

Between Legality and Legitimacy: Behavioral Insights into Digital Piracy and Regulatory Disobedience

Entre la legalidad y la legitimidad: perspectivas conductuales sobre la piratería digital y la desobediencia regulatoria

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Abstract: In the past few decades, the exponential growth of digital goods has overwhelmingly reshaped the landscape of cultural production, access, and distribution, creating new challenges in terms of legality, legitimacy, and accessibility. One prominent issue that has emerged is digital piracy, a practice that continues to gain ground worldwide. While often considered a violation of intellectual property rights, it remains widespread, with segments of society viewing it as morally acceptable, thus highlighting a gap between legal standards and public moral perception. This disconnect has prompted a growing debate on how digital piracy should be regulated, particularly when traditional legal mechanisms seem ineffective in addressing the underlying causes of this phenomenon. This article aims to develop a comprehensive framework that views digital piracy not merely as an infringement of law, but as a multifaceted social issue, incorporating moral, cognitive, distributive, and participatory governance dimensions. It also proposes a paradigmatic shift from punitive approaches to more equitable, inclusive regulatory strategies. Our findings show that punitive legal models fail to account for the social, moral, and psychological factors instigating piracy. Instead, piracy is often framed as a form of resistance against perceived injustice and exclusion from cultural goods. This article concludes that addressing digital piracy in a more meaningful way requires a more nuanced regulatory approach, combining incentives, participatory governance, and distributive justice to create a fairer and more ethical framework for managing piracy in the digital era.

Keywords: access to information; cultural policy; intellectual property; piracy; social justice.

Resumen: La expansión exponencial de los contenidos digitales ha transformado profundamente la producción y distribución cultural, dando lugar a debates sobre su legalidad, legitimidad y acceso. Es así como la piratería digital, práctica extendida en la sociedad, desafía las normas legales y es frecuente-

mente percibida como moralmente aceptable por amplios sectores, evidencia una brecha entre la ley formal y las intuiciones morales. En ese contexto, el objetivo de este estudio es desarrollar un marco que conceptualice la piratería digital como un fenómeno social complejo, al integrarse dimensiones morales, cognitivas, distributivas y de gobernanza participativa, se propone un giro desde el enfoque punitivo hacia regulaciones más equitativas. Los resultados muestran que los modelos tradicionales basados en la sanción no logran abordar las justificaciones sociales y morales profundamente enraizadas de la piratería. Por lo tanto, la piratería se interpreta como una forma de resistencia ante la injusticia percibida y la exclusión estructural en el acceso a bienes culturales. En conclusión, se subraya que, para abordar de manera efectiva la piratería digital, es necesario un enfoque multidimensional que incorpore incentivos, gobernanza participativa y justicia distributiva, más allá de la simple disuasión. De ese modo, se ofrece una estrategia más legítima, eficaz y ética para gestionar la piratería en la era digital, permitiendo una regulación más sensible a las realidades sociales y económicas actuales.

Palabras clave: acceso a la información; política cultural; piratería; propiedad intelectual.

Summary: I. *Introduction*. II. *The Moral Paradox of Digital Piracy*. III. *Theoretical Foundations for a Broader Interpretation*. IV. *Towards an Integrative Analytical Framework: Moral-Economic Legitimacy*. V. *Criticism of the Punitive Paradigm*. VI. *Proposed Guidelines for a Legitimate Public Policy*. VII. *Conclusions*. VIII. *References*.

I. Introduction

In recent decades, the exponential growth of digital goods has profoundly altered the dynamics of cultural production, distribution, and consumption, giving rise to new tensions between legality, legitimacy, and access. Digital piracy has emerged as a widespread phenomenon that challenges conventional legal frameworks, calling into question not only the efficacy of existing regulatory mechanisms but also the perceived legitimacy of restrictions imposed on the use and circulation of cultural content. Unlike physical theft, which is subject to near-universal moral condemnation, unauthorized access to digital goods is frequently tolerated and, in some cases, even justified by broad segments of society, pointing at a structural disjunction between legal rules and moral intuitions.

Within this context, the contributions of diverse theoretical approaches reveal the multidimensional nature of the problem. Indeed, behavioral economics has highlighted the weight of social norms, reciprocity, and perceived legitimacy in shaping patterns of legal compliance.¹ Moreover, theories on distributive justice have examined the criteria governing access to both essential and cul-

¹ ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990), <https://doi.org/10.1017/CBO9780511807763>; Ernst Fehr & Simon

tural goods, and thereby questioned the presumed neutrality of market-based distribution.² Likewise, advances in moral psychology show that purportedly rational decisions are, in fact, mediated by emotions, situational pressures, and moral justifications that influence the building ethical self-awareness.³

Despite these conceptual advances, a notable theoretical and empirical gap remains. Public policy and regulatory models continue to operate largely within a legalistic and punitive paradigm, founded on the assumption that offenders act out of either information deficit or instrumental rationality. Such an approach neglects the subjective conflicts that arise when legal provisions are perceived as unjust or without social legitimacy, particularly in settings marked by significant economic inequality and limited access to cultural goods. While the academic literature offers a wealth of sector-specific analyses, it has often failed to produce a holistic framework capable of bridging the divide between formal legality and socially constructed legitimacy.

