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The liability of politicalness: legitimacy and legality in piracy-proximate entrepreneurship

Karl Palmås*

Technology Management and Economics,
Chalmers University of Technology,
SE-412 96 Gothenburg, Sweden
E-mail: karl.palmas@chalmers.se
*Corresponding author

Jonas Andersson Schwarz

MKV, School of Culture and Education,
Södertörn University,
SE-141 89 Huddinge, Stockholm, Sweden
E-mail: jonas.andersson.schwarz@sh.se

Stefan Larsson

Lund University Internet Institute,
Landskrona Citadel, Sweden
E-mail: stefan.larsson@soclaw.lu.se

Abstract: This article explores three entrepreneurial ventures that have evolved in proximity to online piracy. In reviewing the respective cases of Spotify, Skype, and The Pirate Bay, the argument outlines the radically divergent strategies with which the entrepreneurs have sought to legitimise their ventures and underlying technologies. The article concludes that: 1) the context of practices labelled 'pirate' are paradigmatic examples of fields in which entrepreneurs must work exceptionally hard to legitimise themselves; 2) in this context, it is crucial that the role of law is analytically isolated from the role of institutionalised legitimacy; 3) success in legitimisation is largely dependent upon the entrepreneur's ability to demonstrate that the venture is governed by 'the natural order' of the economy. It is further argued that piracy-proximate ventures may contribute to the entrepreneurship field, inasmuch as they teeter on the border of being considered too disruptive, and thus suffer from a 'liability of politicalness'.

Keywords: piracy; institutional entrepreneurship; The Pirate Bay; Spotify; BitTorrent; Skype; Kazaa; economic theology; legitimacy; legality; innovation.

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Biographical notes: Karl Palmås is an Associate Professor in Innovation, Entrepreneurship and Social Change at the Chalmers University of Technology. He studies social and political aspects of innovation and entrepreneurship, and

received his PhD in Sociology from the London School of Economics and Political Science. He has contributed to several fields – including entrepreneurship, resistance studies, organisation theory, surveillance studies, human geography and sport studies – and is co-author (with Otto von Busch) of *Abstract Hacktivism: The Making of a Hacker Culture*.

Jonas Andersson Schwarz is the author of *Online File Sharing: Innovations in Media Consumption* (Routledge, 2013) and co-edited the *After the Pirate Bay* anthology (with Pelle Snickars, Mediehistoriskt arkiv, 2010). He currently works as a post-doc researcher in collaboration with world-renowned advertising agency Forsman & Bodenfors and is affiliated to the Department of Media and Communication Studies (MKV) at Södertörn University (Stockholm, Sweden). He received his PhD degree from Goldsmiths, University of London, and in his research he critically investigates behavioural and structural conditions for online media consumption, usage, and sharing – with a particular eye towards the technological conditions at hand.

Stefan Larsson is the Head of Lund University Internet Institute (LUii) in Sweden, and a Sociolegal Researcher who generally studies issues in the intersection of conceptual, legal and social change, particularly in relation to digitisation and the internet. He is the co-founder of the Cybernorms research group at Lund University, holds a PhD in Sociology of Law and a LLM, and leads research projects on trust in a digital context, open data, law and digital challenges, and more.

"As a startup, you're a pirate anyway. It's impossible to obey every law! But when your company is the size of Microsoft, you can no longer afford not to." [Taavet Hinrikus, former Skype employee, in Tänavsuu (2013)]

1 Introduction

South China Sea, early 1600s. The Dutch are at war with Portugal and Spain (ruled jointly by the Spanish crown), and the warring nations are accusing one another for acts of piracy around the Spice Islands. In 1603, the Portuguese merchant ship *Santa Catarina*, anchored outside of Singapore, is seized by the Dutch East India Company. Claiming the booty, the company doubles its total assets, but is also plunged into controversy. The Portuguese are outraged; some Dutch observers are also upset by to the perceived inappropriateness of the seizure.

Eager to prove that it is "not a band of pirates but acting in its own *legitimate commercial interests*" [French and Chambers, (2010), p.188, italics added], the Dutch East India Company assigns the jurist Hugo Grotius to the task of legitimating the capture of *Santa Catarina*. His reply comes in the form of *Mare Liberum*, a pamphlet published in 1609. Grotius's deliberation is "a thinly veiled argument for Dutch piracy in the contemporary South China Seas" (p.189), but nevertheless – despite its incongruence with moral perceptions at the time – becomes a foundation for international laws that hold to this day.

Grotius's argument goes as follows: Though the seizure of *Santa Catarina* was not a response to an attack, the act was still in line with natural law. This is because the merchant ship operated under the auspices of a trading monopoly, and the very existence of a monopoly is itself a violation of natural law [Thumfart, (2009), p.75]. By claiming

that the high seas ought to be open to all nations, the Dutch jurist thus challenges an international order dominated by monopolies, and instead presents an alternative international order of free commerce and traffic. For Grotius, it is God's will that different geographies are blessed with different resources, and equally, it is God's will that the peoples of the world should trade with each other. In other words, there is providence in a system of free trade: If one submits to this system, one is simply obeying the laws of God's nature.

