THE USE OF TORRENTS IN SOCIETY

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1. Introduction

Within the general libertarian framework, recent scholarly work on intellectual property (IP) is quite rare. For example, in analyzing the foundations of libertarianism and its positions on a wide array of topics, from the nature of liberty to civil rights, Brennan (2012) discusses, at length, why libertarians think property rights are important, yet disregards issues involving IP with the sole exception of a paragraph discussing how patents might inhibit innovation. The same is true when we take a close look at the *Routledge Handbook of Libertarianism* (Brennan, van der Fossen, and Schmidtz 2018), where there is no discussion of IP in the chapter dedicated to property rights (Stilz 2018), save for a short examination of patents in Flanigan's effort at developing a libertarian approach to medicine (2018).

In the absence of such a unified stance on IP (Long 1995; Bell 2014, 6; Uszkai 2015, 188–94), we can identify a wide array of libertarian positions on copyrights and patents. One of the first libertarian defenses of IP from a natural rights perspective comes from Lysander Spooner (1855). Robert

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Nozick also famously argues, within a Lockean framework, that inventors are entitled to patents in a minimal state but the duration of the legal protection should be drastically shortened (1974, 141, 181–82). Previously, Ayn Rand posited that an individual has the "right to the product of his mind" (1967, 130), while criticizing the idea of perpetual IP protection. Other libertarian-leaning scholars such as Bryan Cwik have highlighted that labor, understood in a neo-Lockean way, should be the basis of IP (2014). Outside of the natural rights framework, some economists have pointed out that copyrights and patents should be understood as incentive mechanisms for creators, thus providing a utilitarian case for copyright and patents (Landes and Posner 2003).

Other libertarian philosophers and economists have mounted a robust critique of the moral acceptability of granting property rights to ideas (and their expression), either in the form of artistic creations or inventions and technological innovations. In three seminal papers, Tom G. Palmer (1989; 1990) and Stephan Kinsella (2001) attack the normative foundations of the natural rights, utilitarian, and personhood-based accounts in favor of IP. Samuel Edward Konkin III argues that copyrights are not a creation of the market, criticizing both utilitarian and natural rights accounts (1986). More recently, Michele Boldrin and David K. Levine (2008) try to show that, on utilitarian (or broadly consequentialist) terms, copyrights and patents actually hinder innovation and competition by promoting toxic monopolies.[1] Last but not least, Wendy McElroy reiterates the argument that only scarce goods can be the object of property rights and sees a dangerous implication of the protection of copyrights: authors could claim ownership to what is in the minds of their readers (2011, 10).

With this general map of libertarian positions on copyright in mind, the current paper aims at exploring whether the anti-IP case could be strengthened by appealing to a surprising figure: F.A. Hayek. At first glance, this choice might seem bizarre, as his remarks and ruminations on copyright (and other IP rights) and copyright infringement are rather brief and sketchy, and are scattered through various works (seemingly) without any conceptual unity. Without rejecting previous work done by libertarians on the question of whether copyright is morally legitimate (quite the contrary), this paper will firstly strive to establish a Hayekian research agenda on copyright by providing a unified reading of Hayek's remarks in the bigger picture of the contemporary philosophy, politics, and economics of IP. Secondly, exploring

[1] When it comes to policy recommendations, some positions are a bit more nuanced. For more details, see Bell (2014).

peer-to-peer (P2P) file sharing and copyright infringement through a Hayekian lens suggests what might be a useful analogy between the ability of torrent downloads and prices to convey information. Last but not least, the paper will end on a skeptical note concerning the moral and economic foundations of copyright by presenting what I consider a more Hayekian alternative: crowdfunding platforms.

Taking into account the fact that Hayek is recognized for the study of knowledge, complex social phenomena, and spontaneous orders, establishing such a research agenda not only would strengthen the libertarian case against IP, but it could also be of great interest for Hayekian scholars interested in the many ramifications of his work. There are similar examples in current classical liberal/libertarian debates, with the libertarian case in favor of a universal basic income being at the forefront. While Hayek does not explicitly discuss a universal basic income, he is referenced by some scholars who try to establish such a case (Munger 2011; Zwolinski 2011) and features in Zwolinski's philosophical reconstruction of why he would support such a policy (2013). We could think about my exploration here in a similar way.

2. The Philosophy, Politics, and Economics of Copyright

In 2014 Swedish police raided the headquarters of The Pirate Bay, seizing its servers and computers and shutting down what used to be "the galaxy's *most resilient* BitTorrent site" (Beyer and McKelvey 2015, 899). The Pirate Bay's founders had already been treated similarly in 2006, when their headquarters were raided by Stockholm police for the same reason. The four founders of the website were found guilty by a Swedish court in 2009 for assisting in violations of copyright law and were each sentenced to prison time and charged a hefty fine for the damages The Pirate Bay (allegedly) caused (Larsson 2013, 354).

Neither of these was, however, the first major case involving copyright infringement in the internet era. That honor is reserved for the American rock band Metallica and its infamous 2000 suit against Napster, the first major P2P file-sharing system (Merriden 2001). While it might be successfully argued that the digital revolution and the emergence of online P2P file

sharing have increased the scope of media piracy,[2] cases like Metallica's are not unique to the contemporary landscape; copyright infringement and IP wars have existed ever since Gutenberg's invention (Johns 2009; Baldwin 2014).

Neither Napster nor The Pirate Bay enjoys a good reputation among most moral philosophers and economists. They hold this position because they see copyright the way they see any other property right, as grounded either in Lockean natural rights (Tavani 2005; Spinello 2011), neo-Lockean labor considerations (Cwik 2014), neo-Kantian and neo-Hegelian personhood arguments (Schroeder 2006), or even (albeit very rarely) Rawls's theory of justice (Merges 2011).

