

**Fairness in digital sharing legal professional attitudes  
toward digital piracy and digital commons**

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This document is the Accepted Version [AM]

**Citation:**

CIESIELSKA, Malgorzata and JEMIELNIAK, Dariusz (2022). Fairness in digital sharing legal professional attitudes toward digital piracy and digital commons. *Journal of the Association for Information Science and Technology*, 73 (7), 899-912. [Article]

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## TITLE PAGE

**Fairness in digital sharing legal professional attitudes towards digital piracy and digital commons.**

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*Funding: This research has been funded by Polish National Science Center, grant no. UMO-2015/19/B/HS4/03223*

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3 **Fairness in digital sharing: legal professional attitudes towards digital piracy and digital**  
4 **commons.**  
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12 **Abstract:**  
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15 **Contrary** to a popular belief of lawyers having the most strict perception of law, law professionals  
16 actually strongly skew towards more favorable views of digital sharing. According to our qualitative  
17 study, relying on in-depth interviews with 50 Harvard lawyers, digital piracy is quite acceptable. It is  
18 considered fair, especially among friends and for non-commercial purposes.  
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22 We argue that this not only can indicate that the existing law is becoming outdated because of its  
23 inability to be enforced, but also that ethically it is not corresponding to what is considered fair, good  
24 service, or being societally beneficial. The common perception of relying on a fixed price for digital  
25 content is eroding. We show that on the verges of business, society, and law, there is a potential for the  
26 new paradigm of digital commons to emerge.  
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31 **Keywords:** culture of sharing, digital commons, digital piracy, legal professionals, streaming  
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44 **Fairness in digital sharing legal professional attitudes towards digital piracy and digital**  
45 **commons.**  
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49 Digital piracy has been studied over the last 20 years. The most prevailing forms of digital piracy are  
50 those of media content and software (Holt et al., 2019). Initially, in line with the industry's claims, it  
51 was linked with the decrease in revenues of the media producers (De Vany & Walls, 2007; Ma et al.,  
52 2014) and even social cost (Lowry et al., 2017). Newer studies show that the situation is not that simple  
53 (Martikainen, 2014; Schwarz & Burkart, 2018), and the European Commission report shows that there  
54 is no clear evidence of a decrease in box office sales as a result of digital piracy (van der Ende et al.,  
55 2014). Similarly, some researchers calculate the box-office losses related to piracy to be major (Rob &  
56 Waldfoegel, 2007), while others doubt a direct causal correlation (Danaher et al., 2010), or even suggest  
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3 a possible reversed one (Peukert et al., 2013). For instance, according to some authors, the vast  
4 popularity of an HBO show, *The Game of Thrones*, can be partially attributed also to its illegal  
5 distribution (Belleflamme & Peitz, 2014). In general, market penetration, as well as increased hype and  
6 buzz, positively affect sales (Smith & Telang, 2010). Unsurprisingly, attitudes and behaviors related to  
7 digital piracy are affected, among others, by the assumptions about their possible outcomes (Al-Rafee  
8 & Cronan, 2006) and the perceived harm (De Corte & Van Kenhove, 2017). The ambiguity in a clear  
9 classification of digital piracy is also linked to the fact that the perceived social cost is minimal, due to  
10 zero-reproduction cost and no material loss, and thus the social stigma is much smaller than in the case  
11 of stealing physical goods (Balestrino, 2008). The ethical choices made by prospective digital pirates  
12 typically relate to price (they can get the desired commodity for free) and ease of access (it is more  
13 convenient to download than to use the legal distribution) (Brown & Krause, 2017). A lot of digital  
14 piracy attitude is also reinforced by peer culture, since persistent digital pirates exchange their norms  
15 and values, even when they do not perceive themselves as members of a specific subculture (Holt &  
16 Copes, 2010).

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There are a significant proportion of studies on morality of digital piracy that have been  
conducted on undergraduate students (Lobato & Thomas, 2018; Phau et al., 2014). These studies do not  
take into account more affluent, legally informed students or those that exhibit cross-cultural differences  
(Koklic et al., 2016), even though the influence of national culture on digital piracy is arguably  
significant (Udo et al., 2016). Since there is a very clear ongoing global shift in the overall social  
perception of digital piracy (Dörr et al., 2013; Wu & Yang, 2013), which is considered to be “so wrong  
and yet so right” in certain contexts (MacNeill, 2017), it is important to shed new light on the perception  
of digital piracy among legal professionals. We seek to extend our understanding through widening the  
focus from younger and / or less affluent members of the society.

In the study we report here, we examine the influence of professional ethics and the level of  
general law knowledge through presenting the results from a qualitative project that draws on 50  
reflexive interviews conducted with international Harvard LL.M. (Masters of Law) students. For the  
purpose of this paper, we are referring to anyone in the Harvard LL.M. program as a “lawyer” or “legal  
professional”. The program requires a prior legal degree from the home country, and is targeted  
primarily at people who already have several years of practical experience, and often are licensed to  
practice. Our interviewees included judges, attorneys, in-house lawyers, solicitors, and other legal  
professionals. Even though the LL.M. program does not have any particular focus on IP and copyright,  
it is quite safe to assume that its participants have well above average understanding of the letter of law,  
including copyright issues. Additionally, to a supreme command of law in general, Harvard lawyers are  
typically also in the top echelons of income in their respective countries (Byrnes & Marquart, 2014;

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3 Wilkins et al., 2015), which partly eliminates the financial motivation often affecting the perceptions of  
4 digital piracy (Smallridge & Roberts, 2013).  
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8 In exploring these issues and presenting new empirical data, we commence by first examining  
9 the contemporary literature on digital piracy, its legal and societal aspect. We also reflect on the link  
10 between the word of law and sense of fairness and morality in the changing society. Second, we present  
11 the methodology of our research and the sample respondents' profiles as well as briefly discussing the  
12 role of the legal profession in changing legal standards. Third, we present, analyse and summarize  
13 empirical data collected through reflexive, open-ended interviews of postgraduate law students. We  
14 conclude that there is a contextual shift towards acceptance of digital piracy and the need to develop a  
15 more open model. Digital commons offer a new paradigm, alongside strive for sustainability, that gains  
16 popularity (Roos et al., 2016). In the centre of this is the reconceptualization of sharing of digital content  
17 from something criminal and negative to becoming a central concept of networked economy linked to  
18 community, generosity and cooperation. Our study shows that this is happening not only among  
19 marginalized parts of our society but also among highly educated lawyers, who by many measures are  
20 high-earners, high-achievers, professionals. If that is the case, there might be a need to develop a new  
21 market propositions that are better in dealing with both consumer's expectations and changes in what  
22 is considered fair and acceptable (Ciesielska & Li, 2011). Because today's digital content businesses  
23 are based on intellectual property laws, significant change in perception of fairness in the area would  
24 influence the legal system, so it can serve the needs and beliefs of the public (Green, 1970).  
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### 36 **Literature review**