Against this backdrop, this article seeks to examine the dissonance between codified legality and perceived legitimacy in the context of digital piracy. The analysis is grounded on the view that regulatory effectiveness cannot be reduced to external compliance alone but must rest upon the alignment of legal provisions with internalized values, collective expectations, and institutional credibility. By identifying the cognitive processes, moral frameworks, and distributive conditions that inform this practice, this research aims not only to account for its continued existence, but also to inform the development of regulatory strategies that are more attuned to actual patterns of human behavior in digital environments.

The practical implications of such an approach are manifold. First, it casts doubt on the efficacy of policies grounded solely on deterrence, while advocating instead for incentive-based mechanisms and the co-creation of regulations. Second, it opens the door to institutional innovation through models of progressive access, social licensing, and digital education that reconnect consumption with broader implications for the cultural value chain. Third, it recognizes that legitimate compliance is not the automatic result of sanctions, but rather the product of an incremental process involving dialogue, reciprocity, and a shared sense of justice. In doing so, the approach seeks to recast the relationship between users, creators, and the State, moving from a paradigm of coercion to one rooted in mutual legitimacy.

At a historical juncture marked by escalating challenges in digital governance, including the consolidation of power on certain global platforms and

Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. ECON. PERSP. 159, 181 (2000), <https://doi.org/10.1257/jep.14.3.159>.

² JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard University Press, 1971); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (Alfred A Knopf, 1999).

³ JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (Vintage, 2012); DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE - ESPECIALLY OURSELVES* (Harper Perennial, 2012).

the erosion of traditional intellectual property models, the distinction between what is lawful and what is legitimate has become increasingly blurred. This reality necessitates a fundamental reconsideration of the normative underpinnings of the knowledge economy. In such a context, addressing digital piracy not merely as a matter of enforcement, but as a manifestation of deeper normative tensions, is essential to developing more adaptive and democratically responsive forms of regulation.

The overarching objective of this article is to construct an explanatory framework that incorporates behavioral, ethical, and distributive dimensions in order to conceptualize digital piracy as a complex and normatively ambivalent phenomenon. Through this lens, this research seeks to contribute to scholarly and policy debates concerning normative legitimacy in digital environments, while also proposing institutional strategies that aim not only at legal compliance, but also at fostering moral and distributive legitimacy. In so doing, this article aspires to move beyond a punitive approach to offer instead a more nuanced, humane, and context-sensitive understanding of economic behavior in the digital age.

II. The Moral Paradox of Digital Piracy

Digital piracy, understood as the unauthorized reproduction of copyrighted content, poses a regulatory challenge whose complexity exceeds the boundaries of mere legal transgression. Although it is subject to legal sanction, it enjoys a degree of social legitimacy that destabilizes the very distinction between legality and illegality. In fact, this dissonance between formal prohibition and informal acceptance indicates that the conventional categories of legal and moral reasoning are insufficient to address the changes introduced by the digital environment. What is ultimately at stake is not a technical infringement, but a broader redefinition of property, harm, and justice within technologically mediated contexts.

From the standpoint of Western legal-philosophical tradition, the right to property has long been grounded in assumptions of scarcity and exclusion. Locke conceives property as originating in labor, since individual effort confers entitlement over what is produced.⁴ Conversely, Hegel links property to the externalization of freedom, whereby possession materializes individual will.⁵ Despite their different premises, both perspectives coincide in presupposing that the object of appropriation is finite, competing, and materially excludable. However, such logic, deeply embedded in the ontology of tangible goods, loses explanatory power when applied to digital assets.

⁴ JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988).

⁵ GEORG WILHELM FRIEDRICH HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen W. Wood ed., H. B. Nisbet trans., 1991).