While not directly denying the value of this principled approach to copyright, a distinct cohort of mostly economists and legal scholars tend to focus on the consequences of copyright, thereby formulating a utilitarian case for a property right in expressing ideas. Perhaps one of the best examples of this approach can be found in the works of Landes and Posner, who write within the general American approach to IP. The crux of the problem for the utilitarian rests on the incentives available for the creative individual: would an artist write, paint, or compose without the power to exclude others from copying her work? Landes and Posner (2003) believe that few would and that that is why we need to grant property rights in the expression of ideas. In this way society will benefit from the existence of books, music, and art. Moreover, even if protecting copyrights is expensive,[3] the trade-off between free access and incentives is worth making. Because of copyright, copies of books, movies, and video games are artificially scarce and, as the laws of supply and demand predict, more expensive for consumers. However, because (to take only one example) copies of video games are more expensive, more and more game developers are incentivized to produce new and better gaming experiences through their work.

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[2] It can be argued that the usage of the term "piracy" is dishonest since the term is tantamount to saying that copying or downloading is theft. While I do not agree that it is theft, I will still use in some instances the term "piracy" as it is entrenched in the scholarly debate. In most instances I will, however, opt for a more neutral label such as "copyright infringement."

[3] Copyright enforcement has become even more expansive in the wake of the digital revolution, following the wide availability of computers with internet connections, which slashed the costs of producing copies.

3. The Fatal Conceit of Copyright

Hayek is largely an unknown figure within the scholarly debate surrounding copyright.[4] The reason for his absence is warranted because he barely mentions the issue and only in some of his works. Regardless, the particular way he does it is quite insightful, and that is why he deserves a place in the ring, especially in the anti-utilitarian corner.

In the second chapter of *The Fatal Conceit*, Hayek aims at answering a couple of questions regarding the nature and purpose of property rights, such as "Where do they come from?" and "Where are they going?" While the answer to the former is simple (they originated in customs and then were shaped by common law and legislation), the answer to the latter involves invoking the names of Arnold Plant, Ronald Coase, Armen Alchian, and Harold Demsetz and their promising proposals for improving our current legal framework.

It is at this point that Hayek feels the need to distinguish between material and immaterial objects and talk about one particular form of property, namely IP:

> Just to illustrate how great our ignorance of the optimum forms of delimitation of various rights remains... a few remarks about one particular form of property may be made. Those very intellectuals who are generally inclined to question those forms of material property which are indispensable for the efficient organisation of the material means of production have become the most enthusiastic supporters of certain immaterial property rights invented only relatively recently, having to do, for example, with literary productions and technological inventions (i.e., copyrights and patents). (1988, 36)

Why does Hayek find it strange that some intellectuals[5] who are skeptical about the value of private property rights in material objects tend to

[4] Hayek's name can, however, be found mentioned in Kinsella (2001) and Bell (2014).

[5] It is interesting that in his "The Intellectuals and Socialism" Hayek sees a strong correlation between the growth of the intellectual class and copyrights, as their development can be seen as a result of the IP system. As they have a vested interest to maintain the status quo, we can tentatively explain why most people tend to generally accept copyrights by taking into account the role that intellectuals have in setting trends in the realm of ideas. Whether an honest debate surrounding copyright is possible in this context is, according to Hayek, highly problematic: "One of the important points that would have to be examined in such a discussion would be how far the growth of this class

embrace private property rights in immaterial objects such as ideas? His answer is of great importance for the copyright debate:

> The difference between these and other kinds of property rights is this: while ownership of material goods guides the use of scarce means to their most important uses, in the case of immaterial goods such as literary productions and technological inventions the ability to produce them is also limited, yet once they have come into existence, they can be indefinitely multiplied and can be made scarce only by law in order to create an inducement to produce such ideas. (1988, 36)

This has to do, first of all, with the fundamental ontological distinction between these two types of goods. When defining a copyright (or any other intellectual property right, such as a patent or a trademark), scholars find it useful to distinguish between ideal objects and their material substrata. As Palmer puts it, "Intellectual property rights are rights in ideal objects, which are distinguished from the material substrata in which they are instantiated" (1990, 818). An alternative way of conveying a similar idea is by applying the classical distinction from metaphysics and the philosophy of language between *types* and *tokens* to IP. What is the object of IP law, then?

> The objects of intellectual property are types and not tokens... The tokens are distinct, physical things, but they are instantiations of the same abstract type. Types are multiply realizable; thus they may be instantiated in more than one place at any time. Tokens, on the other hand, are unique occurrences. (Biron 2010, 382–84)[6]

Secondly, Hayek's answer dwells on the purpose of ownership. We need property rights because they are the best tool we have (one we stumbled upon) to rationally and efficiently allocate scarce resources and reduce the incidence of conflict over material goods (Kinsella 2001). This idea is of great importance because, in contrast to material objects such as laptops or plots of land, ideal types, once produced, can have an indefinite number of tokens. For example, the number of copies produced of George R.R. Martin's closing

has been artificially stimulated by the law of copyright... It would be interesting to discover how far a seriously critical view of the benefits to society of the law of copyright or the expression of doubts about the public interest in the existence of a class which makes its living from the writing of books would have a chance of being publicly stated in a society in which the channels of expression are so largely controlled by people who have a vested interest in the existing situation" (1949, 420). I would like to thank one of the anonymous reviewers for directing me to this passage.

[6] Long (1995) has a similar idea, asserting that IP protects property rights in "universals." Schulman's "logorights" (1990) also come close to this.

novel in the *A Song of Ice and Fire* saga will depend solely on the projected sales. There is no reason not to multiply the *type* into an infinite number of *tokens* except for market concerns.

