* justification for the moral impermissibility of piracy. Arguing that acts of piracy for personal use are morally impermissible will now require arguing that piracy can be undertaken without contributing to this collective harm.

4.4.3 Indirect Harms: Damage to Employment and Incentives

The F.E.M. industry claims that the strong view of F.E.M. property is necessary to protect the industry. Direct harms to sales have an indirect harm to employment. “. . . this theft has hurt the music community, with thousands of layoffs, songwriters out of work and new artists having a harder time getting signed and breaking into the business.” (Recording Industry Association of America quoted in Waldfoegel 2012, 92). Thus the strong view of F.E.M. property is justified to protect a vulnerable industry. Harms to employment opportunities are contingent on two main factors, the direct harm to sales and how F.E.M. profit is distributed. Presuming that F.E.M. owners reinvest their profits into new F.E.M.s and the results of the Ipsos study are correct then in 2010 piracy caused the loss of 6,100 full time equivalent jobs in Australia (Ipsos & Oxford economics 2011, 6). This is based on harms to all instances of the movie industry rather than just to movie ticket sales. As I noted earlier, the study does not take into account positive effects on sales by piracy so the actual job loss figure is likely to be much lower than this. Even if it were only a third the size, this still represents a serious level of harm. While serious it has not yet been demonstrated that this harm is an instance of wrongful harming such as harms by theft or a merely instrumental harm such as the sales damage to music stores caused by supermarkets selling CDs (Zentner 2006, 69). That will be discussed in section 4.5.

The F.E.M. industry claims that direct harms to sales also have an indirect harm to incentives to create new F.E.M.s. The current F.E.M. system is a lottery which rewards the first person to create an idea (Moore 2002-2003, 617). Since the financial rewards of this system are potentially quite vast, agents are highly motivated to create F.E.M. of a high

quality. The industry argues that less financial rewards means less incentives to create (Waldfoegel 2012 p92).

“Infringement of IP by those who do not have ownership rights is a global phenomenon: it is on a scale which is seriously undermining the profitability and competitiveness of many high-tech companies. Piracy and patent infringement subvert the incentives which are at the heart of a knowledge-based economy. In so doing, they erode and distort the basis for trade both in intellectual property itself and the trade and investment that flows from it.” (Kinsella and McBrierty 1998, 61)

This argument seems fairly plausible. If we want the best digital products then we should motivate as many talented people to create them as possible. With as many people in the world as there are, an instance of intellectual property like *Game of Thrones* has the potential to make somebody a millionaire.

4.4.4 Why Appealing to Loss of Incentives Fails

This loss of incentives argument suffers in two places. Firstly the loss of incentives argument relies on the loss of sales argument to work. If piracy is *not* causing significant harm to sales then it is also *not* causing significant harm to incentives to create new F.E.M.s. For the sake of argument I have assumed a 12.89% loss of sales. Even with this assumption it is extremely difficult to make the loss of incentives argument work. In the week 1/5/2014 to 7/5/2014 *The Lego Movie* made \$661,387 at the NZ box office (MPDANZ 2014). It is difficult to convincingly argue that the agents are less incentivised to create new F.E.M. because *The Lego Movie* only made \$661,387 in a single week instead of \$759,255.

The strong view of F.E.M. property creates a lottery style reward system (Moore 2002-2003, 617). To say that piracy will destroy incentives to create new intellectual property is akin to saying that people will stop buying lottery tickets if the jackpot is reduced by 12.89%. I consider such an outcome to be possible but highly improbable. It is highly likely that some creators create for purely financial reasons. Many movie studios and record companies judge F.E.M.s as an investment and are less likely to invest in them if they believe that they will be unprofitable. Despite this, incentives are maintained because no individual F.E.M. wins the profit pool. They win a slice of the profitability pool and even if the total profitability pool was 40% lower than without piracy, investors are no less motivated to get as large a cut of that pool as possible because a larger slice of the reduced pool can still exceed a small slice of a larger pool.

The other place in which the loss of incentives argument suffers is a point made by Waldfogel (2012, 104), that the supply of new music has not been decreasing. According to the industry, the lowered incentives caused by piracy correlate with a lower supply of F.E.M but the supply of labels, albums, music and video games is as strong as ever. This is strong evidence that incentives to create F.E.M. have not decreased. Rather it is likely that the argument is conflating necessary and sufficient causes. Vast monetary rewards are *sufficient* to incentivise F.E.M. creation but they are not *necessary* because the strongest possible incentives to create are not achieved by purely financial motivations (Yung 2009, 51). The strongest motivation to create lies in the hands of the people who are passionate about their work as a form of art. This is why roughly 273,000 working musicians in the USA continue to make music despite averaging 30,000 a year (Courtney Love quoted in Halbert 2005, 79). It is also why so many young directors every year are prepared to take on student loans for the sake of studying directing at university, knowing full well how difficult it is to break into the industry and that they are highly unlikely to earn anything like as much money as Peter Jackson.

The incentives argument is meant to be a justification of intellectual property rights but it is also self-undermining. Strong intellectual property rights stifle creativity by slowing down the free exchange of information (Liebeskind 2001, 50). One of the reasons which we grant intellectual property rights is to incentivise agents to come up with ideas. Intellectual property rights protect the owner by restricting the information flow. But restricting the information flow hampers creativity. There is anecdotal evidence for this in other industries such as American academia. In 1970 the U.S. congress passed a bill which allowed for the patenting of academic discoveries. Since then academics have become significantly more cautious about who they share their ideas with (Nelkin 1982, 705).

Another intellectual property industry providing anecdotal evidence to the contrary of the assumptions in the incentives argument is the database industry. Compiling endless amounts of data in an organised manner is time consuming work so in 1996 Europe adopted a database directive which protected databases under copyright. In America the Supreme Court had already ruled that databases were not copyrightable (Boyle 2008, 207). In the three years following the adoption of the database directive the British database industry increased by roughly 200 databases, France experienced negligible change, Germany increased by 300 databases and then decreased by 200 and America's industry increased by 900 databases (Boyle 2008, 211). Without out any protection via intellectual

property rights America's database industry increased by 650% more than any other country.

I find the loss of incentives argument to be completely unconvincing. It overlooks other sufficient causes for incentives and incorrectly assumes that motivations to purchase tickets in a lottery system swiftly fall away as the jackpot decreases. Furthermore it undermines itself since the strong view of F.E.M. property which protects financial incentives to create also hampers the information flow and makes it more difficult to create. We also have considerable evidence that intellectual property produced without the monopoly style lottery system is of equivalent quality and just as profitable as its monopoly style equivalent. On occasion the quality is superior to traditional software as in the open source computer programmes Google Chrome, Mozilla Firefox and the Linux operating system. Between the faulty assumptions of the loss of incentives argument and the empirical evidence to the contrary, we have little reason to be convinced by it. Instead we will now focus on whether the direct harms to sales and indirect harms to employment opportunities are instances of wrongful harming or not.

4.5 Are Piracy Harms Ethically Justifiable?

Having established that piracy is responsible for a 12.89% decrease in sales and indirect harms to employment opportunities, I must now establish if these are instances of wrongful harming or merely instrumental harms such as sales damage caused by normal industry competition. To this end I will discuss the harm concept and introduce the distinction between intrinsic and instrumental harm before explaining what a wrongful harm is. I then explore the relationship between wrongful harming and moral rights and conclude that the status of piracy harms will be determined by the rights focused analysis presented in chapter five.

4.5.1 Types of Harms and the Relationship Between Moral Rights and Wrongful Harm

The common understanding of 'harm' conjures up images of bruised arms, vandalised cars and stolen property. In fact we need a far more nuanced understanding of harm to adequately answer the thought experiments in the literature. If a parent takes a child outside to exercise then the child may be harmed but in no way that we consider to be morally impermissible (Feinberg 1984, 32). If an agent passes away but their final will is ignored and their money stolen, then despite the fact that they are no longer living we claim that they were posthumously harmed (83). If a pauper steals a penny from Bill Gates

then Gates has still been harmed by the action, even if it does not inconvenience Gates in the slightest. The violation of an agent's consent harms them even if they are never aware of or affected by the violation. The solution to these puzzles is to cease understanding 'harm' as a physical inconvenience to an agent and begin to understand it as a setback of the agent's interests (33). This is a necessary condition rather than sufficient one since we frequently setback other people's interests in simple ways such as declining their invitation to dinner. The sufficient condition is that the setback be serious and avoidable (12).

There is an important difference between merely instrumental harms and intrinsic harms. *Instrumental harms* are harms which are morally permissible in service of a greater goal. The harms to sales caused by industry competition are harms but they are morally permissible and serve the greater goal of a free and competitive market. Thus they are *merely instrumental harms*. *Intrinsic harms* are harms which are intrinsically wrong in virtue of the very nature of the act (Timmons 2002, 8-9). This implies that such acts are morally impermissible regardless of the effects they have. Imagine that I hack into your bank account and transfer money out only to instantly transfer money including interest back in. The overall effect is positive since you now have more money in your bank account than you did before but clearly what I did was still wrong because it is intrinsically wrong to take your ordinary property without your consent.

This distinction matters for the piracy dispute because it is not clear if piracy harms are merely instrumental or intrinsically wrong. If they are only instrumental then it is permissible to pirate for the purposes of sampling to determine if you should purchase it but if piracy is intrinsically harmful then no agent may ever access F.E.M. without the owner's consent. It is not clear how best to determine if a harm is intrinsically wrongful but I will use the account offered by Feinberg (1984); A wrongfully harms B if and only if.

- 1) A acts (including acts of omission)
- 2) in a manner which is defective or faulty in respect to the risks it creates to B, that is, with the intention of producing the consequences for B that follow or similarly adverse ones, or with negligence or recklessness in respect to those consequences; and
- 3) A's acting in that manner is morally indefensible, that is neither excusable nor justifiable; and
- 4) A's action is the cause of a setback to B's interests, which is also
- 5) a violation of B's rights. (105-106)

An act must satisfy all five conditions to be considered an instance of wrongful harming. Acts of piracy trivially satisfy condition 1) and since I have now established that piracy is responsible for a collective harm to sales we can safely conclude that such acts also satisfy condition 2). It is also beyond dispute that acts of piracy set back the owner's interests.

While some F.E.M. owners such as Matt Stone and Trey Parker take little issue with the pirating of their property (Parker and Stone 2006, disc two), others have taken serious issue with it “It is . . . sickening to know that our art is being traded like a commodity rather than the art that it is.” (Lars Ulrich quoted in Halbert 2005, 78). So acts of piracy for personal use also satisfy condition 4). We can collapse condition 3) into condition 5) because the *violation* of a right is the morally inexcusable infringement of a right (Gewirth, 92 in Waldron 1984).

A further consideration is of which kind of right Feinberg (1984) is referring to. It is clear that acts of piracy for personal use infringe on legal rights but this project is not engaging with such rights. Furthermore such a strategy would be circular because anti-piracy legal rights would be justified by their prevention of wrongful harms and the harms would be wrongful because they violated legal rights (111). It seems that the question of whether piracy harms are intrinsically wrong or merely instrumental will be determined by the nature of the rights in the F.E.M. property bundle. If the bundle contains morally justified exclusionary rights over experience as the strong view argues then piracy harms are intrinsically wrong. If such rights are not morally justified, then the harms caused by piracy are merely instrumental. This question will have to be answered in the rights focused analysis of piracy provided in chapter five.