Indeed, digital goods escape the constraints of scarcity and rivalry, as they can be replicated endlessly at negligible cost. Moreover, their consumption is non-rival, since simultaneous access by multiple users does not generate mutual exclusion. As noted before, this feature destabilizes the normative basis of intellectual property regimes, because digital copying does not entail direct material deprivation.⁶ The extension of copyright protections to such goods upholds the conventional logic of ownership only by means of analogous reasoning which, although legally valid, proves to be conceptually fragile. In fact, critical perspectives argue that expanding the scope of copyright responds less to necessity than to corporate interests within the digital marketplace.⁷

This incongruity between inherited legal frameworks and the ontological traits of digital goods undermines not only the legitimacy of regulation but also the way in which society interprets harm and moral responsibility in piracy. Empirical evidence demonstrates that, from the user's perspective, duplicating a file does not carry the same moral weight as stealing a tangible object. The absence of observable loss, the lack of an identifiable victim, and the impersonal nature of the act diminish its perceived severity. For example, it has been shown that piracy is routinely judged as less serious than other property offenses, even when statutory penalties are equivalent.⁸ Further studies reveal that users frequently justify their behavior by appealing to fairness, economic necessity, or the absence of direct harm.⁹

Such moral attenuation is linked to the figure of the absent victim. Unlike physical theft, where harm is visible and the victim identifiable, digital copying generates damage that is abstract or speculative, often framed in terms of unrealized revenue or symbolic rights. This ambiguity obstructs empathetic engagement and weakens the moral inhibitions that would otherwise constrain transgression. Psychological approaches explain this through the concept of distance: the more remote and diffuse the consequences, the lower the moral and emotional involvement.¹⁰ The dematerialized and often anonymous dynamics of the digital environment amplify this distance, which enables moral neutralization.

Nonetheless, such neutralization should not be reduced to ethical deficiency. Rather, it reflects the cognitive mechanisms by which individuals preserve a

⁶ LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (The Penguin Press, 2004).

⁷ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, SSRN JOURNAL (2003), <https://dx.doi.org/10.2139/ssrn.470983>.

⁸ Donald Marron & David Steel, *Which Countries Protect Intellectual Property? The Case of Software Piracy*, 38 ECONOMIC INQUIRY 159 (2000), <https://doi.org/10.1111/j.1465-7295.2000.tb00011.x>.

⁹ Gilles Grolleau, Naoufel Mzoughi & Angela Sutan, *Please Do Not Pirate It, You Will Rob the Poor! An Experimental Investigation on the Effect of Donation on Piracy*, SSRN JOURNAL (2006), <https://dx.doi.org/10.2139/ssrn.930388>.

¹⁰ Yaacov Trope & Nira Liberman, *Construal-Level Theory of Psychological Distance*, 117 PSYCH. REV. 440 (2010), <https://doi.org/10.1037/a0018963>.

favorable moral self-image. Research has shown that people deploy rationalizations to reconcile minor infractions with their ethical identity, often invoking phrases such as “I am not hurting anyone” or “they already have enough money.”¹¹ This mechanism aligns with the observation that moral judgments are contingent on the perception of concrete harm: when no clear victim is present, condemnation weakens significantly.¹²

The tenacity of these rationalizations does not point at a trivial phenomenon but at a transformation in social legitimation mechanisms. Behavior that might elsewhere be described as misappropriation is, in digital contexts, reframed as cultural resistance, equitable access, or symbolic entitlement.¹³ Piracy may thus appear as a response to corporate practices regarded as exclusionary or exploitative. In this sense, digital disobedience becomes not only a legal offense but also a form of informal negotiation of rules, where individuals challenge regulatory systems, they perceive as unfair on distributive or ethical grounds. The normalization of these practices, especially among younger generations and marginalized groups, suggests that piracy must be understood as a conflict between codified legality and socially perceived justice.

This paradox, namely, the informal acceptance of practices that are still formally unlawful, demands rethinking the conceptual tools used to address the issue. Appeals to legality and categories inherited from material contexts no longer suffice. What is needed is a more comprehensive framework—one capable of integrating economic, psychological, and cultural dimensions to account for the complexity of this ethical landscape. Only through such an integrated approach can one explain why legal rules, regardless of their formal coherence,

¹¹ ARIELY, *supra* note 3.

¹² HAITT, *supra* note 3.

¹³ Pastora Melgar Manzanilla, *Retrogression of Economic, Social and Cultural Rights: Mexico in the Context of Austerity and Crisis*, 1 MEX. L. REV. 121 (2021), <https://doi.org/10.22201/ijj.24485306e.2021.1.16094>. within the scope of their powers, to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility, and progressivity. Also, Mexico is a member state of international covenants on human rights, such as the International Covenant on Economic, Social and Cultural Rights, from which some obligations derive. One of these obligations is the progressive realization of economic, social, cultural rights, and the prohibition of retrogression. Even though, limited economic resources require the careful allocation and redistribution of public spending, a practice that has led to the reduced allocation of public resources for some programs considered essential in the acquisition of human rights. The shift in the allocation of public spending in Mexico may ultimately deepen in the coming months and couple years, because of the imminent economic crisis caused by the COVID-19 pandemic. This article analyses the extent to which the Mexican government can, based on austerity, redistribution, or economic crises, make decisions that imply retrogression of rights without violating the obligation to progressive fulfillment stated in the International Covenant on Economic, Social and Cultural Rights.”,”container-title”:”Mexican Law Review”,”DOI”:”10.22201/ijj.24485306e.2021.1.16094”,”ISSN”:”2448-5306, 1870-0578”,”is sue”:”1”,”journalAbbreviation”:”Mex Law Rev”,”page”:”121”,”source”:”DOI.org (Crossref

lose normative traction in environments where the perception of harm and of fairness has been redefined.¹⁴