Utilitarians who are in favor of copyright argue that forced scarcity for literary works has a positive effect, as it incentivizes authors such as Martin and his publishing house to be more creative and productive and take more risks when promoting and investing in authors. Indeed, the fundamental idea Landes and Posner had was exactly this: the purpose of copyrights is exactly this forced scarcity. For Hayek though this idea is fuzzy at best:

> Yet it is not obvious that such forced scarcity is the most effective way to stimulate the human creative process. I doubt whether there exists a single great work of literature which we would not possess had the author been unable to obtain an exclusive copyright for it. (1988, 36)

Hayek's skepticism regarding the core of the utilitarian case for copyright is at least partly warranted. Firstly, we should note that some of the greatest literary works that might be found on our bookshelves or in high school and college syllabi, from Homer's *The Iliad* and *The Odyssey* through Ovid's poems and finishing with Shakespearean plays, were created before anything even closely resembling our current copyright legislation was in place. While it is true that authors did have some financial incentives to write, they did so within a different framework, one involving literary and artistic patronage (Lytle and Orgel 1981; Gold 1982). Forced scarcity is not the only or necessarily even the best way to produce great literary works.[7] Even some legal scholars and practitioners of IP law such as William F. Strong ungrudgingly accept this idea. Strong asserts that the problem of what incentives and disincentives authors have is such a complex one that it is difficult to provide a simple, definitive answer. While not a critic of the copyright system for literary works (quite the contrary), he feels that most scholars tend to uncritically accept the idea that copyright automatically fosters innovation and creativity:

> Nearly all great English poetry and drama (not to mention Latin, Greek, and French), and nearly all great music, painting, and sculpture that existed in 1787 had been created in the absence of copyright. The English copyright law, which had been on the books

[7] In fact, following Demsetz, it can be argued that IP scholars who believe copyright automatically plays this role commit something close to the "nirvana fallacy." An interesting argument exploring the nirvana approach to IP can be found in Vică and Socaciu (2017).

> less than a century, had been enacted more as a narrow-gauge protection to printers and booksellers (who were the publishers of those days) than out of compassion for authors, or as a stimulus to intellectual innovation. And while that testing period of the English law was a period of great intellectual output, you would be hard pressed to say that this was a result of the copyright law. (1986, 33–34)[8]

The same Hayekian skepticism[9] can be useful in evaluating the impact copyright had on classical-music output. Using data from Frederic M. Scherer's research, Boldrin and Levine (2008, 187–89) propose a method to test the potential benefits of forced scarcity by taking a closer look at the consequences of the introduction of copyright protection in Europe for such musical productions. Copyright protection was introduced in the last decades of the eighteenth century and spread to the whole continent by the mid-nineteenth century. With the UK being the first and the strongest supporter of IP and one of the wealthiest countries of its day, the introduction of copyright for printed music in 1777 should have had a positive effect. Yet it appears that the number of composers per million declined almost everywhere, from Germany and Austria to Italy, but especially in the UK, where the numbers dropped especially quickly. With the sole exception of France, the introduction of copyright for printed music did not serve the intended purpose utilitarians think it should have served.

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[8] There might be some situations in which we can say, beyond any reasonable doubt, that the forced scarcity imposed by copyright directly hinders creativity and innovation: in the scientific output of researchers from the developing world. The high costs that researchers from those countries have to endure to access cutting-edge academic papers or books means that they will either produce (i) fewer research papers and books or (ii) outdated research outputs (Uszkai 2016a). For a more comprehensive analysis of IP and copyright as incentive mechanisms, see McNally (2012) and Johnson (2012). Some advocates of IP in the libertarian camp such as William Shughart admit that a lower level of dissemination of ideas is one of the intended purposes of these rights, especially in the case of the pharmaceutical industry. For an in-depth analysis of their proposals, see Kinsella (2016).

[9] One of the specific features of Hayek's approach to the social sciences is his skepticism toward forms of nonspontaneous orders generated through a top-down approach, something he inherited from figures of the Scottish Enlightenment such as Adam Smith and David Hume. It is in this sense that I find his skepticism of great value in the debate surrounding copyrights. I would like to thank one of the anonymous reviewers for pointing out the necessity of highlighting this methodological feature of Hayekian thought.

Before moving on, an additional note on incentives, copyright, and music is in order. Pro-IP utilitarians argue that the absence of copyright protection might be not only a disincentive for artists, novelists, or musicians, but also an incentive for digital piracy (Aversa, Hervas-Drane, and Evenou 2019). Because of digital piracy, both companies and artists lose money; as a consequence, fewer invest their time, effort, or money in bringing new products to the market. This idea was also central for the US District Court for the Northern District of California in the legal battle between A&M Records and Napster in 2000: "The court finds that Napster use is likely to reduce CD purchases by college students, whom defendant admits constitute a key demographic."[10] In analyzing the impact P2P file sharing has had on media output, sales, and revenue, Oberholzer-Gee and Strumpf dispense a healthy dose of skepticism toward this well-entrenched narrative.

First of all, if the sales of an artist are on a downward slope, blaming BitTorrent, The Pirate Bay, and copyright infringement might be a knee-jerk reaction. The equivalence of illegal album downloads and potentially legally acquired albums is a stretch. If someone does not have the resources to buy an album from one of her favorite artists and decides to download it from The Pirate Bay, this does not mean that in the absence of this alternative, she would either go to the record store, order it online, or pay for a subscription to Spotify. It means rather that she would either abstain from listening to it or search for other cheap or free alternatives such as listening on YouTube.

Secondly, because artist revenue nowadays is not solely based on album sales (in turn because of the growing role of live shows and merchandise), an argument could be made that, in fact, copyright infringement in the digital age has increased the exposure of artists and their chances of receiving higher concert fees.[11] Starting in 2000 (after the Napster revolution in the P2P distribution of music and the increasing availability of internet connections worldwide), Oberholzer-Gee and Strumpf point out, the music industry underwent a significant boom, with the annual release of albums more than doubling. The trend was similar in other areas as well. The rate of publication of new books increased by 66 percent from 2002 to 2007. From 2003 to 2010 the rate of film production also increased worldwide—by more than 30 percent (2010, 20)—coupled with a staggering increase in film budgets (especially in Hollywood) even though more and more big productions are proving to be box office disappointments (McMahon 2018).