4.6 The Himma Objection: Consequences Can be Trumped

Himma’s (2008) argument against piracy that considerations of harm in the piracy debate are trumped by the rights of the author. Himma’s argument may be summarised as follows; we have strong arguments from utility both for and against the moral permissibility of illegal downloading which are well documented in the literature. But these arguments overlook the important rights angle (Himma 2008, 1152). This is crucial since rights frequently trump consequences (Dworkin 1981, 153). Even if we could demonstrate that piracy is not harming sales, it will count for naught if moral exclusionary rights trump the positive outcomes of piracy (Himma 2008, 1152). In such a case acts of piracy for personal use will remain morally impermissible because the positive consequences of getting F.E.M.s for free could never outweigh the moral rights of the author to exclude whomever they choose from experiencing the F.E.M.

4.6.1 Reply to Himma: the Trump Stops Here

Himma’s (2008) argument relies on two key assumptions to work. It requires that the F.E.M. property bundle includes moral exclusionary rights over experience and that the

trumping power of such rights is sufficient to overthrow the positive benefits of piracy. I will address the plausibility of moral exclusionary rights in the next chapter. For now I will briefly discuss the natural limitations of the trumping power of moral rights.

The trumping value of rights has an ethical limitation to it. The more obvious consequentialist based counter examples rely on extreme consequences to restrict the trumping value of the right. Himma (2008) acknowledges this problem and accepts it. “The interests that content creators have in the content they create (or discover) outweigh the interests of other persons in all cases not involving content that is necessary for human beings to survive, thrive, or flourish in certain important ways.” (1160). obviously, if pirating a copy of *The Dark Knight Rises* is necessary to save your life then you should do it! This example shows us that the trumping power of a moral right is not limitless. Even a right as basic as the natural right to life has counterexamples such as the acts of killing in war or self-defence (Gewirth 1981, 91).

Despite the existence of some limitations, the trumping power of a moral right is extremely powerful. It is strong enough that Waldron (1981, 124) has argued that moral rights entail a right to do wrong. If we take rights seriously then a wealthy agent may waste all their money on horses and champagne instead of doing something productive with it (Waldron 1981, 107), the discoverer of a cure for cancer may destroy it without ever releasing it, and if an agent owns a lost work of art they are entitled to destroy it rather than release it to the community (Raz 1982, 197). These examples show us that while the trumping power of a moral right is not limitless, it is still more than powerful enough to trump even large scale positive consequences (Scanlon 1977, 137). Despite the massive amount of utility produced by acts of piracy, the trumping power of moral exclusionary rights over experience are powerful enough to make acts of piracy for personal use morally impermissible but it still remains to be seen if the F.E.M. property bundle includes such a right. In the next section I will draw together the important implications of this harm focused analysis of piracy for the master argument against piracy.

4.7 What This Analysis Tells Us About the Moral Permissibility of Piracy

This harm focused analysis of piracy tells us that acts of piracy which contribute to collective harms to the industry are morally impermissible. A cost-benefit analysis found in favour of the weak view of F.E.M. property but I argued that it was an inappropriate analysis because it allowed serious harms to be justified by serious benefits and

overlooked the possibility that piracy harms are instances of wrongful harming. A more careful harm focused analysis found that piracy is most likely causing some direct harm to sales and indirect harm to employment opportunity but no harm to incentives to create new F.E.M. I then argued that the question of whether these are instances of wrongful harming will be settled by the rights analysis in the next chapter. However based on my conservative assumption that acts of piracy have caused a 12.89% drop in F.E.M. sales, I concluded that piracy is causing a serious and avoidable harm. This means that premise three of the master argument against piracy is true for some instances of piracy. The goal is now to determine which acts of piracy are contributing to collective harms to the industry and whether the remaining harmless acts of piracy are morally permissible. Achieving this goal requires that I first respond to Himma's (2008) objection that considerations of harm overlook the more important angle of rights. With this in mind, the next chapter will provide a rights focused analysis in response to Himma's argument and the master argument against piracy presented in chapter three.

A RIGHTS FOCUSED ANALYSIS OF PIRACY

5.1 How This Rights Focused Analysis Will Proceed

In the last chapter I provided an ethical analysis of piracy focusing on the important issue of harms. In this chapter I will provide an ethical analysis of piracy focusing on the question of whether acts of piracy for personal use violate justified property rights in response to premise three of the master argument against piracy that ‘the act of piracy produces significant harm or violates justified property rights’. After explaining the technical machinery of rights this analysis will proceed by discussing the exclusionary right over experience as a moral right then as a special right justified by the utility it produces. The discussion will begin with the question of moral rights because they provide the strongest possible trump of consequences. A moral right to exclude agents from accessing F.E.M. will trump consequentialist considerations in all situations except for those in which access is necessary for the agent’s survival (Himma 2008, 1160). To this end I will present four moral rights which are too powerful to be plausible and argue that they are implied by strong moral exclusionary rights over F.E.M. experience. Via *modus tollens* I argue that the strong version of such a right is implausible before arguing that the weak version of such a right is also implausible as a moral right. I then reconsider the exclusionary right over F.E.M. experience as a special right justified by how it benefits society, concluding that the strong version of such a right fails a cost-benefit analysis but the weak version passes. I will conclude that acts of piracy for personal use do not violate moral property rights or special rights provided that they are not contributing to negative consequences.

5.2 The Technical Machinery of Rights

Here we begin by setting out some philosophical machinery regarding rights. It is rather tricky to give an exact definition of a right without describing it in terms of duty or appealing to consequences. In this project I will use the formulation provided by H.L.A. Hart (1955, 77).

In the absence of certain special conditions which are consistent with the right being an equal right, any human adult being capable of choice (1) has the right to forbearance on the part of all others from the use of coercion or restraint against him save to hinder coercion or restraint and (2) is at liberty to do (i.e. is under no obligation to abstain from) any action which is not one coercing or restraining or designed to injure other persons.

This formulation is a precise and way of expressing that if I have a right to X then I am entitled to do X and other agents have a correlating duty not to interfere. The definition

generates trouble if rights clash with one another.⁸ An example makes this clearer. Let us say that Jervis has the right to be free. He has the right to liberty and the rest of the world has a correlating duty not to interfere with that liberty. Now let us imagine that Jervis wishes to use his liberty to murder people. In this circumstance we are immune from our normal obligation not to interfere with his liberty because there is an exceptional justification. Jervis lacks the right to express his rights in a manner which violate other people's rights because his right to liberty correlates with a duty he has not to interfere with other people's liberty (Raz 1982, 183).

There are four different types of rights: privileges, claims, powers and immunities which all correlate with various duties.⁹ A *privilege* right is a right to perform an action which correlates with a duty people have not to interfere with it. If you own a car then you have a privilege right to drive it. A *claim* right is a right that a person not perform an action against you. I have a claim right that my high school English teacher never strike me during the four years it took me to learn how to use a possessive apostrophe correctly. These are first order rights; the second order rights grant rights to alter the first order rights. A *power* is the right to alter a person's privileges. A judge has the power to deny a person's freedom privileges by imprisoning them. An *immunity* offers protection against claim rights. A police officer has immunity from a person's claim right that no person detain them if they are drunk and disorderly. Claims and immunities are passive rights. Privileges and powers are active rights and come in single or paired forms. A single privilege is a right to perform an action coupled with an obligation to perform it. A police officer has the legal right to arrest you for murder and is legally obliged to do so. A paired privilege is the right to perform an action without any obligation to perform the action. I have the right to watch movies without an obligation to watch them (Wenar 2005, 226).

In this chapter we are primarily interested in whether the F.E.M. property bundle includes a claim exclusionary right over experience of the owned F.E.M. and whether its correlating duty is morally justified. Not all instances of failing to perform the correlating duty for a right are morally impermissible. If the correlating duty of a right is carried out then the right has been *fulfilled*. If the correlating duty has not been carried out then the right has been *infringed* upon. If the infringement was justified then the right was *overridden* but if the infringement was not justified then the right was *violated* (Gewirth

⁸ This is a feature of rights unique to interest theorists rather than will theorists. For more on the differences between the two see Wenar, *The Nature of Rights*, 2005.

⁹ It is not clear if all rights correlate with duties. For a discussion of this see Hart 1955, 80-81.

1981, 92). Let us imagine Barbara and Harvey are both walking down the street. Both of these people have the right to life including a claim right that they not be killed. If they walk past each other without killing each other then they have performed the duty which correlates each other's rights. But let us imagine that they were members of clashing factions trying to kill each other in a war. If Barbara kills Harvey in self-defence then she has overridden Harvey's rights. Alternatively, if there is no war and Harvey murders Barbara for fun then he has violated Barbara's rights.

There are a great range of rights, some of which are more easily overridden than others. When we think of rights we can summon a plethora of examples ranging from the right to life to the right to believe and worship as we see fit. As such we need a framework to distinguish between types of rights and the power of their correlating duties. We may think of rights as *special* if and only if they are rights brought about by arrangements between two parties (Hart 1955, 84). If I agree to pay my friend \$50 for his limited edition batman comic then he has a special right to receive the money for it and I have a special correlative duty to fulfil my promise. *General rights* may be thought of as the common rights we all share in the absence of special rights (87). These are rights such as the right to religious affiliations, to have a family and raise children, to sleep with other consenting adults and so forth. *Legal Rights* are rights which are conferred by the law and *moral rights* are rights which agents are morally entitled regardless of the contingent state of our laws (Feinberg 1984, 110). No matter what the laws are, you have a moral right to life. Sections 5.3-5.5 will focus on whether a claim exclusionary right over F.E.M. experience is best understood as a moral right or special right which is justified by the utility it produces.

5.2.1 Why Copyrights Will Not be discussed

It may seem unusual to the reader that in a project which is so focused on the ethical issue of piracy, I have made such rare mention of copyrights. While copyrights frequently appear in discussions of piracy, I believe that such discussion is a trip wire which slows the debate from progressing. This occurs because the nature of digital media invites multiple counterexamples. Say that the musicians in the band *Linkin Park* exercise their legal right to exclude agents from copying their music. A clever agent could point out that while it is an authorised source, watching their latest music video through YouTube creates a temporary copy because it is streamed (Davis 2008-2009, 372). Thus the agent soberly concludes that not *all copying* violates copyrights and the law may be incoherent.

Such debate is beside the point but inevitable whenever we discuss copyrights because we are beset by philosophical problems about copies created by authorised streaming (Boyle 2008, 51), whether it is within the moral rights of an agent to transfer their legally purchased copy between devices, how we can distinguish between copies and the original in an age in which digital copies are identical to their originals (McGrail & McGrail 2010 p72), whether temporary copies created by R.A.M. are permissible (Davis 2008-2009, 372), and if it is even possible to use the internet without violating copyright (Jones 1998, 60).

Such distractions should and can be avoided if we restrict our talk to the more basic right of experience. In truth any interest which a rational agent has in the reproduction of their F.E.M. is likely to serve an ulterior interest in *what is done with those copies*. Imagine that I set up my printer to constantly print off copies of *Harry Potter and the Half Blood Prince* but the copies flow out of my printer onto a conveyer belt which promptly drops them into a large fire for the purpose of heating my home. No sensible agent would be justifiably upset that I am violating their copyrights in this thought experiment. The interest which an agent has in what is done with F.E.M. reproductions is an ulterior one because it is served by other interests such as copyright (Feinberg 1984, 42). For this reason it is better for this project to focus on the ulterior interest and the question of what consumers are entitled to do with F.E.M. instantiations. A right of experience captures this interest perfectly and we can avoid a rather large set of unnecessary philosophical problems if we focus on experience rights.