III. Theoretical Foundations for a Broader Interpretation

Understanding digital piracy as both a social and a normative phenomenon requires transcending purely legalistic or technical frameworks to incorporate conditions of legitimacy, reciprocity, and perceived justice. In this respect, it is particularly important to recall that Ostrom's work provides fertile ground for analyzing how communities regulate shared resources without resorting to hierarchical or coercive governance. Her notion of non-competing commons proves especially significant when applied to digital environments, where cultural and educational resources are not depleted by use and do not intrinsically demand technological exclusion. Consequently, the governance of digital commons depends less on formal legality than on shared rules legitimized by consensus and active participation.¹⁵

Moreover, initiatives such as free software projects or Wikipedia demonstrate that cooperation can be sustained through non-exclusionary models, thereby challenging the normative boundaries of intellectual property. Within these collaborative spaces, legitimacy stems not from external legal imposition but from deliberative practices that reinforce internally generated norms. Even practices, like piracy, that operate outside legal frameworks may be better understood when interpreted as functional responses to regulatory schemes seen as lacking moral authority. In this light, such practices do not appear to be merely acts of transgression, but informal regulatory mechanisms aligned with the collective expectations of access, fairness, and reciprocity.

This argument becomes even stronger when considering Ostrom's subsequent developments, particularly in the emphasis she places on reciprocity as a cornerstone of cooperative institutions.¹⁶ In digital contexts, fairness and reciprocity play a decisive role: when cultural industries impose excessive prices, restrictive licenses, or geo-blocking, compliance with legal rules erodes. Non-compliance then ceases to be perceived as deviant, acquiring instead the nature of negative reciprocity in response to structural exploitation. Thus, unauthorized distribution becomes legitimized as a corrective practice in contexts where legal regimes are seen as unfair.

¹⁴ Jersain Zadamić Llamas Covarrubias, *Cybersecurity in Mexico: An In-Depth Analysis of a Fragmented Regulatory Landscape*, 1 MEX. L. REV. 69 (2025), <https://doi.org/10.22201/ijj.24485306e.2025.1.19686>.

¹⁵ Ostrom, *supra* note 1.

¹⁶ Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action: Presidential Address, American Political Science Association*, 1997, 92 AM. POL. SCI. REV. 1 (1998), <https://doi.org/10.2307/2585925>.

The validity of this claim is supported by the theory of strong reciprocity, according to which prosocial punishment is conditional on the justice of the rule itself.¹⁷ When intellectual property laws are associated with monopolistic rents or exclusionary practices, their moral authority collapses. In such cases, widespread piracy reflects not only enforcement deficits, but also collective disengagement grounded in ethical delegitimization. From a contrasting perspective, breakdowns in cooperation often arise from differences between social expectations of openness and restrictive designs imposed by market logic.¹⁸ The result is the spontaneous emergence of informal mechanisms aimed at restoring equity, suggesting that transgression embodies distributive reasoning rather than simple deviance.

This reasoning resonates with Rawls's theory of justice, particularly his difference principle, which maintains that inequalities are acceptable only if they benefit the least advantaged.¹⁹ When applied to cultural goods, such reasoning implies that intellectual property regimes should enable, rather than obstruct, access to essential resources for democratic participation. In fact, digital cultural goods may be conceived as primary goods indispensable for furthering autonomous life plans. When economic or territorial barriers preclude such access, the distributive principles underpinning justice are violated, and piracy emerges as a critique of exclusionary design rather than as mere disobedience.

In addition, inequities in pricing schemes deserve special attention. When global pricing disregards local economic conditions, it creates structural injustices that hinder access to culturally significant content. In such contexts, piracy assumes a redistributive function which, despite its legal irregularity, conveys a moral claim grounded in material justice. It follows that punitive approaches alone cannot resolve the discrepancy between legality and legitimacy; instead, what is required is an ethical reconsideration of access to cultural goods.

Furthermore, Sen's capability approach deepens this analysis by distinguishing between formal entitlements and substantive freedoms. The mere availability of digital platforms does not ensure inclusion when economic, technical, or regulatory obstacles impede their effective use. Justice, therefore, cannot be measured solely through the recognition of legal rights but must also consider individuals' actual capacity to exercise them.²⁰ From this vantage point, piracy acts as an informal compensatory practice that mitigates structural exclusions obstructing the development of essential capabilities. The resulting tension between distributive justice and freedom illustrates why normative disobedience may, in conditions of systemic exclusion, represent a rational moral response rather than an arbitrary violation of law.

