

# THE PIRATE AND THE CAPITALIST: A LOVE STORY?

From the East India companies on the high seas to the Prism surveillance program in cyberspace, governments seek control over new territories, but pirates resist, says **Jean-Philippe Vergne**.

*I have mixed attitudes towards capitalism, but I love markets.*

— Julian Assange

Julian Assange is the founder and editor-in-chief of WikiLeaks, an organisation at the heart of the pirate sphere. WikiLeaks has ties to The Pirate Bay, the largest file-sharing website in the world; the Pirate Party, which has two elected representatives in the European Union Parliament; and core members of the hacker group Anonymous. WikiLeaks has acquired tremendous influence, which it is using to gather international support in favour of whistleblowers Bradley Manning and Edward Snowden. In July 2013, Assange heralded the creation of the Australian WikiLeaks Party, which aims to run candidates at the next Senatorial elections. The pirate movement has always been critical of the cosy relationships between states and large corporations, so it's no wonder that the recent revelations about the US National Security Agency's (NSA) Prism surveillance program, implemented jointly with leading tech firms, has led to pirates once again voicing their concerns.

But who are the pirates and what role do they play in the capitalist game? If we look at the history of the pirate movement and its interactions with states and corporations, we have much to learn about capitalism's inner workings and evolutionary dynamics. As it turns out, the implications of piracy for the global economy, government policy, and geopolitics are huge—yet thus far they have received little attention.

## What is piracy and who are the pirates?

International law has no consensual definition of piracy, except for the specific case of sea piracy—and its definition did not become fully recognised and shared by the world's nations until the 1982 UN Law of the Sea Convention. Today, when we hear terms such as *online piracy*, we must keep in mind that *piracy* does not refer to any commonly accepted legal reality. Similarly, during the golden age of sea piracy, circa 1700, the concept of (sea) piracy was vague and malleable. Thus, as a general rule, to be a pirate, one merely needs to be called a pirate by a recognised political authority. In other words, the political reality of piracy is created through a performative statement uttered by a legitimate government.



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There are multiple reasons to explain why certain social actors would want to call someone a pirate. One is legal leverage. In the Roman Empire, pirates were declared ‘enemies of all humanity,’ and piracy later inspired the concept of ‘crime against humanity.’ So calling someone a pirate places that person in a legal category that potentially commands huge penalties and sanctions in a court of law. For example, when illegal file-sharing is relabelled ‘piracy’ in the public arena, judges can more easily justify severe sanctions on the suspected Internet (mis)users, including huge fines combined with prison sentences.<sup>1</sup>

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Another reason is to reduce competition. In the modern age, the Portuguese merchants who opened the sea routes to the East Indies claimed ownership rights on the high seas, enabling them to call every non-Portuguese merchant trading in the area a pirate—including the indigenous merchants who had been trading *freely* in the region long before the Europeans arrived. Thus, any competing merchants considered to be pirates could be removed from the trade business by any means, and the Portuguese crown provided massive military support to that end.

Later, the Dutch and the British took over the Portuguese (and Spaniards) to gain control of Southeast Asian trade networks. Like the Portuguese and Spaniards before, the Dutch and the British operated monopolistic companies, called the ‘East India companies,’ and considered any outsider to be a pirate. Interestingly, the geographical expansion of European capitalism between the sixteenth and eighteenth centuries led to the principle of free trade being replaced by state-supported, monopolistic forms of commerce. Looking back at history, we must acknowledge that capitalism and free trade do not always go hand in hand—precisely the point Assange intended in the epigraph above.

### What do pirates stand for?

Pirates represent a heterogeneous yet influential group of activists who defend a relatively stable set of principles emphasising openness, free access, transparency, and the notion of ‘common good.’ Importantly, since the dawn of capitalism, pirates have exerted their influence across industries and countries, which makes piracy a genuine engine of capitalist renewal, overlooked to a large extent by economists and political scientists alike. Pirates keep reminding us of the crucial difference that exists in practice between capitalism and free markets. To understand this essential distinction, we need to recognise a recurrent pattern in recent history: Every time capitalism expands into new territories, sovereign states rely on monopolistic arrangements to define rules of ownership and exchange, gain control over trade flows, and outcompete rivals.