5.3 Why the F.E.M. Property Bundle Does Not Include Strong Moral Rights of Exclusion Over Experience

In this section I will argue that the maximum defensible commitment to a set of moral F.E.M. ownership rights cannot include strong moral exclusionary rights over experience. Beginning with the logically strongest set of moral ownership rights I will discuss four rights which are highly unintuitive as moral rights and argue that they follow directly from strong moral exclusionary rights over experience. Once I have demonstrated that the F.E.M. property bundle does not include strong moral exclusionary rights over experience, I will argue that it is unlikely to include partial versions of the above rights. I will argue that it is unlikely that such partial exclusionary rights over experiences are instances of moral rights because they share more features in common with special rights justified by consequences than with the typical features of moral rights.

5.3.1 The Unintuitive Implications of Strong Ownership Rights

In this section I will argue that a logically strongest set of moral ownership rights generates unintuitive and obviously false claims about moral rights. Since these implications can be avoided if the F.E.M. property bundle does not include strong exclusionary claim rights over experience I argue that we ought to believe that the F.E.M. property bundle does not include such rights. I will discuss four moral rights which are too powerful to be plausible: the right to lock up film culture, the right to prevent private property, the right to prevent derivative works on the grounds of offense, and the right to conceal the value of the F.E.M. from the consumer. Because these examples rely heavily on intuitions I offer four so that at least one or two are likely to strike the reader as highly unintuitive. These examples highlight unintuitive outcomes of our current F.E.M. property system but should not be understood as a conflation of moral and *de facto* legal rights. If the F.E.M. property bundle includes strong moral exclusionary rights then the *de facto* state of our F.E.M. system is justified by those moral rights. By pointing out that the *de facto* state of our F.E.M. system is too powerful to be plausible, I hope to show that any strong exclusionary rights over experience in the F.E.M. property bundle cannot be instances of moral rights.

A Right to Lock Up Film Culture

A logically strongest set of F.E.M. property rights justifies a moral right of a small percentage of the population to lock up the majority of 20th and 21st century film culture.

Argument from the Imprisonment of Culture

- 1) F.E.M. property ownership consists of the logically strongest set of full moral rights.
- 2) A logically strongest set of F.E.M. property rights includes full moral exclusionary claim rights over experience.
- 3) The F.E.M. property rights over the 21st century film culture are possessed by a small percentage of the population.

Therefore: That small percentage of the population has the right to exclude the rest of the population from the majority of the 20th and 21st century film culture.

The conclusion of this argument is not an unlikely possibility. It has nearly happened. If the reader wishes to visit the American library of congress website at

<http://catalog.loc.gov/>, they will find that nearly 95% of the films there are un-viewable due to copyright concerns (Boyle 2008, 10). Some of these films are orphan works.

‘Orphan Work’ refers to a F.E.M. whose owner cannot be located to give consent to share

the film (Boyle 2008, 9). However such films cannot be shown because exclusionary rights require explicit consent. The owner must be contacted and consent must be given.

Copyright is a collection of legal rights rather than a moral one (Posner 2002, 5) but we should remember that if the F.E.M. property bundle includes full moral exclusionary rights then the current copyright system is also expressing moral rights. If we wish to reject that the current copyright system can be understood as reflective of moral F.E.M. property rights then we should also reject that the F.E.M. property bundle contains strong moral exclusionary rights over experience. As a moral right, the right of a small portion of the population to exclude the rest of the population from their own film culture is too powerful to be plausible.

A Right to Prevent Private Property

The second intuitively false implication of a logically strongest set of full moral F.E.M. property rights is a moral right to prevent agents from possessing instantiations of F.E.M. as private property. In section 2.5.2 I quoted a common copyright statement which listed an exhaustive set of limitations on the consumer's rights. Now consider the following argument.

Argument from the lack of Private Property

- 1) F.E.M. property ownership consists of the logically strongest set of moral property rights.
- 2) To own an object privately is to possess a combination of sufficiently many rights of the logically strongest ownership set: the right of use and to exclude others from use, the right of compensation if someone uses it without permission, enforcement rights over this set of rights, the right to transfer this set of rights, and immunities to non-consensual loss of this set of rights (Vallentyne 2012, section 1).
- 3) The only right which an agent possesses over an instantiation of F.E.M. is an extremely restricted right of use.
- 4) A single extremely restricted experience right over an object is not sufficient to count as an instance of private ownership.

Therefore: Instantiations of F.E.M are not instances of private property.

The argument is valid: premise 1) is the assumption in question; premise 2) is the definition of property which we have been operating with for this whole project, premise

3) follows from the copyright notice on the start of practically every DVD and premise 4) requires some justification.

I assert the truth of premise 4) on pain of accepting that there is no difference between borrowing and owning an object. Ownership consists of some combination of the logically strongest set of property rights (Vallentyne 2012, section 1). However a single heavily restricted right of use is not sufficient to count as an instance of property ownership and according to the copyright statement on most DVDs that is all we have. We may watch the DVD but we may not exhibit any part of the DVD, copy, edit, rent, exchange, hire, export, distribute or sell the DVD. I take it for granted that the reader believes that they own the DVDs in their house but there are not sufficiently many rights in the property bundle for DVDs to count as an instance of private property. No more than a single heavily restricted right of experience over an object indicates borrowed property rather than private property. If we wish to retain our belief that there is a difference between the two, we must retain the belief that private property requires more than a single heavily restricted experience right.

The reader may worry that copyright notices indicate an issue of legal rights rather than purely moral rights and object that other legal rights such as the first sale doctrine clearly overthrow the absurdly powerful conditions dictated on DVDs. However, assuming that F.E.M. property bundle consists of the logically strongest set of rights including strong moral exclusionary rights over experience, it follows that the owner has a moral right to sell experience rights to instantiations as they see fit. Without any obligation in how they transfer those rights over in exchange for money, they can charge money and only ever transfer a partial right of use. Strong moral exclusionary rights entail moral rights to exclude other agents from privately owning instantiations of F.E.M. I do not intend to convince the reader that treating DVDs as rented property only is an impossible system. I only intend to show that the logically strongest set of F.E.M. property rights entails a moral right to exclude agents from privately owning instantiations of F.E.M. This is implausible as a moral right so we ought to accept that the F.E.M. property bundle does not include strong moral exclusionary rights over experience.

A Right to Prevent Derivative Works on Grounds of Offense

A strong moral right of exclusion over access or use justifies a moral right to prevent derivative works for any reason including offense. Because moral rights are so powerful there are inevitably instances in which a moral right entails a right to do wrong

(Waldron 1981, 124). An agent who owns a parking space does have the right to exclude other people from using it, even if they never use it themselves (Lyons 1982, 118). The issue of derivative works is such an instance because a strong moral right of exclusion over experience is very powerful and entitles the owner to exclude any agent they wish for practically any reason they prefer. This occurred famously when the estate who owned the copyrights to *Gone with the Wind* attempted to prevent the publication of *The Wind Done Gone* which re-presented the story from the point of view of a slave (Boyle 2008, 26). Eventually the case was taken to court and publication proceeded. However if we are to seriously grant that the F.E.M. property rights bundle includes a moral right of exclusion then preventing the publication of this work was well within the moral rights of the owners, just as Disney was within its moral rights to prevent artists drawing satirical cartoons of Mickey Mouse (Gordon 1993, 1603). Such moral rights are too powerful to be plausible but follow from strong moral exclusionary rights over experience.

A Right to Conceal the Value of the F.E.M.

Because F.E.M. is an experience good, consumers cannot identify its value until after they have paid for and experienced it (Chellappa and Shivendu 2005, 400). Combined with a moral right of exclusion over access or use this entails a moral right of F.E.M. type owners to conceal the value of their product from consumers before they purchase it. This is not only implausible as a moral right, it is also completely unnecessary. Acts of piracy for personal use provide a wonderful sampling method (Khouja and Rajagopalan 2009, 373) which I suspect is one of the reasons that overhyped products are more vulnerable to piracy harms than under hyped products (Chellappa and Shivendu 2005, 414). The reader may resist this conclusion since they may believe that purchasing F.E.M. is naturally a gamble about what you are purchasing. Sometimes you win and sometimes you lose. But the reader need not be convinced that this particular right is implausible as a special right justified by its effects. The reader need only be convinced that a right to conceal the value of F.E.M.s is implausible as a *moral right*. But such a right follows from a logically strongest set of F.E.M. property rights because it includes strong moral exclusionary rights over experience.

The Will and Interest Justifications for these Intuitions

The above examples rely heavily on the intuitions which the reader has about what constitutes a plausible right. Of course it is possible that the reader may deny one or all of

my intuitions and insist that a moral right of exclusion over access or use has no problematic implications. To guard against this tactic I offer a brief justification for why we should think that these moral rights are too powerful to be plausible. The two main theories of rights are the will and interest theories (Wenar 2011, section 2.2.2). Both of these predict that the four moral rights I have outlined above are too powerful to be plausible.

Will theorists argue that the purpose of rights is to assign domains of freedom while interest theorists argue that rights are defenders of well-being (Wenar 2005, 223). From a will theorist point of view the four moral rights which I have outlined are too powerful to be plausible. No rational assigning of domains of freedom involves assigning a paired privilege to lock up the majority of 20th and 21st century culture of film to such a small proportion of the populace. For that matter neither would it involve assigning a paired privilege to prevent agents from privately owning instantiations of F.E.M., or a paired privilege to either prevent the creation of new F.E.M. or to conceal the F.E.M.'s value. Such an assignment would not be rational because the distribution of the domains of freedom is unjust, first creating a scarcity in a resource by its very existence than placing a disproportionate amount of control in the hands of a single agent. "The function of property rights in such a liberal order, then, is not to maximize some maximand, but to allow human beings to cooperate in the allocation of scarce resources. Intellectual property rights, however, do not arise from scarcity, but are its cause." (Palmer 1990, 861). This is a normal feature of an intellectual property system. It does not reward all hard work; rather it is a lottery system which rewards the first runner across the finishing line (Moore 2002-2003, 617).

Interest theorists argue that rights are defenders of well-being (Wenar 2005, 223). A crucial difference between the two theories is that interest theorists allow for confliction of rights while will theorists do not (Waldron 1989, 127). If it is possible for rights to conflict then justifying these intuitions is more difficult because moral rights can obtain in very powerful instances but just conflict with other rights. Thus it is possible for the right of a small part of the population to lock up 20th and 21st century film to conflict with the rights of the rest of the population not to be excluded from their own culture. Once rights have conflicted they must be mediated. If all the people in an emergency waiting room have an equal right to be treated but cannot all be treated first, we still have to decide who gets treated first (138). In this instance it is sensible to apply a brief consequentialist analysis and treat the person who is the sickest or has been waiting the longest or will be

the fastest. Using consequences to decide between infringements of rights is a last resort (137) but on such an analysis it does not seem to serve the greater good to exclude the majority of the population of the world from their own film culture (Boyle 2008, 11). Nor does it serve the greater good to prefer the other three moral rights which I have discussed in this section.

The logically strongest set of moral F.E.M. ownership rights includes: the right of use and to exclude others from use, the right of compensation if someone uses it without permission, enforcement rights over this set of rights, the right to transfer this set of rights, and immunities to non-consensual loss of this set of rights (Vallentyne 2012, section 1). The use rights include a right of experience and the right to exclude others from experiencing the F.E.M. Assuming that this is a strong moral right it would also entail moral rights to lock up the majority of the 20th and 21st century culture of film, to prevent private property, to prevent derivative works on grounds of offense and a right to conceal the value of the F.E.M. While such rights are not as implausible as special or legal rights, they are implausible as moral rights. For this reason I deny the F.E.M. property bundle includes strong moral exclusionary rights over experience.

5.3.2 The Essentiality Argument for a Right of Exclusion Over Experience

I will now consider an objection. The essentiality argument argues that since a right of exclusion over access is essential to the notion of ownership, if the property bundle does not contain such a right then we are no longer discussing ownership of private property (Gordon 1993, 1550 and Himma 2008, 1144).

