

Framing “Piracy”: Etymology, Lobbying & Policy

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0.0 Introduction

Q: Do you know what a pirate is?

A: They have parrots [effects ‘arrrrr’]¹

“Piracy” is a term that has become a central part of the American lexicon about intellectual property. Various individuals and institutions – including newspapers and lobbyists; politicians and policy analysts – use the term as a synonym for intellectual property infringement generally, and, more specifically, copyright infringement. For example, the Recording Industry Association of America (“RIAA”) and the Motion Picture Association of America (“MPAA”), a pair of the most prominent entertainment industry lobbying organizations in the United States, claim routinely that “piracy” is the primary reason why revenue and profits in their respective industries have dropped precipitously in the past decade.² Similarly, the Business Software Association routinely claims in its annual “Piracy Study” that its industry loses billions of dollars annually to “piracy”; the lobbying organization’s 2007 “Piracy Study” claimed that illegal copies of computer software cost the industry \$29 billion in revenue.³

The claims of lost revenue⁴ are not piracy’s sole harms, according to the lobbyists. The lobbyists also contend “piracy” threatens their respective industries’ continued commercial viability, jeopardizes the livelihood of countless individuals, and, ultimately, diminishes American global competitiveness.

In my upcoming dissertation, I will argue that the entertainment industry lobbyists’ framing of “piracy” is inconsistent with the term’s original meaning. The result is that concerns over “piracy” serve as the questionable basis for passing laws and enacting copyright-related policies that have led to an increase in restrictive and imbalanced copyright law, both within and outside the United States. The purpose of this paper, however, is more modest. Here, I present an etymology of the term “piracy,” demonstrating that the historical and primary definitions of “piracy” have little to do with infringement or intellectual property. My research indicates the term “piracy” did not become widely accepted as a synonym for theft of creative works until the 19th century, when British authors and publishers began using the term widely to characterize American printers’ unauthorized reproduction and distribution of works from Dickens and Tennyson, among others.

¹ TorrentFreak, *Inside the Mind of a 9 Year Old File-Sharer*, <http://torrentfreak.com/inside-the-mind-of-a-9-year-old-file-sharer-071021/> (last visited Sept. 17, 2008).

² The best example of how RIAA and MPAA make and empirically support this argument is through the annual Special 301 report the International Intellectual Property Alliance publishes and sends to the Office of the U.S. Trade Representative. See International Intellectual Property Alliance, *Copyright Protection and Enforcement Around the World: IIPA’s 2008 Special 301 Report*, http://www.iipa.com/2008_SPEC301_TOC.htm (last visited Sept. 17, 2008).

³ Business Software Alliance, *Fifth Annual BSA and IDC Global Software Piracy Study*, http://global.bsa.org/idcglobalstudy2007/studies/2007_global_piracy_study.pdf (last visited Sept. 16, 2008).

⁴ Recently, researchers and journalists have questioned the credibility of economic losses that “piracy” causes. See Fred Locklear, *IDC Says Piracy Loss Figure is Misleading*, ARS TECHNICA, July 19, 2004, <http://arstechnica.com/news.ars/post/20040719-4008.html> (last visited September 17, 2008).

This paper is divided into four sections. Section 1.0 traces the etymology of “piracy” through Greece, Rome, and the Middle Ages in England. Section 2.0 traces the term’s rhetorical evolution in America’s legal system using legal reference materials (including *Black’s Law Dictionary* and *American Jurisprudence*) and non-legal reference materials (including *Oxford English Dictionary*). In this section, the research indicates the primary meaning of “piracy” consistently has been theft on the open seas since its initial appearance in standard American reference works. Section 2.0 also explores the law of piracy in its native meaning, referencing historical Supreme Court cases and relevant provisions of the U.S. Code.

Section 3.0 discusses the secondary meaning of “piracy” in American language. The research indicates that “piracy” has a secondary meaning that equates consistently with intellectual property theft (or unauthorized reproduction of copyrighted works). There is, however, little evidence that the intellectual property meaning ever has been the term’s primary meaning, as I expect data from my dissertation study to show.

Finally, Section 4.0 presents a prospectus for completing a mixed-methods dissertation study that argues a small set of actors has successfully framed “piracy” as a threat to American business and economic interests, and this frame has been effective in changing U.S. information policy in the copyright arena.

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The research presented in this paper is a work in progress and should not be cited for publication purposes. The author welcomes comments about this work, and requests they be sent to copycense@gmail.com. References and sources are included in footnotes. All citations follow *Bluebook* (American law) style. All citations to online sources have been verified and are current as of Sept. 18, 2008.

1.0 A Brief Social & Etymological History of Piracy

While it may be difficult to imagine today, piracy long has been defined and framed in a way that has little to do with copyright or any other form of intellectual property. Historically, piracy always has been a nautical pursuit that was a way of life, an activity that once was so commonplace that a pair of scholars has referred to it cheekily as one of the world's oldest professions.⁵ As it turns out, even the stereotypical images of littoral “piracy” that we see today – think Johnny Depp as the eccentric Jack Sparrow in the Disney movie franchise *Pirates of the Caribbean* – are inconsistent with the term's native meaning. This section explores piracy in terminology and practice.

1.01 Piracy in Ancient Greek and Roman Language

In his comprehensive history of piracy, scholar Alfred P. Rubin contends the practice originally had a positive – even proud – reputation. During the 10th and 9th centuries B.C. in Greece, small groups routinely engaged in the organized use of force; this was an activity seen merely as part of citizens' struggle for survival rather than anything that was immoral or illegal. Those who engaged in piracy seized essential goods, but the practice was not limited to necessities, since pirates also seized goods merely for gain. Whether for need or sport, piracy served as a wholly legitimate alternative to Greece's main gift-exchange economic transfer system.⁶ In this way, piracy was an original underground economy.

The word *peirato* first appeared in Greek literature approximately 140 B.C., when it was applied to political and economic communities on the Mediterranean seashore. Roman (also *peirato*; approximately 60 B.C.) and Latin (*archipirata*; approximately 29 B.C. to 14 A.D.) usages of the word soon followed.⁷ The Greek historian Plutarch⁸ wrote about “pirates” in 100 A.D., and in the translation of his work, he uses *peirato* or one of its derivatives in the original Greek language.⁹

Rubin claims the *peirato* formed communities, had religious rites, and handed down musical traditions like many other social and political groups that existed in that period. Its members saw their actions as entirely proper and legitimate. Further, and perhaps more significantly, few other communities considered *peirato* as legal outlaws: the term was applied to traditional Eastern Mediterranean societies that others had accepted as legitimate for at least 1,000 years.

Even the Romans, with whom the Greeks were at war, considered *peirato* as enemies that needed

⁵ PETER DRAHOS AND JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY 21 (2002).

⁶ ALFRED P. RUBIN, THE LAW OF PIRACY 5 (1988) (hereinafter “Rubin piracy book”).

⁷ *Id.* at 5; see also Alfred P. Rubin, *The Law of Piracy*, 15 DENV. J. INT'L L. & POL'Y 173, 179 (1986-87) (hereinafter “Rubin piracy paper”).