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39 Digital piracy can be defined as the production, viewing or sharing of unauthorized copies of digital  
40 content. It can be equally committed by individuals and businesses for private, commercial, educational  
41 or entertainment purposes. A range of content can be digitally pirated: software, movies, TV shows,  
42 books, music to name just the top five. Digital piracy has been argued in the past to be economically  
43 destructive by reducing the propensity of business and creatives to produce new digital content in the  
44 future (Chan & Lai, 2011). Digital piracy is an area where two conflicting discourses collide (Barry,  
45 2015). On one hand, digital piracy is an illegal behavior (Hashim et al., 2018; Meireles & Campos,  
46 2019; Olivero et al., 2019). It is considered as theft and presented as a crime against property and  
47 ownership. On the other hand, the alternative, subversive discourse is slowly developing. It focuses on  
48 a moral shift towards communal and sustainable values. It contests the contemporary conceptualizations  
49 of property rights as the bedrock of our society and order and instead is looking at democratizing digital  
50 content (Arvanitakis & Fredriksson, 2018). Knowledge and access to information is beginning to be  
51 argued as a human right (Roos et al., 2016).  
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3 We see these discourses are reflecting a change in society and potential for emerging a new sense of  
4 morality and fairness. It is also that “morality provides ultimate standards for assessing human conduct  
5 in a way that law does not, moral reasons trump legal reasons in the deliberations not only of subjects  
6 of the law but also of legal officials who administer the law.” (Cane, 2012:85). In this we argue to reject  
7 ‘the separation thesis’ which says that law and morality can be separated, and there is a difference  
8 between what law is and what it should be.  
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### 13 ***Digital piracy as theft***

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16 The law sees digital piracy as a crime against property, a theft. It is the logic of powerful industry  
17 players, which focus on prevention efforts (Akulavičius & Bartkus, 2015; Petrescu et al., 2018).  
18 Therefore, it is crucial to understand their behavior, motives and cognitive processes in order to develop  
19 deterrent strategies and to realign them with legal standards (Hashim et al., 2018). Research shows a  
20 range of factors affecting propensity to digital piracy. These have socio-economic (Al-Rafee & Dashti,  
21 2012) and individual dimensions (Meireles & Campos, 2019; Olivero et al., 2019).  
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27 Factors like GDP , education levels, country freedom, regulatory protection, and computer  
28 penetration (Chang et al, 2017; Shin et al., 2004, Driouchi et al, 2015) were found to significantly affect  
29 the level of piracy.. The higher willingness to purchase, rather than to pirate digital content, is related  
30 to the higher level of higher earnings and higher education (Jackman & Lorde, 2014). As a result, for  
31 years we have had an image of a digital pirate as a young person, with low or no income (Akbulut &  
32 Dönmez, 2018, Hashim et al., 2018; Lee et al, 2018).  
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37 However, the piracy behavior is also influenced by the individual characteristics. Among key  
38 theories used to understand pirate behaviors at the individual level are: Planned Behavior, Past  
39 Deterrence Theories, Moral Obligation, and Perceived Value/Cost of digital goods (Meireles &  
40 Campos, 2019; Olivero et al., 2019). Theory of Planned Behavior states that beliefs and subjective  
41 norms, attitudes and perceived control determine our actions. Decision of whether to pirate or not has  
42 been closely linked to peers’ influence, when piracy is well accepted with low risk of apprehension and  
43 penalization (Borja et al., 2015). Hansen & Walden (2013) discovered that when people receive files  
44 privately from a friend, they are less likely to recognize digital content sharing as being illegal or  
45 unethical in contrast to downloading from a torrent site. Previous studies also indicated a difference in  
46 attitude towards pirating different types of digital contents depending on the perception of fairness and  
47 the effort put in the production of the digital content, with copying books being the least acceptable  
48 (Konstantakis et al., 2010). Deterrence Theory states that individuals will mediate the risks of being  
49 caught and punished for pirating digital content. Research shows that factors like the perceived risk of  
50 using illegal digital goods and impact on society can also serve as a good predictor of piracy behavior  
51 in the future (Henning-Thurau et al., 2007) as much as perceived importance and awareness of potential  
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3 consequences of illegal actions (Jackman & Lorde, 2014). Interestingly, certainty of punishment in this  
4 case is found as an important factor, but severity of punishment not (Meireles & Campos, 2019). It is  
5 also concluded that past piracy behavior is a good predictor of future piracy behavior, in a way the  
6 individuals who pirated successfully in the past and got away with this are more likely to repeat the  
7 same behavior in the future (Fleming et al.2017; Meireles & Campos, 2019).Further, Theory of Moral  
8 Obligation leads us to linking personal feelings and propensity to digital privacy. In particular,  
9 anticipated guilt has a significant influence on intentions to download illegally (Wang & McClung,  
10 2012). Computer users, those who reject moral codes and whose personal values determine judgment  
11 had a more favorable attitude to software piracy and most likely were involved in pirating digital content  
12 in general (Chan & Lai, 2011). Finally, it is argued that Perceived Value of the digital goods and their  
13 cost will affect propensity to piracy behaviour. Research shows positive effects on both of those factors  
14 and concluded that people are more likely to pirate high value, high price digital content (Meireles &  
15 Campos, 2019).