¹⁷ Fehr and Gächter, *supra* note 1.

¹⁸ YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: HOW COOPERATION TRIUMPHS OVER SELF-INTEREST* (Currency, 2011).

¹⁹ RAWLS, *supra* note 2.

²⁰ SEN, *supra* note 2.

Insights from moral psychology further clarify the cognitive dimension of this phenomenon. It has been shown that the principle of harm, central to moral judgment, is not easily triggered in cases of piracy because the victim is absent, and the damage seems to be abstract.²¹ Equally significant is the self-deception mechanism individuals use to reconcile lawbreaking with a positive moral self-image. Rationalizations such as “it’s only a copy” or “nobody gets hurt” illustrate this process.²² Additionally, psychological distance reduces moral engagement by attenuating the perceived consequences of mediated actions.²³ This effect is amplified by moral disengagement processes that neutralize guilt and weaken the symbolic authority of law.²⁴

For these reasons, digital piracy cannot be reduced to a simple legal transgression. Rather, it must be understood as a phenomenon situated at the intersection of legitimacy, reciprocity, and cognitive self-justification. Its prevalence does not merely expose deficiencies in enforcement but also reveals the erosion of moral adherence to rules that fail to embody justice. Hence, what is required is a multidimensional framework capable of integrating economic, cultural, and psychological dimensions in order to explain the conditions under which laws retain, or lose, their normative traction.

IV. Towards an Integrative Analytical Framework: Moral-Economic Legitimacy

Understanding digital piracy requires more than a conventional legal analysis, since the reduction of the phenomenon to a mere breach of intellectual property rules occludes the moral, social, and cognitive dimensions that sustain it. Although legal provisions are indispensable, addressing piracy exclusively through their lens neglects the deeper tension between codified legality and perceived legitimacy. In this sense, its tenacity does not appear as marginal deviance but as an expression of structural conflict that compels the integration of moral cognition, distributive justice, and social processes of legitimation. Only such an integrated approach can explain the paradox whereby certain legal provisions, while formally valid, lose their normative force in everyday practices.

A central factor in this dynamic lies in the difficulty of identifying clear and personalized harm. As said, before, moral psychology shows that intuitive judgments are activated with greater intensity when there is visible damage and a tangible victim.²⁵ By contrast, the non-depletable character of digital goods,

²¹ Haidt, *supra* note 3.

²² Ariely, *supra* note 3.

²³ Trope & Liberman, *supra* note 10.

²⁴ Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSP. SOC. PSYCH. REV. 193 (1999), https://doi.org/10.1207/s15327957pspr0303_3.

²⁵ Haidt, *supra* note 3.

together with their infinite replicability, attenuates the perception of harm and gives rise to the construct of the “absent victim.” Within this framework, the act of downloading content —whether academic or recreational— rarely provokes unequivocal condemnation, since the damage appears to be abstract or imperceptible. This invisibility, in turn, is accentuated by moral disengagement mechanisms that weaken the sense of causal responsibility.²⁶

However, the issue cannot be reduced to individual psychology, as the legitimacy of rules is closely tied to social endorsement. As has been demonstrated, laws derive their authority not only from formal validity but also from how they line up with shared moral expectations.²⁷ When the alignment greatly differs, tolerance thresholds emerge to reframe the breach as morally permissible. This is especially evident in contexts of inequality, where legal protections are perceived as barriers to substantive justice.²⁸ In this light, piracy often operates less as disobedience and more as an objection to rules considered illegitimate in matters of distribution.

The contextual sensitivity of moral evaluation further explains the variability of compliance. Experimental evidence shows that anonymity and emotional detachment facilitate rule violations, particularly when legal systems are viewed as protecting concentrated interests.²⁹ The alienation generated by restrictive intellectual property regimes thus fosters individualized ethical reasoning in which the law loses symbolic authority. Consequently, piracy emerges not in an ethical void but in a space shaped by structural discontent and distrust.

In terms of discourse, this corrective remedy acquires legitimacy through processes of moral neutralization. Research indicates that individuals employ strategies such as euphemistic labeling —“sharing,” “copying,” or “accessing”— to replace the stigmatized notion of “piracy”.³⁰ Such redefinitions are not mere semantics; they constitute moral filters that recast illegality as ethically tolerable. In some cases, they even generate narratives of inverted victimhood, where users perceive themselves as excluded subjects resisting monopolistic structures.³¹ In this way, transgression is redefined as an act of distributive resistance rather than as criminal deviation.