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[10] A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000).

[11] More on BitTorrent and digital piracy as a discovery mechanism can be found later in the paper.

Despite the ubiquity of digital copyright infringement, it is very difficult for artists to actually make a living from their talents. With over 50,000 albums released annually and only 950 of them selling over twenty-five thousand copies in 2007 (Oberholzer-Gee and Strumpf 2010, 47), the explanation of what incentivizes an artist to be creative, to compose, and to sing should be sought elsewhere. Maybe a more promising way to answer the question is to return to the so-called "theory of superstars" (Rosen 1981). The idea that copyright plays the essential role of an incentive may well just be a fallacy (Johnson 2012).

While Hayek is skeptical that forced scarcity is effective in stimulating creativity, he is certain of the economic consequences of copyrights: monopolies and a decrease in competitiveness. Applying something like the concept of property, which, Hayek says, developed for material objects, to immaterial objects such as ideas has led to

> the growth of monopoly... drastic reforms may be required if competition is to be made to work. In the field of industrial patents in particular we shall have seriously to examine whether the award of a monopoly privilege is really the most appropriate and effective form of reward for the kind of risk-bearing which investment in scientific research involves. (1948, 114)

Intellectual monopoly is of great importance for Hayek because it has an impact on what he labels as "the fund of experience" (1978, 43). Restricting the spread of ideas and knowledge by making them artificially scarce through copyrights and patents limits progress because it limits the ability of the market to provide the "free gift of the knowledge" that would allow all individuals and nations who are worse off "to reach the same level at a much smaller cost" (1978, 47).

4. Copyright: The Result of Human Action and of Human Design

Hayek's discontent with Cartesian rationalism and his methodological "love affair" with the Scottish Enlightenment's anti-rationalism and its proponents (Bernard Mandeville, David Hume, Adam Ferguson, and Adam Smith) is well known (1967, 96–105). Some commentators on Hayek even consider this his "most striking feature" (Barry 1986, 74). Gerald Gaus expands on this point, arguing that the Hayekian approach to understanding complex phenomena such as human interaction is based on two main concepts: cultural evolution and spontaneous order (2006, 233).

Echoing Adam Ferguson's famous analysis of human institutions,[12] Hayek believes that to understand our civilization,

> one must appreciate that the extended order resulted not from human design or intention but spontaneously: it arose from unintentionally conforming to certain traditional and largely moral practices, many of which men tend to dislike, whose significance they usually fail to understand, whose validity they cannot prove, and which have nonetheless fairly rapidly spread by means of an evolutionary selection—the comparative increase of population and wealth—of those groups that happened to follow them. (1988, 6)

Drawing upon an earlier distinction that Hayek makes between two types of order, *cosmos* and *taxis* (1968; 1982, 35–55), and his preference for the former (spontaneous orders), it is easy to see why he preferred evolved institutions and *nomos* to *thesis*.[13] How well does copyright fare in the Hayekian *cosmos* of spontaneous orders and evolved institutions? Was copyright a product of human action without human design, or was it *rationally* designed?

The first thing we have to ask ourselves is when human beings began to think that, just like apple trees, tools, and plots of land, ideas could be thought of as something to be owned. Some historians argue that ever since antiquity we something similar to this idea has existed, with early craftsmen and traders using something close to trademarks to protect their reputations (May and Sell 2006, 44–45). While some Greek poets and painters did sign their works with their names, it was the Romans—and in a similar fashion, the Islamic scribes—who came closer to assigning what we might currently

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[12] "Nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design" ([1767] 1995, 119).

[13] Some, like Shearmur, tend to be skeptical of this general reading of Hayek: "It is such considerations that, presumably, underlie Hayek's enthusiasm for evolved institutions in his *Law, Legislation and Liberty* and *The Fatal Conceit*. Indeed, this enthusiasm at times seems to verge on a Panglossian conservatism to the effect that, whatever is, is good—provided it was not designed. But this is clearly not an attitude that Hayek sustains. For *Law, Legislation and Liberty* starts from the problem that older institutions which divided and limited constitutional powers have broken down—something which, in Hayek's view, was clearly neither designed nor desirable. And, as we have seen, throughout his work Hayek exhibits a concern for the improvement of inherited institutions" (1996, 108). Whether or not Shearmur is right, what matters is that Hayek did have an overwhelming bias against designed rules and in favor of evolved norms and institutions.

label as "authorship" (45–49; Hesse 2002, 28). However, it was not until the European Enlightenment that IP in the modern sense arose:

> The concept of intellectual property—the idea that an idea can be owned—is a child of the European Enlightenment. It was only when people began to believe that knowledge came from the human mind working upon the senses—rather than through divine revelation, assisted by the study of ancient texts—that it became possible to imagine humans as creators, and hence owners, of new ideas rather than as mere transmitters of eternal verities. (2002, 26)

The reason the Enlightenment (and the early modern precursor period) is such a decisive moment in the history of IP has to do with several interconnected elements: (i) Gutenberg's technological revolution; (ii) the ongoing social, cultural, and economic transition toward capitalism, (iii) the emergence of the modern notion of authorship (Uszkai 2015, 184–85), and (iv) increasing state centralization and the resulting growth of state power, two essential elements IP relies on because of their specific status (as opposed to other natural rights such as the right to self-ownership and the right to tangible property).[14]

The impact of Gutenberg's 1439 invention of the printing press on the very notion of copyright is difficult to underestimate (Atkinson and Fitzgerald 2014, 15). The reason this invention is one of the keys to understanding how copyright appeared has to do with some practical consequences of the invention and spread of the printing press in medieval Western Europe. First, up to the middle of the fifteenth century, books were one of the most expensive consumer goods available for purchase because of their scarcity. This had much to do with the fact that the process of copying them was resource consuming. Gutenberg's printing press slashed those costs to an unimaginably low level and thus increased the availability of books. Second, books were becoming more available to an ever-increasing middle class of the emerging and soon-to-be very important bourgeois class that invested more in the education of their offspring. Soon enough, some of them began writing and publishing books, thus drastically increasing the total pool of available creative works. If you add to the mix growing rates of literacy, an interesting picture emerges:

> In the 1700s, cultural life in Europe underwent a dramatic transformation. A shift from intensive to extensive reading and the

[14] I would like to thank one of the reviewers of this paper for pointing out this essential fourth element, which helps paint a more accurate picture of the "primordial historical soup" that IP and copyright emerged from.