The moral of this introductory story is three-fold: First, since the very advent of free trade, economic endeavours have been rife with political struggles. When trying to conquer the high seas and launch ventures that enriched some at the expense of others, successful trading companies needed to legitimise their own conduct while simultaneously seeking to delegitimise the conduct of competitors. Secondly, as seen in the case of Grotius, laws, on the one hand, and general perceptions of appropriate conduct, on the other, are not necessarily congruent with each other. Thirdly, in trying to legitimise their ventures and evade accusations of piracy, the protagonists of the story referenced divine providence and natural, universal laws. Arguing that they were acting in their own legitimate commercial interests, they claimed that they merely yielded to a natural order beyond their control, thus denying their own agency and culpability.

This article will pursue these three themes, discussing them in light of contemporary entrepreneurial practices. These themes can be restated in the form of research questions:

1 How do entrepreneurs manage legitimacy in situations where they are not merely disruptively innovative, but also politically subversive?

2 How do such entrepreneurs negotiate the tension between the law and wider notions of legitimacy?

3 What tactics and strategies do these entrepreneurs deploy when positioning themselves in relation to the supposedly universal and natural laws of the market?

The article will interrogate these questions in relation to three entrepreneurial ventures. These ventures, in turn, unfold in another space currently conquered by entrepreneurs – that of the internet and the phenomenon of online file sharing. Reviewing three cases of entrepreneurial ventures based on data transmission protocols, the article seeks to contribute to the literature on institutional entrepreneurship. The cases selected are of Swedish origin – all extremely successful in terms of users and public interest, but some less successful in terms of legitimacy and legality. The first one is Spotify, whose programmers also created the supremely popular file-sharing client µTorrent, which served as development platform for the subsequent streaming service. The second case is Skype, whose forerunner was the infamous file-sharing application Kazaa, and the third one is The Pirate Bay.

To begin with, we will present a brief review of institutional entrepreneurship, pointing to how this literature relates to socio-legal issues, and discuss the demarcation between 'the economic' and 'the socio-political'. Thereafter, we will briefly discuss methods, and then present the three cases mentioned above. These will ultimately be discussed in relation to the perspectives previously introduced. The article ends with a short conclusion that reiterates the main points of the argument.

2 Theory: entrepreneurship and legitimacy

The introductory story about piracy in the seventeenth century suggests that competition between entrepreneurs can be viewed through the lens of legitimacy: The success of ventures are to a large extent determined by the capacity of entrepreneurs to legitimate their actions. This issue lies at the heart of the literature on institutional entrepreneurship. As an introduction to this perspective, this section will first review the interrelation between legitimacy and entrepreneurial success. Following the three successive themes introduced in relation to the story of Grotius, it will then discuss legitimacy in relation to law, followed by a discussion on legitimacy and natural orders.

2.1 Legitimacy and entrepreneurial success

One way to approach the notion of legitimacy in entrepreneurship is to view it as a form of resource that grants access to other resources (Zimmerman and Zeitz, 2002). However, the issue can also be approached in relation to the introductory example: What is ultimately at stake in battles for legitimacy? Fittingly, in their introduction to institutional entrepreneurship, Garud et al. (2007, pp.959–960) use Schumpeter's (2000) influential description of 'entrepreneurship as innovation' as a point of departure. Entrepreneurship plays a crucial role in capitalism, setting off the perennial gale of creative destruction, and thus destabilising incumbent structures. Social theorists have described this violent topsy-turviness in a number of ways: modern capitalism can be construed as a process in which "all that is solid melts into air" [Marx and Engels, (1998), p.38]; as a Faustian bargain that "promises us adventure" while threatening to "destroy everything we are" [Berman, (1988), p.15]; as a constant creation of new transgressive desires coupled with a concurrent containment of this creative juggernaut (Deleuze and Guattari, 1984). In any case, the idea of creative destruction is crucial to the institutional entrepreneurship perspective, as it highlights that conflicts – and the subsequent need to legitimise action – is an inherent property of capitalism. Thus, the institutional entrepreneurship perspective stipulates that

> "the emergence of novelty is not an easy or predictable process as it is ripe with politics and ongoing negotiation. What may appear to be new and valuable to one social group may seem threatening to another. Thus, as with institutional theory, the literature on entrepreneurship has also had to come to grips with issues of agency, interests and power." [Garud et al., (2007), p.960]

From this perspective, then, successful entrepreneurship is a matter of managing the potential conflict that lies dormant in any new technology, product or service. To overcome the "liability of newness" (Stinchcombe, 1965), entrepreneurs need to secure their legitimacy. However, this implies that institutional entrepreneurship scholars point to a duality in the role of the entrepreneur. The entrepreneur must offer something distinctive and new, but also show that this novelty is – in some way – congruent with existing organisational forms and ideologies [Lounsbury and Glynn, (2001), p.551]. In other words, the entrepreneur must not only "break with existing rules and practices", but also "institutionalize the alternative rules, practices or logics they are championing" [Garud et al., (2007), p.962]. Further to this point, entrepreneurs that operate in industry contexts that lack legitimacy are most successful when they overstate their legitimacy,

and downplay their distinctiveness [Lounsbury and Glynn, (2001), p.559]. In order to institutionalise the alternative proposed, the entrepreneur must demonstrate conformity with rules and requirements presented by the institutional environment [Scott, (1995), p.132]. The reward for doing so is to gain legitimacy, which can be defined as

> "a generalized perception or assumption that the actions of an [entrepreneurial] entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs, and definitions." [Suchman, (1995), p.574]

How 'generalised' must this perception be? Lounsbury and Glynn (2001, p.548) suggest that entrepreneurial ventures ultimately need to be "accepted as appropriate and useful by broader publics". However, one must distinguish between legitimacy among a broader public and legitimacy with reference to the law.

