

A Proposal for Legalising Small-Scale Physical Copyright Piracy Book Publishing, Video Films and Music in Developing Countries¹

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Abstract

The paper looks at the formative phase of media systems particularly in developing nations. It finds that copyright piracy in those situations serves a purpose not only in providing access to knowledge and creative works to audiences who would otherwise be excluded but also as the original accumulation of media infrastructures, know-how and capital that over time leads to the establishment of original forms of creative expression and legal media industries.

Looking at the examples of the publishing of books by foreign authors in 19th century USA, the emergence of the video film industry in Nigeria and briefly at the popular dance music in northern Brazil it shows the beneficial effects of piracy. From a public policy point of view, the paper then considers the benefits of copyright piracy and its harms, the most severe ones of which are caused by its illegality. In order to balance benefits and harms, it concludes by proposing to legalise small-scale physical copyright piracy in developing nations.

Keywords

piracy, copyright law, informal copyrights, access to knowledge, book publishing in 19th century USA, Nollywood, Tecnobrega

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Prelude: Piracy in Paradise

A tree to be desired to make one wise.
(Genesis 3.6)

When the Christian god commanded Adam and Eve not to eat the apples of a certain tree in the Garden of Eden, he imposed the first knowledge regulation. The fruits contained knowledge to which its owner claimed exclusive rights and did not give permission to anyone to make use of. Being god, one would think he could have devised some access and copy protection technology to make sure his will was not disobeyed, but obviously not even a god can change the inherently public nature of information. With the storage medium in clear sight and nothing but the human's obedience between them and the wisdom it contained, along came the serpent, the first middleman and forefather of all marketing, and lured Eve with the promise of the apple of knowledge: your eyes shall be opened and you shall have the same knowledge as he who claims exclusive rights to it. Eve took it without the permission of its owner and shared it with Adam. And they knew that they were naked, and they made themselves a cover from fig leaves, after, one may assume, finding out what those parts they had noticed for the first time were good for. Thus the original sin of piracy was not only the necessary prerequisite for knowing good and evil, it also immediately led to the invention of sex, apparel and therefore culture.

They vilify us, the scoundrels do, when there is only this difference,
they rob the poor under the cover of law, forsooth, and we plunder the
rich under the protection of our own courage.
(Captain Bellamy)

In „Das Kapital“ Marx addresses an economic hen-and-egg problem: money is transformed into capital which produces surplus value which is again transformed into capital. However, accumulation of capital presupposes surplus value which presupposes capitalist production which requires the presence of large masses of capital and labour power in the hands of producers. „This whole movement,“ he writes, „seems to turn around in an erroneous circle from which we can only escape by assuming an 'original' accumulation ('previous accumulation' in Adam Smith) that precedes capitalist accumulation, an accumulation, which is not the result of the capitalist mode of production but its starting point. „This original accumulation plays roughly the same role in political economy as the Original Fall in theology. Adam bit into the apple, and thus sin came onto humankind. Its origin is explained by telling it as anecdote from the past.”²

The original accumulation takes two distinct forms. In the bourgeois struggle against the old feudal system it refers to the separation of the producer from the means of production, the expropriation of the farmers from their means of subsistence. In the process that takes its classical form in England large masses of people were suddenly and forcefully torn from the land and thrown onto the labour market as 'free' proletarians. 'Free' very much in the sense of

2 Marx, 1867: 741 (my translation)

Janis Joplin of nothing left to loose, of having nothing left to sell but their own skin.

The second form started with the colonisation of the globe. „The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the aboriginal population, the beginning of the conquest and looting of the East Indies, the turning of Africa into a warren for the commercial hunting of black-skins, signalised the rosy dawn of the era of capitalist production. These idyllic proceedings are the chief moments of original accumulation.“³

In our post-colonial times one might assume that these are anecdotes of the past. A look at a world map teaches us that certainly with respect to intellectual capital the process is still ongoing.