⁸ Plutarch was a biographer and author whose works influenced the development of the essay and biography in Europe from the 16th to 19th centuries. Ralph Waldo Emerson, Frederick Nietzsche, Frederick von Schiller are among those whom Plutarch influenced. Britannica Online Encyclopedia, *Plutarch*, <http://www.britannica.com/EBchecked/topic/465201/Plutarch> (last visited Sept. 12, 2008).

⁹ Rubin piracy paper, *supra* note 7, at 180, citing 5 Plutarch, PARALLEL LIVES OF GREEKS AND ROMANS 173-175 (CB. Perrin tran. 1917).

to be defeated in war, rather than outlaws.¹⁰ The Roman Senate even passed a law in 68 B.C. that commissioned Pompey the Great to take the *peirato* as opposing royalty.¹¹ At the time, *peirato* was used then much in the way many use the term Viking today: describing a way of life that was legitimate within the harsh social, political, legal and environmental realities of the middle ages.¹²

Throughout ancient Greek and Roman history, the conception of “piracy” distinguished between thieves who were criminals that were subject to punishment under Roman law, and Eastern Mediterranean political societies that pursued an economic and political way of life that accepted seizing goods.¹³ But even allowing for an interpretation that means the illegal act of marauding at sea, the term’s classical meaning did not imply criminal behavior, or even a violation of general law. Instead, *peirato* was a term that meant a community that engaged in a justified political action. While there were groups that engaged in plunder – including the Danes and Vikings – none of the groups were referred to as “pirates” (or the literal equivalent of that age).¹⁴

1.02 Piracy in the English Language

The second (and current) edition of the Oxford English Dictionary traces the first English appearance of the word to John of Trevisa,¹⁵ who translated the word *piratae* as “see theves” – or sea thieves in today’s language – in 1387.¹⁶ Rubin notes the term apparently had no legal implication at that time, and Rubin notes that later writers who gave “pirate” some legal and romantic did so misleadingly. As evidence of this, Rubin points out that during the period 1580-1648, sea trade in the Mediterranean Sea was strong despite littoral takings, and that “the forcible exchange of goods and slave-taking was in fact a tolerable part of the [period’s] economic system.”¹⁷ During this time, a “pirate” was considered to be engaged in privateering, a practice whereby a government commissioned private individuals with a private ship for the purpose of capturing an enemy’s shipping merchandise.¹⁸

By the 17th century and consistent with the privateering phenomenon then in existence, England used its strong naval presence under Queen Elizabeth I and sanctioned taking Spanish ships when they returned home from trips to America and the West Indies. In addition to helping England economically, these takings also helped train the English military and lead to England

¹⁰ See generally Rubin piracy paper, *supra* note 7, at 180-182.

¹¹ Pompey the Great was one of the great statesman and generals of the late Roman Republic, and a later opponent of Julius Caesar. Britannica Online Encyclopedia, *Pompey the Great*, <http://www.britannica.com/EBchecked/topic/469463/Pompey-the-Great> (last visited Sept. 12, 2008).

¹² Rubin piracy paper, *supra* note 7, at 182.

¹³ Rubin piracy paper, *supra* note 7, at 187.

¹⁴ Rubin piracy book, *supra* note 6, at 13.

¹⁵ John of Trevisa translated to English from Latin Ranulf Higden’s Polychronicon, an early encyclopedia, finishing in 1387. Britannica Online Encyclopedia, *John of Trevisa*, <http://www.britannica.com/EBchecked/topic/305135/John-of-Trevisa> (last accessed Sept. 12, 2008).

¹⁶ OXFORD ENGLISH DICTIONARY 897 (2nd ed. 1989); Rubin piracy book, *supra* note 6, at 13.

¹⁷ Rubin piracy paper, *supra* note 7, at 189-190; See also Donald J. Puchala, *Of Pirates and Terrorists: What Experience and History Teach*, 26 CONTEMP. SECURITY POL’Y 1, 10 (2005) (“Historically, however, pirates were not identified as universal criminals, and no one could therefore legally justify hunting pirates of alien nationality on the high seas in the interest of universal justice.”).

¹⁸ Rubin piracy paper, *supra* note 7, at 193-95.

surpassing Spain as the military supremacy of the oceans.¹⁹ The rise of the British naval forces over those from Spain also wrought a change in terminology, according to Rubin. Somewhere in the beginning of the 17th century, the English began referring to the Spanish as “pirates” in popular ballads.²⁰ This change of language also coincided with British use of the term “pirate” in international relations fora. Despite possible British attempts to frame those word exclusively in relation to privateers who captured English vessels, the broader, popular understanding of the term remained consistent with that of a privateer.²¹

In contrast to its sister term “pirate,” it is difficult to pin down an exact date when the term “piracy” first entered the English lexicon. One scholar, Adrian Johns, credits John Fell²² with coining the term to describe the greed of London printers and booksellers. According to this definition, a person who engaged in piracy – a pirate – was guilty of reprinting a book known to belong to someone else without authorization. The term, however, soon broadened to mean “a wide range of perceived transgressions of civility emanating from print’s practitioners.” Given this linguistic imprecision, notes Johns, any book could be dubbed that of the result of “piracy,” regardless of its source.²³

Like Rubin noted how linguistic imprecision plagued the definition of “pirate” centuries before, Johns notes the broadening of “piracy” has led to inaccuracies that have plagued the historical record.

Historians of printing have therefore misconstrued instances of alleged piracy in at least two senses. First, they have seen piracy, like fixity, as inherent in the object, and not as a contestable attribution. Second, furthermore, they have assumed cases of piracy to be exceptions, accidental (in the philosophical sense of the word) to the essentially stabilizing character of print. Contemporaries were not so sure of this. Incidents that have been retrospectively dismissed as isolated and exceptional often seemed to them commonplace and representative. They might even be seen as attempts to undermine, and thereby to reform, the whole structure of the book trade.²⁴

Additionally, the inexactness of “piracy” meant the term could blur easily into charges of plagiarism, which hurt an accused author’s reputation and intellectual credibility. The result, according to Johns, was a charge of “piracy” not only had economic implications; the charge also could strike at the heart of a person’s literary or academic validity.²⁵

Eventually, English usage of the terms “piracy” and “pirates” – in language and by British citizens – evolved from a comment about the practices of London printers and booksellers in the 17th century into a complaint about American theft of literature from British writers such as

¹⁹ Drahos and Braithwaite, *supra* note 5, at 21-22.

²⁰ Rubin piracy paper, *supra* note 7, at 191-193.

²¹ Rubin piracy paper, *supra* note 7, at 193-95 (general evolution of the words).

²² John Fell (1625-1686) was dean and bishop at Oxford and a benefactor to the University of Oxford and its press. Britannica Online Encyclopedia, *John Fell*, <http://www.britannica.com/EBchecked/topic/203989/John-Fell> (September 12, 2008).

²³ Adrian Johns, *THE NATURE OF THE BOOK* 32 (1998).

²⁴ *Id.*

²⁵ *Id.* at 33.