Pirates have fought the principle of exclusive sovereign control over certain territories that they saw as being common ground for the benefit of the larger society. And here’s a paradox whose implication should not be downplayed: The nation-state system often drove the expansion of capitalism through monopolies; meanwhile, pirates advocated free-market ideals for the greater good of all people, above and beyond national boundaries.

### Pirates against big business capitalism

The interconnected histories of capitalism and piracy shed new light on the tensions now surrounding the regulation of cyberspace, copyright reform, and the patentability of gene sequences. When the state decides to be big business capitalism’s best ally, pirates stand up and promote, sometimes violently, an alternative model of capitalism.

Back in 1602, the Dutch Republic granted its East India Company a 21-year monopoly on trade with the regions lying east of the Cape of Good Hope, which led to the quick ruin of well-established merchants, some of whom reverted to piracy—that is, they began the illicit practice of trade conducted outside of the established state monopolies. Historian Christopher Hill rightly observes that modern sea ‘pirates exterminate those who bought privileges from a State.’<sup>2</sup> In fact, those pirates seemed to defend the right to venture

off on their own, to follow their own standards, and to benefit from the profits. Sea pirates were not attacking ships out of some high-minded defence of free markets. Rather, they were independent merchants suddenly relabelled 'pirates' because of the monopolistic endeavours of European states. Underlying the pirates' actions was the belief that the high seas should be free and open. In his famous treatise, *Freedom of the Seas*, seventeenth-century legal scholar Hugo Grotius wrote that waters and navigation should be 'free' because the sea is a public good—it does not belong to anyone, and using the seas for navigation does not prevent others from doing the same. Rebuttals came quickly from Iberic and English sovereigns, who claimed that the parts of an ocean that linked their territories could be legally appropriated. But, centuries later, it was Grotius' point of view that won out. Outside of territorial waters, Grotius defended the idea that no nation has the right to take possession of the open seas. Eventually, the freedom of the open seas—nowadays, more than 50% of all water surfaces on Earth—was achieved through a series of treaties, starting with the 1856 Declaration of Paris, which abolished privateering. But as historian Pérotin-Dumon put it, 'to eliminate piracy on a larger scale, however, trade monopoly had to be given up altogether.'<sup>3</sup>

In many respects, the international recognition of the freedom of the seas in the mid-nineteenth century framed the heated debate regarding the freedom of airwaves at the beginning of the twentieth century. In an interesting historical twist, the British government of the 1920s issued a royal charter that granted a monopoly to the British Broadcasting Corporation (BBC)—the same kind of charter that 300 years earlier had been issued for the British East India Company. This royal charter allowed the British government to appropriate the 'ether,' wherein airwaves were thought to circulate, thereby preventing free radio broadcasting. Soon after, Leonard Plugge set up the International Broadcasting Company (IBC) under the nose of the government and began to buy airtime from pirate radio stations established on offshore platforms outside the realm of British influence. Plugge contested both the BBC's monopoly and the underlying principle that the

British sovereignty extended into the airwaves; for these actions, he was considered a pirate.

Overwhelmed by the pirate phenomenon, the British government eventually ended the BBC's monopoly in 1967, thereby freeing both radio broadcasting and the airwaves as the common heritage of humankind. At last, listeners could tune into the official BBC channels and hear the evil sound of rock 'n' roll. As Adrian Johns explained:

As of 1967, the BBC became one among many ... The irony is that it then found the critical and skeptical voice it had been missing ... the virtues of the BBC only came to light at the end of its monopoly.<sup>4</sup>

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As telecommunication technologies improved, corporations with a dominant position in radio broadcasting, such as AT&T, became increasingly interested in expanding their control into cyberspace, a nascent territory whose design began in the 1960s. Many see in AT&T the first monopoly in the history of cyberspace. Around 1970, it was the preferred target of so-called 'phone phreaks'—the early pirates who refused to stand silent while AT&T shaped its centralised, monopolistic control of phone communications. Little wonder that in the list of America's largest pirate groups published in the 1980s by the underground computing magazine *Phrack*, many had adopted clever monikers that mocked the computing industry's dominant corporations, such as Bell Shock Force or IBM Syndicate.