The Essentiality Argument

- 1) F.E.M. ownership is an instance of private property.
- 2) An exclusionary claim right over experience is a necessary condition of private property.

Therefore: If the F.E.M. property bundle does not include an exclusionary claim right over experience then F.E.M. ownership is not an instance of private property.

Therefore: The F.E.M. property bundle must include an exclusionary claim right over experience.

The argument is valid so my strategy is to reject one of the premises. Since I agree with premise one I must deny premise two. This will be difficult because premise two is an interesting objection with strong intuitive pull. Let us say that I own my coffee mug but do not have exclusionary rights over experience. Then any person can come and take it, even

if I am using it. Clearly the coffee mug is not an instance of private property. It may be property in the public sense but it is not private property because I do not have the right to prevent other people from accessing it. Without exclusionary claim rights over experience then it seems that the object in question cannot be instance of private property.

5.3.3 Against the Essentiality Argument

The solution to this puzzle is to be aware of the disanalogies between F.E.M.s and ordinary property. In the case of *ordinary property* the right of exclusion is essential to private ownership. Coffee mugs are rivalrous goods, so exclusionary claim rights over experience are necessary for the coffee mug to count as an instance of private property. But F.E.M.s are non rivalrous. They can be experienced by multiple agents at the same time. Thus it is possible for F.E.M. ownership to be an instance of private property without the property bundle including an exclusionary claim right over experience. So premise 2) of the essentiality argument is false.

As a thought experiment imagine that Jason writes a song which his friends think is brilliant. They then take a copy of it and circulate it under his name on the internet. Jason never gave consent for millions of people to possess instantiations of that song but despite the fact that they do possess such instances he is still clearly the song's moral owner. He is the song's owner because of all the rights which he still retains over the song. He still possesses: a full privilege right of use including rights of modification and destruction, a moral claim right of exclusion against people profiting from his work or claiming it as their work (Strauss 1955, 507-508), a claim right of compensation if someone profits from his work or claims it as their own without his consent, enforcement rights over this set of rights, the right to transfer this set of rights, and immunities to non-consensual loss of this set of rights (Vallentyne 2012, section 1). This set contains sufficiently many ownership rights for Jason to still be considered the song's owner and there is nothing ad hoc about this claim since it is well established that ownership rights vary from case to case (Waldron 1985, 315).

5.4 Why the F.E.M. Ownership Bundle Does Not Include Partial Moral Rights of Exclusion Over Experience

Thus far I have only engaged with very strong versions of moral exclusionary rights over experience. Indeed moral rights are very powerful and tend to take an all or nothing approach to rights (Waldron 1981, 122-123). Due to their nature they either obtain or do not so it is unlikely to find partial moral rights such as a claim right against the

violation of informed consent in most cases. As previously mentioned it is mostly accepted that there are no absolute rights (Gewirth 1981, 91). Given this and the observation that all my unintuitive implications are of very strong versions of exclusionary rights over experience, it is worth considering whether the F.E.M. property bundle could include partial moral exclusionary rights such as a right of the creator to exclude her F.E.M. from being experienced by other agents for six months following its release.

5.4.1 Ways in Which a Moral Right of Exclusion Over Experience Can be Partial

There are a few ways in which we can understand moral exclusionary rights to be partial. The versions of this partial right follow from the different ways that an owner can exclude agents from their F.E.M. A non exhaustive list of possibilities is: an owner could exclude agents from her F.E.M. via time if she chose to keep it from free public access for the first six months following its release, she could exclude people via quantity if she only charged money for the first 1000 instantiations of the F.E.M., she could also exclude people via content if she released an instantiation of a F.E.M. which locked up certain content, she could exclude people via ease of access if she only has the right to charge up to a maximum of \$10 per F.E.M. instantiation, she could exclude agents via geography by only allowing her product to be available in certain countries or she could exclude people via group by only giving consent for members of certain groups to experience the F.E.M.

While these are all possible outcomes of an owner exercising moral exclusionary rights they all have a similar form and question. The form is that there exists a continuum of possible moral rights and the question is that if an exclusionary right via time, money . . . etc. is not absolute is there a moral instance of a partial exclusionary right over experience? Such a continuum looks like this.

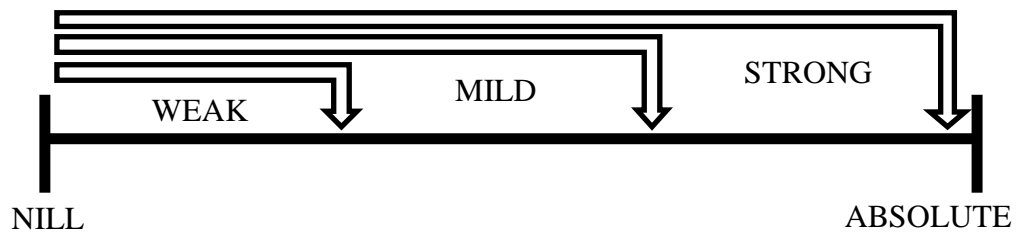


Figure Four: Continuum of Possible Moral Exclusionary Rights over Experience

We have three sections on this continuum referring to the strength of the exclusionary right separated by vague boundaries. The absolute instance of exclusionary rights over experience does not obtain because there is wide agreement that there are no absolute

rights. An obvious counterexample was provided by Himma (2008, 1160) who accepted that if piracy were to make the difference between life and death then in such an instance it is permissible. My discussion in the last section argued that strong instances of such moral rights are not a member of the F.E.M. property bundle. This leaves the possibility of weak or mild moral exclusionary rights over experience still unanswered.

5.4.2 Why Partial Rights of Exclusion Over Experience Are Implausible As Moral Rights

Weak instances of moral exclusionary rights over experience do not obtain because they would lack a powerful trumping ability. It is a property of all moral rights that they correlate with a powerful trumping ability. If an agent has moral ownership of their parking space then they have a powerful trumping liberty to exclude people from using it at whim in all but the most extreme situations (Lyons 1982, 118). Since this is a necessary feature of moral rights, a right without a powerful trump is by its nature not a moral right (Waldron 1981, 122). Weak exclusionary rights do correlate with some trumping ability but the key difference is that it is extremely weak. The moral entitlement to exclude people from a F.E.M. for only 2 months following release or from only the first 10 instantiations is too weak to be considered a powerful trump in an ethical calculation. Without a powerful trumping ability, it is not a moral right.

Mild instances of moral exclusionary rights over experience do not obtain because if they did then they would be justified by appeals to consequences. But moral rights obtain irrespective of the consequences (Waldron 1989, 132). At this point in the analysis I have eliminated the options for moral exclusionary rights to be weak, strong or absolute. If a mild moral exclusionary right did obtain then it would have to be between these two points on the rights continuum.

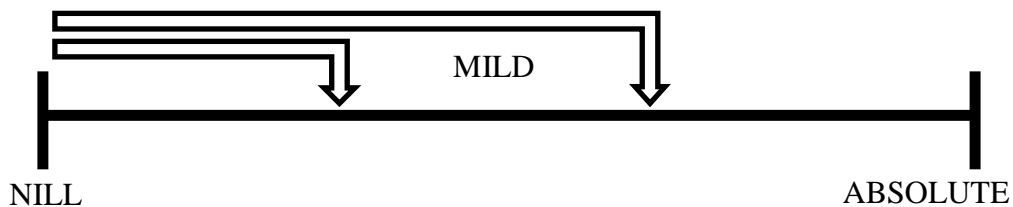


Figure Five: Remaining Possible Accounts of Moral Exclusionary Rights over Experience

The issue with a moral right which obtains here is that it would be justified via an appeal to consequences. Taking the example of time, if the F.E.M. property bundle includes a moral right to exclude people from experiencing F.E.M. for six months then we are

saddled with the task of explaining why it obtains at six months and not seven months. There is little recourse here other than appealing to the superior outcomes of such a right obtaining at six months rather than at seven. However this requires that we justify the obtainment of a moral right with an appeal to consequences which is not a feature of moral rights. Moral rights obtain or they do not regardless of consequentialist considerations of outcomes (132).

I do not consider this argument to be an exploitation of the vagueness problem. I have already accepted the existence of vague boundaries in my analysis and it is well known that famous paradoxes of vagueness require small incremental steps such as from childhood to adulthood or day to night. This argument will still hold if we must explain why a moral exclusionary right obtains at six months rather than five years. A better explanation of the argument I have provided is that, by their nature moral rights are not partial. Rather they are all or nothing claims about entitlement. Attempting to treat such claims as a continuum of possible obtainments is a mistake because they either lose necessary features of moral rights or gain features that moral rights do not have.

This completes my consideration of moral rights in the F.E.M. property bundle. I have argued that such a bundle does not include moral exclusionary rights over experience. This does not mean that the bundle does not include an exclusionary right over experience; it just means that if the F.E.M. property bundle includes such a right then it is not a *moral right*. It is still possible that the F.E.M. property bundle includes strong exclusionary rights over experience which are justified, but they will be justified by something other than an intrinsically moral nature. Neither does it mean that the F.E.M. property bundle does not include *any* moral rights. The right to be credited for your work seems to be a moral one (Strauss 1955, 507). But for the purposes of this project I have only engaged with the specific rights which affect the moral permissibility of piracy. A final possible justification for the strong view is the F.E.M. property bundle contains strong exclusionary rights which are created by large scale agreements for the purpose of benefiting society. In the next section I consider this possibility.

5.5 Why the F.E.M. Ownership Bundle Should Not Include a Special Right of Exclusion Over Experience

Having argued that the F.E.M. property bundle is unlikely to include *moral* exclusionary rights over experience I will now consider the possibility that it ought to contain special exclusionary rights over experience (Wagner 2003, 1010). We will think of these special rights as large scale agreements about how society should function which are

justified if they either promote social utility or are necessary to prevent serious and avoidable harm. The voluntary inclusion of special rights in the property bundle is possible because special rights are rights that arise from agreements between agents (Hart 1955, 84). Thus the F.E.M. property bundle either includes moral rights or it does not but it either ought to contain special rights or it does not. I will argue that the property bundle ought not to include strong version of exclusionary rights by pointing out that our current F.E.M. system is representative of the strong view of F.E.M. property but does not promote social utility and is not necessary to prevent serious and avoidable harm. These arguments should not be taken as a critique of intellectual property law. While serving the common good is a frequent justification for laws (Murphy 2007, 45), it is not the only one and this project does not have space to engage with all the justifications. These arguments should be taken as an argument against the strong view of F.E.M. property that the property bundle contains justified strong exclusionary rights over experience. I have argued that the property bundle does not include such a moral right and now I will argue that if it does include strong special exclusionary rights over experience then they are not justified.

5.5.2 Why a Strong Special Right Over Experience Does Not Promote Social Utility

A strong special right of exclusion does not serve the common good because our current F.E.M. system includes such a right but clearly fails a cost-benefit analysis (Moore 2002-2003, 603). Consider the argument from social utility.

The Argument from Social Utility

- 1) Strong exclusionary rights over experience are necessary to protect the maximum profitability of a F.E.M.
- 2) Protecting the maximum profitability of F.E.M. is sufficient for the strongest incentives to produce new F.E.M. and leads to the greatest possible investment in new F.E.M.
- 3) The strongest incentives combined with the greatest possible investment in new F.E.M. are sufficient to promote social utility by producing the best possible F.E.M.s.