2.2 Legitimacy and law

The role of legal norms in the processes of entrepreneurial legitimacy may be explored further, as the dichotomies legit/illegit and legal/illegal are not necessarily congruent. This implies that some institutional settings are more intertwined with legal structures than other. For an entrepreneurial effort to achieve 'institutional legitimacy', an entrepreneur may sometimes be able to secure legitimacy by referencing the law. However, in other cases, such as that of informal economy entrepreneurship, a venture may be accepted as legitimate even though it does not fit inside the confines of the law (cf. Webb et al., 2009).

From a socio-legal perspective, one could address the theoretical implications stemming from the fact that norms spoken about with regards to legitimacy (cf. Suchman, 1995 above) will have to be widely defined – including not only legal, but also social or other norms (cf. Svensson, 2013). Indeed, regarding the extralegal aspects on legitimacy and its constituents, there is a rich literature in sociological, anthropological, and socio-legal disciplines on how to study and understand norms, values, and beliefs. In broader terms, regarding societal change, the role of law is sometimes argued to be challenged in times of rapid transition. This would relate to the often conservative essence of law – making it lag, so to speak – possibly creating conflict or at least a sort of formal normative void in relation to the emerging structures (Abel, 1982; Larsson, 2014).

The reasons for legal revisions to proceed so slowly may be found in what many socio-legal scholars discuss in terms of predictability [Aubert, (1982), p.62; Luhmann, 1972] but also in a type of retrospectivity that Posner (2000) has called 'past-dependency'. This retrospectivity may lead to lock-in effects that can further add to difficulties for law to adapt to technological, societal or any structural change (Gillette, 1998; Larsson, 2011). This is relevant for this article, given that the cases involve technical innovations embedded in a wider reformation of the societal structure: digitisation. Thus, (formally) illegal innovations may be experienced as legitimate by wide sections of society, but not within the particular sectors/industries being challenged. A number of studies on online piracy have come to this conclusion (Andersson Schwarz, 2013; Larsson et al., 2012; Svensson and Larsson, 2012). We now shift focus to one particular strategy by which actors may legitimate their actions: How legitimacy is conferred by reference to natural orders.

2.3 Legitimacy and natural orders

The introduction pointed to Grotius' theological foundation for free trade: When engaging in the free market on the high seas, one is yielding to a natural, divine order. By doing so, one is allegedly 'free' from culpability. As this paper will argue, approaches deployed recently by contemporary entrepreneurs wishing to legitimise their actions are akin to this strategy.

150 years after Grotius had presented his ideas about high seas as a neutral sphere of trade governed by natural laws, Adam Smith developed a similar perspective on trade as a general phenomenon: The famous idea of the invisible hand. In developing this idea, Smith too was influenced by disputes over European seaborne trade. Arrighi (2007) states that Smith was critical of this approach to economic development, as it necessitated large-scale, monopolistic and powerful East-India Companies. Indeed, as noted by Mitchell (2002, p.294): "Smith wrote *The Wealth of Nations* as an attack on the power of these colonising corporations and formulated the idea of individual exchange in 'the market' as the program for an alternative". So, like Grotius, Smith imagined that free trade would spawn a depoliticised economic sphere, governed by no individual agent but "by impersonal laws that assure a beneficent outcome of the pursuit of self-interest" [Foley, (2006), p.1]. The belief in beneficent outcomes was in fact a belief in providence: The famous invisible hand is the hand of God [Agamben, (2011), pp.283–284], and both Grotius and Smith can thus be labelled 'economic theologicians' (Thumfart, 2009).

By inventing the economic sphere, Smith also created a demarcation between pure economic action and non-economic action. This demarcation is an ideal that remains a fundamental ideal within contemporary capitalism: note Friedman's (2002, p.9) assertion that while capitalism provides economic freedom, it "also promotes political freedom because it separates economic power from political power". Ideal capitalism thus implies that the economy is a safe harbour from inter-human political games. The economy can then be left to the natural laws of the hidden hand, whereas "the rest of social life" [Foley, (2006), p.1] requires "the conscious balancing of self-interest with social considerations". In other words, whereas the form of action that can be sorted as 'economic' is always beyond reproach, non-economic action is always subject to moral and legal scrutiny. This article will show that this has serious implications for the success of entrepreneurs. If there is a generalised perception that an entrepreneur is acting in accord with 'commercial interests', that action is likely to be more legitimate than actions that are understood as political.

There is a further point to be made in relation to economic theology. Since the laws of the market are divine – since the invisible hand is the hand of God – this means that they are universal. Thus, Grotius claimed that his version of free trade was to rule across the globe, leaving no space for alternative arrangements. As we shall see, this tension between universalist legislation and local practices is present in the cases presented below.