Dickens and Tennyson in the 18th and 19th centuries. At the time America declared its independence from Britain, many of the books that circulated in the country were imported²⁶ and copyright laws were virtually nonexistent until Connecticut passed the country's first legislation intended to protect an author's work. Several of the colonial states followed with their own copyright laws.²⁷

It is important to note that British complaints about American theft of intellectual property – and the Brits' denigration of American printers, booksellers, and authors as practitioners of "piracy" – coincided with the American Congress' passage of the Copyright Act of 1790 ("1790 Act"), the country's first federal copyright act.²⁸ The 1790 Act, however, granted protection only to "the author and authors ... being a citizen or citizens of these United States, or resident therein." In other words, no foreigners (including British authors like those who complained about theft of American intellectual property) received copyright protection under the 1790 Act. To be fair, though, neither did England grant copyrights to American authors. The difference between the two countries, though, was that there was a demand in America for the works of British authors, while American authors' work routinely was dismissed in England.²⁹ The higher demand for British literature was reflected in the fact that nearly half the best sellers in the U.S. between 1800 and 1860 was stolen, mostly from English novels; the stolen American versions cost one-tenth the amount of British originals.³⁰

(There are two significant presumptions that lie just beneath the surface of this discussion, both of which are beyond the scope of this paper, yet worth acknowledging. The first presumption is that a creative work that is eligible for – or subject to – copyright protection is a tangible good, like paper or widgets, whose taking without permission may result in a theft that makes the work unavailable to others. This presumption has gone unchallenged since the inception of copyright protection, both at the state and federal levels. In the last decade, however, there has been an increasing amount of scholarship that questions whether intellectual property is a tangible form of property that is subject to the same sort of exclusivity and dominion.³¹ The second presumption concerns the nature of authorship, and the extent to which authorship is unique and solitary enough to grant a single person credit for a creative work's generation. This second presumption is particularly important in today's environment, since a networked information economy allows many people access to others' works and cultural influences in a way heretofore unimagined.³² Both presumptions are critical to the contemporary piracy frame and will be explored in further detail in the dissertation study or in a separate writing.)

²⁶ Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 341 (2003).

²⁷ 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:17 (2007). Patry's treatise does not provide an exact date when the Connecticut act passed, but Peter Yu claims the legislation passed in January 1783. See Yu, *supra* note 26, at 341-42. (Citations omitted.)

²⁸ For a more expansive history of the 1790 Act, see Patry, *supra* note 27, at § 1:19.

²⁹ Edward Samuels, THE ILLUSTRATED STORY OF COPYRIGHT, 231.

³⁰ Yu, *supra* note 26, at 342. (Citations omitted.)

³¹ For greater insight into the intangibility of copyrighted works and how such a status affects the "piracy" frame, see, for example, Majid Yar, *The Rhetorics and Myths of Anti-Piracy Campaigns: Criminalization, Moral Pedagogy and Capitalist Property Relations in the Classroom*, 10 NEW MEDIA SOCIETY 605 (2008).

³² See generally Yu, *supra* note 27; and Kembrew McLeod, OWNING CULTURE: AUTHORSHIP, OWNERSHIP AND INTELLECTUAL PROPERTY (2001) (concerning cultural influences affecting the concept of authorship). For a comprehensive treatment of authorship and its relation to copyright law, see Patry, *supra* note 27, at § 5:1, *et seq.*

Having established the history and etymology of piracy throughout the ages, I turn now to tracing the evolution of the term piracy within the context of American law.

2.0 Primary Definitions of “Piracy” in American Law

Constructing a clear history of the term “piracy” in American legal language is no easier than trying to do so in English, Greek, or Roman. In the law, for example, Rubin contends “piracy” has had at least six different meanings:

1. a vernacular usage without specific meaning;
2. an international law meaning that relates to the private acts of foreigners against other foreigners;
3. special international law meanings derived from treaty negotiations;
4. municipal law meanings as defined by various states;
5. another international law meaning, related to “unrecognized belligerency”; and
6. yet another international law meaning related to unrecognized states, or recognized states whose governments were not considered to be authorized to engage in certain kinds of activities.³³

Interestingly, many of these meanings suggest relations between or among states, both intra-national and international, or the actions of one state against another. None of them, however, refer to intellectual property.

Drahos and Braithwaite identify Alberico Gentili³⁴ as the first scholar to build a legal principle around piracy. Gentili was the first to link “piracy” with a meaning to lack authority to take goods.³⁵ This definition distinguished piracy from privateering, but Gentili’s definition has been debated virtually since its introduction.³⁶ From this point forward, I analyze the primary uses of the term “piracy” in the American legal lexicon, referencing *Black’s Law Dictionary*, *American Jurisprudence*, the *United States Code*, and the United Nations Convention on the Law of the Sea.

2.01 Black’s Law Dictionary

The term “piracy” was codified into American legal language in 1891, when West Publishing Co. released the first edition of the Henry Campbell Black’s *A Dictionary of Law*. Also known from its inception as *Black’s Law Dictionary* (“*Black’s*”), *Black’s* long has maintained a reputation as the preeminent legal dictionary for American law. Part of this reputation arises from the founding editor’s desire to create the first comprehensive law dictionary,³⁷ while another, equally important part of its reputation arises from being the technical dictionary American judges cite most in court decisions.³⁸

³³ Rubin piracy book, *supra* note 6, at 1.

³⁴ Gentili (1552-1608) was an Italian jurist whom many consider to be the founder of the science of international law. Britannica Online Encyclopedia, *Alberico Gentili*, <http://www.britannica.com/eb/article-9036437/Alberico-Gentili> (last visited Sept. 17, 2008).

³⁵ Again, the underlying presumption here is that creative works that are eligible for copyright protection are “goods” in the tangible, physical sense. See Section 1.02.

³⁶ Drahos and Braithwaite, *supra* note 5, at 23. Drahos lists the first name as “Albertico” while most other sources use the name “Alberico.”

³⁷ BLACK’S LAW DICTIONARY, preface (1st ed. 1898).

³⁸ Lawrence Sloan, *When Judges Use the Dictionary*, 68 AMERICAN SPEECH 50, 51 (1993).

The first primary definition for “piracy” in *Black’s* reads as follows:

PIRACY. In criminal law. A robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi*,³⁹ in the spirit and intention of universal hostility. 3 Wheat. 610. This is the definition of this offense by the law of nations. 1 Kent, Comm. 183.

There is a distinction between the offense of piracy, as known to the law of nations, which is justiciable everywhere, and offense created by statutes of particular nations, cognizable only before the municipal tribunals of such nations. 2 Cliff. 394, 418.⁴⁰

Black’s defined piracy exactly the same way in its third⁴¹ and fourth⁴² editions. The fifth edition of *Black’s*, however, featured a significant change.

Those acts of robbery and depredation upon the high seas which, if committed on land, would have amounted to a felony. Brigandage committed on the sea or from the sea. Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life. 18 U.S.C. § 1651. See also Air piracy.⁴³

This definition includes a references to “brigandage,”⁴⁴ and, for the first time, two cross-references: the first, to a section of Title 18 of the U.S. Code,⁴⁵ and the second to “air piracy.”⁴⁶ The cross-reference to “air piracy” is immaterial to the current analysis. The cross-reference to the federal criminal code is relevant, however, and I will revisit it in Section 2.03.