### 24 ***Digital piracy as democratizing content***

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27 Piracy as “an act and an ideology interrogates common understandings of property as something self-  
28 evident, natural and incontestable” (Arvanitakis & Fredriksson, 2018: 4-5). There are clear parallels  
29 between the political struggle of digital users and working classes in the sense that late capitalism with  
30 its expansion of markets, inequalities and alienations affect both the digital and material world (Wittel,  
31 2013). Progression towards a more sustainable paradigm depends on talking about the underlying socio-  
32 economic problems in natural and digital realms (Roos et al., 2016). Digital and social exclusion  
33 influence each other (Helsper, 2012). Struggle for access to food, clear water, and education is  
34 intertwined with struggle for access to content, knowledge and networks. Sharing has been pathologized  
35 in leakage of information that gets construed as whistle-blowing or hacking, thus becoming a political  
36 tool of resistance and protest (Strangelove, 2015).

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44 Digital products and markets clearly have the potential to reduce some economic frictions and introduce  
45 a number of new factors: very low marginal costs, lack of entry barriers, low communications and  
46 search costs, reduced informational asymmetries, so that standard economic models and approaches  
47 should be applied carefully. These features of digital markets according to some authors (Benkler, 2013)  
48 facilitate the emergence of new modes of production and consumption, that rely on sharing one’s  
49 “possessions” with unspecified strangers, based on a social agreement that they will also share with us,  
50 in a form of gift economy (Bergquist & Ljungberg, 2001). In our view, the emergence of widespread  
51 digital piracy, and its relatively high moral acceptance are related to the emergence of the digital  
52 commons and the rise of the collaborative society, which according to some authors relies heavily on  
53 cooperative sharing of the digital goods and collective creation (Jemielniak & Przegalinska, 2020). As  
54 Adrian Johns (2010:508) aptly points out, we are on the verge of a major change:

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3           *Such turning points have happened before-about once every century, in fact, since the end of*  
4 *the Middle Ages. [...], we are already overdue to experience another revolution of the same magnitude.*  
5 *If it does happen in the near future, it may well bring down the curtain on what will then, in retrospect,*  
6 *come to be seen as a coherent epoch of about 150 years: the era of intellectual property” (p. 508)*  
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10 The area of copyright, intellectual and digital (non-material) goods redistribution seems to be one of  
11 the key challenges for the society in general, and management and organization science in particular,  
12 in the very near future (Kawashima, 2010; Van Dijck, 2009). The economic consequences and drivers  
13 of digital economy development are still poorly understood (Greenstein et al., 2013). The whole  
14 understanding of digital goods seems to be in a flux, also because organizational actors have yet to  
15 establish their views. One way of exploring this is by looking at changing attitudes to digital piracy is  
16 the society. The very notions of ownership and of fairness in sharing non-material goods (with a zero-  
17 reproduction cost) undergo significant changes. The main areas of the incoming digital revolution are  
18 related to economic and legal changes, as well as the behavioral changes of the society, including the  
19 emergence of “prosumerism” (Toffler, 1980; Ritzer & Jurgenson, 2010), and the phenomenon of open  
20 collaboration, digital commons, and peer production (Jemielniak, 2016).  
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### 29 ***Changing attitudes***

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34 Becker (1968) argues that the costs of law enforcement should be traded-off against the benefits of  
35 deterring digital piracy. Despite decades of efforts, research, and police reinforcement digital piracy  
36 seems to be pervading today’s society (Holt et al., 2019) and the reasons for it are further reaching than  
37 a simple economical calculation. Digital-piracy-as-theft discourse is simply condemning digital pirates  
38 as people with no ethics and feeling no remorse (De Corte & Van Kenhove, 2017), but not contesting  
39 possible division between the legal and moral standpoints, how moral stances have shifted and to what  
40 extent the IP legal systems are behind the changing perception of what is socially important and  
41 acceptable. As our society and technology develop, the old legal rules may need to be revised to reflect  
42 new ethical and moral stands. The previous studies on digital piracy seem to assume that ethical  
43 behavior equals behavior acceptable in the light of law (Wu et al, 2018). Ethical consumers are those  
44 who follow the rule of private law and obey legally defined ownership and pay the price to purchase  
45 legal goods. Justice in this context is perceived as obeying the intellectual property rights (Yoon, 2011)  
46 without broader assessment if that system is fair and whether the legal sanctions have any effect on the  
47 piracy behavior (Byung et al., 2019; Meireles & Campos, 2019). Some recent studies argued that  
48 attitudes and moral beliefs, rather than effective punishment, should be an essential element of studying  
49 digital piracy (Koklic et al., 2016) and that there is a need for reconceptualizing digital piracy to  
50 accommodate changes in society (Arvanitakis & Fredriksson, 2018).  
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## Methodology

Our paper relies on the results of an ethnographic, longitudinal work (Denzin & Lincoln, 2003). Typically for ethnographic projects, the study was conducted with an “anthropological frame of mind” (Czarniawska-Joerges, 1992), as a “professional stranger” (Agar, 1980), attempting to understand the studied people’s perspectives (Geertz, 1973/2000), rather than fit the responses in a pre-determined theoretical model. Thus, the study is performative, not ostensive (Latour, 1986): it aims at allowing and showing the logic and beliefs of the studied, and not at creating a theory.

One of the researchers spent a whole year in Cambridge, MA, interacting informally with one of the Harvard LL.M. cohorts, and participating in its social life on a daily basis, including a Facebook group. As a result of this unique access, the researcher was able to conduct open-ended, loosely structured reflexive interviews (Alvesson, 2003) following the qualitative tradition (Ciesielska & Jemielniak, 2018), as well as conduct quantitative studies of the cohort. Alvesson (2003) postulates an interplay between producing interpretations and challenging them. In our approach, we made many iterations of interpreting the rich material from interviews, trying to make sense of the emerging model. As seasoned ethnographers, we relied on our own perceptions and interpretations as tools - and attempted to challenge them critically. Per Alvesson’s advice, we also aimed at pragmatism, trying to balance the endless reflexivity and skepticism with focusing on common ground and interpretations that fit the interviews most.

The current paper relies on the interview part of the larger project, grounded in ethnographic fieldwork (Angrosino, 2007). Volunteers from the Facebook group expressed interest in participating in the study. The sampling of interviewees relied on a digital ethnographic approach (Jemielniak, 2020). A total of 50 interviews were conducted. In all cases, the interviews were done face-to-face, near campus. The total cohort of the LL.M. program is about 200 people every year, and the vast majority of them join the Facebook group for a respective year’s cohort.