3 Methods

The argument in this article is based on a historical case study method; a decidedly qualitative and interpretive approach to research. Generally, a case study approach is suitable for discovery, description, and relational mapping [Vissak, (2010), p.371],

seeking to answer 'how' and 'why' questions (Yin, 2009). Explanatory case studies seek to link an event with its effects, and are suitable for investigating causality. Historical case studies explore social events that cannot be prematurely controlled; actions and effects are described 'after the event'. A sociological use of history is to signal the presence of a simple element or particular characteristic that remains the same throughout several discrete events and can be placed in a context [Wievorka, (1992), pp.160–161]. As Amenta (2009, p.355) writes:

> "Historical social scientists are expected to provide evidentiary demonstrations that support their more sophisticated theoretical claims and cast doubt on plausible alternatives. One question is whether case studies can do more than simply suggest hypotheses and build theory."

In our case study, we hope to both dismiss some taken-for-granted claims about the nature of the economy, but also build theory regarding the relation between politics, piracy and entrepreneurship. Like all case studies, ours must strive to be both representative and generalisable. Regarding representativity, the guiding question is: What is the case *a case of*? Our three cases are chosen in order to represent the industrial categories of technology, innovation, and economic growth. They were chosen to signify a shared national origin (i.e., Sweden), ensuring a comparative factor. A comparison may help deconstructing what common sense takes to be unique or unified, but it may also arrange unity out of what would ostensibly seem as divergent practical categories [Wievorka, (1992), p.170]. Our cases could thus be labelled strategic selections that are intended to exemplify continuity where more superficial observations would claim disparity. In terms of generalisation, the article endeavours to isolate a theoretical argumentation, which – in well-defined circumstances or contexts – might be used for understanding the emergence of similar phenomena. For instance, one may expect that the findings from this article are applicable in other 'politicised' fields of economic life.

4 Securing the legitimacy of p2p: three cases

As mentioned in the introduction, the three cases presented below are sourced from a situation in which entrepreneurs are conquering a new space – the internet. The ventures in question all emanate from peer-to-peer-based (p2p) technologies; a type of innovation whose potential disruptiveness forces the entrepreneurs to manage claims of piracy. The three stories will thus explore how these actors deploy different strategies for gaining legitimacy. Moreover, the cases also illustrate how, as Barry (2001, p.33) has argued, technical practice can be both inventive and anti-inventive in its implications; some technological practices are indeed so inventive that they instigate a surplus of possible further thoughts and actions, thus becoming politically controversial. Quite often, entrepreneurial agency can actually serve to close off or preclude such possibilities, rather than serving to open them up. Some of this prohibitory agency is linguistic, manifested in speech acts and performances clarifying the limits and aims of one's operation; some of it is material, enacted by hard-wiring certain limitations onto the technology in question.

What is central for an understanding of digital technology is that agency is always mediated through the technological conditions at hand. The hardware substrate and the software protocols/applications all serve to introduce limits and affordances. We will

trace three internet applications, each based on a different protocol, moving through society along somewhat different paths. Each of these applications happen to be founded by Swedes, and the Swedish/Nordic context is central to all of them. They have all been revolutionary in one way or another, but only two of these applications have become legitimised over time. Note that although our aim is to sketch the trajectories of each innovation, we do not intend to present a teleological argument; the forking of roads for each innovation has by no means been historically pre-given.

4.1 Spotify: legitimisation through content clearance

Spotify, officially launched in 2008, is often heralded as a well-known 'success story' of online entrepreneurialism, and has been subject to significant national industrial pride in Sweden, being endorsed by establishment figures such as the government and the Swedish public service radio. What is perhaps less known is that Spotify has its roots in the world of unrestricted file sharing, in at least two different ways: Spotify managed to build new infrastructure around the scattered activities of individual file sharers, building a rogue archive of mp3 files that a select group of invited users could remotely access via streaming protocols, before reaching a deal with record labels and ultimately succeed to make the service legit. What is more, the engineers behind Spotify honed their skills by crafting pure-play BitTorrent application µTorrent.

Spotify was founded in April 2006 by two entrepreneurs, Daniel Ek and Martin Lorentzon. Both had engineering backgrounds: Ek from Stockholm's KTH, Lorentzon from Gothenburg's Chalmers. Prior to founding Spotify they had been involved in the internet start-up TradeDoubler. Ek realised that more and more people downloaded music for free via the internet instead of buying CDs. Inspired by Napster, he began to think about a possible new solution to the problem. Spotify – the name allegedly coming from Ek mishearing one of Lorentzon's name suggestions (Bertoni, 2012) – can be seen as a streaming-based music brokerage service. An important technical contribution came from lead programmer Ludvig Strigeus. Already from the outset, the idea was to partner with major record companies, and after long negotiations Ek and Lorentzon succeeded, launching the service for music customers in Sweden and parts of Europe in 2008. The content that they needed for their beta version was copied from their own and their friends' music collections (Greeley, 2011). In other words, the cloud-based streaming service heralded by many people as the successor, or perhaps antidote to file sharing, itself began as an archive of non-licensed media content.

In retrospect, Spotify served to fill numerous gaps: in terms of usage and readiness to consume music via computers and other streaming devices, Sweden was a very mature market thanks to the outstanding levels of internet penetration and usage. Especially the establishment of mobile connections was a prerequisite for Spotify becoming profitable; in order to use Spotify on mobile devices, one has to subscribe to the 'premium version', which drives subscription signup rates. Further, file sharing was an already existing and widely popular behaviour at the time. Initially, the content hosted on the Spotify servers was itself actually acquired in this way, its inventory containing mp3 files illegally obtained on the unregulated internet.