This interpretive framework elucidates why piracy maintains social acceptance despite punitive regimes. The convergence of emotional distance, distributive injustice, and discursive rationalization erodes the deterrent capacity of law. Consequently, any regulatory response that confines itself to repression proves insufficient. What is required, instead, is a normative reorientation ca-

²⁶ Bandura, *supra* note 24.

²⁷ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton University Press, 2nd ed. 2006).

²⁸ SEN, *supra* note 2.

²⁹ BENKLER, *supra* note 18; ARIELY, *supra* note 3.

³⁰ Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOCIO. REV. 664 (1957), <https://doi.org/10.2307/2089195>; Bandura, *supra* note 24.

³¹ SOCIAL SCIENCE RESEARCH COUNCIL, *MEDIA PIRACY IN EMERGING ECONOMIES* (Joe Karaganis ed., 2011).

pable of reconciling legality with perceived justice. Without such reconciliation, the authority of intellectual property laws will remain fragile, and practices of informal redistribution will continue to emerge as legitimate alternatives in the eyes of those excluded from cultural access.

V. Criticism of the Punitive Paradigm

For decades, institutional responses to digital piracy have been shaped by a punitive rationale that assumes the deterrent effect of penalties and technological restrictions. This approach built upon the premises of classical deterrence theory, which posits that individuals act as rational calculators of costs and benefits.³² The expectation is clear: if penalties are sufficiently severe and the likelihood of being caught is high, unlawful behavior should diminish. Nevertheless, in digital environments this strategy has shown both limited effectiveness and an acute lack of connection among the moral, cognitive, and distributive dimensions that condition user behavior.

In practice, intellectual property law infringement rarely corresponds to the rational-choice model. Empirical studies corroborate that the escalation of penalties has not reduced piracy rates in proportion to the severity of enforcement. On the contrary, piracy continues to thrive in jurisdictions with advanced surveillance and stricter sanctions, suggesting that coercion misinterprets the drivers of legal obedience. What is overlooked is that compliance often stems from perceptions of justice rather than from threats deterring such behavior.³³ Where legitimacy erodes, voluntary compliance structurally deteriorates, leaving deficient levels of formal enforcement.

The erosion of legitimacy in the case of intellectual property is particularly associated with the view that copyright systems privilege concerted corporate interests while penalizing socially accepted practices. Indeed, many users perceive intellectual property not as a normative good but as an exclusionary mechanism that imposes artificial barriers to access culture.³⁴ This perception is exacerbated by pricing policies that disregard distributive justice. It has long been noted that fixed prices applied to non-rivalrous goods generate distortions, since digital content can be replicated at negligible cost.³⁵ When pricing fails to account for local inequalities, piracy becomes reinterpreted as a morally defensible reaction to structural exclusion. In this sense, the gap between formal

³² Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968), <https://doi.org/10.1086/259394>.

³³ TYLER, *supra* note 27.

³⁴ SOCIAL SCIENCE RESEARCH COUNCIL, *supra* note 31.

³⁵ Joseph E. Stiglitz, *Chapter 15 Pareto Efficient and Optimal Taxation and the New New Welfare Economics*, 2 HANDBOOK OF PUBLIC ECONOMICS 991 (1987), [https://doi.org/10.1016/S1573-4420\(87\)80010-1](https://doi.org/10.1016/S1573-4420(87)80010-1).

availability and real accessibility, clearly articulated in the capability approach, constitutes the terrain where informal legitimization of piracy flourishes.³⁶

Such economic asymmetries are amplified by market concentration, which consolidates editorial and audiovisual power. Research has shown that a small group of corporations dominate the flows of information and content, suppressing competition, inflating prices, and reducing cultural diversity.³⁷ Moreover, the expansion of copyright protections has been linked less to creative incentives than to corporate interest lobbying.³⁸ Within this landscape, piracy implies structural dissent rather than opportunistic deviance, as said before. What emerges, therefore, is a conflict between the exclusionary legitimacy of markets and the distributive legitimacy of cultural access.³⁹

Attempts to address these challenges through technical protection measures such as DRM, geo-blocking, or restrictive licensing have produced similarly counterproductive effects. According to the theory of psychological reactance, individuals resist limitations perceived as arbitrary, which often increases the very behavior these measures attempt to deter.⁴⁰ When users are denied legitimate uses, for instance, when digital purchases are limited by format or geographical region, they frequently interpret circumvention not as misconduct, but as justified resistance to technological overreach. Such perceptions reinforce the delegitimization of the law and normalize infringement as morally defensible.

The inefficiency of these mechanisms is compounded by their unintended consequences. Digital controls not only restrict unlawful use, but also obstruct legitimate practices, including education, research, and non-commercial innovation.⁴¹ By harming lawful users without substantially reducing piracy, these measures undermine perceptions of fairness and weaken regulatory credibility. Thus, enforcement ceases to function as a neutral safeguard of creativity and instead becomes a source of institutional mistrust.