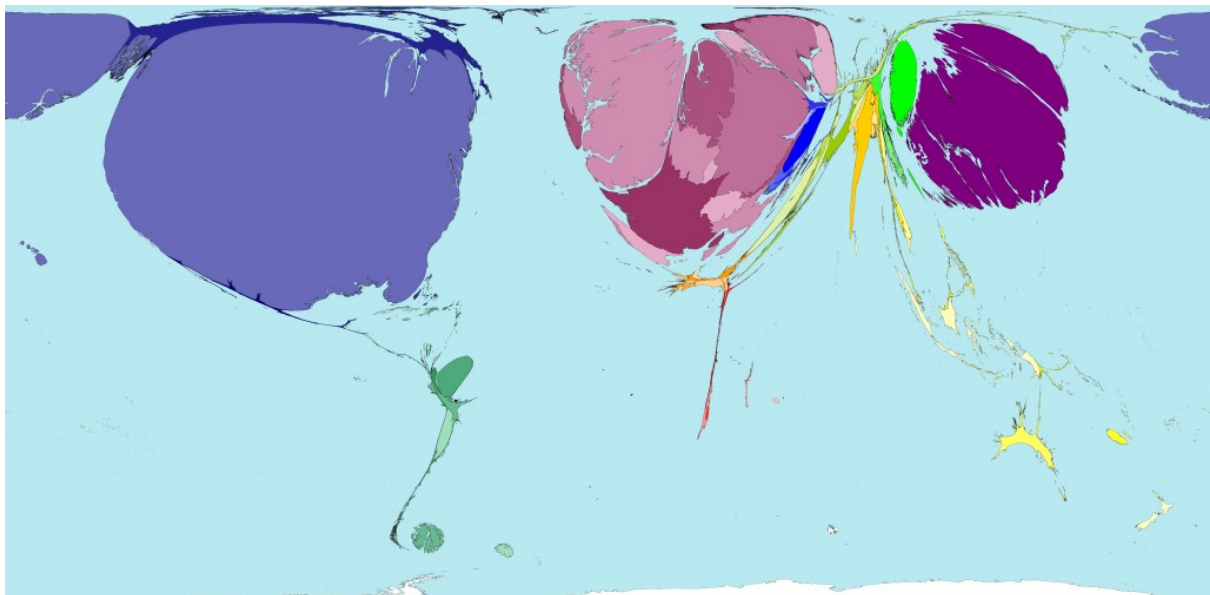


Illustration 1: worldmapper.org: world by royalties. Territory size shows the proportion of worldwide earnings (in purchasing power parity) from royalties and license fees that are earned there.

The map based on estimated data from 2002 shows earnings from copyrights and patents.⁴ It dramatically visualises the unequal distribution of the benefits of the global “intellectual property” system. Over half (53%, US\$ 44 billion) of the value of all royalty and license fees paid in 2002 were received in one territory: the United States. Large proportions of these fees were also received in Western European countries and in Japan. This does not mean, of course, that no music, art or medical knowledge is being created in Latin America or Africa. It does mean that the profits from the exploitation of this creativity flow to the North.

Piracy

While the phenomenon might be as old as humankind, the word is not. Before certain illicit acts with respect to knowledge came to be called ‚piracy,‘ techniques of seafaring had to be

³ Ibid.: 779

⁴ <http://www.worldmapper.org/display.php?selected=168>. #Permission pending.

invented. We owe the word, like so many other things, to the Greeks (peirates, peiratikos).⁵ Through Latin ‚pirata, piraticus‘ it entered the Roman languages. In the 13th century ‚pirate‘ was used for a kind of ship. By the 17th century the word firmly connoted a robber at sea, a free-booting bandit, an outlaw and a rebel, also a kind of guerilla fighting for his or her⁶ country with somewhat less gentlemanly methods than the etiquette of warfare demanded, privateers plundering the enemy’s lands with or without the approval of their worldly and otherworldly lords and at their own profit. Etymology points to a number of words in close proximity, like ‚buccaneer,‘ ‚corsair,‘ ‚filibuster‘ and ‚yankee.’

Pirates played a role in plundering the colonies, especially those of other powers. In the 19th century the word also took on an anti-colonial meaning. A key document is Jose Rizal’s anti-nation-forming novel *El Filibusterismo* (1891). In the introduction to his 1961 translation into English, Leon Ma. Guerrero quotes from a letter by Rizal to his friend, the Austrian anthropologist Blumentritt: „The word *Filibusterismo* is very little known in the Philippines. The masses do not know it yet. I heard it for the first time in 1872 when the tragic executions took place. I still remember the panic that this word evoked. Our father forbade us to say it... The Manila Newspapers and the Spaniards use this word to describe those whom they want to render suspect of revolutionary activities. The educated Filipinos fear its scope: It does not have the meaning of *pirate*; it means rather a *dangerous patriot who will soon be on the gallows*, or else a *conceited fellow*.“⁷ Guerrero adds that it seemed to him that the title of the novel *Filibusterismo* „can only be translated for the present generation as ‚subversion‘ if it is to be correctly understood as a non-conformist attitude of mind, as an overt attempt to overthrow an established order of society.“⁸