The initial, guiding questions we relied upon included:

- What do you think of copyright regulations these days?
- What do you think of digital files sharing?
- Under what circumstances do you consider digital files sharing acceptable, and under what circumstances unacceptable?
- What do you think of the future of copyright?
- How will digital files be distributed in the future?

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3 These questions served as entry points for loosely structured conversations, in which the interviewer  
4 followed the interviewee with the topical coverage. A sample from an interview beginning can be found  
5 in Appendix 1.  
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9 In the interviews, we attempted to follow the logic and values of our interviewees, to understand  
10 their intuitions and the perception of fairness in digital files sharing. We relied on an ethnographic  
11 interview approach, resembling a conversation (Burgess 2003), and oriented at grasping the values and  
12 viewpoints of the interviewees by concentrating on following the topics important for the interviewees  
13 themselves, in relation to the generally described guiding questions (Weeks 2020). The participants were  
14 interviewed in a relatively friendly setting, not limited to the typical scholar-subject dynamics. Each  
15 interview lasted 45-70 minutes. All interviews were recorded, transcribed, and anonymized. Voice files  
16 were deleted after the transcription to comply with standard human subjects protection protocols.  
17 Thematic analysis was used to code the interviews (Nowell et al., 2017) to represent the legal  
18 professional's opinions and perceptions of digital piracy, their own or their close ones involvement in  
19 it and the potential business, customer and legal developments in the area of digital content. Thematic  
20 analysis was chosen as a highly flexible approach to compare similarities and differences of  
21 perspectives between participants and to summarize key findings of a large dataset (Braun & Clarke,  
22 2006). Firstly, we applied an inductive approach, using natural codes derived from the transcribed  
23 interviews. Secondly, we used the concepts and themes from the literature review to help with codes  
24 grouping into key themes and establishing links and relationships between them. Coding process was  
25 assisted by NVivo. The participants speak largely of their private attitudes, and only occasionally refer  
26 to their professional attitudes, in particular when their behavior would differ depending on the context.  
27 However, it is worth pointing out that the discrepancy between personal and professional response to  
28 digital piracy was only mentioned by a couple of participants.  
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41 All interviewees were informed that they should avoid saying something that could be  
42 potentially identifying, and also that the researcher will make a separate effort to secure their privacy  
43 and anonymity by removing those quotes or names at a transcription stage. All interviewees received  
44 written information about the purpose of the study, contact information to the investigator, and a  
45 summary of their rights as interviewees, including the right to opt-out at any time. One person quit  
46 during the interview process and is not counted in the overall number of responses.  
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51 Harvard LL.M program is highly competitive with high admission criteria which top grades  
52 and further work experience beyond university. Participants had various work experiences before  
53 joining Harvard, LL.M program: J.D., LL.B.: 46% in the law firms, 14% in NGO, 10% in a corporation,  
54 and occasionally in other types of organizations like international agencies, academia or at independent  
55 attorney/barrister practice. The youngest participant was 22, the oldest 43. Among participants, 2/3 of  
56 were men, and 1/3 women. Informed consent was obtained from all individual participants included in  
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3 the study. The interviewees come from over 40 different countries. With some exceptions, most of them  
4 came to the US for their LL.M. year, and spent 6-9 months in the country before being interviewed.  
5 Therefore, participants had varied national backgrounds and similar relatively short exposure to US  
6 culture. We selected law professionals for the sample of our study for a number of reasons. Firstly,  
7 lawyers rely on a strong professional knowledge and sense of ethics, which is part of their education  
8 and bar system, and their conforming conduct has major practical consequences for their professional  
9 standing. The codes of practice, for example American Bar Association ([www.americanbar.org](http://www.americanbar.org)), expect  
10 the legal professionals to be an exemplar of law obeying citizens. We don't claim here that all law  
11 professionals adhere to these high standards, but we know from the theory of professions (Freidson,  
12 2001; Jacobs & Bosanac, 2006) that socialization in a given occupation plays an important role in value-  
13 creation, and it indeed may be so also in the case of perception of piracy (Moores & Esichaikul, 2011;  
14 Chen, 2013). Secondly, it has also been suggested that students on legal degrees have a greater sense of  
15 ethics in comparison, for example, to business school students and are more likely to resolve ethical  
16 dilemmas (McCabe et al., 1994). Thirdly, lawyers are well paid professionals, with a 2019 median  
17 annual wage in the US of \$122,960 (US BLS, 2020). Studying this group gives us the opportunity to  
18 gain insights about attitudes towards digital piracy of high earners and highly educated members of  
19 society, which is unique in comparison to many previous studies focusing on participants with low  
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## 34 Findings

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36 The interviews with legal professionals shed a new light in the extent to which digital piracy is  
37 acceptable behavior also in this highly privileged group. Legal professionals were also explicit about  
38 the fact that the current intellectual property rights in relations to the digital content is archaic and do  
39 not correspond to the changes in technology, society, ethics and potential customers' expectations.  
40 Many interviewees commented on a range of justifications for illegal behaviors, including moral  
41 standing that sharing should be allowed, the cost of legally obtaining the content, the use of the content,  
42 the value of the work input and level of earnings of the individual authors.  
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49 In the following sections, we present findings around key themes, that emerged as dominating  
50 in the interviews: (1) unenforceable IP Law, where we comment on changing perceptions of digital  
51 piracy in society, in particular the culture of sharing, difficulty or unwillingness to enforce the IP law  
52 and discussing whether we actually need it; (2) new content-driven business models where we comment  
53 on contemporary customer expectations regarding (2.1) digital content pricing/perceived value and  
54 (2.2) availability possibly leading to new digital business models; the culture of sharing which indicates  
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3 shift in perceptions of fairness in digital sharing and (3) finally we discuss some indications about  
4 potential future developments in this field leading to new digital creative commons<sup>1</sup>.  
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### 10 (1) *Unenforceable IP Law*

