GLOBAL EDITION
The New York Times
WITH THE International Herald Tribune

OP-ED CONTRIBUTOR

When Stealing Isn't Stealing

By STUART P. GREEN
Published: March 28, 2012

THE Justice Department is building its case against Megaupload, the hugely popular file-sharing site that was indicted earlier this year on multiple counts of copyright infringement and related crimes. The company's servers have been shut down, its assets seized and top employees arrested. And, as is usual in such cases, prosecutors and their allies in the music and movie industries have sought to invoke the language of "theft" and "stealing" to frame the prosecutions and, presumably, obtain the moral high ground.

Whatever wrongs Megaupload has committed, though, it's doubtful that theft is among them.

From its earliest days, the crime of theft has been understood to involve the misappropriation of things real and tangible. For Caveman Bob to "steal" from Caveman Joe meant that Bob had taken something of value from Joe — say, his favorite club — and that Joe, crucially, no longer had it. Everyone recognized, at least intuitively, that theft constituted what can loosely be defined as a zero-sum game: what Bob gained, Joe lost.

When Industrial Age Bob and Joe started inventing less tangible things, like electricity, stocks, bonds and licenses, however, things got more complicated. What Bob took, Joe, in some sense, still had. So the law adjusted in ad hoc and at times inconsistent ways. Specialized doctrines were developed to cover the misappropriation of services (like a ride on a train), semi-tangibles (like the gas for streetlights) and true intangibles (like business goodwill).

In the middle of the 20th century, criminal law reformers were sufficiently annoyed by all of this specialization and ad hoc-ness that they decided to do something about it.

In 1962, the prestigious American Law Institute issued the Model Penal Code, resulting in the confused state of theft law we're still dealing with today.

In a radical departure from prior law, the code defined "property" to refer to "anything of value." Henceforth, it would no longer matter whether the property misappropriated was tangible or intangible, real or personal, a good or a service. All of these things were now to be treated uniformly.

From www.nytimes.com/2012/03/29/opinion/theft-law-in-the-21st-century.html?_r=1&adxnnl=1&pagewanted=all&adxnnlx=1333108962-MMcE/mz1IjRA34OYsq88Ag#

Before long, the code would inform the criminal law that virtually every law student in the country was learning. And when these new lawyers went to work on Capitol Hill, at the Justice Department and elsewhere, they had that approach to theft in mind.

Then technology caught up.

With intangible assets like information, patents and copyrighted material playing an increasingly important role in the economy, lawyers and lobbyists for the movie and music industries, and their allies in Congress and at the Justice Department, sought to push the concept of theft beyond the basic principle of zero sum-ness. Earlier this year, for example, they proposed two major pieces of legislation premised on the notion that illegal downloading is stealing: the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA) and the Stop Online Piracy Act (SOPA).

The same rhetorical strategy was used with only slightly more success by the movie industry in its memorably irritating advertising campaign designed to persuade (particularly) young people that illegal downloading is stealing. Appearing before the program content on countless DVDs, the Motion Picture Association of America's much-parodied ad featured a pounding soundtrack and superficially logical reasoning:

You wouldn't steal a car.

You wouldn't steal a handbag.

You wouldn't steal a mobile phone.

You wouldn't steal a DVD.

Downloading pirated films is stealing.

Stealing is against the law.

Piracy: It's a crime.

The problem is that most people simply don't buy the claim that illegally downloading a song or video from the Internet really is like stealing a car. According to a range of empirical studies, including one conducted by me and my social psychologist collaborator, Matthew Kugler, lay observers draw a sharp moral distinction between file sharing and genuine theft, even when the value of the property is the same.

If Cyber Bob illegally downloads Digital Joe's song from the Internet, it's crucial to recognize that, in most cases, Joe hasn't lost anything. Yes, one might try to argue that people who use intellectual property without paying for it steal the money they would have owed had they bought it lawfully. But there are two basic problems with this contention. First, we ordinarily can't know whether the downloader would have paid the purchase price had he not misappropriated the property. Second, the argument assumes the conclusion that is being argued for — that it is theft.

10 June 2012

From www.nytimes.com/2012/03/29/opinion/theft-law-in-the-21st-century.html?_r=1&adxnnl=1&pagewanted=all&adxnnlx=1333108962-MMcE/mz1IjRA34OYsq88Ag#

So what are the lessons in all this? For starters, we should stop trying to shoehorn the 21st-century problem of illegal downloading into a moral and legal regime that was developed with a pre- or mid-20th-century economy in mind. Second, we should recognize that the criminal law is least effective — and least legitimate — when it is at odds with widely held moral intuitions.

Illegal downloading is, of course, a real problem. People who work hard to produce creative works are entitled to enjoy legal protection to reap the benefits of their labors. And if others want to enjoy those creative works, it's reasonable to make them pay for the privilege. But framing illegal downloading as a form of stealing doesn't, and probably never will, work. We would do better to consider a range of legal concepts that fit the problem more appropriately: concepts like unauthorized use, trespass, conversion and misappropriation.

This is not merely a question of nomenclature. The label we apply to criminal acts matters crucially in terms of how we conceive of and stigmatize them. What we choose to call a given type of crime ultimately determines how it's formulated and classified and, perhaps most important, how it will be punished. Treating different forms of property deprivation as different crimes may seem untidy, but that is the nature of criminal law.

Stuart P. Green is a professor at Rutgers Law School in Newark and author of the forthcoming "13 Ways to Steal a Bicycle: Theft Law in the Information Age."

A version of this op-ed appeared in print on March 29, 2012, on page A27 of the New York edition with the headline: When Stealing Isn't Stealing.