Before one could speak of ‚copyright piracy,‘ obviously, copyright had to be invented in the first place. But when it was it did not take long, in fact, it seems that ‚copyright‘ and ‚piracy‘ emerged simultaneously. A dictionary from 1755 gives as the first meaning the conventional ‚sea-robber‘ and in second place: „Any robber; particularly a bookseller who seizes the copies of other men.“⁹ In this sense, for example, David Hume, in his letter on the law of copyright in 1774, speaks of a possible „pyrated Edition“ of his essays.¹⁰

A recent addition to the phenomenology of piracy is biopiracy. It refers to the taking and exploitation of the knowledge of natural resources of indigenous peoples of the South by

5 S. various historical dictionaries on piracy: <http://www.geocities.com/Tokyo/Garden/5213/english.htm>

6 Not to forget the famous female pirates (see <http://www.beaglebay.com/womenpirateslist.htm>).

7 Rizal 2006: xi. The „tragic executions“ that took place in February of 1872, was that of three priests for their alleged role in the anti-colonial uprising in Cavete.

8 Ibid.

9 A Dictionary of the English Language by Samuel Johnson, A.M. - London: W. Strahan, 1755, <http://www.geocities.com/Tokyo/Garden/5213/english.htm>

10 Hume 1774.

pharmaceutical corporations in the North.

Today the historic pirates at sea and, through appropriation by their contemporary descendants in the digital age, also the data-pirates and hackers have taken on a positive image, signifying the power of the underdog, using superior skills to turning techniques and technologies developed by the rich and mighty against them, communities of outlaws taking from the rich sharing equally among themselves, living risky, celebrating wild parties, having fun, dying young.¹¹ Pirates are a popular model of identification for the forces of contestation.¹²

They are so popular indeed, that Disney regularly cashes in on them, thereby reinforcing the power of the image. The movie „Pirates of the Caribbean 2“ helped the corporation double its earnings in the first quarter of the business year 2005/06. The movie was a success in spite of massive interventions by studio bosses in order to minimise risks. For their idea of family wholesomeness and mass-compatibility, what director Gore Verbinski and anti-star Johnny Depp were creating was a figure too stinking dirty, gay and alcoholic. Depp threatened to quit over these interferences into his creative work but the studio did not dare fire him because the first sequel had earned them 650 million US\$.¹³ The movie was, as a matter of course, immediately available from street-vendors across the globe and on the net. This did not prevent Disney from increasing its annual profits by 33 percent to 3.4 billion US\$. One may then ask how much harm piracy actually caused and how much it contributed to the success of the “Pirates.”

The same corporations that on-screen teach the young that pirates are cool, in the press and in the political arena depict copyright piracy as the worst evil of our age. Now that „piracy“ has become an ambivalent, somewhat old-fashioned, even cute kind of metaphor, the copyrights industry mobilises stronger images. They increasingly evoke a linkage between copyright infringement and organised crime and even terrorism.¹⁴

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- 11 Hakim Bey (1985) aka Peter Lamborn Wilson emphatically wrote about „Pirate Utopias,“ „Islands in the Net“ (after Bruce Sterling’s novel) or, most famously „Temporary Autonomous Zones“. The Chaos Computer Club (<http://www.ccc.de>) that had seen the light of the public one year before Bey’s text is waving a flag with the signé of the German then still public post and telecom service, a postal horn, subtly altered into skull and crossbones (<http://de.wikipedia.org/wiki/Bild:Ccc2003PirateTent.jpg>). Hackers and data-pirates were the heroes formulated in the cyberpunk SiFi novels of Sterling, William Gibson and Neal Stephenson.
 - 12 For a current mix of Robin Hood, rebellion, outcasts and copyright infringement, see e.g. the Pyrate Punx: <http://www.pyratepunx.net>. See also the Kingdom of Piracy: <http://kop.fact.co.uk>
 - 13 Der Gegendarsteller, Die Weltwoche, Ausgabe 30/06, <http://www.weltwoche.ch/artikel/?AssetID=14527&CategoryID=82>
 - 14 Talking about imminent dangers of terrorism in South America, Frank C. Urbancic, Principal Deputy Coordinator for Counterterrorism in the U.S. Department of State, said in the Committee on International Relations of the U.S. House of Representatives in September 2006: „Hizballah supporters and sympathisers are also involved in a number of illegal activities, including smuggling, drug and arms trafficking, money laundering, fraud, intellectual property piracy, and other transnational crime.“ (http://commdocs.house.gov/committees/intlrel/hfa30143.000/hfa30143_0.HTM#33, p. 33.) Terrorist link to copyright piracy alleged. Counterfeit DVDs and cigarettes may be funding terrorists, CNET, May 27, 2005, http://news.com.com/Terrorist+link+to+copyright+piracy+alleged/2100-1028_3-5722835.html; Terrorism by Copyright Infringement?, September 29th, 2006, <http://interactionlaw.com/wordpress/2006/09/29/terrorism-by-copyright-infringement/>; Course materials for „Political Economy of Terrorism“ at Northern Arizona University, <http://dana.ucc.nau.edu/~lmo5/politicalEconomy/PoliticalEconomyTerrorism.htm>