In 2005, Ek and Strigeus had launched µTorrent, one of the most popular BitTorrent clients (still operational but since 2006 owned by BitTorrent, Inc.). Like with Spotify, it is free, easy-to-use, and performs superbly well, having made it a very popular product: In 2012, µTorrent was estimated to have approximately 150 million active monthly users.

While µTorrent can be argued to be the technical solution to the problem of resourcefully cacheing streaming data as close to the user as possible (much like with Skype's usage of 'nodes' and 'supernodes', p2p is used as an underlying technique for improving speed and thus easing access at the transmission endpoints), the important thing to note with Spotify is the long-term legitimisation process that preceded the official launch. The pirated music was used as a demonstration to get licensing deals with the labels; a process that has famously been described as 'two years on planes' (Butcher, 2009) – just in order to safeguard European licenses covering Scandinavia, France, Spain, and the UK.

4.2 Skype: legitimisation through change of application

Just as Napster was getting shut down for enabling the illegal sharing of music files, p2p file-sharing application Kazaa was launched in September 2000, enabling people to share music files but also videos and software as well. It utilised a file-sharing protocol that was new at the time: FastTrack. It was different from Napster in that it allowed peers to interact without an intermediary server, and in that it assigned some of the connected computers to become so-called 'supernodes', improving the overall exchange through making networks more scalable. Both FastTrack and Kazaa were created and developed by a group of Estonian programmers; the same team that later created Skype. FastTrack was sold to Niklas Zennström (from Sweden) and Janus Friis (from Denmark), and was introduced in March 2001 by their Amsterdam-based company Consumer Empowerment.

In October 2001, as Consumer Empowerment was risking to get sued in a Dutch court case, Zennström and Friis sold the rights to the FastTrack protocol and the Kazaa client to Sharman Networks, headquartered in Australia and incorporated in Vanuatu. In early 2002, Sharman duly forced the competing Morpheus client off the FastTrack network – the reason being that the Morpheus developers had failed to pay license fees to Sharman. Kazaa soon became the dominant FastTrack client. By May 2003, the Kazaa software had been downloaded more than 230 million times. This could be compared to the total estimated number of users at the height of Napster's popularity in 2000: approximately 80 million. Nevertheless, Sharman soon found itself embroiled in a US lawsuit, alongside Grokster and MusicCity (the makers of the Morpheus software) and in 2006 these file-sharing companies settled with the plaintiffs (a conglomerate of record labels, music publishers, and motion picture studios), resulting in Kazaa being converted into a legal music download service.

According to a recent account of the history of Skype (Tänavsuu, 2013), the idea that would eventually become Skype germinated in the summer of 2002. Initially, Zennström and Friis planned to invent a service that would allow the sharing of home Wi-Fi. They even talked about creating Wi-Fi phones, an idea that would later be implemented in Skype. The concept of open Wi-Fi networks was very big at the time and Tallinn, the capital of Estonia, was in fact one of the most Wi-Fi-saturated cities in the world at the time, very much thanks to EU funding. A clever move was to retain the rights to the p2p protocol that enabled Skype; a piece of intellectual property that the Kazaa team had originally developed and later on administered by Zennström's and Friis's company, Joltid, founded in early 2002 and based in the British Virgin Islands. The protocol was called Global Index and was a proprietary version of the FastTrack protocol. It has served as a core technology making a string of subsequent applications possible – not only

Skype, but also video-streaming ventureJoost (founded in 2007, folded in 2009), and current music-streaming venture Rdio (cf. Santos, 2014).

Skype went live in late August 2003. Similar services existed at the time – virtually all of them based on the established standard voice-over-IP (VoIP) protocol SIP. What Skype had to offer was increased ease-of-use, convenience, and technical efficacy (Tänavsuu, 2013). Skype leveraged the same type of p2p networking idea that Kazaa was built upon, but applied it to voice transmission instead. It was a 'disruptive' service in that it challenged an existing, profitable business model based on scarcity (telephony). The idea was that the more people that used Skype, the more reliable the connection would be for each of them. Despite the potentially cumbersome task of making phone calls while sitting at a computer, it attracted users through being free, and since it was a p2p network it was to Skype's advantage to have as many people using the network as possible so that it would be stable and fast.

Throughout the development of service, observers have discussed whether Skype is a software or telecoms company. Though the French telecoms regulator has argued that Skype needs to register as a telecoms operator (Jolly, 2013), the company has maintained that it is simply a software provider. Unlike telephony providers, Skype does not, for example, provide handsets or grant access to emergency numbers. Through the end-user license agreement, users confirm that they are using Skype purely as software; it is not offered as a stand-alone telephony solution, and is in this sense framed as a neutral data transmitter or a 'communications provider' in the most general of terms. Arguably, such performative speech acts serve to specify the ontological description of what the service actually *is*. These acts are not merely business plans; they operate in the realm of legality and legitimisation and have a bearing on the way the service becomes regulated.