Therefore: Strong exclusionary rights promote social utility by producing the best possible F.E.M.s. (Boyle 2008, 4)

The general gist of this argument which is employed by many pro-intellectual property organisations is that strong exclusionary rights are required to protect the profitability of

F.E.M.s and providing these rights will create an intellectual property system which produces the most F.E.M. of the highest quality. “Music may seem intangible, indeed invisible. But the maintenance of solid copyright law and the appreciation of its economic value is simply imperative for the jobs and ongoing income of many well trained, hard working professionals.” (Gross quoted in AFACT 2012). This argument is valid and I do not contend the truth of premise 1). Rather I have serious reservations about the truth of premise 2) and premise 3).

Premise 2) is false because as I argued in section 4.4.4 the strongest possible incentives to create are not achieved by purely financial motivations (Yung 2009, 51). Premise 3) is false because of a collective harm danger that strong F.E.M. property rights pose. If the reader recalls from section 4.2.1, I explained that a collective harm problem occurs when rational agents all act in their own self-interest and end up pursuing the destruction of their own interests (Feinberg 1973, 53). This collective harm is caused by excited attempts to protect our F.E.M. rights. If every owner desires to protect the commercial exploitation of their F.E.M. then they will justifiably argue for more powerful protection and extended exclusionary rights over experience (Boyle 2008, 200). Eventually copyrights are extended indefinitely and acts of legitimate file sharing are shut down because of the threat they pose to F.E.M. security (78). Since strong exclusionary rights paralyse the exchange of information it steadily becomes more and more difficult to produce F.E.M. until it is practically impossible (148). Creators of F.E.M. will sympathise with the danger of unintentionally infringing on intellectual property rights in the creation process.¹⁰

While this collective harm problem refutes premise three of the argument from social utility, it is only an instance of a potential consequence. It is worth discussing what the actual consequences of our strong intellectual property rights are. In the moral rights section of this chapter I outlined four moral rights which followed from a moral right of exclusion. I then argued that these were too powerful to be plausible. As special rights these outcomes are slightly more plausible because agreements are likely to be imperfect and produce unusual outcomes. However the fact remains that the large majority of film culture is unavailable to its citizens, DVDs can never be private property, and creators

¹⁰ The band *Men At Work* was ordered to pay compensation for sampling a ten second flute riff from the song *Kookaburra Sits in the Old Gum Tree* in their song *Land Down Under*. Intended as a homage to the Australian classic in what would become another Australian classic, it has backfired rather viciously. See Guardian 2010. For an interesting discussion of how songs are inspired by other songs see Boyle 2008 chapter six.

have the power to stifle derivative projects which they find offensive. In an effort to protect ourselves against the possibility of a collective harm by piracy we are travelling much further down the slippery slope towards a different collective harm. We must not forget that the ultimate purpose of F.E.M. special rights is to maintain a society with a rich diversity of F.E.M. rather than to help F.E.M. owners squeeze every penny out of their product that they possibly can (208).¹¹

On the other hand the benefits of weak exclusionary rights over experience are: a sampling method for consumers, free advertising and distribution for owners, an anti-monopoly source of competition and a limitless source of utility for agents. It follows that social utility is better served with weak exclusionary rights over experience than strong rights because it maintains the incentives to create but distributes F.E.M.s far more widely. So far the justification for such a right has been via a cost-benefit analysis and I have already argued in section 4.3.1 that such analyses make the mistake of justifying harms by appealing to the overall benefit of such acts. To avoid this error I will also consider another justification for strong special exclusionary rights over experience; that they are necessary to prevent harm.

5.5.3 Why a Strong Special Right of Exclusion Over Experience is Not Necessary To Prevent Harm

The final justification for a strong special exclusionary right over experience is that it is necessary to prevent the serious and avoidable collective harm caused by the large majority of agents choosing to pirate instead of supporting the F.E.M. industry through purchases (Kinsella and McBrierty 1998, 66).

This is a very profound moment historically. This isn't about a bunch of kids stealing music. It's about an assault on everything that constitutes the cultural expression of our society. If we fail to protect and preserve our intellectual property system, the culture will atrophy. And corporations won't be the only ones hurt. Artists will have no incentive to create. Worst-case scenario: the country will end up in sort of a cultural Dark Ages (Richard Parsons, Time Warner CEO in Halbert 2005, 66)

It is only the most severe form of this harm that must be prevented by such a right. Minor harms to the profitability of F.E.M.s are entirely contingent on the current system of special rights and do not threaten its survival. In this instance we cannot claim that special

¹¹ This is a feature of F.E.M. creation that it is easy to overlook. In a quest to increase the value of music the Wu-Tang Clan have minted a single copy of their new album *The Wu-Once Upon A Time in Shaolin* in a nickel and silver custom case. No other copies of this album either exist or are permitted to exist. The group has taken it on tour charging up to \$50 for a single listening session (under heavy supervision). They plan to auction it off at a later date to the highest bidder (Vincent 2014).

rights are necessary to prevent minor harms to sales because it would be circular. Sales harm must be prevented because such harm violates justified property rights and the property rights are justified because of the harm they must prevent (Feinberg 1984, 111). It is only the large scale collective harm which special rights are justified in preventing.

Such a strong exclusionary right over experience is *sufficient* to protect against this collective harm. However we are primarily interested in whether such a special right is *necessary*. That is to ask if strong special exclusionary rights are *the only recourse* to guard against the collective harm or at least the best fallible system we could have. If a system containing only weak exclusionary rights over experience can guard against the collective sales harm *and* does not carry all the heavy costs of strong exclusionary rights then it is only the weak version of such a right which is justified. I will now briefly outline such an alternative.

Some authors have suggested a government funded system for intellectual property as a whole (Croskery 1992-1993, 636, Moore 2002-2003, 614 and Yung 2009, 48). In such a system, the creation of all F.E.M. is funded and distributed via the government. The government applies a general F.E.M. tax to its citizens and then distributes the profits to the F.E.M.'s creators based on the proportions of access to those F.E.Ms via internet downloads, theatre attendance or TV ratings. In such a system, creators are unlikely to discourage people from accessing their F.E.M. because the more views or downloads they get, the more they get paid. Thus it forcibly guards against the collective harm in both directions while maintaining strong incentives to create new F.E.M. This system is remarkably similar to the current intellectual property system in academia which may explain why academics are so content with people accessing their work for free.

I have reservations about this alternative because it removes the voluntary element in F.E.M. purchasing. Our current system allows agents to purchase only the F.E.M. which they are interested in rather than paying a generic tax for access to F.E.M. which they may not desire. With this in mind I think it is important to prefer a system which retains an element of voluntary contribution. Furthermore the authors who suggested this approach have also highlighted some of its problems. Governments tend to be slow at predicting market change and so placing them in charge of a market based F.E.M. reward system is somewhat ill-advised (Moore 2002-2003, 614). Lastly F.E.M.s are an important source of free speech so submitting funding to government approval should be avoided where practical.

In my opinion, a government run system is not entirely preferable but it would be a considerable improvement on our current F.E.M. system. Alternatively a system of special rights which is identical to our current one with significantly weaker F.E.M. exclusionary rights would also do a better job of serving social utility. In section 6.5 I will outline another system in response to the problem of agents adhering to the requirements of special F.E.M. property rights. I will argue that this system would do a better job of maximising F.E.M. incentives and distribution while minimising the monopolies that such systems generate.

We have seen that the cost-benefit or serious harm prevention justification for a large scale system of special rights justifies the weak view of F.E.M. property and its correlating exclusionary right over experience. This means that strong versions of special exclusionary rights over experience are not justified and that acts of piracy for personal use do not violate justified property rights. In the next section I will draw together the important implications of this rights focused analysis for the master argument against piracy.

5.6 What This Analysis Tells Us About the Moral Permissibility of Piracy

The rights focused analysis of piracy in this chapter tells us that acts of piracy for personal use do not violate F.E.M. property rights provided that such acts do not contribute to a collective harm to the intellectual property system. The right of an author to exclude an agent pirating F.E.M. rests on the property bundle including a right of exclusion over experience. The F.E.M. bundle contains no such full moral rights because of the obviously false moral rights it would generate and is highly unlikely to contain partial moral exclusionary rights because they would not resemble typical moral rights. Thus exclusionary rights over experience are better understood as special rights which are justified by how well they benefit society. This result answered Himma's (2008, 1152) objection that the moral rights of the author trump an agent experiencing F.E.M. for free and shifts the focus of the piracy dispute back to harms. Since the weak view of property rights produces the least harms with the greatest distribution of F.E.M. it is only weak exclusionary rights over experience which are justified rather than the strong version of such rights.

This outcome necessitated that harms caused by piracy are merely instrumental rather than instances of wrongful harming because they failed to satisfy the fifth condition of wrongful harms that they are "a violation of B's right" (Feinberg 1984, 106). The

F.E.M. property bundle contains no moral exclusionary right over experience for acts of piracy to violate and since any exclusionary special rights are justified by the consequences which they produce, only the weak instances which permit piracy are justified. Thus the analysis in this chapter tells us that acts of piracy for personal use are morally permissible. Taken in conjunction with the harm based analysis in chapter four, it is clear that premise three of the master argument is true for some acts of piracy for personal use but not all. Acts which contribute to the collective harm against sales are morally impermissible so the focus of the next chapter will be to set out conditions for piracy which prevent such acts. Acts of piracy for personal use which meet these conditions will be morally permissible because they do not cause serious and avoidable harms or violate justified property rights.

HOW PIRACY CAN BE MORALLY PERMISSIBLE

6.1 Introduction

In the previous two chapters I provided an ethical analysis of piracy focusing on harms and rights. I argued that acts of piracy for personal use are not responsible for instances of wrongful harming and do not violate justified property rights but are responsible for significant levels of instrumental harm. Since this harm is serious and avoidable I have concluded that morally permissible acts of piracy must be conducted without the risk of contributing to the collective harm. In this chapter I will use a rule based solution to create conditions for acts of piracy which prevent any possible harms to sales. Combined with the absence of moral or strong special exclusionary rights over experience, these conditions outline how piracy can be morally permissible. I will outline a rule P and explain how it meets these conditions before considering the argument that this rule does a better job of identifying morally permissible instances of piracy than it does in guiding an agent in identifying whether their act of piracy is going to be a morally permissible one. In response I will outline an alternative system aimed at fallible agents which I argue does a better job of balancing the goals of a F.E.M. system and thus encouraging adherence by fallible agents. I then consider and reply to possible objections to my solution considering what it means for piracy for profit, the protection of private information, the development of new F.E.M., and briefly discuss what this project suggests for piracy laws. Lastly I will consider the objection that my project has unfairly prioritised consequentialist and rights based ethical theories and respond by arguing that they are by far the most appropriate theories to use in an analysis of piracy.

6.2 How Rules Can Settle the Piracy Dispute

At this point in the project I have argued that both sides of the piracy dispute are partially correct. Proponents of the weak view are correct in that acts of piracy for personal use do not violate moral exclusionary rights over experience and proponents of the strong view is correct in that acts of piracy for personal use are responsible for a serious and avoidable collective harm. Thus the moral permissibility of piracy now turns on what our moral obligations are for serious and avoidable collective harms. We are not obliged to cease any behaviour which could possibly contribute to the collective harm such as lending DVDs to one another. The impact of humans on the environment does not require that all agents everywhere cease polluting the air at all (Feinberg 1984, 227). Rather these situations typically require a threshold which individual agents should not exceed

(Feinberg 1984, 229-231). Regarding piracy this would mean that once an agent has contributed a certain amount to the F.E.M. industry, they are permitted to pirate. My concern with this solution is that it allows for the development of collective harms to specific F.E.M.s. If enough agents decided to pay for the first *Hobbit* movie and pirate the second then it would appear that the second movie was unpopular. I believe that rules can provide the best solution to these issues. They will set out the conditions for piracy in such a way that if those conditions are satisfied then the act could not foreseeably contribute to the collective harm to sales or specific F.E.M.s. Without this direct harm to sales loss, there is also no indirect harm to employment opportunities.