Piracy thus appears to be the dark side of media economy. It is parasitic to creativity and supposedly harms industry, creative people and consumers alike. On a national level it refers to a state of not yet being fully civilised. But is the reverse side of things, is the parasite, the noise,¹⁵ the garbage,¹⁶ the pirate really a desideratum of order, its exception, something not yet quite cleaned up, not quite under control of the system, or is it one of its constitutive genetic forces, asks philosopher and historian of science Michel Serres. His answer: „No system without parasite.“¹⁷

In Serres' seminal analysis the parasite operates on the lines of communications and transportation. He intercepts goods and information. He establishes himself as an intermediary wherever he finds an incline of either. For the system he fulfils a productive function by opening channels between regions that are not linked otherwise. He brings information to audiences who are excluded from it. He also takes his toll, although, how much harm to economic interests he actually causes is contested.¹⁸ He sets up a temporary autonomous zone in the interstices of power. „The producer is concerned with content, the parasite with position. He who cares about position will always beat him who cares about content.“¹⁹

To sum up: Communication systems and parasite, shipping and naval piracy, copyright and its infringement are systemically, intrinsically linked. They cannot be separated. From a public policy point of view therefore eradication of piracy (just as that of drugs) cannot be a meaningful goal. It must rather strive to strike a balance between its benefits and its harms. The public debate is dominated by the arguments for its harm. This paper therefore focusses on the benefits of piracy.

Pirate Nations

If copyright pirates are indeed part and parcel of any market for creative goods, what is their function? Can their distribution networks be utilised for legitimate content? Can pirates turn into creators? Can a situation of systematic piracy be sustained at all? Would creativity not simply cease or go elsewhere? In the absence of legal copyrights what strategies do creatives and the exploiters of their works develop to protect their interests? In order to approach these questions we will look at three cases.

First we will look at the United States of America during the 19th century during which the systematic illegal importation of technologies and the reprinting of foreign books that only received copyright protection in 1891 played a crucial role in turning it from a developing country into the leading industrial and culture industry nation.

In the second case, the Nigerian film industry provides us with one of the most fascinating

15 Larkin 2004: 307

16 Volker Grassmuck & Christian Unverzagt, *Das Müll-System*, Suhrkamp, FfM 1991

17 Serres 1981: 26

18 E.g. that there is no negative effect by file-sharing on sales of music has been shown consistently by independent empirical academic research starting from Oberholzer and Strumpf's paper in 2004 to Bhattacharjee et al.'s study on the dynamics of music album life-cycle in 2007.

19 Serres 1981: 63

from-piracy-rags-to-popular-culture-riches stories of our times. Piracy here functions as a crucial factor in the original accumulation of capital, infrastructure and skills for legitimate media business. In the 1990s, it kick-started a film industry that today is considered to be the third-largest after Hollywood and Bollywood.

And finally we will take a brief look at Tecnobrega, a genre of popular dance music in the north of Brazil that by utilising the pirate infrastructure of duplication facilities, distributors and street vendors has also created an impressive media market.

The United States of America: Books

After declaring itself independent from the English colonial motherland, the USA was a poor underdeveloped country on the periphery of the world. During the 19th century it transformed itself into a leading industrial power. How did the USA do it, asks Fordham University historian Doron Ben-Atar, and he points to the phrase “Yankee ingenuity.” “Yankee” originates from the Flemish word “Janke” for smuggler, pirate.²⁰ In his ground-breaking study *Trade Secrets* Ben-Atar shows how the USA laid the foundation for its success by systematically resorting to piracy.