4.3 The Pirate Bay: illegal and illegitimate?

Sprouting from the very loosely organised Swedish hacktivist collective Piratbyrån (The Bureau of Piracy), The Pirate Bay (TPB) was launched in 2003. Initially, TPB was, literally, Piratbyrån's 'own' torrent tracker, but soon became an entirely separate entity. The popularity that ensued was largely unexpected, yet the early decision by administrators (Gottfrid Svartholm Warg, Fredrik Neij, and Peter Sunde) to include pornography and mainstream commercial content can partially explain why this file-sharing site became so popular. TPB quickly rose to become perhaps the most dominant actor in the file-sharing world; already in 2009, it made sense to describe TPB as a 'strategic sovereign' (Andersson, 2009).

Technical efficacy is another explanation to the site's popularity – as is the rebellious associations attached to it. By publishing the so-called 'legal correspondence' submitted to TPB (where various media corporations and collecting societies threatened the site owners with legal action) both notoriety and charismatic authority was achieved by the site's founders; this even continued after the famous police raid against the service in May 2006 and the subsequent trial in 2009. By maintaining dedicated to hosting all sorts of material, even in the face of direct threats, the provocative stance was bolstered. Merchandise and film documentaries in the visual style of punk and non-conformism have also helped shaping an image of the site's administrators as assertive hardliners.

In order to understand some of the claims of the 2009 trial, one must delve into the specifics of the BitTorrent protocol. This file-sharing protocol – also mentioned above in relation to Spotify – is highly decentralised, which adds to the legal difficulties of the

matter. In its original design, peers (users) in a swarm rely on a central computer server (a tracker) to find each other and to maintain the swarm. This initially required the publication of so-called *torrent links* on web servers, but over the last five years a gradual introduction of additionally decentralising elements (*distributed hash tables*, *peer exchange*, *magnet links*) has made the need for static, server-hosted torrent links superfluous. This implies that no copyrighted material is ever physically hosted on the trackers or in the indexes. Still, BitTorrent trackers, links, and indexes provide means to receive and send copyrighted data between users. Legally, if the servers are deemed to have this coordination as their main purpose, while having few or any other purposes, the server owners can be judged as directly aiding and abetting copyright infringement on a large scale. In the court proceedings, this claim was challenged by the defendants, arguing that TPB should be seen as 'mere conduit' or a 'neutral carrier', but these claims were rebuffed by the jurors.

Another issue during the trial was that of profitability. File sharing does have economic repercussions, and the operation of hubs, indexes, and websites that facilitate the sharing can – at least in theory – be made economically profitable. However, it is equally important to note that the Swedish court rulings found that TPB had in fact *not* been a profitable operation (Larsson, 2013); the earnings generated from advertisements (equivalent to $150,000) only covered the expenses that were required to run the site, and barely so. As a contrasting case, the entrepreneur Kim Dotcom, running the New Zealand-based megaupload service that was raided in 2012, made it part of his persona to brag about how profitable it was to run a file-sharing hub.

While these founders were sentenced to prison and extensive fines in the 2009 trial, the site has seen continued popularity and is arguably even more resilient than before, being mirrored on several different servers, having migrated between different domain names (.org, .se, .sx, etc.). Worldwide, several auxiliary services exist that offer access to the site by proxy, for users in jurisdictions where the original TPB web address is blocked. Moreover, the actual site is partially hosted by the Swedish Pirate Party (otherwise unrelated to TPB and Piratbyrån).

In terms of organisation, TPB remains constantly entangled with ever-shifting collectives of individuals, both in terms of the millions of users connecting to the site in any given moment, and in terms of being partially aided for example by Pirate Parties in different countries. More operationally, it involves several individuals acting as site administrators and/or offering support to the running of the service (most of these actors doing so in secret, even vis-à-vis one another, ever since the famous Sunde-Svartholm-Neij trio were legally forced to take their hands off the site's operation). Further, unintentionally or not, the site serves as a pawn in a greater diplomatic game of transnational trade dominance (Burkart and Andersson Schwarz, 2013).

5 Discussion

This section will discuss the extent to which these entrepreneurial ventures have managed to secure legitimacy, and how they did so. Moreover, it explores the ways in which legality and lawfulness are interlinked with legitimacy in the three cases, and to what extent the cases relate to a notion of being purely economic, non-political ventures, as a means for achieving legitimacy. The discussion is thus structured in accordance with the

three themes signposted in the introduction and theory section: legitimacy and entrepreneurial success; legitimacy and the law; and legitimacy and natural orders.

5.1 Legitimacy, entrepreneurial success and piracy

The radical technical innovations that have emerged in the realm of p2p and file sharing have subverted many of the distinctions (private/public, commercial/non-commercial, human/non-human) and valuation systems that have been central to modernisation since the Enlightenment. As such, this context is interesting for entrepreneurship scholars: Indeed, it a fertile ground for exploring modes of radical innovation and creativity that the contemporary economy struggles to contain. However, as discussed in Section 2, this forces entrepreneurs acting in this field to overemphasise the ways in which they conform to existing values and norms [Lounsbury and Glynn, (2001), p.559].