Many pirates now deliberately oppose abusive monopolies in all their forms—from dominant positions in emerging industries, such as online search optimisation to 'copyright extremism' in the cultural and media industries. Thousands of Twitter accounts controlled by hacktivists who

identify with organisations like WikiLeaks and Anonymous diffuse messages trumpeting the need for ‘a free and open Internet,’ starting from the premise that ‘information wants to be free’—a statement first made public in 1984, during the inaugural Hackers’ Conference. Today, the dominant positions of such corporations as Facebook, Google and Amazon raise issues reminiscent of those raised in terms of AT&T or Microsoft in years past.

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### Pirate-driven innovation

Organisations with a pirate identity—let’s call them ‘pirate organisations’—do not just protest against the established order, they also introduce new ideas and technologies. Several innovations originally considered illegitimate—and promoted by pirate organisations—have reshaped entire industries. For example, until piratical Napster triggered a massive overhaul of the music industry, it was uncommon to purchase music by the song. If you as a consumer wanted to acquire that one big hit song, you typically needed to buy a 12-track album for \$20 and spend a good deal of your listening time skipping the 11 tracks you didn’t like or want. And back in the 1990s, distributing free software was not Bill Gates’ next big idea—yet, under the impulse of the hacker movement, it became a key driver of growth in the software industry (e.g. think mobile apps). And if you know anyone who spent time in the United Kingdom before 1967, they will certainly remember that back then, the BBC was the only radio station authorised by the British government. But pirate radio ended the BBC’s monopoly and changed the rules of the game: It popularised the role of the DJ, diffused new music genres, and offered a much wider selection of programs—all made possible from advertising revenues (instead of government subsidies). Pirate organisations also played a role in weakening Microsoft’s dominant position and in wiping out the comfortable monopoly of ‘the majors’ in the music industry.

Today, major players in the pharmaceutical, biotech, and seed industries perceive advocates of open-source synthetic biology, such as the DIY Bio movement as a pirate threat.

More generally, those who reap the rents generated by dominant industry positions typically argue that pirates jeopardise capitalism, but a more nuanced picture can be drawn by taking a historical perspective. Who promoted the freedom of the seas in the seventeenth century against the state monopolies that claimed ownership rights on sea routes? Sea pirates. Who helped achieve the freedom of the airwaves against the state monopoly of the BBC in the United Kingdom? Pirate radio stations. And what exactly are the wants of pirate organisations such as WikiLeaks and Anonymous? They want cyberspace to be open, neutral, respectful of privacy, and treated as a common good of humankind—not as a territory to be divided up and conquered by competing nation-states. In many respects, pirate organisations represent the vanguard of capitalism and foreshadow the future directions of the economy. They can be seen as a key driver of what Schumpeter called creative destruction.

### Implications for capitalism’s future

#### ***Piracy is not about the law, it is about geopolitics***

From the Portuguese point of view, the Dutch merchants coming to Southeast Asia circa 1600 were considered pirates. But for the Dutch, the true pirates were the Portuguese who did not want to recognise Dutch ownership of certain trade routes. Over the last few months, the US government has repeatedly accused the Chinese government of cyberpiracy. But the latter returned the compliment after Snowden’s revelations regarding the NSA’s Prism surveillance program. From the point of view of an organisation such as WikiLeaks, both the United States and China are wrong by implementing cyber-espionage tactics. Together with members of the Pirate Bay, MegaUpload (now MEGA) and Anonymous, WikiLeaks advocates a supranational recognition of cyberspace as a common good, where the principles of Net neutrality, transparency and privacy are embedded *by design*, in both the global network infrastructure and software components. Notorious

pirate and MegaUpload founder Kim Dotcom expressed this opinion clearly in a recent interview:

We want anything that is transferred over the Internet to have an encryption layer to protect privacy. It is a basic human right. The U.N. Charter says every human being has a right to privacy. And how is that being respected by governments?<sup>5</sup>

As long as governments keep playing the geopolitics of cyberspace as a zero-sum game, piracy will remain a major issue for governments and corporations alike.