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12 One of the surprising findings from this study is that even the law students and professionals have varied  
13 knowledge about the level of penalties involved in digital piracy. The confusion around legal protection  
14 is not only related to the US context, but in most cases also to the national context of the respondents.  
15 This stems on one hand from the different forms of protections available by law, and also how legal  
16 systems perceive the piracy offense and the actual enforcement.  
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21 Probably, at least partly because there is a common perception that actual prosecution and proof  
22 of the crime is unlikely to result in any negative consequences for the individuals, if “*they know that*  
23 *the chance of being caught is very small*” [Interview 2]. One of the respondents suggested even that  
24 “*laws which don't have enforcement capabilities should actually be taken off the books*” [Interview 9]  
25 because they are in fact dead laws. Other respondents explicitly stated that we shouldn't impose  
26 penalties and enforce a law that goes against prevalent societal norms and those that do not serve the  
27 contemporary societal needs. Instead, we should be looking at ways of making information, digital  
28 content available for everybody. A number of legal professionals admitted pirating digital content, some  
29 of them justifying it by the lack of access or high price, but others were considering it as a technological  
30 development that one has the right to use. Respondents largely sympathize with the authors and creators  
31 of the content (writers, musicians), but there is a perception that the current system of IP protection and  
32 its enforcement is not beneficial for those groups of people but rather for intermediaries (music or movie  
33 industry, book publishers) as “*there's no victim*” and that people feel like “*the other side [industry] is*  
34 *very wealthy anyway*” [Interview 36]. If that is, in fact, the situation current IP legislation is creating,  
35 one should consider whether copyright regulations really serve any real economic value. So much  
36 attention is given to individuals downloading pieces of content online while the problem may actually  
37 lay in the uneven power relations, the excessive power of the industry:  
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54 <sup>1</sup> Please, note that we are referring to digital creative commons, that is creative production  
55 of digital goods that are accessible to all members of the society and not held privately or  
56 with a restricted access, rather than Creative Commons - a popular type of licensing,  
57 developed by a non-profit organization with the same name, and aimed at making cultural  
58 production widely available without restrictions. To avoid confusion with the Creative  
59 Commons, we are going to refer to “digital commons” in short throughout the paper for  
60 clarity.

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3 *I think really the problem is with the IP holder and they should target those companies that*  
4 *offer this content. [...] Companies that have links to millions of movies and T.V. shows and what not*  
5 *and no one is targeting them [Interview 5].*  
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9 A few law students who supported wholeheartedly the intellectual property protection, but  
10 interestingly hardly any of them would feel comfortable to report and prosecute individuals for  
11 downloaded digital content, especially if there was a good reason for it, like lack of access due to  
12 geographical location or extensive prices.  
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16 The respondents were divided whether the penalties for digital piracy should, in fact, be more  
17 strict to resolve the current situation. Most of them, however, believed that increasing the penalties  
18 would not make much difference; *“merely increasing the penalty in itself will not do anything to affect*  
19 *the current equilibrium” [Interview 33].* Being serious about addressing issues of copyright  
20 infringement means being serious about enforcement. Strict enforcement involves high administrative  
21 costs like police time and dedicated force to target the copyright infringements. At the same time,  
22 focusing on harsh penalties for digital piracy might be considered socially questionable, especially if it  
23 meant restricting access to knowledge or risk of being arrested for watching a movie. An alternative  
24 solution is to revise the law to address new norms and expectations: *“I would modify the incentives for*  
25 *people to comply with the law. So find a good law so that people are happy and they at the same time*  
26 *stick to the law” [Interview 27].*  
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## 37 **(2) New content-driven business models**

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39 The contemporary consumer of digital content wants immediate access to content on demand. The old  
40 ways of distributing media, including power over the market introduction at different times and prices  
41 around the world are easy to overcome by the use of streaming and downloading. The interviewed law  
42 practitioners were emphasizing a range of issues related to their and other potential customers’  
43 expectations around the provision of digital content and how they, as customers, would see an ideal  
44 value proposition. Alongside the factors like price, release timing or accessibility, they have also  
45 indicated the lack of need to own a copy of the content as long as it is available on demand. They also  
46 indicated the need for developing new (or renewed) business models to meet those expectations. Some  
47 of them also suggested that there is a need for policy makers and the government to be involved in  
48 shaping the digital content market. These aspects will be discussed in the following sections about price  
49 and value and accessibility.  
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## (2.1) Price and value

The price levels discussions brought a range of issues from the actual price tags to the valuation of work and individual contributions, ability or fact of being paid elsewhere, the quality of content, and wider societal problems like distribution of wealth. There is also a common belief that people who produce quality content should be acknowledged and paid adequately, *"the authors need to be appreciated"* [Interview 13]. The narratives also reveal grooving juxtaposition of the industry vs creatives and that the current IP regulations and the pricing strategies are mostly coming from the wealthy industry and not helping the actual authors to make a living: *"People sympathize with the artist [...], some young musicians that barely make a living"* [Interview 42]. Customers are *"are willing to pay for quality"* [Interview 2] but the competition and new technology are expected to be pushing the prices down. Since there is no physical artifact of the product, the digital goods can be accessed anywhere but also with reduced fees.

On the other hand, affordable prices would probably limit the piracy behavior as *"nobody would like to do illegal stuff if they can pay a nominal fee to do it"* [Interview 30]. The question is then more about the system - why we are paying for digital content, who is actually benefiting from it and is it an appropriate and fair system:

*[Y]ou have the money but you look at the product and you say that's not fair. I'm not ready to pay. So even the difference may not be significant.* [Interview 17]

One way of rethinking the pricing strategies is looking at overall income sources of IP holders. Content creators usually have other sources of income and therefore *"licensing fees cannot be the only source of income"* [Interview 8]. For example musicians can be paid from live music performances, actors are being paid for cinema releases. Academic writers have set salaries at the universities and *"the exposure is much more valuable to them than a few dollars they could get from publishing"* [Interview 5]. Finally, celebrities like actors and musicians are already wealthy and *"online access is not their primary resources for income"* [Interview 13]

Therefore, the considerations of a *"fair price"* goes far beyond the perceived value of the content, but encompasses a broad spectrum of issues including societal fairness, fair access to content, affordability, global distribution of wealth, industry power, and the ability of authors to make money for actual work. This, on the one hand, all fits into the debate of the appropriateness of capitalist system for societal progression and interestingly, on the other hand, is not that much different from how performers made their living in the old days. Middle age troubadours wrote and performed lyrics and the audience paid them as they see fit. The lyrics and songbooks were considered public good and the payment was only for the actual performance of the work (Johns, 2010).