The primary definition of “piracy” in *Black’s Law Dictionary* in its sixth edition was consistent with what was published in the fifth edition. New editor-in-chief Bryan Garner simplified the definition in the seventh edition,⁴⁷ but the simplification did not alter the word’s basic, primary meaning: violent theft at sea. The eighth, and current, edition of *Black’s* retains the same primary definition as the seventh edition.⁴⁸ In the end, primary definition of “piracy” throughout the history of *Black’s Law Dictionary* never has meant anything but violent theft at sea. This is

³⁹ BLACK’S LAW DICTIONARY 88 (6th ed. 1990). Emphasis in original. “Animus furandi” is a Latin term that means intent to steal. It is an essential element of the crime of larceny.

⁴⁰ BLACK’S LAW DICTIONARY, *supra* note 37, at 898.

⁴¹ BLACK’S LAW DICTIONARY 1361 (3rd ed. 1933).

⁴² BLACK’S LAW DICTIONARY 1306 (4th ed. 1951).

⁴³ BLACK’S LAW DICTIONARY 1034 (5th ed. 1979).

⁴⁴ *Id.* at 174. “Brigandage” means robbery and banditry as perpetrated by a band of robbers or brigands, plundering and outlawry.

⁴⁵ Title 18 of the U.S. Code contains federal criminal law and procedure statutes.

⁴⁶ BLACK’S LAW DICTIONARY, *supra* note 43, at 64. “Air piracy” is “any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, or any aircraft in flight in air commerce.”

⁴⁷ BLACK’S LAW DICTIONARY 1169 (7th ed. 1990). The seventh edition of *Black’s* defines “piracy” as “robbery, kidnapping, or other criminal violence at sea.” For comparison, the secondary definition of “piracy” is “a similar crime committed aboard a plane or other vehicle; hijacking.” The seventh edition includes a cross-reference to “air piracy” after the secondary definition, but excludes the cross-reference to provisions of the U.S. Code.

⁴⁸ BLACK’S LAW DICTIONARY 1186 (8th ed. 2004).

consistent with part of the core definitions that existed in ancient Greece and Roman, and the Middle Ages in England.

2.02 American Jurisprudence

The definition of “piracy” as violent theft at sea also is present in legal encyclopedias such as *American Jurisprudence*. *American Jurisprudence* (also known as “*AmJur*”) is a general legal encyclopedia organized into 83 volumes that covers more than 430 topics.⁴⁹ In its entry for “piracy,” *AmJur* writes:

A pirate is one who roves the sea in an armed vessel without any commission or passport from any government, solely on his own authority, and for the purpose of seizing by force, and appropriating to himself without discrimination, whatever ships or vessels he may choose to plunder. He is outlawed by all civilized nations, and is viewed as the enemy of all humanity without protection of any state or government. The term “piracy” is defined as robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi* and in the spirit and intention of universal hostility. A piratical or felonious intent includes the wanton plunder or malicious destruction of property. The word “piratical,” has been held to mean that class of offenses which pirates are in the habit of perpetrating, whether they do it for the purpose of plunder, hatred, revenge, or wanton abuse of power. It is the offense at sea which corresponds to robbery on land.

Piracy is inherently an offense against the law of nations, as distinguished from a crime or wrongful act created by local enactment, and is no, therefore, regarded as a felony at common law, but merely a civil-law offense, punishable according to the provisions thereof ...⁵⁰

Many of the cases that this entry cites are decisions the U.S. Supreme Court settled before 1891, the publication date for the first edition of *Black’s Law Dictionary*. Among these cases is *U.S. v. Smith*,⁵¹ an 1820 case that is seminal for defining the legal boundaries of piracy.

In March 1819, Thomas Smith was part of the crew of a Buenos Aires ship named the *Creollo* during the period in history when Buenos Aires sought independence from Spain. After overtaking the *Creollo*, Smith and other crew members seized a second private vessel called the *Irresistible*, which had been commissioned by the government of Artigas, who was also at war with Spain. After seizing control of the *Irresistible*, Smith and others robbed a Spanish ship in April 1819.⁵²

Piracy laws in the United States at the time mandated those guilty of “piracy” could be “punished with death.”⁵³ This issue was complicated, however, because the U.S. Congress had just passed the Act of 1819. The Act stated in Section 5

⁴⁹ University of Texas at Austin, Tarlton Law Library, *Secondary Resources*, <http://tarlton.law.utexas.edu/tour/secondary.html> (last visited Sept. 16, 2008).

⁵⁰ 61 AM. JUR. 2d Piracy § 1 (2002).

⁵¹ *U.S. v. Smith*, 18 U.S. 153 (1820).

⁵² *Id.* at 154.

⁵³ *Id.*

... if any person or persons ..., shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States for the District into which he or they may be brought, or in which he or they shall be found, be punished with death.⁵⁴

Rubin notes that this definition is inherently circular⁵⁵ and does not address the central question of whether “a statute ought to be construed to embrace [offenses] when committed by foreigners against a foreign government.”⁵⁶ Ultimately, the Supreme Court held that “piracy,” as defined in Section 5 of the Act of 1819, means “robbery or forcible depredations upon the sea.”⁵⁷ Justice Joseph Story wrote a 17-page footnote to support this conclusion.⁵⁸ Most of the remaining citations in the *AmJur* entry on piracy cite *U.S. v. Smith* or its progeny, and *Black’s* cites the *Smith* decision in its third edition, published in 1933.

2.03 U.S. Code

Several sections of the *United States Code* (“*U.S. Code*”), the nation’s official compilation of federal laws, address piracy. According to the U.S. Department of Justice, the U.S. has had jurisdiction to prosecute anyone who commits the crime of piracy, as defined by the law of nations, on the high seas and is later brought to or found in the United States.⁵⁹ Chapter 81, Part I of the *U.S. Code* contains the federal statutes that make it a crime to commit piracy.⁶⁰ Specifically, Section 1651 makes it a federal crime to commit piracy; if a pirate is caught and prosecuted in the United States, the penalty is life imprisonment.⁶¹ This statute has been part of American federal criminal law since May 1820.⁶²

2.04 United Nations Convention on the Law of the Sea (UNCLOS)

Several American cases and statutes seems to allow for the preeminence of an international definition of piracy, even if those same sources of law make punishment of piracy a national matter. This is because matters involving the sea may make jurisdictional issues problematic, and jurisdiction is the basis upon which trial and punishment rest. Therefore, no discussion of the meaning of piracy would be complete without considering international definitions.

The standard international legal definition of piracy is that used in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).⁶³ Part VII, Article 101 defines piracy as “any of

⁵⁴ Rubin piracy book, *supra* note 6, at 144. See also *Smith*, *supra* note 51, 18 U.S. at 154.

⁵⁵ *Id.* at 145.

⁵⁶ *Id.* at 141, citing *U.S. v. Palmer*, 16 U.S. 610, 630-33 (1818).

⁵⁷ *Smith*, *supra* note 51, 18 U.S. at 161.

⁵⁸ Rubin piracy book, *supra* note 6, at 145.

⁵⁹ U.S. Dept. of Justice, *U.S. Attorneys’ Manual*,

http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00009.htm (last visited Sept. 18, 2008).

⁶⁰ 18 U.S.C. §§ 1651-1661.

⁶¹ 18 U.S.C. § 1651.

⁶² Rubin piracy book, *supra* note 6, at 144-45.