> rise of a middle-class reading public led to an explosion of print commerce in the eighteenth century. In England, it is estimated that annual book production increased fourfold over the course of the eighteenth century. France, too, saw a marked increase in the literacy rate and a dramatic increase in the demand for modern secular literature. (Hesse 2002, 31)

Until the Enlightenment, there was little recognition of authors qua authors. Ancient Greek poets or philosophers (with the exception of the highly criticized sophists) were said to be inspired by muses in their creative endeavors. Likewise, Chinese authors had no property right to their published books. Moreover, a medieval European scholar "might lay claim to the manuscript he created, and the printer to the book he printed, but neither could claim to possess the contents that lay within it. The Renaissance elevated the poet, the inventor, and the artist to unprecedented social heights, but their 'genius' was still understood to be divinely inspired rather than a mere product of their mental skills or worldly labors" (Hesse 2002, 28).[15]

Unlike Greco-Roman antiquity or Christian Europe, the Enlightenment provided fertile land for the emergence of the modern conceptions of "author" and "authorship" made possible by the contributions of John Locke, Edward Young, Gotthold Lessing, and Diderot (Hesse 2002, 33–36). Following this epistemic revolution of the Enlightenment, people began to recognize that particular individuals, be they poets, philosophers, or novelists, were the true source of human knowledge and creativity. They should not thank external sources such as the muses or God.

While these (mostly cultural and economic) transformations were the result of spontaneous and contingent forces, we cannot say the same thing when it comes to the institutional aspects. Some historians argue that IP was born in the fifteenth century, during the so-called "Venetian moment" (May and Sell 2006, 58). Pressure to enact the laws did not come from authors (or inventors), but from powerful lobbying groups—the Venetian guilds—which

[15] There are some dissenting views claiming that in the Byzantine world there was something similar to authorship and copyright in the arts: "The *Institutes* of Justinian (AD 533) distinguished between corporeal and incorporeal property and they also interpreted the doctrine of *accessio* or merger to favour, in some circumstances, ownership by the artist of objects embodying art. Whether the artist owned the object seemed to depend on the quality of the art" (Atkinson and Fitzgerald 2014, 10). Regardless, the general picture shaped by Carla Hesse remains largely correct and authorship became really important only during the Enlightenment.

wanted to block competitors from copying their techniques. Labeled *privilegi*, the Venetian IP statutes were similar to the later English monopolies.

Just like in the Venetian Republic, the creation of the UK's copyright-and-patent system was not the result of spontaneous order and an invisible-hand process. In fact, it was almost the complete opposite of this desirable Hayekian filtering process; the system was a direct result of the visible hand of monarchs distributing favors. The background of the story is the ideological and political fight between Catholics and Protestants, which made controlling book publishers and printers a useful way of ensuring the success of one's faction. In Continental Europe, something similar happened a century earlier, with the backlash of tech-savvy Lutherans who extensively used the printing press against Catholics, who had established a licensing system for the printing of new books (Atkinson and Fitzgerald 2014, 16–17). In England, the act creating copyrights was signed by the Catholic queen Mary in 1557, who bestowed on the Stationer's Company the exclusive right to publish and sell books. Starting in 1558, the Protestant queen Elizabeth I was also known for her activist approach to offering patents as court favors. The passing of the Statute of Monopolies in 1623 by Parliament excluded the English monarchs from the patent game, and, by 1710, with the Stationer's Company's monopoly rescinded, the English copyright-and-IP system reached adulthood[16] (Johnson 2012, 635–40). Copyright was not the result of an "uprising of authors," but "an outgrowth of the privatization of government censorship in sixteenth-century England" (Fogel 2005, 2).

What does this short historical foray tell us, from a Hayekian standpoint? Firstly, some cultural and epistemic norms did evolve, in the face of technological, economic, or social factors. "Authorship" may very well be a result of a spontaneous, unplanned order. When it comes to copyright, the narrative is, alas, different:[17]

> If you travel back in time attempting to trace the origins of intellectual property law, you will find that in the vicinity of the 17th century, the ideas of "patents" and "copyrights" become snarled and intertwined not only with one another but also with "monopolies." All of these legal concepts represented variations on a theme: a monarchy's efforts at maintaining control and doling out favors in an era of increasing threats to royal power. Thus, the origins of modern IP law are not found in a scholarly disputation of

[16] Interestingly enough, according to the *Oxford English Dictionary* the phrase "intellectual property" first appeared only in 1845 (Hesse 2002, 39).

[17] As Johnson so eloquently puts it, "with intellectual property, the *d'être* preceded the *raison*" (2012, 635).

> economics, but rather in the vast political struggle between the monarchy and the various power bases in mid-millennium society. (Johnson 2012, 635)

5. The Use of Torrents in Society

Game of Thrones is, undoubtedly, one of the most important and culturally significant TV shows of the second decade of the third millennium, with millions of viewers per episode. Unsurprisingly, the fantasy drama based on George R.R. Martin's saga is one of the most pirated TV shows in history. How pirated? According to the available data, it holds the honor of being the most torrented TV show for six years in a row, starting from 2012 (Van der Sar 2017).