„In the span of seventy years an agricultural republic with some household manufactures that had more in common with the Middle Ages than with the industrial world transformed itself into a world leader of cutting-edge industrial technology. American machines and the ,American system of manufacturing,‘ as the British press called it, became models for worldwide imitation. Like modern developing nations, early in its history the United States violated intellectual property laws of rivals in order to catch up technologically. Integration into the international community required that the government of the United States distance itself from such rogue operations. In the process the United States had come full circle. The fledgling republic, once committed to technology piracy, had become the primary technology exporter in the world. The years of piracy upon which the new status was founded, however, were erased from the national memory. The intellectual debt to imported and pirated technology did not turn the United States into the champion of free exchange of mechanical know-how. As the technology began to flow eastward across the Atlantic, the United States emerged as the world’s foremost advocate of extending intellectual property to the international sphere.“²¹

Ben-Atar's piracy study focusses on technology, a field in which the U.S. early on was internationally competitive, leading to a strong domestic patent system and to the U.S. taking a leadership role in international patent conventions.²² The piracy strategy is even more pronounced in copyright where domestic laws were weak and the U.S. did not join the core international treaty until more than one hundred years after its promulgation. In the 18th century, Massachusetts was the only American province that gave some recognition to the principle of copyright.²³ In January 1783 Connecticut’s General Assembly enacted a copyright law stating that „every author should be secured in receiving the profits that may

20 <http://www.etymonline.com/index.php?term=Yankee>

21 Ben-Atar 2004: 214

22 The first international patent convention was held in Austria in 1873, at the suggestion of the United States which at the time was already granting equal rights to foreign patentees.

23 Ibid.: 32

arise from the sale of his works, and such security may encourage men of learning.“ On its urging, the Continental Congress established a committee on this matter that led to Congress in May of that year recommending that the states pass copyright laws granting a fourteen-year ownership of books written by citizens of the United States. „The resolution explicitly denied protection to foreign authors, thus encouraging the unauthorised reprinting of mostly British authors in North America.“²⁴ It was only in 1891 that the USA allowed foreign authors to obtain copyright protection if they met certain conditions.²⁵ Economist Zorina Khan conducted empirical research on the effects of this policy. Her conclusion: “The results suggest that the United States benefited from copyright piracy and that its intellectual property regime was endogenous to the level of economic development.”²⁶

Khan cites several researchers who argue that laws and enforcement mechanisms for the protection of intellectual property rights are relevant to the needs of already developed countries, “whereas newly industrialising societies (at least initially) may not benefit from their adoption or may need to tailor patent and copyright polices to fit their own specific circumstances.”²⁷ To approach this issue one would have to estimate, says Khan, both static welfare gains from infringement in developing societies versus the costs to the owners of copyright, as well as dynamic effects of infringements in these countries. The latter would have to consider the costs of imitation and of adapting pirated material to a different environment, the role of learning by doing and the extent to which comparative advantage builds on cumulative innovation.²⁸

Reliable current data on piracy dynamics for such an estimation are not available. Instead Khan takes the key era of protectionist U.S. American economic growth, from 1790 through 1891 when federal copyright statutes explicitly condoned piracy of foreign works, as a natural experiment, basing her research on copyright registrations, biographical information on authors, market data of publishing companies and copyright lawsuits. Let us now look at the media environment she describes from the viewpoints of the different parties involved.

“The reading public appears to have gained from the lack of copyright which increased access to foreign works. American authors and the public were able to obtain foreign books at prices that were lower than in European markets, and this aided the expansion of a mass market and economies of scale in publishing in the United States.”²⁹ In other words, piracy was instrumental in originally establishing the infrastructure on top of which later on a legitimate media market for both domestic and foreign works developed.

Strategies in markets for creative goods in the absence of copyright

The way publishers of foreign authors dealt with the situation is most instructive because

24 Ibid.: 125 f.

25 For the “manufacturing clauses” on which protection was conditioned see Khan 2004: 10.

26 Kahn 2007: 2

27 Referring to work by C. Fink and K. E. Maskus, W. P. Alford and S. Vaidhyathan (Khan 2007: 3).

28 Ibid.: 6

29 Ibid.: 28

today's copyright maximalists would make us believe that in the absence of copyright protection no sustainable market could develop. A publisher, even if he does not have to pay royalties, needs to make a large fixed investment that he cannot recoup if the sales of the book are low due to competing publishers printing the same book. Unrestricted competition would also lead us to expect prices to be driven down to marginal cost.