⁶³ Adam J. Young and Mark J. Valencia, *Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility*, 25 CONTEMP. SOUTHEAST ASIA 269, 270 (2003).

the following acts”:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).⁶⁴

This definition is taken from the 1958 United Nations Convention on the High Seas.⁶⁵ From the beginning, perhaps foreshadowing contemporary usage, the word “piracy” “had such an overlay of emotion and conflicting meaning that many political compromises would have to be made.”⁶⁶ Rubin has noted the problems of this definition – which include a reference to illegality that, at a minimum, fails to address the law by which illegality would be determined – and notes this definition “appears to be as much the product of exhaustion and the dynamics of a group drafting committee as of logic or a knowledge of jurisprudence and history.”⁶⁷ Still, the UNCLOS definition remains consistent with the concept of violent theft at sea.

While piracy’s primary legal and statutory definition has been consistent, if a bit muddled by international relations, the term’s secondary definition consistently has made reference to intellectual property.

⁶⁴ Preamble to the United Nations Convention on the Law of the Sea, http://www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm (last visited Sept. 17, 2008).

⁶⁵ Young and Valencia, *supra* note 63, at 270.

⁶⁶ Rubin piracy book, *supra* note 6, at 144-45.

⁶⁷ *Id.*

3.0 Secondary Definitions in American Law

3.01 Black's Law Dictionary

Since the first edition of *Black's*, "piracy" also has had a secondary definition that synonymizes piracy with intellectual property theft. As Henry Campbell Black wrote in 1898, the term "piracy" "is also applied to the illicit reprinting or reproduction of a copyrighted book or print or to unlawful plagiarism from it."⁶⁸ This definition is consistent with the 1798 case *Beckford v. Hood*, one of American law's first case citations that invoked "piracy" as a proxy for unauthorized copying. In *Beckford*, the court characterized the case's primary issue (an unauthorized commercial republication of a book) as "an action upon the case for piracy of copyright."⁶⁹

While H. C. Black, the *Dictionary's* first editor, acknowledged he relied on other law dictionaries and treatises in preparing the first edition of his work, he also acknowledged the dictionary contained many entries he wrote from scratch.⁷⁰ Given that history and definitions of legal piracy include no connection between "piracy" and creative or cultural artifacts, it is intriguing that the first edition of what would become America's leading legal dictionary includes a secondary reference to books in its inaugural edition.⁷¹ As I have noted elsewhere in this paper, Alfred Rubin notes writers have used "piracy" in "wholly misleading," "vague and unhistorical" ways since the 15th century,⁷² and here is where his observations about inexact and transformative usage come into play. I posit that Rubin's theory helps clarify how "piracy" may first have entered the English legal lexicon as a proxy for copyright infringement.

3.02 American "Piracy," Lexicon & Oxford English Dictionary

During the same historical period, lexicographers were shaping the *Oxford English Dictionary* (*OED*). According to the *OED* Web site, members of Philological Society of London decided in 1857 that existing English language dictionaries were incomplete and deficient. Members of the Society wanted a complete re-examination of the English language from Anglo-Saxon times onward. In 1879, the Society made an agreement with the Oxford University Press and James A. H. Murray to begin work on a *New English Dictionary* (the former name for *OED*). The Press published the first part for the first edition in 1884; the last volume of the first edition was published in 1928.⁷³ Now, *OED* widely is considered to be the definitive English dictionary, one

⁶⁸ BLACK'S LAW DICTIONARY, *supra* note 37, at 898.

⁶⁹ *Beckford v. Hood*, 101 Eng. Rep. 1164 (K.B.), cited in Justin Hughes, *Copyright and Incomplete Histiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 SO. CALIF. L. REV. 993, 1042 (2006). In his study, Hughes notes several federal court cases in which judges use the term "piracy" as a proxy for copyright infringement, whether or not such infringement is of books or printed materials. See Hughes at 1042-1045. Hughes, however, does not address the apparent conflict between judicial uses of "piracy" as a synonym for copyright infringement in light of a formal definition for "piracy" in the U.S. Code, and the term's primary definition in *Black's Law Dictionary*. This apparent conflict between usage and meaning is ripe for further empirical study.

⁷⁰ University of Texas at Austin, *supra* note 49.

⁷¹ *Id.*

⁷² Rubin piracy book, *supra* note 6, at 20.

⁷³ Oxford English Dictionary, *History of the Dictionary*, <http://oed.com/about/history.html> (last visited Sept. 17, 2008).

which features “the most complete historical record of the English language ever assembled.”⁷⁴

The *OED* entry for “piracy” states:

1. a. The practice or crime of robbery and depredation on the sea or navigable rivers, etc., or by descent from the sea upon the coast by persons not holding a commission from an established civilized state; with a and pl., a single act or crime of this kind.
2. *fig.*⁷⁵ The appropriation and reproduction of an invention or work of another for one’s own profit, without authority; infringement of the rights conferred by a patent or copyright.⁷⁶

OED traces the etymology of the word’s primary meaning – marked as number 1 above – to the 13th century.⁷⁷ This history does not reach as far back as Rubin’s history, but it is not inconsistent with it, either. *OED* traces back the etymology of the word’s secondary meaning – which *OED* indicates is a “figurative” or metaphorical usage – to 1771. This period is consistent with the time when Britain was using the term as a proxy for unlicensed reproduction of its books in America. That is a use that Rubin contends is inconsistent with its true meaning.

3.03 Societal Impact on Black’s Secondary Definition

In the United States, *Black’s Law Dictionary* later would adopt as a secondary definition of “piracy” in 1898 a meaning that would echo what *OED* later would trace back to 1771 as its figurative definition:

The term is also applied to the illicit reprinting or reproduction of a copyrighted book or print or to unlawful plagiarism from it.⁷⁸

While a more rigorous etymological examination is beyond the scope of this paper and may be necessary to pinpoint a more exact time when people first used “piracy” to mean “illicit reproduction of a copyrighted book,” Rubin’s analysis of the word’s inexact meaning and “wholly misleading” use; history; the *OED*’s etymology; and the *Black’s* publication date strongly suggest that the secondary meaning of “piracy” that appears in the first edition of *Black’s* results from British complaints about unauthorized American printing of British authors’ works.

Black’s continued using the secondary definition for “piracy” in its third,⁷⁹ fourth,⁸⁰ and fifth⁸¹

⁷⁴ DONNA L. BERG, A GUIDE TO THE OXFORD ENGLISH DICTIONARY vii (1993).

⁷⁵ According to Berg, this indicator means this use of the definition is “figurative” or metaphorical. Berg, *supra* n. 74, at 20.

⁷⁶ OXFORD ENGLISH DICTIONARY 897 (2nd ed. 1989).

⁷⁷ In his book, Rubin notes *OED* traces the term “pirate” in English back to the second quarter of the 15th century. Rubin piracy book, *supra* note 6, at 13.

⁷⁸ BLACK’S LAW DICTIONARY, *supra* note 37, at 898.

⁷⁹ BLACK’S LAW DICTIONARY, *supra* note 41, at 1361.

⁸⁰ BLACK’S LAW DICTIONARY, *supra* note 42, at 1306.