## (2.2) Accessibility

The second factor, by some considered even as more important than price, is accessibility with its physical, spatial and temporal aspects. First of all, there is a significant change in the way respondents perceive artifacts on which digital content was or can be stored. There is a shift of thinking from owning an artifact (a CD, a hard copy of a book) to having access to content:

*I'm not particularly fussed about owning [...] because I know that as long as I have an internet connection in 98-99% of cases I will be given access to content. [Interview 43]*

Another expectation is that the content should be available instantly around the world. Release dates should be the same irrespectively of the jurisdictions. Most of the respondents considered regional restrictions to the content inefficient and unfair, especially for the people who paid already for the content in their home country: *instantaneous release globally is the future [Interview 5].*

Finally, no one wants to schedule their day around the TV schedule anymore, so the expectation is that the digital content is made available on demand. Majority of interviewees emphasized this different approach to timing and schedule of viewing digital content. The importance is in when, how often and what to watch depends purely on the viewer not the imposed schedule.

## (3) Society and the Culture of Sharing

The perception of the acceptance of streaming and/or downloading digital content varied among interviewees. However, the vast majority either admitted doing so and /or that this is a common practice among their friends and colleagues, it is a common “culture of sharing” [Interview 28]. Despite industry efforts to equal digital piracy to stealing a car as in one of the popular British anti-piracy campaigns, most respondents see a significant difference between stealing a physical object and breaching IP rights on the Internet. There is the shared sense that digital goods differ from physical goods, and that this constitutes a basis for new societal norms to emerge: while they *would never do anything illegal elsewhere* [Interview 36], pirating digital content is treated morally differently and morally acceptable.

All of the legal professionals admitted that in their opinion, digital streaming/downloading is prevalent in society to the extent that often there's no stigma attached to illegal downloading anymore. We can compare it to jaywalking: “*You see someone jaywalk, you're not going to have any reactions to it.*” [Interview 20] and although it might be illegal, there is a widespread perception that it's not theft and some have no issue discussing it in a professional setting: “*I have spoken with my clients about the*

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3 *T.V. shows that I have downloaded and watched*” [Interview 3]. Even those few (3 out of 50) who had  
4 a strong opinion of streaming and/or downloading digital content being absolutely illegal and  
5 unacceptable, they wouldn’t necessarily report a friend for breaking the IP law: *“It’s morally incorrect*  
6 *and legally incorrect, but I wouldn’t turn in them.”* [Interview 12], and *“If I were to call police when*  
7 *someone watches pirated movies, I wouldn’t have any friends”* [Interview 33].  
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12 It seems to be widely acceptable to pirate popular music, movies, and TV shows, in particular,  
13 if there are not available on demand via legal access or that access is considered overpriced. Any  
14 regional restrictions imposed by the content owner may change the perception of the pirating of media  
15 content. Majority of the respondents agreed that if the content is made unavailable to purchase legally,  
16 there is nothing wrong with downloading it illegally:  
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21 *[I]f for any reason, there is a restriction. I think it's fair for me to download illegally or use*  
22 *VPN to have access to the content. I don't believe in geographical restrictions on the internet. [Interview*  
23 *16]*  
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27 Similarly, excessive pricing structures, especially if these are for learning or personal use, was  
28 seen as a green light for torrent downloading or copying. One of the interviewees reflected: *“Two-*  
29 *hundred dollars [for an academic textbook] is absolutely crazy. If there was a choice that someone sells*  
30 *it pirate, I would buy the pirate.”* [Interview 41].  
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34 Movies and TV shows are also considered pure entertainment and downloading them for  
35 personal, usual single watch weren’t considered problematic. The slightly different point was often  
36 made about music. In this case, respondents were questioning whether a musician should receive  
37 remuneration for distribution of a recording, while they had other options to earn money by actually  
38 doing the work, for example through organizing gigs and concerts. Some respondents also indicated  
39 that actors are overpaid, especially in Hollywood.  
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45 On the contrary, pirating digital content of a book or a software, in particular, if that was to be  
46 used for commercial activities was widely considered unacceptable. The perceived value and effort put  
47 in those two types of content was high, and similarly feeling that the authors need to be remunerated  
48 was strong:  
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52 *I am a little bit sad for people who write books because they are not millionaires. They really*  
53 *work hard. [Interview 4]*  
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56 The prevailing exception from this rule was made for academic and educational books and  
57 content. In the case of those, and in the light of excessive pricing used by some publishers, sharing those  
58 resources was in majority considered acceptable. That is because our participants in majority believe  
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3 that the access to knowledge should be as free as possible and with “*the fewer restraints on information,*  
4 *the best society can become*” [Interview 19]. However, respondents didn’t suggest any specific model  
5 of how this broad access to digital content could be provided. Instead they described a number of  
6 parameters and aspects that future changes in this area could embrace. We discuss them in the next  
7 section.  
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#### 10 11 12 **(4) Moving Forward?** 13