This approach should not be understood as a rule consequentialism solution. Rule consequentialism states that acts are right if and only if they comply with *the rules* which produce the best consequences. Those rules are determined by the positive outcomes they produce when all agents are following them (Moore 2002-2003, 609). By comparison these rules are determined by how well they prevent possible harms. If they were only determined by the consequences they produced then the rules would permit many acts of piracy so long as the harms were outweighed by the benefits. I consider this kind of solution to be taking advantage of the well-known weaknesses of act consequentialism that unethical behaviours can be justified by appealing to their positive consequences (Sosa 1993, 102). To avoid this weakness the rules I set out will prevent all foreseeable harms rather than attempting to produce the best overall outcomes.

Despite this difference any rule based solution is susceptible to a well-known objection to rule consequentialism focusing on its vulnerability to counterexamples (Arneson 2005, 236).¹² Most rules have exceptions so inevitably there exists some possible state of affairs in which the rules I will set out should not be adhered to. As a toy example imagine that a madman threatens to torture and kill an innocent person unless you pirate a movie that you would have otherwise purchased. As part of the arrangement the victim will be held in luxurious captivity until your death so that the madman may be certain that you will never purchase the F.E.M. legally. In such a situation it seems obvious to me that you should pirate the movie but this leaves us with a difficult dilemma. Either my rule based solution will have obvious counterexamples or I will have to stubbornly insist on blind rule worshipping (236). The best response I can see to this dilemma is to argue that the conditions I lay out should be applied if and only if other more pressing ethical

¹² For interesting discussion of rule consequentialism and its weaknesses see Arneson 2005, Jackson 1991, Law 1999, and Sosa 1993.

concerns are equal. The conditions I lay out are only intended to prevent instrumental harms and will be naturally trumped by considerations of moral rights or other more pressing ethical concerns.

6.3 Guideline P: A Rule Based Harm Prohibition

To satisfy the conditions for morally permissible piracy, I propose the following rule P for piracy.

‘Agents ought to only pirate for personal use F.E.M.s whose informed consumer value is less than the owner assigned value.’

Owner assigned value = the value which the F.E.M. is being sold for

Uninformed consumer value = the value which a consumer assigns to a F.E.M. without fully experiencing it.

Informed consumer value = the value which a consumer assigns to a F.E.M. after fully experiencing it.

The logical machinery in rule P requires some explanation. We know that harms to sales, which I have argued are merely instrumental, are only caused by acts in which the agent pirates F.E.M. instead of purchasing (Waldfogel 2012, 95). Economic theory tells us that agents only cross the purchasing threshold when the value that they assign to a product is equal to or more than the cost which is assigned by the seller (95). When an agent is shopping they are unlikely to purchase a copy of the movie *Equilibrium* if it is being sold for \$34 and they believe that it is only worth \$15. If that same DVD is being sold for \$10 in a different store then the agent is much more likely to purchase it there. There is an important caveat with this analysis; we must bear in mind that the value assigned by an agent varies with many different factors. If the agent only has \$10 left in her bank account for the next 3 weeks then the consumer assigned value to the product will go down since the DVD must now be extremely cheap to justify the agent parting with her last \$10. If the agent has been desperately looking for this particular movie for years then the consumer assigned value will go up because the agent will not want to risk not being able to find it again.

Applied to acts of piracy, we can conclude that acts which cause harms to sales are acts in which the agent pirates a F.E.M. whose owner assigned value is less than the informed consumer assigned value. That is to say that the agent pirates something which they would have purchased. Say that the DVD’s owner assigned value is \$10; the agent knows the F.E.M., values it at \$15 and intends to purchase it but decides to pirate it

instead. This action harms sales. It follows that acts of piracy which cause instrumental harms are instances in which an agent pirates a F.E.M. whose informed consumer assigned value is greater than the owner assigned value. Other acts of piracy, specifically those which would not otherwise have been a purchase are ones in which the agent pirates F.E.M. whose informed consumer value is less than the owner assigned value.

6.4 Agent Centred Problems: Rule Adherence and Rule Adoption

There are well known agent centred problems with rule based solutions. Rules can be difficult to follow. For instance harmless acts of piracy are ones in which agents do not pirate F.E.M. that they would have otherwise purchased. However it can be very difficult for an agent to know if they would have otherwise purchased a F.E.M. without fully experiencing it first. It is possible for an agent to pirate a F.E.M. and discover that they ought to have purchased it instead. Since the harms to sales caused by piracy are merely instrumental and part of a collective harm rather than an instance of serious and immediate harm, unintentional violations of guideline P do not create a permanent harm to sales. Rather they create a moral obligation to purchase the F.E.M. in question within a reasonable timeframe. The discharge of this moral obligation prevents acts of piracy for personal use from contributing to the collective harm to sales.

This problem does not demonstrate that my initial conditions have failed to pick out the morally permissible instances of piracy. Rather it is a pragmatic issue to do with the limitations of fallible agents to follow the ethical rules (Timmons 2002, 122). More precisely this is the difference between *rule adherence* and *rule adoption* (Moore 2002-2003, 623). Using guideline P as an example, if agents only pirate F.E.M. that they wouldn't otherwise purchase and if they purchase F.E.M. which they have pirated and determined to be worth the owner assigned value, then they are *adhering* to my rule. However, if they pirate and convince themselves that the F.E.M. is not worth the owner assigned value then they are only *adopting* the rule. This is a problem because agents who only adopt rule P are likely to contribute to the collective harm to F.E.M. sales.

There is a certain amount of personal responsibility which agents must take for actions in this case but it is still worth presenting an alternate solution to the piracy dispute which is more resilient to our fallible decision processes. Such a solution is an important because of the subtle ways in which our desires can influence our beliefs. In the instance of adhering to rule P, if the belief that the F.E.M. which he is pirating is not worth purchasing will save him a \$40 purchase then the agent is highly motivated to believe just that. A

simple reply might be to insist that such a person is only adopting rule P in a rather dishonest way.

However, this reply feels like a dodge and to my mind misses the force of the objection that agents can be quite bad at adhering to rules. According to the latest Sycamore research the large majority of pirates are quite informed of the illegal nature of piracy but choose to engage in it anyway. The participants were presented with a range of hypothetical situations and asked to evaluate them as legal, illegal or ‘can’t say’. The situations ranged over piracy for personal use or profit for music, movies, T.V. shows or E books. 61% to 93% correctly identified the situations as illegal (Sycamore 2013, 29). Of that group 34% are persistent or casual pirates (Sycamore 2013, 7). Agents are good at knowing what the rules are but significantly worse at adhering to them. Some of these agents may have ethical concerns or other good reasons for not adhering to the rules but it is more likely that they majority of them simply are aware of the rules but choose not to comply with them. With this in mind I present a pragmatic system which is more resilient to the problem of rule adoption.

6.5 An Alternative System for Fallible Agents

The solution to agents only adopting the rules is to create an alternative F.E.M. system which more thoroughly meets the goals of an ideal F.E.M. system and does a better job of meeting the demands of the public and at the same time seems less monopolistic does a better job of attracting support from agents. The computer software industry reduced the control they built into its products when worldwide piracy was estimated at 80% (Katz 2005, 158). By 2001 estimates of worldwide piracy of computer software were down to 40% (164).

“The software industry had an interesting experience in the 1980’s, because at that time, when the personal computers first became popular, most software came with copy protection. You bought a floppy disk and that disk had protection that enabled you to make only two copies of the program. And this was true if you bought the software from Microsoft or the other popular companies of the time: Lotus, WordPerfect, anybody else. By the late 1980’s every single company abandoned that approach for the simple reason that legitimate customers did not like it. They found that there were times when they needed to make additional copies: they sold the computer and bought a new one and wanted to move their software, or their hard disks crashed and they needed to reinstall it.”

(Bradford Smith quoted in Katz 2005, 159)

Attempts to tighten control over F.E.M.s have the unintended effect of pushing people away from the legitimate options because the extreme nature of the property claims makes the industry position seem completely implausible. In a world in which the ASCAP

demands public performance fees from cafes for playing radios in the background (Halbert 2005, 71), it is not difficult to see why the entertainment industry has lost credibility with the public.

The most effective step that I can see to changing this is to create a fairer F.E.M. system which does a better job of meeting the goals of an ideal intellectual property system. The reduced monopolies of this system are far more likely to attract support from agents than attempts to tighten control which have more potential to drive agents away from legitimate options (Harbaugh and Khemka 2010, 307). I will first outline the goals of an ideal F.E.M. system before introducing an instance of such a system I call F.E.M. Hub. F.E.M. Hub rewards F.E.M. purchases with downloads and operates on a dual contribution system to reduce piracy by encouraging agent adherence. I will explain how F.E.M. Hub meets the goals of an ideal intellectual property system and discuss the formula which determines the proportion of downloads to purchases.

6.5.1 The Goals of an Ideal F.E.M. Property System

The main purpose of a good F.E.M. system is to serve the common good (Katz 2005, 216). With this in mind, a good system performs a balancing act between excluding people from F.E.M.s to protect their financial potential and distributing the availability of the F.E.M. as much as possible (Boyle 2008, 21). A perfect system maximises incentives to create F.E.M.s whilst minimising the artificial monopolies over the F.E.M.s which exclusionary rights create. Perfect systems are possible but difficult to achieve because of the cumbersome nature of setting up rules (Law 1999, 273). This system will align with the weak view of F.E.M. property because our current F.E.M. system is a reflection of the strong view which multiple authors have argued does not achieve the goals of a good F.E.M. system.¹³

6.5.2 An Alternative System

An alternative system to our current one is a website which holds all the F.E.M. and rewards agents for supporting the F.E.M. system by offering extra downloads of F.E.M. I will call this website F.E.M. Hub. All harms to sales are caused by instances in which an agent pirates instead of purchasing so not all free downloads of F.E.M. are harmful (Waldfogel 2012, 95). F.E.M. Hub sets a strict proportion of downloads to purchases which maintains a profit level equivalent to current F.E.M. sales plus the sales

¹³ For interesting discussion on whether intellectual property laws are too strong see Boyle 2008, Gordon 1993, Halbert 2005, Moore 2002-2003 and Posner 2002.

loss due to piracy. F.E.M. Hub offers dual pricing strategies since such approaches reduce piracy by catering more thoroughly to public demand (Khouja and Rajagopalan 2009, 381). The first strategy offers an agent access to all the F.E.M. they desire for a flat monthly fee. The second strategy offers an agent free downloads of F.E.M. in exchange for individual purchases through F.E.M. hub or some other legitimate source. The precise proportion of downloads to purchases and its justification will be discussed in section 6.5.3. Thus both strategies maintain the profitability of F.E.M. sales without the negative effects of piracy such as sales and employment loss. Importantly it retains the beneficial effects of piracy such as sampling methods, and free advertising. F.E.M. Hub tracks the streaming and download totals and distributes the weekly profit to F.E.M. owners based on what was watched or downloaded.

F.E.M. Hub meets the goals of a good F.E.M. system because it achieves a much greater distribution of F.E.M. for an increased level of profitability. It offers only a weak version of exclusionary access; you cannot access the system if you do not contribute to it but offers vigorous rewards for contributions. From the point of view of F.E.M. owners F.E.M. Hub keeps all the benefits of piracy without the negative effects and from the point of view of the consumer F.E.M. Hub offers a much wider variety of F.E.M.s to sample and download. It also encourages consumers to sample F.E.M.s in between flagship productions and small independent works since the extra downloads allow for a lower risk F.E.M. gamble. This will also distribute profit more fairly since F.E.M.s of average quality are more likely to gain an average amount of views than they would if they were sold as full price DVDs. Agents are unlikely to risk \$40 to purchase a modestly budgeted movie such as *Judge Dredd* but they are likely to sample it as one of their free downloads. It also retains the element of voluntary contributions which I think is important because the government run alternative systems which I discussed in section 5.5.3 interfere with the liberty of agents. For this reason I prefer a F.E.M. system which works on voluntary purchases.