⁸¹ BLACK’S LAW DICTIONARY, *supra* note 43, at 1034.

editions, spanning more than 80 years. *Black's* didn't change this secondary meaning until 1990, when it published its sixth edition. There, the secondary definition for "piracy" reads as follows:

The term is also applied to the illicit reprinting or reproduction of a copyrighted book or print or to unlawful plagiarism from it; and, similarly, to the unlawful reproduction or distribution of property protected by patent and trademark laws. See also Infringement; Plagiarism.⁸²

Two changes to this definition are notable. First, this is the first time the *Black's* secondary definition refers to a form of intellectual property protection other than a "copyrighted book." Second, this is the first time the secondary definition provides a cross-reference to "infringement." Interestingly, though, the editors continue to focus the secondary definition on books, despite the increasing use of non-paper materials such as compact discs (which became available commercially in the eighties⁸³) and videotapes (which were introduced in 1976, and ultimately were an indirect part of the *Sony v. Universal* copyright litigation, which the Supreme Court decided in 1984⁸⁴).

The seventh⁸⁵ and eighth⁸⁶ editions of *Black's Law Dictionary* featured another significant change to the figurative definition of "piracy":

3. The unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law. See infringement.

"[T]he test of piracy [is] not whether the identical language, the same words, are used, but whether the substance of the production is unlawfully appropriated."
Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions* 97 (1879)

"[I]n some countries the problem is what might be called the 'cycle of piracy' – legitimate copyright owners refuse to sell in the country because of the piracy problem, which means that the only way the public can obtain the goods it wants is to turn to piracy. This in turn only strengthens the resolve of copyright owners not to do business in the country." *Intellectual Property in the New Technological Age* 514 (Robert P. Merges et al. eds., 1997)

These changes were made at the hand of Bryan Garner, who has been the editor-in-chief of *Black's* since the dictionary's seventh edition. In the current (eighth) edition, the reference to intellectual property infringement drops to a tertiary level. But for the first time, *Black's* explicitly refers to copyright law and adds quotes from secondary sources⁸⁷ to reinforce a

⁸² BLACK'S LAW DICTIONARY 1148 (6th ed. 1990).

⁸³ BBC News, *How the CD Was Developed*, <http://news.bbc.co.uk/2/hi/technology/6950933.stm> (last visited Sept. 17, 2008).

⁸⁴ *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984).

⁸⁵ BLACK'S LAW DICTIONARY, *supra* note 47, at 1169.

⁸⁶ BLACK'S LAW DICTIONARY, *supra* note 48, at 1186.

⁸⁷ A secondary source is any material that provides well-reasoned statements of the law, but cannot purport to be a

connection to intellectual property. Also, for the first time, “piracy” includes a subentry:

video piracy. The illegal copying and sale or rental of copyrighted motion pictures.⁸⁸

It is unclear why the dictionary would include a subentry to illegal copying or sale of motion pictures, but not to music compact discs, for example.⁸⁹ But the current edition also includes cross-references to extensions of “piracy,” including “pirate recording”⁹⁰ and “cyberpiracy.”⁹¹

The extension of “piracy” as a proxy for intellectual property infringement in American legal lexicon has matched Congress’ legislative interest in this area, as proposed legislation such as The Protecting Intellectual Rights Against Theft and Expropriation Act of 2004 (“PIRATE Act”)⁹² illustrates. But by 2004, the framing of “piracy” as a policy concern had been in place for more than 25 years, and the concern had nothing to do with sea-borne theft. The next section outlines my proposed dissertation study about how “piracy” became framed exclusively as an intellectual property matter worthy of consideration in the United States’ domestic information policy and its global trade policy.

primary source of the law like statutes or judicial opinions. MORRIS L. COHEN, ET AL. HOW TO FIND THE LAW 8-9 (9th ed. 1989).

⁸⁸ BLACK’S LAW DICTIONARY, *supra* note 48, at 1186. See Section 4.0 for my hypothesis about “piracy” attaching to certain forms of media.

⁸⁹ One reasonable theory may rest in the effectiveness of the late, former MPAA president Jack Valenti in framing “piracy” of movies as a threat to industry domestically and American competitiveness abroad. This is a theme to which we will return in the next section.

⁹⁰ BLACK’S LAW DICTIONARY, *supra* note 48, at 1186. “Copyright. An unauthorized copy of the sounds on a copyright-protected recording, including the digital duplication made available over the Internet. -- Sometimes also termed bootleg recording.”

⁹¹ *Id.* at 414. The “cyberpiracy” definition has nothing to do with copyright. *Black’s* defines it as “the act of registering a well-known name or mark (or one that is confusingly similar) as a website’s domain name, usu. For the purpose of deriving revenue.”

⁹² S. 2237, 108th Cong. (2004).

4.0 Research Study Prospectus

This section provides a summary of my proposed dissertation study, which I plan to begin in the 2009-2010 academic year. This prospectus is a work in progress and I anticipate one or more elements may evolve between this writing and my commencement of the dissertation study. Feedback about any element of this prospectus is welcome.

4.01 Background & Research Motivation

I have been involved with copyright from several perspectives for more than 30 years. The first time I heard the term “piracy” was in the late nineties, in relation to press coverage about consumers’ trading music files over the Web. For several reasons, I thought “piracy” was an interesting term to describe an activity others were calling “file sharing.”

First, “piracy” always has had negative connotations: images of wanton, unabridged plunder amidst violence and stench. The term’s connotations seemed at odds with peer-to-peer technology, which is a collaborative, voluntary activity. Second, I sensed that certain parties intended to leverage “piracy” (or more accurately, a fear of “piracy”) to gain a rhetorical advantage in some debate. In the late-nineties, I was unsure what the debate was or how it would play out. But since the entertainment industries seemed to be the sole users of “piracy” in the press, and people like the late Jack Valenti⁹³ were ranting incessantly about the evils of “piracy,” I suspected the industry was using the word as part of a push for some as yet identified legislative initiative.

In 1996, the United States government published Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, the so-called “NII White Paper.” In the White Paper’s executive summary, the committee, then headed by Bruce Lehman⁹⁴, wrote:

[T]he full potential of the NII will not be realized if the legal protections that extend to education, information and entertainment products and their use in the physical environment are not available when those works are disseminated via the NII. Creators and other owners of intellectual property rights will not be willing to put their investments and their property at risk unless appropriate systems are in place – both in the U.S. and internationally – to permit them to set and enforce the terms and conditions under which their works are made available in the NII environment. Likewise, the public will not use the services available on the NII and generate the market necessary for its success unless a wide variety of works are available under equitable and reasonable terms and conditions, and the integrity of those works is assured. All the computers, telephones, scanners, printers, switches, routers, wires, cables, networks and satellites in the world will not create a successful NII, if there is no content. What will drive the NII is the

⁹³ Jack Valenti was the longtime president of the Motion Picture Association of America, and widely regarded as a master at using rhetoric to support passage of intellectual property protection legislation.

⁹⁴ Bruce A. Lehman was the United States’ “intellectual property czar” for President Clinton from August 1993 through 1998. His former title was Assistant Secretary of Commerce and Commissioner of Patents and Trademarks. Lehman is widely credited for being a major architect of the U.S. Digital Millennium Copyright Act.

content moving through it.⁹⁵

In many ways, NII White Paper report provides the political authority that ushered in the current era of strong U.S. intellectual property protections and related policy. Much of this law and policy has been developed as a legislative response to curbing “piracy.” Further, since the United States has been aggressive over the last decade in lobbying other countries to adopt strong intellectual property protection (mostly through treaties and trade agreements), the influence of the rhetoric of “piracy” no longer remains exclusive to the United States. Now, it is an issue that affects other governments.