***Piracy is not about free content, it is about un-monopolised distribution channels***

Piracy is about territory, so the means of distribution—the transportation modes if you wish—matter much more than what is being transported. In that sense, the pirate organisation is a-moral, which is precisely why government policies that want to censor certain types of online content such as gambling and Satanism completely miss the point in their attempt to curb piracy. Policymakers' inattentiveness to the nature and purpose of the pirate movement readily translates into a political inability to deal with a series of market failures in industries where the rules of the game are dictated by such monopolistic arrangements as patents and copyrights.

***Piracy questions the foundations of the nation-state system***

Since the inception of the nation-state system in the seventeenth century, its stabilising role has fostered economic development by providing human societies with clear rules to distribute and administer territory. And despite the tragic wars that the nation-state system helped fuel, it achieved most of the objectives envisioned by the signatories of the 1648 Treaty of Westphalia. The sovereignty principle came in handy to delineate frontiers in physical territories such as land and water, where existing geological properties could be exploited to draft the map (e.g. this river would delineate the southern frontier and that mountain the northern one). But capitalism's relevant

boundaries have shifted into new territories—the airwaves, cyberspace, and soon, outer space. These new territories differ fundamentally from land because they are not bound by design—that is, there exist no topological specificities to justify drawing a frontier here rather than there.

For that reason, it seems odd today to build national firewalls that enclose cyberspace within the limits of a sovereign territory whose frontiers were determined centuries ago by such earthbound divides as the location of a river. And yet many governments do just that, by invoking the principle of sovereignty. Consider the online filters put in place by China and Iran, but also by democracies such as Australia and the United States. Here, then, is the fundamental question: Is cyberspace a juxtaposition of national intranets connected by underwater cables, or is it a neutral, open and global territory akin to the 'international waters'? The nation-state system will need to answer questions like this, which pirate organisations continue to ask, sometimes aggressively, as unbounded territories, such as cyberspace, become the vanguard of capitalist evolution.

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Looking ahead, the rise of the space-mining industry may be the next apple of discontent. Take private corporation Planetary Resources, which defines itself as 'the asteroid mining company.' Its purpose is to establish 'a new paradigm for resource discovery and utilisation that will bring the solar system into humanity's sphere of influence.'<sup>6</sup> But according to which principle can a private organisation legitimately claim ownership rights on extraterrestrial territory? The 1967 UN Outer Space Treaty recognises 'the common interest of all mankind' in matters of space exploration and cautions that 'outer space,

including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.’

If some organisations violated the treaty’s expectations regarding the need to consider celestial bodies as ‘a common heritage of mankind,’ can it be long before we witness the rise of activist organisations—literally, space pirates—attempting to change the rules of the game, just as their predecessors did earlier on the high seas, in the airwaves, and in cyberspace? Pirates compel us to seek answers to two questions: First, can the principle of sovereignty be updated to fit our current needs, or do we need a new principle in its place? Second, is the United Nations the relevant institution to represent supranational interests and enforce supranational rules? Clearly, thanks to Blackbeard’s descendants, there’s much work ahead for politicians and regulators alike.

Treating piracy as a purely legal issue is a mistake because piracy is about the geopolitics of capitalism, namely, how states and corporations interact as economic activity expands into new territories, wherein the rules of ownership and exchange are yet to be defined.