It is possible that the industries sales may still decline. But the crucial point is that this sales loss could not be attributed to the new system. Damage to sales only occurs when agents pirate a F.E.M. instead of purchasing it (Waldfogel 2012, 95). So as long as a minimum proportion of downloads to purchases is always being maintained then the sales damage cannot be due to piracy because that would require an agent to increase the number of pirated downloads whilst decreasing the purchases. This would necessarily alter the proportion of purchases to downloads. Piracy is a collective harm and it deserves a

collective solution, one which does a superior job of balancing the monopolies of exclusionary rights with the distribution of F.E.M.s. and of attracting voluntary contributions from agents.

6.5.3 The Formula Which Determines the Distribution of the F.E.M.

To identify the correct proportion of downloads to purchases we will need to apply the following formulae. We will also need some values.

L: percentage sales loss due to piracy

S: Sales level had piracy never occurred.

D:P the mean proportion of downloads to purchases,

D:P* the ideal proportion of downloads to purchases.

Now the measured mean proportion D:P has the consequences of sales loss L. So if we invert the loss and multiply that number by P we will produce D:P* which is the proportion of downloads to purchases that will prevent the sales loss. As an example imagine that the mean proportion is 10 downloads to 1 purchase i.e. 10:1 and that total profit from movies is 22 billion. Assume that $L = 12.89\%$ across the industry. So we need to increase purchases to S, where 12.89% lower sales than $S = 22$ billion. $S = 25.26$ billion which means that the increase of purchases from mean to ideal is 14.81%. The mean proportion is 10 downloads to 1 purchase so increasing the purchases by 14.81% yields an ideal proportion of 10:1.15 or 1000 downloads to 115 purchases. This indicates that an agent on F.E.M. Hub could download 8 instances of F.E.M. for each purchase without contributing to the collective sales harm. This is because the only way to disrupt the ideal proportion of downloads to purchases is to download instead of purchasing in a greater proportion than 8 to one which the system will not allow.

Obviously such a formula requires extensive empirical work to learn the values of D, P & L. Empirical approaches will be subject to all the usual difficulties I discussed in section 4.4 but it is certainly possible. In support of this I cite the recent research by Sycamore (2013 and 2014). From a sample size of 1001 New Zealanders aged 18-64, Sycamore have obtained a wonderful variety of data on piracy rates, agents' behaviours and attitudes towards piracy. They have also obtained accurate data on illegal behaviours such as piracy frequency in New Zealand, 34% are currently pirating on a regular basis and 20% have lapsed (Sycamore 2013, 7), and what types of F.E.M. are being pirated; 18% of persistent pirates in NZ download at least one music track a month but only 5% of persistent pirates download an E-book at least once a month (Sycamore 2013, 18). The

research being carried out by Sycamore both in Australia and NZ is an exemplary instance of how empirical research can give us the data we need.

6.6 Possible Objections to My Solutions

In this section I will discuss objections to my solution by exploring and defending against apparent implications. I will argue that piracy for profit is still morally impermissible, that our private information should still be protected, explain how we can still develop intellectual property without a right of exclusion and discuss what this project suggests for laws governing the experience of F.E.M.

6.6.1 Piracy for Profit

I have argued in this project that acts of piracy for *personal use* are morally permissible. This suggests a further question about the moral status of *piracy for profit*. While I think that it is morally permissible to use piracy as a sampling method, I deny that we are entitled to profit from another's work via charging other agents for experience of it. This conclusion depends on which rights are included in the F.E.M. property bundle. I have argued that such an ownership bundle does not include a moral exclusionary right over experience. However I still maintain that such a bundle does include a right of sale or profit. Such a right is an extension of the right of transfer over the rights bundle. It is the right to transfer parts of the rights bundle to another agent in exchange for money or some other resource. I will provide brief argumentation for the claim that this right is better understood as a moral right rather than a special right justified by the positive consequences it produces

From a moral point of view we intuitively feel that the owner of intellectual property such as *Harry Potter* has the right (moral or otherwise) to sell something. It does not satisfy our intuitions if the owner only has a right of sale over the first instantiation of her work. J.K. Rowling possesses a much stronger right of profit than just a single instance of the story written down. It does however satisfy our intuitions if J.K. Rowling possesses the right of sale over all further instantiations of *Harry Potter* (Resnik 2003, 320). A right of sale over the type does not generate the same unintuitive implications that an exclusionary right over experience does and it carries a powerful right which trumps positive consequences. If the right of sale were purely a special right which was justified only by the positive consequences it produced then we would struggle to explain why an author has the right not to sell their F.E.M. if the sale of it would benefit society overall. Thus piracy for profit is still morally impermissible because the best explanation of our

moral intuitions is that the F.E.M. property bundle includes a *moral* claim right against other agents selling one's work even if it does not include a moral right to exclude others from experiencing one's released work.

6.6.2 What Happens to My Private Information?

In chapter two I explained what intellectual property is and suggested that private information may be a kind of intellectual property (Resnik 2003, 321). I have also argued that the F.E.M. rights bundle does not include a moral exclusionary right over experience. This does not sit well with the intuition that we have a moral right to keep our private information private. This problem is solvable because the rights contained within the property bundle vary from case to case and the arguments I have presented in this project apply specifically to the rights in the F.E.M. bundle, rather than to a generic intellectual property rights bundle. Much of the support for my arguments against a moral exclusionary right over experience rests on the absurd implications of such a right. While it is implausible to claim that there is a moral right to lock up the majority of 21st century film culture (Boyle 2008, 9). It is not implausible at all to claim that there is a moral right to lock up the majority of the private information in the 21st century.

Without these implications my arguments against moral exclusionary rights do not work. The sensible conclusion to draw is that ownership of private information as intellectual property includes a claim right against unauthorised use but that ownership of F.E.M. intellectual property does not. There is nothing inconsistent about these claims. The ownership bundle of rights varies from case to case. This is why a landlord, renter and bank owner may all justifiably use the expression 'my house' (Waldron 1985, 346). It is also why I can argue that we can own both ordinary and intellectual property even though ownership of ordinary property may include moral exclusionary rights over access but some instances of F.E.M. property do not. Thus there are no good reasons to doubt that ownership of private information includes strong moral exclusionary rights over experience.

6.6.3 What About F.E.M.s in Development?

I have argued that owners of intellectual property do not possess moral exclusionary rights over experience. This raises interesting questions for F.E.M.s in development. Let us imagine that I am making a movie, if I possess no moral exclusionary right over the F.E.M. property then I have seem to have no claim against other people accessing and circulating my half-finished projects. Let us say that George Lucas invests a

few hundred million dollars in a new Star Wars movie and when it is only half way completed, his assistant pirates a digital copy and releases it onto the internet. Such an outcome is highly undesirable cannot justify a moral right because those obtain irrespective of consequences (Waldron 1989, 122). In this vein there are excellent consequentialist based reasons to grant strong special exclusionary rights for F.E.M. in development. Temporary special strong rights of exclusion over experience serve the common good by protecting F.E.M. in development and encouraging investment in new F.E.M. Furthermore I argue that the strong version of these special rights should expire when the F.E.M. in question is released to the public in which ‘released’ refers to the moment it first goes on sale. Such a right will help the F.E.M. owner to maximise their first day sales by reducing the likelihood of harms caused by pre-release piracy (Chandray, Goel and Miesing 2010, 12).

6.6.4 What Does This Project Suggest for New Zealand Law?

Piracy is illegal in New Zealand. Despite this I have devoted an entire Masters project to arguing that these acts are morally permissible provided that certain conditions are met. There has not been room in this project to explore the question of how well our current intellectual property laws are achieving the goals of maximising the availability of F.E.M. while minimising the monopolies generated by those laws (Boyle 2007, 21). This is due to the many different justifications for laws which include but are not limited to the prevention of harm, the protection of moral rights, and the production of the greatest good (Murphy 2007, 40). It is also due to the gap between the law and morality (40), and the near impossibility of perfectly legislating morality (Murphy 2007, 98). Thus this project should not be taken as a knock down argument against our current intellectual property laws. Instead this project should be taken as an eliminative argument against possible justifications for intellectual property law. The analysis presented here suggests that the strong laws governing the experience of F.E.M. cannot be justified as protecting moral rights, preventing instances of wrongful harms or serving the greatest good. In general it is better to not encourage widespread disregard for the law (Boyle 2008, 157 and Murphy 2007, 53-62) but I wish to suggest that our current laws require more careful consideration in light of possible justifications which this project has argued against. We would be wise to remember that “A system of Law that announces that it is not for the common good is like an alarm clock that is labelled ‘not to be used to awaken people’. (Murphy 2007, 45)”

6.7 The Preferred Theory Objection: There Could Be More to Consider Here Than Just Rights and Harms.

I shall consider one more objection to my solution; that it prioritises a focus on harms and rights. Assuming the reader does not prefer the assumptions of my ethical analysis then she may take issue with my conclusions. There is not space in this project to argue that my focus on rights and harms is the correct approach to any ethical situation. Instead I will argue that these are by far the most appropriate theories to use in such an analysis.

6.7.1 The Reply: There Are Very Good Reasons to Prefer a Rights and Harms Focused Ethical Analysis.

Any philosopher who approaches an applied ethical topic like piracy faces a difficult choice about which normative theory of ethics or combination of them forms the best analysis of an act. This involves selecting a theory or theories from the following list: act consequentialism, rule consequentialism, deontology, cultural relativism, Kantian theory, contractarianism, contractualism, divine will theory, rights, natural law theory, virtue ethics, or Rossian style pluralism. This list is by no means exhaustive. Once a philosopher has identified the main theory they must then choose between all the subtle variants of that theory. I provided a rights based approach in this project which could have been cast as a purely moral rights, legal rights, special rights or natural rights approach. Engaging with a Rossian style pluralism then allows for any combination of these theories to feature in the analysis. In a sense my preferred theory has been a Rossian style pluralism of rights and harm since it has appealed to more than one normative theory of ethics. In another sense it is not a complete Rossian pluralist analysis because I have made no attempt to explain how these two ethical theories work together despite the fact that their compatibility is a point of some debate.¹⁴

Rights and harms are by far the most appropriate normative theories in this case for two reasons. Firstly they are theories most commonly appealed to in anti-piracy arguments. Intellectual property foundations, anti-piracy public service announcements, and much of the academic literature focus on the harms caused by piracy (Himma 2008, 1146-1155). These same organisations also constantly appeal to the negative effects of piracy by arguing that it lowers incentives to produce new intellectual property, costs the industry jobs and represents a collective harm that could implode the entire intellectual property industry (Boyle 2008, 4). Every one of these is a consequentialist style appeal to

¹⁴ For more on the friction between rights and utility see Lyons 1982, 110-136 and Scanlon 1977, 137-152.

the external effects of the act of piracy. Arguments which appeal to the violation of rights or instances of wrongful harming are not as common as consequentialist appeals but they are even more important because of the well-known weaknesses of consequentialist theories of ethics.¹⁵

For this reason it was crucial that my project addressed the rights angle. This invites a further question about which rights system to apply. I began with a moral rights analysis and worked my way back to a special rights analysis because I wished to engage with the strongest possible anti-piracy argument. Moral rights are stronger than special rights because of the trumping power they carry over the kinds of agreements which generate special rights. It would be a huge oversight on my part to treat the rights section of this analysis purely as something which was only justified by appeals to consequences. Instead I assumed that the F.E.M. property bundle included moral exclusionary rights over experience first and after eliminating that possibility, I then treated the exclusionary right as a special right justified by its benefit for society.