4.02 Problem Statement

In my upcoming dissertation, I will argue that the entertainment industry lobbyists’ framing of “piracy” is inconsistent with the term’s original meaning. The result is that concerns over “piracy” serve as the questionable basis for passing laws and enacting copyright-related policies that have led to an increase in restrictive and imbalanced copyright law, both within and outside the United States.

4.03 Research Questions

The following are my proposed research questions⁹⁶:

1. The term “piracy” is more likely to be used in connection with copyright law than in connection with theft on the open seas during the period 1978 to 2008.
2. The term “piracy” is more likely to be used in relation to copyright law than patent law or trademark law during the period 1978 to 2008.
3. The term “piracy” is used more when the protected work is a digital work as opposed to an analog work during the period 1978 to 2008.
4. The term “piracy” is used more in connection with music than in connection with film or computer software during the period 1978 to 2008.
5. News articles about copyright law are more likely to include comments from entertainment industry lobbyists⁹⁷ in the 1998 to 2008 time period than in the 1978 to 1988 time period.
6. News articles about copyright law that include comments from entertainment industry lobbyists are more likely than to print the lobbyists comments first in the 1998 to 2008 time period than in the 1978 to 1998 time period.

4.04 Purpose of the Study

The purpose of the study is to identify the frame of piracy, the actors who created the frame, and

⁹⁵ U.S. Patent & Trademark Office, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, <http://www.uspto.gov/go/com/doc/ipnii/> (last visited Sept. 17, 2008).

⁹⁶ These questions are specifically for the content analysis portion of my study, which will yield quantitative data that I will use to reinforce the policy analysis portion of the study. Further, it is likely that some of these research questions will change or evolve between this writing and approval of my dissertation proposal.

⁹⁷ For the purpose of this study, I will define “entertainment industry lobbyists” as a representative or spokesperson from the Recording Industry Association of America, the Business Software Association, or the Motion Picture Association of America.

analyze how the frame manifested itself in the United States' approach to domestic and international copyright law. Again, my argument is that a frame about "piracy" existed, certain actors exploited it, and the has led to restrictive and imbalanced copyright law in the U.S. and abroad. The study period is the 30 years between 1978 and 2008.⁹⁸

4.05 Theoretical Bases

My proposed dissertation study is multidisciplinary, cutting across the fields of communications, information policy, political economy, and, of course, law. Therefore, the proposed study involves an analysis of several issues.

4.051 Framing (Communications)

In his influential 1993 article on the topic, Robert Entman provides a classic definition of framing:

To frame is to *select some aspects of a perceived reality and make them more salient ... in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation* for the item described. ... Frames ... *define problems* – determine what a causal agent is doing with what costs and benefits ...; *diagnose causes* – identify the forces creating the problem; *make moral judgments* – evaluate causal agents and their effects; and *suggest remedies* – offer and justify treatments for the problems and predict their likely effects.⁹⁹

Frames work by highlighting certain phrases to make them more noticeable or memorable, typically through placement, repetition, or association with culturally familiar symbols.¹⁰⁰ They play important and strategic roles for organizations, since the frames can appeal to prospective members, and link values and ideologies.¹⁰¹

As applied to my proposed dissertation study, I anticipate finding the piracy frame to be the most dominant frame in news discussions of intellectual property generally and copyright in particular. I also anticipate certain actors who represent the music record companies, computer software manufacturers, and movie studios will promote and sharpen the frame of piracy. I also anticipate the news media will reinforce the "piracy" frame through its coverage of copyright issues.

⁹⁸ I chose this period for two reasons, one theoretical, one practical. Theoretically, this 30-year period tracks nicely with contemporary copyright law, since the current U.S. copyright law became effective on January 1, 1978. Further, the Digital Millennium Copyright Act – which is one of the pieces of legislation I argue arises from the piracy frame – was signed 20 years later, in October 1998. An ending date of 2008 gives me 30 years of data from which to work, all of which occur under the current copyright regime. The more practical reason for selecting this period is that 1978 is about the earliest date I can be confident of having access to a full complement of news articles in order to perform a thorough content analysis portion for this study.

⁹⁹ Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMM., 51, 52 (1993) (Emphasis in original).

¹⁰⁰ *Id.* at 53.

¹⁰¹ Bryan H. Reber and Bruce K. Berger, *Framing Analysis of Activist Rhetoric: How the Sierra Club Succeeds or Fails at Creating Salient Messages*, 31 PUB. REL. REV. 185, 186 (2005).

4.052 Agenda Setting (Communications, Political Economy)

Agenda setting – the practice of generating issues by disseminating information and providing a normative frame to interpret that information¹⁰² – likely is the most prevalent political economy theory at work in the story of the piracy frame. Agenda setting is closely related to problem definition, which is critical to an issue’s political standing and a way to engage otherwise uninterested parties or gain advantage in any ensuing policy debate.¹⁰³ Both with problem definition and agenda setting, the goal is to describe, recommend, and persuade, usually by representing problems in terms of blame, severity or crisis.¹⁰⁴

There seems to be a natural connection between agenda setting from a political economy perspective and agenda setting from a communications perspective.¹⁰⁵ Additionally, there seems to be similar connection between agenda setting (both from a communications and political economy perspective and framing. Part of the challenge of my dissertation will be to identify such interdisciplinary, theoretical connections and analyze how they may affect my study.

4.053 Forum Shopping (Political Economy)

Forum shopping (also called forum shifting¹⁰⁶) is a strategy in which actors seek to get their issues heard in the forum they perceive will be most likely to provide a favorable judgment or decision. According to John Braithwaite and Peter Drahos, forum shopping increases the participant’s chances of victory, effectively by changing the field of play. Forum shopping requires power and deep resources, and thus it is unsurprising that Braithwaite and Drahos claim the United States is the only state actor that has implemented forum shopping with any regularity. The scholars also note, however, that forum shopping may create opportunities for weaker actors to pursue different agendas. This may be especially true in instances where similar issues can be discussed in multiple fora.¹⁰⁷

Forum shopping has played a significant role in the information policy field over the last two decades, and nowhere is this more evident than in the development of the Section 301 institution.¹⁰⁸ The 301 institution presents several different instances of forum shopping. First, private actors used the 301 institution to move IPR from the domestic front to the international front, and in doing so moved IPR from its traditional legislative home to forum of trade. Second, the 301 institution moved negotiations with foreign countries – which individual companies traditionally had done directly with foreign government officials – to the USTR. This effectively

¹⁰² Susan K. Sell & Aseem Prakash, (2004). *Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights*, 48 INT’L STUD. Q. 143, 157 (2004).

¹⁰³ DAVID A. ROCHEFORT & ROGER W. COBB, THE POLITICS OF PROBLEM DEFINITION: SHAPING THE POLICY AGENDA, 3-4 (1994).

¹⁰⁴ *Id.* at 15-24.

¹⁰⁵ See generally Maxwell McCombs, *A Look at Agenda-Setting: Past, Present and Future*, 6 JOURNALISM STUD. 543 (2005).