To avoid such ruinous competition publishers developed several strategies such as being first in the market, forming cartels and fixing prices, price discrimination and informal customs-based copyrights. “The first producer could saturate the market and others would suffer from their excess inventories. In the early years of the nineteenth century firms engaged in publication races in order to be the first in the market with popular books such as the works of Sir Walter Scott. A Waverley novel could be reprinted within twenty four hours through a gang system where the book was divided among as many as a dozen printers working at full capacity.”³⁰

A consequence of such races was poor quality and a greater likelihood of mistakes and deliberate alterations. Sloppy proof-reading, printing and binding, abridgements and errata not included seem to have been common.³¹ In this sense piracy harmed the readers. But Khan notes that this tendency was countered by publishers building a reputation for quality. On an increasingly demanding market price discrimination by quality became an option that outweighed speed.³²

But speed did remain crucial. In order to get new titles from England first, publishers employed agents to send them to the U.S. They also started to buy early proof sheets to get an advantage over competitors. In order to secure early sheets, publishers made significant payments to foreign authors in the form of royalties or lump sums.³³ E.g. the publishing firm Ticknor and Fields (the precursor of Houghton Mifflin) sent several unsolicited payments over the years to Tennyson out of profits on his poetry reprints. “Such payments ... were recognised by reputable publishers as 'copyrights,'” even though they were not enforceable at law.

In this way foreign authors did get remunerated by the pirates. They also resorted to mobilising the public opinion against piracy of their books. E.g. Charles Dickens during his lectures and readings in the U.S. bitterly complained about the practice. Challenging their reputation might have been another incentive for U.S. publishers to obtain authorisation. Dickens in fact, was very skilful in playing U.S. publishers off against each other, with as many as four companies paying him large sums for the claim to be his sole U.S. representative.”³⁴

Collusion among competitors was another strategy employed by the publishers to reduce risk and establish what Khan calls artificial or synthetic copyrights. In England publishers of works in the public domain, such as those by Shakespeare and Fielding, had formed strictly

30 Ibid.: 21

31 E.g. Carey & Lea's edition of Sir Walter Scott's *The Pirate* (orig. 1821) omitted an entire chapter (Ibid.: 21 f.)

32 Ibid.: 22

33 Ibid.

34 Ibid.: 27

regulated cartels in order to share the risk of recouping investments.³⁵ “The unstable publication races in the United States similarly settled down during the 1840s to collusive standards that were termed 'trade custom' or 'courtesy of the trade.' Publishing houses were acknowledged to have the exclusive right to reprint specific authors. ... In the case of new authors, the first publisher to receive the item or the first to list the work in a trade publication was deemed to have the right to exclude other reprinters. Firms that violated these rules were punished or at least threatened with punishment.”³⁶ What that punishment consisted of does not become clear. Khan cites Thackeray who after the rights to his books were adopted by Harper’s publishing company in New York declared that “there's no danger now of their being pirated in this Country [the United States], the Harper's being the chief buccaneers, & the perfect terror of all their brethren in these seas.”³⁷

These 'synthetic copyrights' were transferred and sold among booksellers and publishers through contracts that were honoured even in the absence of legal protection. Khan cites a court case between two publishing firms over such synthetic right to Charles Dickens' works that indicates how vested a right it had become. The court denied the claim arguing that this custom is very far from a property title which courts can protect from invasion. “It may be an advantage to the party enjoying it for the time being, but its protection rests in the voluntary and unconstrained forbearance of the trade.”³⁸

“The trade,” one may assume, was not as rigid a social formation as the medieval guild but as a community of producers it was nevertheless able to enforce contractual rights of exclusion through soft law mechanisms such as public ostracism. Thus, these informal copyrights decreased uncertainty, enabled publishers to recoup their fixed costs and avoided wasteful duplication. Khan concludes: “In short, publishers were able to achieve some degree of appropriation through industry structure rather than through government-mandated monopolies.”

This extra-legal system ensured payments to foreign authors as well. They also directly and indirectly benefited from the original accumulation of media infrastructure through piracy, i.e. the expansion of the market and increase in the literary and academic population in the USA. They discovered that they could turn their piracy-aided popularity into astonishing earnings from lectures and readings.³⁹ This shift from a product- to a service-based economy can be seen in many areas where copyright law plays no or only a marginal role, such as in free software, free music or, as we shall see, in Nigerian video films.

If copyright-free foreign authors and their U.S. publishers were able to establish a beneficial and sustainable media environment for themselves and U.S. readers, what about native U.S.

35 “The congers created divisible property in books that they traded, such as a one hundred and sixtieth share in Samuel Johnson’s Dictionary that was sold for £23 in 1805.” (Ibid.: 23)

36 *ibid.*: 23 f.

37 *Ibid.*

38 *Ibid.*: 25

39 “Dickens was able to parlay his popularity among readers of his pirated works into a heightened demand for complementary fee-based lectures. His U.S. reading tour of 1867-68 comprised 76 appearances that earned the author the astonishing sum of \$228,000 in total receipts.” (*ibid.*: 27 f.)

authors? Those most strongly in favour of protecting foreign copyrights in the USA argued that dumping and unfair competition by cheap foreign works harmed the development of domestic literature and deterred U.S. citizens from choosing authorship as a career in the first place.