If the utilitarian case for copyright were correct, we should expect the producers and other important stakeholders of the show (directors, actors, etc.) to have railed against this injustice. If anything, this clear encroachment on their property rights is nothing short of theft, as the punishment for The Pirate Bay's founders has shown.[18] Jeff Bewkes, the CEO of Time Warner (the parent company of HBO, the network on which *Game of Thrones* aired), begs to differ. In a piece in *Forbes*, he compares having the most pirated show in the world with receiving an Emmy award:

> Basically, we've been dealing with this issue for years with HBO, literally 20, 30 years, where people have always been running wires

[18] An interesting rejoinder on utilitarianism, incentives, copyright, and piracy could be made if we took a look at the fashion industry. As Raustiala and Springman have shown, it might be the case that in some industries, piracy actually has had a straightforwardly positive impact: "We have argued that the lack of IP rights for fashion design has not quashed innovation, as the orthodox account would predict, and this has in turn reduced the incentive for designers to seek legal protection for their creations. Not only has the lack of copyright protection for fashion designs not destroyed the incentive to innovate in apparel, it may have actually promoted it. This claim—that piracy is paradoxically beneficial for fashion designers—rests on attributes specific to fashion, in particular the status-conferring, or positional, nature of clothing. We do not claim that fashion designers chose this low-IP system in any conscious or deliberate way. But we do claim that the highly unusual political equilibrium in fashion is explicable once we recognize its dynamic effects: that fashion's cyclical nature is furthered and accelerated by a regime of open appropriation. It may even be, as one colleague suggested to us, that to stop copying altogether would be to kill fashion" (2006, 1775–76). Johanna Blakley concurs, arguing "that one reason that fashion design has been elevated to an art form is precisely because of the *lack* of copyright protection" (2010).

> down on the back of apartment buildings and sharing with their neighbors... Our experience is, it all leads to more penetration, more paying subs, more health for HBO, less reliance on having to do paid advertising... If you go around the world, I think you're right, Game of Thrones is the most pirated show in the world. Well, you know, that's better than an Emmy. (Tassi 2014)[19]

This assessment of copyright infringement, which happens (almost exclusively) in P2P file-sharing architectures facilitated by BitTorrent, sounds paradoxical both on theoretical and empirical grounds, as big-media corporate conglomerates have had the tradition of lobbying for extensions of copyright protection (Boldrin and Levine, 97–120) and pushing for the legal shutdown of those who facilitate the infringement of copyrighted materials. There is, however, a sense in which Jeff Bewkes is right, and there is also a (Hayekian) case in favor of more leniency for copyright infringement, as it might actually have a positive long-term financial impact within certain parameters.

A recent study commissioned by Ofcom UK,[20] prepared by Kantar Media with the financial support of the UK Intellectual Property Office, might shed some preliminary light on this issue. The purpose of the *OCI Tracker Benchmark Study* was to provide key insights and data regarding media consumption in the UK during 2011 detailing the extent of copyright infringement and behaviors and attitudes among people older than twelve.

One of the elements the study addressed was the likelihood of consumers paying for certain goods (music, movies, books, video games) after taking into account two variables. The first one was price sensitivity: how likely they were to buy something as the price of that good increased. The second divided the consumers into three main categories based on their consumption habits: (i) 100 percent legal consumers; (ii) consumers with a mix of legal and illegal activities; and (iii) 100 percent illegal customers. Their findings concerning music and movies vindicated Jeff Bewkes's take on copyright infringement.

When it comes to music, individuals who follow a combined legal-and-illegal consumption pattern were willing to pay the highest mean price for

[19] As one anonymous reviewer pointed out, it is not clear whether in a no-copyright world movie producers would adopt such a position. However, the point I am trying to make is smaller, namely, that copyright infringement in the digital age is not necessarily harmful to owners of IP and that it actually might have some positive spillovers.

[20] The Office of Communication is a UK statutory corporation tasked with regulating British broadcasting and telecommunications.

both a single track (seventy-two pence/track) and a subscription service (£4.69/month), with the 100 percent legal consumers lagging behind at forty-two pence/track and £2.59/month. Using the same scale of willingness to pay in the case of movies, the author of the study notices a similar distribution within the examined groups. The mix of legal and illegal was willing to pay both the highest absolute and the highest mean price for downloading a film (£4.92) and also for movie subscriptions, with the 100 percent legal crowd lagging behind (Kay 2012, 31, 41–42).

The findings of this 2012 study are complementary to some previous research done on the positive economic impact of piracy. For example, Khouja and Park have argued that "from an economic viewpoint, tolerating some piracy has been shown to have some positive aspects in that piracy makes a product available to those who cannot afford it, increases the consumer base for a product, and creates positive network externalities" (2007, 110).

The positive externalities are derived products like spin-off books, t-shirts, or other forms of merchandise that can appeal to the fan base of a musician, a movie, or the like. More recently, Kim, Lahiri, and Dey embarked on a similar task with an empirical twist. Their conclusion?

> Piracy reacts with double marginalization in a rather interesting manner that could lead to higher profits for both the manufacturer and retailer as well as a higher surplus for consumers, resulting in a surprising win-win-win situation. To the best of our knowledge, no other work has viewed piracy in this light and, as a result, all have overlooked this beneficial aspect that ought to make businesses, consumers, and governments rethink the value of anti-piracy enforcement. (2018, 40)

We could shed some light on the (seemingly) bizarre value of media piracy by turning to a Hayekian analogy. Knowledge, as many Austrian economists and Hayek scholars[21] are surely aware, is one of the central conceptual tenets of Hayek's economics and social philosophy (Scheall 2016, 205) because it is closely tied to the idea of a rational economic order:

> The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the

[21] Some even consider it to be "his most distinctive contribution both to economics and to social science" (Gamble 2006, 111).