14 Digital piracy has threatened the traditional business models, but they are trying to fight back. They are  
15 still lobbying to protect their interests, but the world has already changed, empowering the artists and  
16 the audience. An interviewee commented:  
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20 *I would [like to] see a lot of artists voluntarily uploading their content on YouTube and see*  
21 *what reaction it gets from the audience and on that basis using their popularity to negotiate with*  
22 *producing companies [Interview 43]*  
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26 In the short run some adjustments, like offering the digital content at lower prices, may help  
27 keep business going, because customers are now more than before are comparing the value of content  
28 to its price. Another possibility for the industry is to use digital piracy to its advantage. As in the case  
29 of the TV show *Game of Thrones*, its popularity started on pirate websites and expanded to paying  
30 users. One of the interviewees think that “*if Torrents did not exist, Putlocker did not exist, a lot of people*  
31 *would just not watch those movies*” [Interview 3] because they wouldn’t know they exist.  
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35 But in the long run the industry will have to rethink their value proposition and carefully  
36 reframe their business models. This reorientation process should be initiated by the industry which at  
37 this moment in time is aware that it needs to find other income streams: “*it's not our fault that it's*  
38 *broken, and I think it's the companies who should figure it out.* [Interview 27]  
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44 A new business model utilizing regular fees for unlimited content streaming, as in the case of  
45 Netflix or Spotify, has been pointed out on several occasion as the one most progressive. Combination  
46 of the sensible monthly fee, content on demand and lack of commercials were considered as key  
47 benefits. Also, those services seem to price their services in a way that customers feel comfortable  
48 paying and feel discouraged to pirate the content.  
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53 The future of digital commons is however undefined. The respondents have explored two  
54 possible scenarios: pay as much as you like and flat license/access fee. Paying as much as you like is a  
55 rarely used model, typical mostly to beginner musicians or start-up software companies, and more  
56 recently widely popular crowd-funding platforms such as Patreon. It resembles a revenue model of a  
57 medieval troubadour or busker performing in public (here internet) places for gratuity (pay as you like).  
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3 Another possible option is to assume that digital content is a public good (digital common) and  
4 everybody has access to it and everybody pays a small flat fee to support it. This is a similar idea to a  
5 TV license fee, which is compulsory as long as you have a means of access to the content. Either way,  
6 the forward solutions would require some new regulation and involvement of the government as there  
7 is a common opinion that “*governments are not doing enough*” [Interview 5] in this situation it is about  
8 appropriate market regulation “*rather than trying to prohibit in certain cases, or completely*  
9 *privatizing*”. [Interview 46]  
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15 The policymaker needs to think of the best way to balance the interests of everybody involved  
16 in the digital content market, by ensuring the content is widely available at a reasonable cost while  
17 authors and distributors have means to support their new productions in search for the solution is to  
18 strike the balance and find the right compromise between different interest groups. The legal  
19 practitioners’ expectations about the future of digital content include free unrestricted access resembling  
20 the idea of digital commons: [...] *that needs to be facilitated by the governments* [Interview 12].  
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### 29 **Discussion – Towards the new model of Digital Commons?**

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34 The input from interview with legal professionals revealed an extensive shift towards new  
35 customer expectations and perceptions of access to digital content. It also seems that the tension  
36 between economic and ethical valuing of digital piracy is lessening, with the idea of digital common  
37 corresponding directly to virtue ethics: It is not important to merely follow the law, but to consider  
38 what is fair and appropriate for the society as a whole, the common good (Akrivou & Sison, 2016). The  
39 changes in the field are driven by changes in technology and society, which the business side is  
40 responding to at a slow pace, and the law being beneficial mostly for the obsolete business models.  
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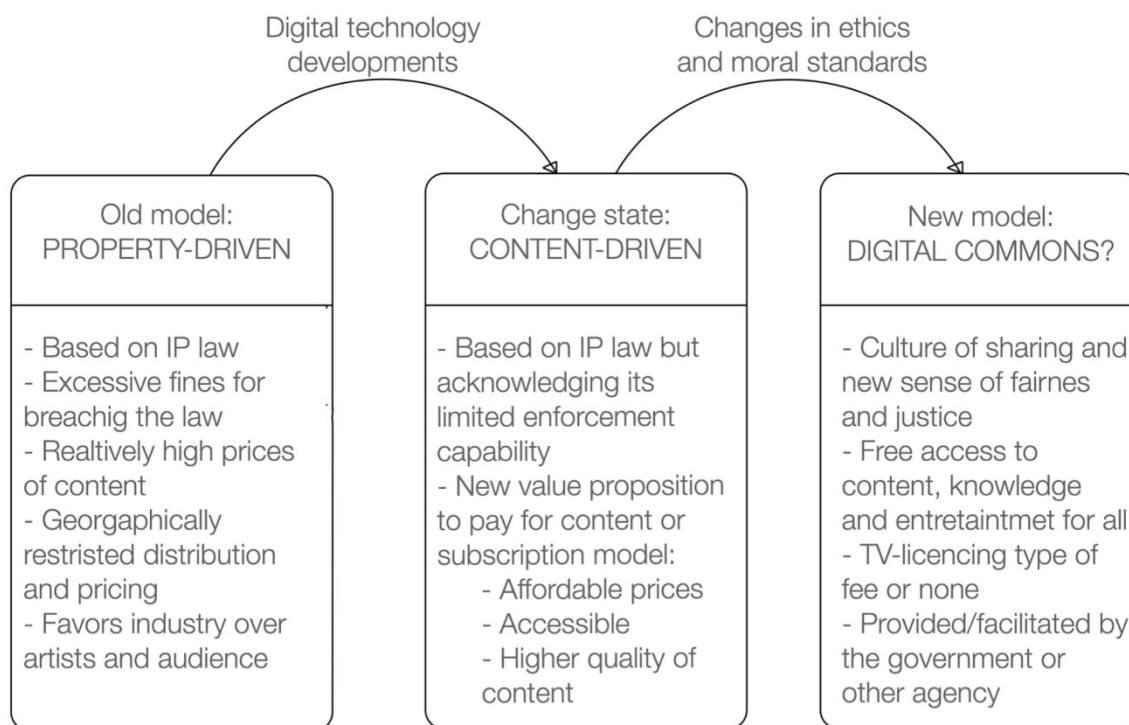
47 Moreover, our findings show that digital content sharing is inseparably interwoven into the  
48 everyday practices of social lives. The distinction between professional, commercial uses, typical for  
49 business logic, and communal, peer-to-peer private use, typical for non-economic collective sharing  
50 practices is very striking. Both logics permeate the legal perspectives and regulatory regimes, which are  
51 a result of both non-commercial social behaviors and commercial market transactions’ influence and  
52 demands. Somewhat similarly to platform capitalism organization, which commodified what previously  
53 was perceived as a non-monetary favor, such as giving a friend a ride or allowing them to sleep on a  
54 couch, the social change we are observing signals a struggle between two concepts of digital sharing  
55 (Hergueux & Jemielniak, 2019). One, evident in the interviews, classifies digital sharing as a collective  
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3 act of kindness without monetary value and treats it as a normal social practice. The other imposes a  
4 business logic on digital content sharing. Both translate and adapt the legal vocabulary into their  
5 respective discourses.  
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9 One of the main purposes of the intellectual property law was to protect the authors and ensure  
10 fees are being paid for the creative output, even though, admittedly, it e.g. also has the goal of promoting  
11 the progress of science and useful arts, according to the U.S. Constitution. Many law professionals who  
12 took part in this study suggest that intellectual property law has been supporting the legal owners of the  
13 digital content like large movie producers and TV stations, but often less protecting the interests of the  
14 actual authors. Both the literature and our findings show that high fines do not detract people from  
15 pirating content, because the law is rarely being enforced and societal norms are favorable towards  
16 digital sharing (Holt et al., 2019). Therefore, there has to be wider discussion on how to address these  
17 issues, the purpose of the intellectual property law, development of new market propositions and the  
18 government involvement in regulating this area is crucial.  
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26 The content producing and distributing industries are under criticism. The findings in this study  
27 we summarize in Figure 1. The **old property-driven** business models, still protected by law, are  
28 becoming slowly obsolete because they do not offer a value proposition that would be appreciated by  
29 the customers. As our findings indicate that traditional business models, with their high pricing and  
30 scattered geographical release restrictions as well as international pricing differentiation can be  
31 considered unfair and unattractive. There is a considerable shift towards new technology enabled  
32 **content-driven** offerings like Spotify or Netflix. Subscription services resemble TV licensing or paid  
33 TV channels model with the difference that for a set fee the customer can choose content on demand  
34 rather than being forced to watch a stream of pre-defined shows. Our findings shows that they are seen  
35 as more balanced in terms of price-quality-volume of content ratio. But, they do not 'prevent' from  
36 pirating other content unavailable on those services. In this area the very notion of ownership is being  
37 questioned and redefined, and the legal and organizational environment seem not to catch up with the  
38 new trends in the society.  
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30 Fig 1: Changes in the perceptions of digital content models among legal professionals