***The Left/Right political paradigm is becoming increasingly irrelevant***

In July 2013, following Snowden’s revelations about Prism, many US politicians pushed for a reform of the US administration’s cyber policy. An amendment designed to prevent the NSA from collecting citizen phone records was defeated in the US House of Representatives in a narrow vote (205 to 217).<sup>7</sup> Truly interesting about that vote was the composition of the two camps, which failed to follow the traditional political divide between Republicans and Democrats. Those in favour of restricting the NSA’s surveillance power came from both the Left of the Democratic Party and the Right of the Republican Party (including Tea Party

affiliates). This disparity of support indicates that the issue at stake was not the *size of the government*—the usual apple of discontent between the Right and the Left—but the scope of the sovereignty principle and its application in cyberspace. In the Western world, as soon as the sovereignty issue is debated, uncanny patterns of political alliances emerge. In several European countries, for instance, socialist hardliners agreed with representatives of extremist right parties to reclaim sovereignty—in particular, to push for an exit from the Eurozone, as occurred in France last year when communist parties and the extreme right voiced similar concerns regarding the European Union’s oversight on French affairs.

The pirates’ answer to such political confusion has been the creation of Pirate parties all over the world. The Swedish branch has even elected representatives to the European Parliament. But in many respects, Pirate parties confront the same internal contradictions as traditional parties. For instance, on the key issue of state regulation, they deal with a huge internal contradiction. On the one hand, many members from the Left want a stricter state regulation, say, of the finance and banking sectors (all the more so in the aftermath of the financial crisis). But on the other hand, they keep repeating that cyberspace and its related industries should be free from state influence and regulation. So ... more state regulation or no state regulation? Why here and not there? The recent revival of the pirate movement calls for re-examining the foundations of Western political thought. Specifically, before asking how much government and regulation we want, we need a robust theory of what sovereignty means from the perspective of twenty-first century global capitalism.<sup>8</sup>

**Rethinking capitalism with the pirates, not against them**

There is no obvious solution to the issues outlined in this essay. Piracy has always been located at the crossroads of state politics and big business. Economic theory alone cannot embrace the full scope of the challenges posed by the pirate movement, which often reveal the real-world

divide between free markets and capitalism. These challenges are crucial, and the questions pirates ask are often legitimate—dismissing them as nonsense would be counterproductive. Treating piracy as a purely legal issue is a mistake because piracy is about the geopolitics of capitalism, namely, how states and corporations interact as economic activity expands into new territories, wherein the rules of ownership and exchange are yet to be defined. History has shown that on multiple occasions, pirates and governments have co-defined those rules—in this respect, the story of the BBC is telling. At the very least, the pirate movement needs to be more inclusively involved in discussions about the future of regulation. That is *not* what the International Telecommunications Union did during its 2012 summit on global Internet governance, where only governments and their invited corporate guests had a voice, and the broader civil society and billions of Internet users had none. But that *is* what the Iceland government did in cooperating with WikiLeaks to rethink the architecture of online civil liberties.

## Endnotes

- 1 For a recent example, see the documentary about the trial of the founders of The Pirate Bay, *The Pirate Bay: Away from Keyboard*, [http://youtu.be/eTOKXCEwo\\_8](http://youtu.be/eTOKXCEwo_8).
- 2 Christopher Hill, *Liberty Against the Law: Some Seventeenth-Century Controversies* (New York: Penguin Books, 1997), 115.
- 3 Anne Pérotin-Dumon, 'The Pirate and the Emperor,' in James Tracy (ed.), *The Political Economy of Merchant Empires* (Cambridge: Cambridge University Press, 1991), 196–227.
- 4 Adrian Johns, *Death of a Pirate: British Radio and the Making of the Information Age* (New York: Norton, 2011), 262.
- 5 Toby Manhire, 'Kim Dotcom on Mega, Hollywood, the Internet and Copyright Enforcement,' video.
- 6 Planetary Resources, website.
- 7 The amendment was framed in the following way: 'H. Amdt. 413 (Amash) to H.R. 2397: To end authority for the blanket collection of records under the Patriot Act. It would also bar the NSA and other agencies from using Sections 215 of the Patriot Act to collect records, including telephone call records.'
- 8 In *The Pirate Organization: Lessons from the Fringes of Capitalism* (Boston: Harvard Business Review Press, 2013), Rodolphe Durand and I argue that a robust theory of state sovereignty must distinguish between 'charted' and 'uncharted' territory, and that the analysis of economic forces alone cannot provide us with useful regulatory guidelines.

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