> separate individuals possess. The economic problem of society is thus not merely a problem of how to allocate "given" resources—if "given" is taken to mean given to a single mind which deliberately solves the problem set by these "data." It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in its totality. (Hayek 1945, 519)

Firstly, a conceptual caveat is in order: knowledge should not be understood in the epistemological sense of a "justified true belief," but as any belief or "subjective data" that play a role in our decisions and actions (Scheall 2016, 207–8). Secondly, taking into account the fact that knowledge is dispersed among many people, it is crucial to identify a mechanism that could coordinate our actions toward an efficient result. Hayek's contention is that this is precisely what the function of prices is. Namely, prices convey essential signals to both entrepreneurs and consumers, and, based on that knowledge and their preferences, they manage to optimally allocate their resources (Hayek 1945, 526–30).

Returning to the matter of the positive value of copyright infringement, my hypothesis is that because of the artificial scarcity induced by copyrights, music and movies are more expensive in comparison to what they would be absent such protection. Furthermore, just as in the case of price ceilings enacted by the state, one of the foreseeable consequences of copyright protection is the emergence of something similar (in functionality) to a black market, namely P2P file sharing through the BitTorrent protocol. Using this protocol, individuals have found a way of acquiring and transmitting local, decentralized knowledge, which is beneficial to all the parties involved, be they consumers, artists, or producers. To see how this happens, a short digression regarding how the BitTorrent protocol works is in order.

Launched in 2001, BitTorrent soon became, alongside related P2P file-sharing protocols, responsible for a significant chunk of internet usage worldwide, with some studies suggesting that, in 2006, P2P file sharing was responsible for 71 percent of internet traffic (Van der Sar 2006). The number of BitTorrent users grew exponentially in the next few years, reaching 150 million a month in 2011 (Van der Sar 2012).[22]

[22] In more recent years, the "internet share" of BitTorrent (and P2P file sharing in general) has been decreasing (Lareida and Stiller 2018) in part because of movie- and music-subscription platforms such as Netflix and Spotify.

One of the reasons why BitTorrent emerged as the favorite protocol of digital copyright infringement has to do with the architecture of the system, as it manages to incentivize cooperation and achieve coordination between a group of users called a *swarm* (Hales and Patarin 2005). Assume someone wants to see her favorite episode of *Game of Thrones*. She might go online and download, via The Pirate Bay or a similar website, a torrent file that doesn't contain the episode, but only the metadata of that file. In downloading that file, she enters into the swarm interested in that specific media file; the swarm contains *leechers* (people interested in downloading the episode) and *seeders* (users who have the episode stored on their hard drive and who allow people access to bits and pieces of it via the torrent file, which plays the role of a road map). The process is mediated by the BitTorrent protocol, which has the purpose of recomposing, on the user's computer, the desired file from the pieces obtained from seeders.

The BitTorrent ecosystem is a market of its own that managed to solve through both technical and moral/institutional tools the problem of coordination and cooperation;[23] Hayek would have undoubtedly taken a keen interest in this development. For present purposes, I will, however, focus on a different aspect. Just as prices are the best tools available to allocate resources, torrent files constitute, to the user and consumer, a mechanism by which she can test the desirability of investing in a particular good but also the desirability of those goods in general, as the dynamic between seeders and leechers shows.

From a strictly technical perspective, a rational consumer of music is an individual who manages to obtain the best return on investment of her scarce resources (mostly time and money). The problem of knowledge lingers: the consumer is not acquainted, ex ante, with intellectual goods, which are more expensive because of the artificial scarcity induced by the existence of copyrights and the increased opportunity cost of each acquisition. That is why being part of BitTorrent swarms can be understood as a discovery mechanism for rational consumers of music, movies, or video games. In other words, to take a simple example, before deciding whether paying a

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[23] The emergence and evolution of the so-called "copynorms" (Schultz 2006; Svensson and Larsson 2012) would have definitely been a topic of interest for Hayek (Andreozzi 2005).

hypothetical hundred-dollar fee for a summer music festival is worth it, individuals download and listen to the bands that will play gigs there.[24]

Furthermore, an analogy can be made between prices, on the one hand, and the number of seeders and leechers a file has, on the other. Just as the increasing price of craft beers signals that people are more interested in consuming them, incentivizing established producers to produce more or aspiring entrepreneurs to enter the market, the more leechers and seeders a torrent file for a movie has, the more valuable it is in market terms. This is why the comparison with the Emmys makes sense and also how the positive externalities of copyright infringement kick in: producers are aware that, for a certain premium reward, users will spend money on those goods with additional value in the form of memorabilia or another type of merchandise because they now know and love the product.[25]

[24] This is especially true if we talk about rational consumers from the developing world who would be more inclined to pay for a premium service (e.g. a live gig from a rock band) than for an MP3 or a physical copy of an album.

[25] Someone might argue that while my take on the use of torrents is correct for the beginning of the second decade of the 2000s, it is not correct today, as internet users have started to abandon BitTorrent and P2P file sharing for other, legal alternatives such as Netflix, Hulu, and Spotify. While this seems correct, we may ask ourselves what triggered the migration to subscription-based services. Moreover, a similar explanation might be needed for the ever-increasing use of 3D technology in Hollywood movies and for the increasing number of gamers who exclusively use platforms such as Steam. My hypothesis is that this is another case of "the use of torrents in society." Keeping it Austrian, it seems that our consumption pattern has shifted this way because of something close to a Schumpeterian creative destruction initiated by the torrent and digital revolution. For example, in the case of movies, producers are incentivized to offer a premium to their future viewers who always have the alternative of watching the latest Hollywood production at home, on their laptops, or on their desktop PCs. This premium comes in the form of 3D experiences. Likewise, with instant gratification a part of our day-to-day online lives and with broadband and 4G internet connections the norm in infrastructure, Netflix and Spotify deliver, at a fraction of the cost of physical copies and also instantly (as opposed to a download with the BitTorrent protocol) the song we are in the mood for or the latest episode from our favorite fantasy drama. In the absence of torrents, P2P file sharing, and piracy, it seems reasonable to think that these entrepreneurial and technological developments would have at least taken significantly more time to emerge.