Entrepreneurs operating in the proximity to piracy do however face further legitimacy challenges, not least the ones associated with the normative dimensions of the word 'piracy'. When 'piracy' is used as terminology, as opposed to 'entrepreneurship' or 'innovation', the normative difference tends to be clear (Roth, 2014b). Note how Kim Dotcom wants to be described: "I'm not a pirate, I'm an innovator" (Greive, 2014). This inherent normativity is what signifies the underlying legitimacy or illegitimacy of the actions performed. As we see in the case studies for this article, the issues of legitimacy has been regarded differently by the actors in the three cases. Here, entrepreneurship scholars may lean upon socio-legal scholars and sociologists of law, to whom normativity and legitimacy in relation to law and legality is a core topic. Although different social orders are seen as differently valid depending on perspective (Roth, 2014a), the importance of distinguishing the normatively accepted from the normatively non-accepted has been central.

The Spotify case chimes with the claims of Zimmerman and Zeitz (2002): an effective process of legitimisation has facilitated the attraction of vast amounts of investor capital. Paradoxically, however, Spotify has yet to prove profitable. Rather, the company loans money in order to expand and reach critical mass, in terms of paying subscribers (Johansson, 2013). A high expansion rate is preferred over a slower growth, and this expansion is fuelled by credit. One explanation might be that the environment that Spotify moves within is one that was rather quickly and prudently characterised by integration with both the traditional copyright industry and the telecoms/computer hardware industries; the company's remarkable credit inflation is somewhat akin to the music industry 'betting on itself', hedging parts of this bet against the prospect of continued expansion of entertainment devices (pads and mobiles) since these devices are dependent on 'content suppliers' such as Spotify. Another interpretation is that in order to be effective, creative destruction cannot be half-hearted; the industry has to converge on one mode of delivery (or even one supplier among a range of competing suppliers) and invest exactly so much that the innovation gains enough leverage to overtake the more crippled business models preceding it. An initial 'success story' thus often becomes a stepping stone to further investments; it also becomes expedient in order to arrange a narrative that masks any claims of illegitimacy, since – as our introductory quote descried – when large enough, actors can no longer be allowed to be seen as illegitimate.

Whereas Spotify represents a reasonably clear-cut example of legitimisation – securing agreements and joint ownership rights with interested parties – the case of Skype is somewhat more complex. Here the entrepreneurs chose to abandon the

controversial domain of file sharing, and instead chose another application for their technology. By all means, operating in this new domain also implied a certain degree of legitimisation, yet the company has dexterously managed this process. In the third case – The Pirate Bay, where the founders were convicted – legitimacy was managed in a radically different manner, which calls for a deeper investigation into the interrelation between legitimacy and law.

5.2 Legitimacy, law and piracy

Given a hypothetical demarcation between legitimacy and legality, one can see that law and legal action has played an important role in the pursuit for legitimacy in all three cases. Arguably, when tying a new institutional arrangement to existing legislative frameworks, the defence of that pre-existing legal paradigm would be strengthened. Entrepreneurs operating outside of such paradigms not only risk being regarded is illegitimate by the traditional entities but their innovativity may even be criminalised. Regarding TPB, this is arguably the case – partly due to the intertwined development between copyright and the structures of the music and film industries. As we have seen, Spotify spent tremendous effort to sign deals with the larger content providers, as a means to overcome the legal obstacles in their need to be able to offer a sufficient catalogue. As a means to this, Spotify also sold parts of the company to large music companies. The structural power held by the content owners has been consolidated by copyright law, over a long period of time. Therefore, innovation in this particular area has likely been held back due to the strong links between industry and law.

The launch of Skype, on the other hand, meant a shift of context to another market with other industrial players, and, a legal complexity different from the one of intellectual property. For example, the process of challenging traditional pay-per-minute business models in telephony with VoIP as with Skype, meant a sort of reshaping of what is regarded as legitimate within this particular institutional arrangement. Once Skype was fully operational, the team had had to continue zigzagging their way through different national jurisdictions; apparently Skype fought quite hard to become seen as a software company and not as a telco, mainly due to the latter industry being much more regulated and involving much bigger competitors: “From the beginning, I was very keen to comply with legislation and regulation, and we managed to keep Skype categorised as an electronic information provider – just like an e-mail provider rather than a telecom provider – for a long time” (Zennström, in Tänavsuu, 2013).

The file-sharing protocol behind Skype and Kazaa, Global Index, was never open source; it was proprietary and largely encrypted, making its technical details still partially unknown. Due to the constant risk of litigation, the Kazaa inventors had played a game of hide-and-seek with the legal authorities, encrypting all their communication and avoiding to be approached by lawyers. If bands of activists maintain secrecy out of political concerns, and innovators maintain secrecy out of concerns for industrial espionage or economic competition, Zennström and Friiswere a somewhat different breed in that they had to maintain secrecy due to legal concerns. In this sense, the duo resembles the TPB trio. On the other hand, while the TPB trio were brash and bold, outwardly energetic, the strategy kept by Zennström and Friis was rather to lay as low as possible, remaining in command of the hidden core technology, focusing on how to harness it in the best ways possible while being unsentimental regarding its possible applied uses. Moreover, the under-the-radar strategy adopted by them could be said to parallel those of neoliberal

entrepreneurs just as well. Tellingly, the Skype headquarters were placed in Luxembourg, partially to benefit from the low tax rate there (Tänavsuu, 2013).