The key issue here is the limited substitutability of information goods. Non-fiction books had to be adapted or completely rewritten to be appropriate for an American market. Thus from an early period on geology, geography, history, grammars, readers, schoolbooks and juvenile texts were predominantly written by U.S. authors.⁴⁰

Fiction was indeed at first dominated by foreign authors. Between 1790 and 1829, two thirds of all authors of fiction best-sellers were foreign. This changed after the 1830s with the entrance of such authors as James Fenimore Cooper, Henry Wadsworth Longfellow, Nathaniel Hawthorne and R. H. Dana. The category of fiction writers grew from 6.4 percent before 1830 to 26.4 percent by the 1870s.⁴¹ If cheap foreign books indeed had had the claimed harmful effect on native authors one would expect a marked increase in U.S. authorship only after 1891. Instead Khan finds a rather gradual decline of foreign authorship until by the early twentieth century Americans comprised the majority of best-selling authors in this country.

In fact, the assumption that books by foreign authors without copyright protection were cheaper than those by protected U.S. authors could not be supported by Khan's research. Her "results suggest that, after controlling for the type of publication, the cost of the work, and other objective factors, the prices of American books were lower than prices of foreign books."⁴² She explains this by publishers perceiving U.S. books to be of lower quality and demand therefore being less. This is again an effect of imperfect substitutability between foreign and local products.

Did U.S. authors gain any advantage from the fact that they in contrast to foreign authors could enforce their copyrights in court? "The growth in actual litigation was minimal until the 1880s, suggesting that infringement of domestic authors was within manageable proportions."⁴³ One can assume that again the informal norms of the trade discussed above were more important than the law. Also authors' bargaining position vis-à-vis publishers depends only marginally on the law. Many of the earlier books were published at author's risk, or on commission. "In the 1840s, reputable authors received an average of 10 percent, and between 10 to 20 percent. However, there was wide variation in contracts for unknown authors."⁴⁴ Thus the economic position of authors was not much different from today where there is much stronger protection.

If there was significant benefit and no objectifiable harm, the question arises why the USA in 1891 implemented foreign copyright protection at all. Ben-Atar sees the strive for legitimacy as a crucial factor. There was widespread international condemnation of the U.S. refusal to recognise copyrights of foreigners. The movement toward reciprocal recognition of

40 Ibid.: 16

41 Ibid.: 18

42 ibid.: 14

43 Ibid.: 20

44 Ibid.: 12

copyrights led to the Bern Convention of 1886 that accorded national treatment to foreign copyright holders. The USA did not join the debate, did not sign the Berne Convention until more than one hundred years later and even encouraged the widespread appropriation of European literature by imposing tariffs on imported books that ranged as high as 25 percent.⁴⁵

The century-long struggle for reciprocal copyright inside the USA was driven by U.S. authors with international reputation, by some universities and by European authors like Charles Dickens. On the opposing side were publishers, printers, typographers, bookbinders, and paper producers.⁴⁶ In Khan's analysis the decisive factor for the change of law was the gradual evolution of U.S. culture that resulted in internationally competitive literary products and shifted the trade balance. "Once the U.S. had developed its own native stock of literary and cultural capital that was valued in the market place, it voluntarily had an incentive to recognise international copyrights."⁴⁷

Khan's conclusion: "In sum, the U.S. experience during the nineteenth century suggests that appropriate intellectual property institutions are not independent of the level of economic and social development."⁴⁸

Taking a broader look at media history one has to add that the state of development of a given media technology is another decisive factor. Lawrence Lessig draws the line of original accumulation of media infrastructure through piracy on into the 20th century. „If ‚piracy‘ means using the creative property of others without their permission – if ‚if value, then right‘ is true – then the history of the content industry is a history of piracy. Every important sector of ‚big media‘ today – film, records, radio, and cable TV – was born of a kind of piracy so defined."⁴⁹ After the phonograph had been invented the record companies took the music from its composers; when radio started the stations in turn took the music recordings; and when cable TV started its operators took television programmes, in all three cases without permission or payment. In all these cases, as Lessig recounts, eventually a legal solution was found: compulsory licenses for music recordings and cable TV, and collective management for radio. At this point the USA was not a developing nation any longer, nevertheless each emerging media system benefited from an original period of piracy that in the case of cable TV lasted for almost thirty years.