6. Conclusion: Crowdfunding, Online Patrons, and a Renaissance of the Renaissance Spirit

To sum up, a Hayekian research agenda on copyright and piracy through P2P file sharing should start with a healthy dose of skepticism regarding foundational questions (is the utilitarian argument in favor of copyright correct?) and empirical issues (is copyright infringement harmful?). To paraphrase Hayek, it is still far from obvious that the most effective solution we have at our disposal is the artificial scarcity produced by copyrights or that media downloads through P2P file-sharing protocols such as BitTorrent should be treated as anything other than a victimless crime (Uszkai 2016b).

Is there room for a positive Hayekian research agenda in proposing an alternative way of stimulating the human creative process? My educated guess is that, yes, we might already have at our disposal the prerequisites of such a proposal, and the name of this alternative is online[26] crowdfunding.

While platforms such as IndieGoGo, Kickstarter, and GoFundMe are relatively new, the way they function is not: the French philosopher Auguste Comte used a scheme similar to modern-day crowdfunding to support his work as a philosopher during the middle of the eighteenth century (Gupta 2018). The internet changed crowdfunding's magnitude and expanded its possibilities, with total funding generated in 2014 being estimated at around $16.2 billion worldwide (Belleflamme, Omrani, and Peitz 2015, 12). In 2012, for example, underground artist Amanda Palmer managed to raise $1,192,793 for the release of a record, an art book, and a US tour (McIntyre 2015). Furthermore, the growing popularity of Patreon means that the hundred thousand content creators registered on the platform are expected to receive, in 2019, $500 million from the three million patrons that have constantly contributed to a wide array of creative and scientific endeavors by funding, for example, musicians and podcast creators such as Mike Duncan with his popular *The History of Rome* and *Revolutions* shows (Roettgers 2019).

The basic idea behind crowdfunding schemes on online platforms is pretty simple:

> Crowdfunding involves an open call, mostly through the Internet, for the provision of financial resources either in form of donation or

[26] Writing more than a decade ago, Fogel believed that the "arrival of the Internet, with its instantaneous, costless sharing, has made that business model obsolete" (2005, 2). While the model is not yet obsolete, there are clear developments that could bring about such an outcome in the foreseeable future.

> in exchange for the future product or some form of reward to support initiatives for specific purposes. (Belleflamme, Lambert, and Schwienbacher 2011, 8)

Imagine you are a talented musician in need of funds to launch a new album. To raise those funds you promote your project with a trailer of your future production, which is then uploaded on a platform such as Kickstarter and promoted using social media platforms such as Facebook, Twitter, and Instagram. Afterward, at each threshold a support pledge from the users of the platform comes with a premium reward: while generally for a pledge like $10 people receive a digital copy of the album or a signed physical copy, with each increase in the pledge the premium becomes more enticing. For example, the individuals with the highest pledge could also have their names on your album or be invited to an exclusive behind-the-scenes event. Both "personal networks and underlying project quality are associated with the success of crowdfunding effort" (Mollick 2013, 1).

While it is true that crowdfunded projects are still (at least most of the time) protected by IP, this need not be the case in the future. Some argue that the advent of an online solution for artistic production can render current copyright policies obsolete as creators are starting to "forgo monopoly returns, instead marketing their works widely and cheaply" (Bell 2014, 163) through the internet with the aid of crowdfunding platforms. Moreover, as Bell observes, a future with consumer specialization, better use of technology (to reduce the costs of both production and distribution of artistic works), and common law rights could actually be better at fostering innovation and creativity in expressive works (2014, 165–66).

Leaving the issue of the future of copyright aside for a moment, what is interesting, from a Hayekian standpoint, is that crowdfunding manages to bring closer the artist, her project, and a real market. In the absence of large media corporations, the only actor who decides the value of a particular project is the actor who should have that prerogative to begin with: the potential consumer. Moreover, the logic of supply and demand works better when artistic entrepreneurs and consumers are closer. Last but not least, future consumers are the ones who are able to decide how much they want to pay in order to have access to a product.

In Karen Vaughn's reading, Hayek's implicit economics implies that

> entrepreneurship can only be exercised if the entrepreneur already knows a great deal about the circumstances surrounding the opportunity he believes he has identified. That is, an entrepreneur can exploit profit opportunities only insofar as he knows how to buy in one market and sell in another with all the rich detail that those activities encompass. This knowledge of "how to" is knowledge of

> at least the relevant parts of the institutional structure that makes up a market economy. While such knowledge does not guarantee entrepreneurial success, it does load the dice, so to speak, in the entrepreneur's favor. (1999, 142)

Crowdfunding platforms can be viewed, then, as knowledge-enhancing mechanisms for creative entrepreneurs, as they manage to connect the artists directly to their markets. Moreover, Kickstarter and Patreon do this by significantly reducing transaction costs. While up until recently musicians almost exclusively used record labels to acquire capital and promote their work, with the advent of the internet and digitization crowdfunding platforms increasingly play that role at only a fraction of the previous cost (Galuszka and Bystrov 2013).[27]

Virtually all historians consider the Renaissance as characterized by a return to Greco-Roman values in art and philosophy and as an emancipation from the more rigid norms and institutions of the Middle Ages. If Michael Munger (2018) is right in predicting that Tomorrow 3.0 will be achieved by a reduction in transaction costs (associated with triangulation, trust, and transfer), then we might soon witness a renaissance of the Renaissance spirit, with the role that the state, wealthy aristocratic families such as the House of Medici, or the Catholic Church played as patrons taken over directly by consumers. Will the sharing economy of the future still need the rigid norms of copyright? I am sure that Hayek's answer would be no.

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[27] While they are right in saying that crowdfunding platforms are not better at reducing the transaction costs associated with the distribution of a musician's album, when we take into account the recent shift toward digital-music consumption (via subscription platforms such as iTunes and Spotify) their assessment might not be so problematic after all.

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