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35 Clearly, neither the consumers, nor the organizations and legislators have a clear understanding  
36 of the desired and stable outcome of the current digital revolution and following societal changes in  
37 values and perception of fairness. We believe that the new option of digital **commons** seems to address  
38 these changes., Our findings from legal professionals suggest that the key aspects of the new system  
39 could involve open public access to digital content, a public tax or TV licensing-type fees and  
40 coordinated distribution of profits among content producers/authors. It would emphasize equal and  
41 distributed access to both entertainment and knowledge, but might differentiate between private and  
42 business use of the digital content and pricing regimes respectively. However, the digital common  
43 model is directly threatening the old property-driven paradigm, and raising some resistance (Wittel,  
44 2013). Implementing digital commons would certainly require negotiations with content producers and  
45 the new system design in. A strong government intervention in the media and digital content market  
46 may be needed to ensure economic viability of this model and that redistribution of digital goods is  
47 equitable while ensuring that further digital content can be supported financially.  
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56 Change in attitudes among highly-educated, well-paid legal professionals does not directly  
57 mean that the digital common model will be implemented imminently nor in any particular way or as  
58 hinted in our study, but it shows the extent of societal changes and does make the digital common model  
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3 more likely to be taken seriously. In principle law professionals have the credibility, understanding of  
4 the jurisdictions, and access to the legislators.  
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## 8 **Conclusions**

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11 Our study reveals that law professionals, with raised professional ethics standards and expectations  
12 towards law-abiding behavior, highly above average understanding of law, and higher than average  
13 socio-economic status, do not equate digital piracy with physical theft, and are generally very tolerant  
14 or even supportive to it.  
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18 We show that there is a potential for the new paradigm of digital commons to emerge. This new  
19 paradigm relies on a different philosophy of royalties, as we mentioned already practiced in the  
20 Medieval ages, and more contemporarily grounded in the pay-as-you-like model. While Gutenberg's  
21 invention may have led to treating books like standardized commodities (Yu, 2006), the introduction of  
22 digital distribution and technologies for illegal copying with zero cost are breaking the similarities to  
23 physical goods again. As a result, the common perception of e.g. relying on a fixed price is eroding,  
24 and transferring the obligation to remunerate the artist to the satisfied customer seems increasingly  
25 justified.  
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32 From this point of view, increasing efforts to criminalize digital piracy (Haber, 2018), is not  
33 going to be effective in changing public opinion. While new technologies, such as content filters  
34 required by new EU regulation on copyright, may temporarily help in mitigating digital piracy, in the  
35 end the copyright-holding corporations need to focus on three key factors to stay afloat. One is  
36 increasing the convenience of use and access to digital media. As more and more media players try to  
37 rely on a "walled garden" strategy (Chen et al., 2017), the advancing fragmentation of platforms will  
38 likely have the opposite result, as relying on one platform of choice for all desired content is one of the  
39 key components of convenience. The other important issue is allowing different levels of payment  
40 chosen by the customers, e.g. in a "pay as you like" model and transitioning to selling experience rather  
41 than products. Additionally, meeting the demands of highly cohesive, well-organized groups of file  
42 sharers and offering the possibility to participate in legal communities of media consumers is also  
43 crucial (Beekhuyzen et al., 2015).  
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52 One of the major practical implications of our research is that it indicates that a social, cultural  
53 and mental change in the perception of piracy has already happened. The industries, which are best  
54 adapting to the needs and perceptions of the society, will win in the race to establish new, effective and  
55 yet widely accepted and sustainable business models. Our theoretical contribution is clear: by presenting  
56 the first qualitative study of international lawyers from an elite law school, and their perceptions of  
57 digital piracy, so as to expand the knowledge on social understanding of fairness in digital content  
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3 sharing, we are exposing the contradicting and evolving paradigms of fairness. Our results point to the  
4 emerging new shared understanding of the digital commons, that the legislative has not caught up with  
5 yet.  
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9 Our study is limited in the sense that it is focusing on a particular cohort of Harvard L.L.M.  
10 students. Based on our data, we are unable to estimate direct impact, or the percentage of legal  
11 professionals among people involved in digital piracy. Nor can we stipulate beyond literature review  
12 what other stakeholders of digital content markets bring to the discussion. Even though our results are  
13 highly consistent, more research is needed to understand the influence of age, gender, and the country  
14 of origin in lawyer's views on the topic.  
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