This accumulated evidence demonstrates that the punitive model is both normatively fragile and practically ineffective. An insistence on coercion overlooks the fact that non-compliance is rooted not in ethical indifference but in reasoned objection to laws regarded as unfair. Consequently, rethinking public policy is imperative. Future frameworks must incorporate insights from behavioral economics, distributive justice, and participatory governance to build hybrid models of intellectual property that balance the incentive to create with the

³⁶ SEN, *supra* note 2.

³⁷ BENKLER, *supra* note 18; Alejandro Faya, *Competition and Regulatory Policies Intertwined: Towards a Comprehensive Oversight of Digital Platforms*, 2 MEX. LAW REV. 3 (2025), <https://doi.org/10.22201/ijj.24485306e.2025.2.19349>.

³⁸ Boyle, *supra* note 7.

³⁹ NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* (Columbia University Press, 2009).

⁴⁰ JACK W. BREHM, *A THEORY OF PSYCHOLOGICAL REACTANCE* (Academic Press, 1966).

⁴¹ LESSIG, *supra* note 6.

right to access. Such an endeavor requires abandoning the binary opposition between legality and illegality, to instead embrace the ethical, distributive, and cultural complexities that characterize the digital ecosystem. Only then will it be possible to design systems capable of reconciling enforceability with legitimacy and thereby restore the normative traction that current strategies have noticeably lost.

VI. Proposed Guidelines for a Legitimate Public Policy

The structural steadfastness of digital piracy, even in contexts where enforcement systems and technological controls have become increasingly sophisticated, demonstrates that the punitive model has reached the limits of both its explanatory and operational potential. To assume that legal transgression in digital environments can be effectively deterred through sanctions or restrictions reflects not only an incomplete but also a reductive understanding of behavioral dynamics. What is at stake is a shift in the way things work in terms of legitimacy, cooperation, and justice in the information economy, which cannot be adequately addressed without incorporating moral, distributive, and cognitive dimensions into public policy design.

In this regard, behavioral economics offers one of the most compelling challenges to the reductionist logic of punitive enforcement. Unlike classic models that posit individuals as rational utility-maximizers, behavioral economics emphasizes the influence of cognitive biases, emotions, and contextual factors. Within this framework, the concept of “choice architecture” underscores the role of decision-making environments in shaping behavior through non-coercive mechanisms.⁴² This perspective is particularly important in digital contexts, where environments can be designed to encourage lawful practices. Indeed, interventions like highlighting the financial impact of piracy on independent creators or facilitating access to legitimate free sources operate as “nudges” that preserve independence while placing choices within a morally intelligible framework.

Nevertheless, for such interventions to be both effective and legitimate, they must rest upon empirical evidence and not on paternalistic intuitions. Controlled experiments, field studies, and context-sensitive evaluations are indispensable to ensure that interventions respect user independence and avoid covert manipulation. Thus, the challenge is not merely technological but fundamentally normative: how to design environments that foster compliance without infantilizing users or transferring systemic responsibility onto them.

From the standpoint of distributive justice, differentiated models, whether through adaptive licensing, tiered access, or freemium schemes, are not only

⁴² RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Yale University Press, 2008).

feasible but normatively superior. In fact, the capabilities approach reinforces the fact that justice should not be measured by formal availability alone but by individuals' effective capacity to benefit from cultural and educational goods.⁴³

Equally important is the role of participatory governance in generating legitimacy. Empirical evidence demonstrates that collective rule-making, mutual monitoring, and proportionate sanctioning often provide more sustainable governance than hierarchical enforcement.⁴⁴ Rendering this principle into digital contexts requires mechanisms that allow users to co-determine rules regarding access, redistribution, or monetization. This does not imply idealizing self-regulation, which varies in effectiveness, but rather recognizes that legitimacy is more robust when derived from deliberative processes than from unilateral imposition.

Such participatory logic aligns with the proposal of hybrid governance models. As has been argued, digital environment regulation cannot be reduced to legal enforcement alone, but must be understood as the interplay between law, markets, rules, and technological architectures.⁴⁵ Hybrid institutions that incorporate creators, users, platforms, and public authorities, whether in the form of citizen observatories, participatory audits, or ethics committees, could serve as checks against distortions in distribution, providing corrective measures before legitimacy collapses.⁴⁶

The intellectual property system itself also requires critical reassessment. The sterile polarization between absolute copyright protection and radical calls for open access has obscured the potential of hybrid alternatives. Scholars have highlighted that digital goods constitute a new type of commons, requiring flexible models of regulation.⁴⁷ Initiatives like Copyfair licensing, time-limited exclusivity, or strengthened digital commons are promising ways of reconciling incentives to create with rights of access. Such approaches imply setting up access thresholds, reasonable exclusivity periods, symbolic recognition of authorship, and redistributive mechanisms to mitigate the concentration of benefits.