Secondly, much of the debate over piracy focuses on legal issues. Moral considerations are just as if not more than important than legal issues and this project has focused on the ethical angle by looking at our moral obligations regarding harms and rights in potential acts of piracy. Laws are important and a common purpose of the law is to prevent substantial and avoidable harm (Feinberg 1984, 12), protect moral rights (Murphy 2007, 36), or aim to produce the greatest good (Murphy 2007, 45). Speaking in general many laws are built around the ethical considerations of rights and harms. This is one of the reasons they can conflict with each other (Lyons 1982, 112-113). This project has prioritised the ethical theories of harms and rights because as well as being an ethical issue it also a legal issue. For this reason and the reasons given above I believe that the normative theories of rights and harms are by far the most appropriate for analysing the ethical permissibility of piracy.

6.8 Conclusion

In this chapter I have argued that piracy for personal use is morally permissible and outlined its conditions. If we follow rule P that agents ought to only pirate for personal use F.E.M. whose informed consumer value is less than the owner assigned value then acts of piracy will not harm sales. The moral rights of the owner are not violated because the F.E.M. ownership bundle does not include a moral exclusionary right over experience. The

¹⁵ For more on the weaknesses of consequentialist theories of ethics see Timmons 2002, 103-150.

special rights of the owner are not violated because they are overridden. In this case infringing on these rights is morally justified because they are not grounded in a moral right and do not serve the common good. Thus this solution also avoids Himma's (2008) objection that acts of piracy will be morally impermissible because the rights of the author would trump the positive consequences of getting the good for free. In response to agent centred problems I outlined an alternative F.E.M. system called F.E.M. Hub which grants some special exclusionary rights over experience and argued that it would do a better job of encouraging adherence to the system. Next I defended this solution against objections, arguing that piracy for profit is still morally impermissible, that we still have a moral right of exclusion over our private information, that F.E.M. in development justifies a temporary special right of exclusion until it is released, and argued that this project suggests that moral rights cannot serve as a basis for laws governing the experience of F.E.M. Lastly I argued that while this project prioritises the ethical theories of harms and rights, they are by far the most appropriate theories to consider. In the final chapter I will summarise the conclusions of this project and discuss open questions suggested by it.

CONCLUSION

7.1 Project Conclusions

Acts of piracy are morally permissible provided that certain conditions are met. The analogy justification for the strong view of F.E.M. property rights fails because of the crucial disanalogies between F.E.M.s and ordinary property such as coffee mugs. The harm focused analysis of piracy concluded that it was responsible for damage to sales in the range of 4.1% -12.89% but that these harms were merely instrumental as opposed to instances of intrinsically wrongful harming. The rights focused analysis of piracy concluded that the F.E.M. property rights bundle does not include a full moral exclusionary right over experience of the F.E.M. and is unlikely to include such a partial moral right. It is far more likely that the exclusionary rights over experience included in the bundle are large scale special rights justified by how they benefit society. Thus the ethical analysis sided with the weak view of F.E.M. property and refutes premise three of the master argument since acts of piracy for personal use do not cause wrongful harm or violate justified property rights.

While acts of piracy for personal use do not violate moral rights or harm wrongfully, the literature is converging on the conclusion that they are responsible for large damage to sales through a collective harm (Smith & Telang 2012, 18). While I have argued that these harms are instrumental, I also accepted that there are sufficiently many of them to count as an instance of significant harm given that they are serious and avoidable. In response to this significant harm I outlined conditions for acts of piracy for personal use which prevent them harming sales. The act must be for personal use rather than for profit and the agent must not pirate something which they would otherwise have purchased. If an agent pirates a F.E.M. and realises that it is worth paying for i.e. if they determine that the value of the experience good is greater than the initially thought, then the agent is obliged to purchase it. If you pirated *Inglorious Basterds* and loved it then purchase a copy of *Inglorious Basterds*.

I then considered objections to my solution, beginning with objection that agents are unlikely to adhere to the conditions which I have laid out. In response I outlined an alternative F.E.M. system which I argued does a better job of meeting the goals of the intellectual property system, more carefully balances the collective harms which the weak and strong property views are vulnerable to, and is more likely to encourage adherence from agents. Next I showed why piracy for profit is still morally impermissible, explained

why agents still have a moral right of exclusion over their private information, argued that F.E.M. in development is still protected, and defended my choice of ethical theory in this analysis. It is unlikely that I have considered all possible objections to my solution but I have at least presented strong argument in support of the weak view of F.E.M. property rights with the implication that acts of piracy for personal use are morally permissible provided that they strictly adhere to the conditions which I have set out.

7.2 Open Questions

In this section I will briefly discuss open questions suggested by this project. I will outline future research in four areas: further empirical work, the justification for ownership, the digital commons, and what rights are included in academic discovery bundle.

7.2.1 Further Empirical Work

There is a great deal of room for more empirical work on the topic of piracy. In section 4.7 I outlined a formula to generate guideline P^* which recommended a minimum proportion of purchases to downloads. Obviously there is a great deal of empirical work to discover the values used in this formula. At the very least we want to know the current mean proportion of purchases to illegal downloads and the actual percentage of sales damage caused by piracy. The work on this provided by economics thus far is impressive but the results still vary (Boyle 2008, 74). We can now confidently assert that piracy is harming F.E.M. sales but not that the level of harm has been precisely identified (Smith & Telang 2012, 18). Given the detailed results provided by Sycamore, I believe that focusing on surveys and activity diaries will provide the most accurate information.

7.2.2 What Entitles Me to Original Property Ownership?

In this project I assumed that ownership of an idea is justified. The question of what justifies the notion of owning an idea at all is a compelling one. Two interesting ways to approach this would be via a Lockean or Kantian Route. John Locke advocated an argument for original appropriation of physical property which has become a central theme in the literature surrounding justifications of intellectual property ownership.¹⁶ This argument focused on the mixing of one's labour with a physical object. We own ourselves and the labour we produce so by mixing our work with an object we gain moral ownership over it.

¹⁶ As examples see Gordon 1993, 1549, Hettinger 1989, 44, Himma 2008, 1153 and Resnik 2003, 322.

Though the Earth and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then, he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, hath by this labour something annexed to it, that excludes the common right of other Men. For this Labour being the unquestionable Property of the Labourer, no man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others. (John Locke, *Two Treatises of Government*, II, Chapter Five section 27 in Waldron 1983, 38)

This argument has a great deal of intuitive pull to it. We feel entitled to the fruits of our labour (Resnik 2003, 322). Ergo if we mix our labour with something which is currently not owned, then we have appropriated something in a legitimate way. It also has many interesting implications for intellectual property. There are questions about why we gain the new object instead of just losing our labour (Waldron 1983, 42) and whether a mixing argument is a plausible justification given that abstract objects like ideas do not spatiotemporally interact with concrete objects (Resnik 2003, 321 and Himma 2008, 1154)

Another methodology for justifying idea ownership is provided by Kant. In *Of the Injustice of Counterfeiting Books* Kant rails against people who produce and sell unauthorised copies of other people's work (McGrail & McGrail 2010, 71). Kant argues that counterfeiting is immoral by appealing to the categorical imperative. This feature of Kant's philosophy claims that actions which imply absurdity when willed to be a universal maxim are immoral. Let us consider deception, imagine that every person in the world lied constantly. In such a world, there could be no society since communication would be impossible. Thus deception is immoral because it is impossible for all people to lie (Timmons 2002, 168-169).

Kant's proof of the immoral nature of counterfeiting involves a proof that a right to reproduce owned publications is impossible in some sense.

That the property of the copy does not furnish this right I prove by the following ratiocination:

A personal positive right against another can never be derived from the property of a thing only.

But the right of publishing a work is a personal positive right.

Therefore it never can be derived from the property of a thing (the copy) only.

(Kant 1768, 233, emphasis added).

This argument may seem a little ambitious but clearly a Kantian style analysis of the moral justification of intellectual property ownership would be a fascinating one. But Kantian or Lockean analyses are only two of the many interesting possibilities here.

7.2.3 The Digital Commons

There is an interesting question about whether some ideas by their very nature cannot be owned. Putting aside whether it is a moral or a legal issue, it does seem that some ideas such as basic mathematics cannot be owned. These ideas are the property of the digital commons in much the same way that resources like air are the property of the ordinary commons. It seems fine for K.F.C. to own the secret recipe to greasy chicken but a little more absurd for Nike to claim that they own the tick. In a rough sense the types of intellectual property which are part of the digital commons are properly basic shapes and concepts. A similarly troubled distinction to this is applied in intellectual property law between ideas and the expression of an idea. Only the latter is copyrightable (Croskery 1992-1993, 642 & 643). This suggests some legitimacy for a distinction between abstract objects which may be owned and those which may not.

7.2.4 Which Rights Are Included in The Academic Discovery Bundle?

In this project I have argued that the F.E.M. property rights bundle does not include moral exclusionary rights against experience but I did not include a full account of which rights are included in that bundle. Aside from concerns about space, such an account would be premature because bundles of property rights vary from case to case (Waldron 2012, section 1). Another instance of idea ownership which is likely to have a very different rights bundle is the ownership of academic discovery. It seems that certain discoveries such as the invention of calculus ought not to entitle the discoverer to a right of profit but there are good consequence-based reasons to justify a special right of profit for the discovery of a cure for Alzheimer's (Kinsella and McBrierty 1998, 61). It certainly would increase incentives for people to discover one. These examples suggest that while academic discovery is a kind of intellectual property (Resnik 2003, 321), academics are more likely to have ownership of the discovery of the idea rather than the idea itself. Thus the intellectual property rights bundle in this case will include the right to credit for the discovery but not the right to profit.

Further ethical questions about academic work concern issues of who controls gathered data and whether an academic is entitled to take their work with them if they change institutions (Hettinger 1989, 46 & Nelkin 1982, 705). There are also ethical

questions about whom, if anybody has the right to profit from these discoveries and to what extent the lack of profitability correlates with looser attitudes towards intellectual property protection. Finally there is the serious question of what effects stronger property rights over academic discoveries would have on the progression of knowledge. They could serve to incentivise more discoveries or they could interfere with the progression as academics become more protective of potentially profitable ideas (Nelkin 1982, 705). Because the progression of knowledge has more severe implications for society than the progression of F.E.M.s the conclusions of such a project would be even more applicable.

7.3 Final Remarks

Acts of piracy for personal use are morally permissible. At the beginning of this project we saw that claims about their moral status relied on bold assumptions about the similarities of ordinary property and F.E.M., the harms caused by piracy and which rights are included in the F.E.M. property rights bundle. The truth is that these assumptions were faulty. Acts of piracy for personal use are morally permissible provided that they strictly adhere to my recommended guidelines. Despite the disanalogies between the two, F.E.M. share much in common with ordinary property such as coffee mugs. We are within our rights to own, sell, create and dispose of both. And if coffee mugs were non-exclusive abstract objects then we could also download them for free from the internet. Fortunately for coffee drinkers, with 3D printing becoming more and more sophisticated, the future and all the ethical conundrums which accompany it are just around the corner at a future coffee shop near you¹⁷.

¹⁷ A real world instance of exactly this sort has recently occurred. Grace Choi from Harvard Business School has worked out a way to print make up from a relatively cheap 3D printer. For more detail see Shontell 2014.

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¹⁸ The research from sycamore is not yet available to public access but I have obtained permission to cite it for the purposes of this project.

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