¹⁰⁶ American lawyers may also call the practice venue shopping. Unlike the type of strategies American lawyers use in domestic litigation, the discussion of forum shopping in this paper concerns moves from domestic legislative or judicial fora to international legislative or judicial fora.

¹⁰⁷ JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 564-55 (2000).

¹⁰⁸ Section 301 of the Trade Act of 1974, as amended is the principal statutory authority under which the United States may impose trade sanctions against foreign countries that violate, deny benefits under, or unreasonably discriminate against the U.S. government, or otherwise restrict U.S. commerce, pursuant to a trade agreement.

shifted the debate forum from a one-on-one, mediated relationship (albeit one where individual companies or their employees could be subject to retribution from foreign government officials) to a more aggressive extension of the American presidency that allowed USTR to represent several companies (and industries) at once, all while wielding an implicit threat of trade sanctions.¹⁰⁹

4.054 Delegation (Political Economy)

Delegation occurs when a person or organization asks others to perform tasks on their behalf, involving a transfer of power. Agency theory plays a role within any delegation because a principal gives an agent authority to act on its behalf. In an optimal situation, the agent will act in the principal's interests. If, however, the agent does not act in the principal's interest, there is high agency loss.¹¹⁰

Under the auspices of the “piracy” frame, I contend delegation has occurred at several levels. Again, the Section 301 story provides an instructive example. First, I argue there was a delegation of power from the legislative branch to the executive branch. Under the U.S. Constitution, Congress alone has the authority¹¹¹ to conduct and manage foreign trade. Yet, Congress delegated some a significant portion of this authority to the president's Cabinet when it passed Trade Act amendments that allowed the USTR and private actors to unilaterally manage the 301 institution.

Second, the 301 institution involves a second, more subtle delegation of power from the executive branch to private actors who form and shape the institution. Private actors – both trade groups and policy entrepreneurs – are the sole providers of alleged economic loss evidence in many situations. These actors play an extensive role in shaping the legislative agenda and influencing the direction of the U.S. government's policy

4.055 Policy Entrepreneurship (Political Economy, Law)

A policy entrepreneur is a person who works from outside the formal governmental system to introduce innovative ideas into public sector practice, translate them into legislation, and implement programs that effectuate the legislation.¹¹² Among the key activities a strong policy entrepreneur engages in is lobbying the legislature, framing the problem, and attracting media attention.¹¹³

My core argument is not that entertainment industry organization serve as policy entrepreneurs –

¹⁰⁹ The United States Trade Representative has been a Cabinet-level position since the Ford administration. See Office of the U.S. Trade Representative, *History of the United States Trade Representative*, http://www.ustr.gov/Who_We_Are/History_of_the_United_States_Trade_Representative.html (last visited Sept. 16, 2008).

¹¹⁰ ARTHUR LUPIA, DELEGATION OF POWER: AGENCY THEORY, 5 INT'L ENCYCLOPEDIA OF THE SOC. & BEHAV. SCI. 3375 (Neil J. Smelser & Paul B. Baltes eds., 2001), <http://www-personal.umich.edu/~lupia/delegation.pdf> (last visited Sept. 16, 2008).

¹¹¹ U.S. Const., Art. I, §. 8. (“The Congress shall have power ... to regulate commerce with foreign nations, and among the several states, and with the Indian tribes ...”)

¹¹² Nancy C. Roberts and Paula J. King, *Policy Entrepreneurs: Their Activity Structure and Function in the Policy Process*, 1 J. PUB. ADMIN. RES. & THEORY 147, 152 (1991).

¹¹³ *Id.* at 158-59.

although one may argue this issue compelling – but instead that the institutions relied on separate individuals and small institutions to help craft a core, threatening message of “piracy” that would reverberate with members of the U.S. Congress in a way that would solicit compliance with the industries legislative preferences. The use of issue entrepreneurs in American politics is not a foreign concept: Frank Luntz, for example, helped craft messaging for the Republican Party – including the “Contract With America” – that helped the G.O.P. secure both houses of Congress during Democrat Bill Clinton’s presidency.¹¹⁴ In the intellectual property field, Jaques Gorlin is mentioned repeatedly as a key player in helping companies craft the “piracy” message in the mid-eighties that result eventually in a number of legislative initiatives that made intellectual property law more restrictive.¹¹⁵

4.06 Methods

I plan to use a mixed methods approach in my dissertation study, weaving quantitative and qualitative data into an interdisciplinary study that traverses the fields of information policy, communications, political economy, and intellectual property (focusing on copyright law). The two main methods will be frame analysis and content analysis. Frame analysis will involve examining “piracy” as a master frame, and identifying possible subframes that relate to the master frame.

Next, I plan to conduct a content analysis of newspapers articles from 1978 to 2008, using articles from *The New York Times*, *The Wall Street Journal*, *The Washington Post*, and *The Los Angeles Times*, looking at focal points such as headlines, lead paragraphs, and pull quotes. The pool of news articles will be chosen using a series of Boolean search terms¹¹⁶ that will be subjected to a systematic random sampling method to select a reasonable number of articles for analysis, randomly beginning at the seventh article and using a skip interval of 2 until the sample is completed.

The third method I anticipate using in this study is an interpretive policy analysis. Interpretive policy analysis involves identifying the language that carry significant meaning for a given policy issue; identifying the communities of speech that are relevant to the policy issue that is being analyzed; identifying the relevant discourse and their specific meanings; and identifying the points of conflict and their sources.¹¹⁷ I anticipate this analysis will offer a richer understanding of the piracy frame and its manifestation in current intellectual property policy.¹¹⁸

¹¹⁴ See generally FRANK LUNTZ, WORDS THAT WORK: IT’S NOT WHAT YOU SAY, IT’S WHAT PEOPLE HEAR (2007). For a Democratic approach to framing, see GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE (2004).

¹¹⁵ Drahos and Braithwaite, *supra* note 5, at 73.

¹¹⁶ I will pretest the search terms to ensure they yield a maximum percentage of search results.

¹¹⁷ See generally DVORA YANOW, CONDUCTING INTERPRETIVE POLICY ANALYSIS (2000).

¹¹⁸ For more insight on the need for more qualitative and interpretive research in policy analysis, see FRANK FISCHER, REFRAMING PUBLIC POLICY 133 (2000). (“Policy analysis ... can be better understood as a ‘craft’ than as a science in the positivist understanding of the term. ... The work of the policy analysis depends ... ‘more on knowing how than knowing that’: it is a ‘social process, rather than a purely logical activity.’ ... From this perspective we learn that the job of the policy analyst is guided by all sorts of informal judgments and inferences concerning the various aspects of a particular problem.”)

4.07 Possible Significance of Study Findings

To date, the “piracy” frame and its affect on domestic and foreign intellectual property law has gone relatively unchallenged until recently.¹¹⁹ The scholars that have addressed the “piracy” frame have done so from a singular perspective: Yar’s study approaches it from a communications perspective, while Hughes’ study approaches it from a legal perspective. This study may be one of the first to address the intersection of law and language from a fully interdisciplinary perspective. It also likely will be one of the first studies to discuss the role of policy entrepreneurs in shaping copyright policy and legislation partly through the news.

¹¹⁹ See generally Yar, *supra* note 31; and Hughes, *supra* note 69.