The moral dimension cannot be overlooked either. Where norms are perceived as illegitimate or exclusionary, any policy that aspires to be effective must include restorative elements. The framework of restorative justice, centered on repairing harm rather than imposing punishment, offers valuable guidance.⁴⁸ In digital contexts, this could involve symbolic or material user contributions,

⁴³ SEN, *supra* note 2.

⁴⁴ OSTROM, *supra* note 1.

⁴⁵ LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (Basic Books, 1999).

⁴⁶ Patricia Villa Berger, *Legal Process Automation as a Tool for Access to Justice: A Proposal to Restructure First Contact Interviews in the Federal Institute of Public Defenders*, 2 MEX. LAW REV. 41 (2022), <https://doi.org/10.22201/ijj.24485306e.2023.2.17617>.

⁴⁷ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (Yale University Press, 2006); Boyle, *supra* note 7.

⁴⁸ Steve Kirkwood, *A Practice Framework for Restorative Justice*, 63 AGGRESSION AND VIOLENT BEHAVIOR 101688 (2022), <https://doi.org/10.1016/j.avb.2021.101688>.

such as subtitling, metadata curation, or small voluntary payments, that reinforce the value of creative work without resorting to stigmatization. These practices would allow users to assume co-responsibility while avoiding the criminalization of widespread behaviors that already enjoy social legitimacy.

Taken together, these considerations suggest that the punitive model not only fails to curb piracy but also deepens its moral delegitimization. If public policy continues to rely exclusively on coercion, it will perpetuate the gap between legality and legitimacy. By contrast, an approach that combines behavioral insights, distributive justice, participatory governance, regulatory hybridization, and restorative mechanisms offers a more coherent and ethically grounded framework. Only by bringing these dimensions together can regulatory design hope to reconcile the incentive to create with the fundamental right to cultural access.

VII. Conclusions

The continued existence of digital piracy, despite increasingly more stringent legal and technological enforcement measures, reflects a deeper dissonance between regulatory compliance and its underlying moral justification. This tension, far from being sporadic, reveals a structural gap between formal legality—rooted in models of scarcity and exclusion—and a digital environment defined by frictionless reproduction, dematerialization, and a growing sensitivity to principles of distributive justice. Within this context, we propose a conceptual shift that moves beyond legalistic and punitive paradigms, drawing upon insights from behavioral economics, moral psychology, and contemporary theories of justice to construct an interpretive framework capable of addressing current forms of digital non-compliance through the lens of legitimacy.

By reconceptualizing digital piracy as a manifestation of normative dissonance, rather than as a purely intentional violation of the law, this framework incorporates the moral dimension of individual decision-making in conditions of symbolic or material exclusion. Such an approach enables us to understand unlawful behavior not as opportunistic defection, but as a cognitively justified response to legal norms perceived as inequitable. The notion of moral reciprocity, alongside mechanisms of self-justification and psychological distancing from harm, becomes central to explaining the erosion of adherence to rules which, though legally binding, have lost their ethical resonance across broad segments of society.

From a policy standpoint, these findings support a reorientation of public regulatory strategies away from coercive enforcement and toward the redesign of the normative environment itself. Choice architecture offers a viable approach to aligning individual decision-making with collective goals without resorting to punitive measures. This shift entails recalibrating pricing structures to

reflect users' actual purchasing power, recognizing alternative modes of cultural circulation, and developing inclusive digital platforms grounded in principles of procedural justice. In an era of increasing normative pluralism, legitimacy is no longer secured through the imposition of rules, but through their capacity to align with morally shared expectations.

A broader research agenda remains open—one that should empirically examine how narratives of legitimacy and resistance are constructed within digital ecosystems. Priority must be given to understanding how contextual variables—economic, cultural, and technological—shape perceptions of normative justice. Equally important is a critical reassessment of the role of digital platforms as de facto regulatory actors, and the extent to which their discretionary governance practices shape the moral architecture of online environments. This line of inquiry calls for a more situated epistemology, paying careful attention to the material and social conditions under which normative judgments are produced and internalized.

What is ultimately at stake is not mere compliance with legal provisions, but the capacity of those norms to elicit moral assent within an environment in which foundational concepts such as property and exclusion have undergone radical transformation. In such a setting, legitimacy does not follow from legality—it constitutes its very precondition. The theoretical and political imperative, therefore, is to reexamine the ethical foundations of regulatory compliance, incorporating user experience, distributive justice, and the expanding expectation of institutional co-responsibility. In contexts of accelerated technological and social transformation, the sustainability of legal regimes depends, more than ever, on rebuilding their legitimacy from the ground up.

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