5.3 Legitimacy, natural orders and piracy

The introduction showed how Grotius depicted the high seas trade as a natural order that can, and should, be devoid of political power battles. This conception of exchange is in operation in the contemporary economy, and features prominently in the cases presented above. Just like Grotius was participating in the establishment of rules for a vast new oceanic space, the above-mentioned entrepreneurs have been engaged in the elaboration of rules for the flow of data. Here, there are similarities between the calls for the free flow of goods and the free flow of bits: The entrepreneurs have depicted the latter flow as a natural order that lies beyond their control. Thus, when Skype is challenged to register as a telecoms operator, it argues that it is simply a software provider that has nothing to do with handsets, hubs, servers, cables, or the bits that flow through them. Similarly, but less successfully, TPB describes itself as a 'neutral carrier', which only directs users to already existing flows of data.

However, this issue can be unpacked further. The theory section suggested that Adam Smith adopted a Grotius-like perspective on trade as a general phenomenon, and thus invented the idea of the economic sphere as a space for non-political exchange, which follows natural laws. In the context of the entrepreneurs presented above, with their proximity to online pirate activity, the ideal of being seen as non-political is difficult to attain. First, there are the normative issues regarding the word 'piracy', mentioned above. Secondly, file sharing, as a cultural practice, can never be argued to be purely about transmission; it has political side effects that go deeper than the simplistic cybernetic notion of 'information transfer'. This implies that these piracy-proximate entrepreneurs not only from the liability of newness (Stinchcombe, 1965; Freeman et al., 1983); they also suffer from *liability of politicalness*. They must work exceptionally hard to demonstrate that their operations can be safely left to the laws of the market – that they do not require a "conscious balancing of self-interest with social considerations", legal or otherwise.

This, of course, is precisely what TPB failed to do. Throughout the 2009 trial, the interests and motives of the founders are at stake. On one level, the protagonists appeared to be acting as entrepreneurial actors (Palmås, 2010). Nevertheless, there were also signs of the founders being 'political', such as their apparent critique of the copyright regime, and the republishing of provocative legal communication with large media corporations. Such strange hybrids may manage to find a place for themselves as 'political entrepreneurs' (Palmås, 2012). However, for entrepreneurs operating in the proximity of piracy, failing to present oneself as a pure economic actor compromises the legitimisation one needs to overcome the liability of politicalness.

There is, finally, another way to explicate the difference between the Spotify and Skype cases, on the one hand, and the TPB case, on the other. This relates to the issue of universalist legal aspirations, introduced towards the end of Section 2. The former cases can be understood as efforts to search for sustainable business models for a world in which international copyright laws are strictly and effectively enforced. One may even argue that the emergence of these business models have contributed to the legitimation of such an international regime, and to a concomitant elimination of local 'pockets' of alternative file sharing arrangements. This, in turn, points to a curious paradox: while

Spotify and Skype managed to overcome the liability of politicalness, they are nevertheless profoundly political actors, inasmuch as their respective ventures have influenced the shaping, and implementation, of law.

6 Conclusions

This article has explored three cases of entrepreneurial ventures that have evolved within the context of online piracy. In reviewing the respective fates of Spotify, Skype and The Pirate Bay, the argument has pointed to the radically divergent strategies with which the entrepreneurs have sought to legitimise their ventures and underlying technologies. Spotify gained legitimacy through securing co-ownership deals with the incumbents whose business was threatened by the service, while Skype did so through re-orienting the application of its technology from file sharing to internet telephony. By failing to build the same kind of business legitimacy, the development of The Pirate Bay follows a different trajectory, which nevertheless suggests that the line between entrepreneurship and piracy is a fine one.

In relation to existing literature on entrepreneurship, the argument endeavours to make three contributions. First, adding to Lounsbury and Glynn (2001, p.559), it posits that the context of practices labelled 'pirate' are paradigmatic examples of fields in which entrepreneurs must work exceptionally hard to legitimise themselves. Piracy contexts are nevertheless particularly interesting for entrepreneurship scholars, inasmuch as they breed innovations that teeter on the border of being considered too disruptive, suffering from a 'liability of politicalness'. In other words, these pirate contexts are a fertile ground for exploring modes of radical innovation and creativity that the contemporary economy struggles to contain.

Secondly, the article adds to the existing literature on institutional entrepreneurship by dissociating legitimacy from legality. The case studies show how practices declared illegal may still be "accepted as appropriate and useful by broader publics". This implies that entrepreneurial endeavours may be embroiled in what socio-legal scholars call 'law lag' (Abel, 1982) or dealing with a discrepancy between legal and other norms (Svensson, 2013). A particular challenge emerges – as in all the three cases in this study – when there is a close linkage between the institutionalised norms and practices of a particular industry and the specific legal setting. When the two are congruent, law serves the purposes of the incumbants, irregardless of whether the legal setting may have been slow to adapt to technological, societal or structural change (Gillette, 1998). The risk is then that *any* innovation diverting from the current industry structure will by default be illegal.

Thirdly, the argument has introduced a specific strategy of entrepreneurial legitimisation that has been overlooked in the entrepreneurship literature (cf. Suchman, 1995; Zimmerman and Zeitz, 2002). This strategy benefits from the 'economic theology' that presents the economy as a sphere governed by natural laws, decoupled from human agency and political struggle. In pirate contexts, success is largely dependent upon the entrepreneur's ability to demonstrate that the venture is governed by the natural order of the economy. In this way, any disruptions caused by the innovation are construed as benign outcomes of the supposed perennial gales of creative destruction.

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