As Ben-Atar had remarked, the United States has now come full circle: from pirate nation to primary exporter of IP with 53% of global copyright and patent revenues being realised there and foreign sales of the U.S. copyright industries larger than that of any other industry sector.⁵⁰ After originally not recognising copyrights of other countries' citizens it is now the driving force in compelling developing countries to adopt its own level of copyright regulations through WIPO, WTO, bilateral trade agreements and unilateral measures under Special 301.⁵¹

45 Ibid.: 9

46 Ibid.: 8

47 Ibid.: 30

48 Ibid.

49 Lessig 2004: 53

50 According to Stephen E. Siwek, Copyright Industries in the U.S. Economy: The 2006 Report, commissioned by the International Intellectual Property Alliance (IIPA), http://www.iipa.com/pdf/2006_siwek_full.pdf

51 After the U.S. copyright industry in the early 1990s failed to establish new copyright legislation for the

Nigeria: Video Films

In many parts of the world, media piracy is not a pathology of the circulation of media forms but its prerequisite. In many places, piracy is the only means by which certain media -- usually foreign -- are available. And in countries like Nigeria, the technological constraints that fuel pirate media provide the industrial template through which other, nonpirate media are reproduced, disseminated, and consumed. (Brian Larkin⁵²)

With the exception of a few early Yoruba- and Hausa-videos, in all three production centres most of the capital needed for this industry as well as the professional expertise was accumulated during the oil boom with the illicit mass importation of foreign films in the framework of a complex system based on trust and international trade networks. ... Out of something looking at first glance rather destructive can thus grow something new and creative. (Daniel Künzler⁵³)

Nigeria gained independence from Great Britain in 1960. Movies had been introduced during colonial rule (1901-1960). British and U.S. American companies were projecting them at first from trucks, then building cinemas, and shooting films in Nigeria as well. Native film-making was pioneered in the 1960s by theatre directors like Hubert Ogunde and Ola Balogun. In contrast to the French policy that nurtured cultural production in its former colonies in West Africa, there was no support by the U.K. for film-making in Nigeria. The cinemas were dominated by movies from the USA, UK, India, China and Japan. Government tried to build a domestic movie industry, but the Nigerian Film Corporation (NFC),⁵⁴ a national institution under the Information Ministry established in 1979 by the administration of General Olusegun Obasanjo became an personal fiefdom of bureaucrats.⁵⁵ Cost-intensive celluloid production remained minimal.⁵⁶

The first television station in all of Africa was established in Nigeria in the late 1950s.⁵⁷ The postcolonial government bore the large and controversial investment in TV stations as a

digital realm at home, it went to WIPO initiating the WIPO Internet Treaties of 1996 that were then implemented in the USA as the Digital Millennium Copyright Act. Since WIPO does not have an enforcement mechanism, the U.S. then forum-shifted to the WTO. (Sell 2003)

52 Larkin 2004: 309

53 Künzler 2006: 14

54 <http://www.nigfilmcorp.org/>

55 Nathan 2002

56 By the mid-1980s fewer than 200 titles had been produced (Adesanya in Haynes 2000: 41). There is to this day a small number of African art-house directors whose movies are shown almost exclusively at international festivals but not on the continent itself (Larkin 2001).

57 Ch. Igwe 2006: 2 and Aluko's timeline (<http://www.ngex.com/personalities/voices/baluko1950.htm>) mention 1957, Africine gives 1959 as the year of the first TV signal (<http://www.africine.org/?menu=fichedist&no=2596>).

symbolic means to establish its authority. In 1977 the Nigerian Television Authority was established and a single federal system was formed out of the regional networks.⁵⁸ Producing TV series on 35 mm film was expensive. Legal regulations limited foreign content. This encouraged the televising of theatre productions. In the 1980s when there was a station in every Nigerian state, television properly began. The second generation of filmmakers like Amaka Igwe, Tunde Kelani, and Zeb and Chico Ejiro were already shooting on video. Still, most of what was shown on TV was U.S. American fare. „By 1993 when the National Film Festival was held for the first time our film industry score sheet was moderate – about 25 English films, five Hausa films, 50 Yoruba and one Igbo film.“⁵⁹

While the early celluloid film tradition had all but disappeared,⁶⁰ a lively culture of storytelling, travelling theatre⁶¹ and popular literature as well as television became formative factors in the video film industry of the 1990s. Another crucial ingredient was the reproduction and distribution infrastructure of piracy.

In support of the anti-apartheid struggle in South-Africa, the Nigerian government exerted pressure on foreign companies that had relationships with the apartheid regime. This went together with an attempt to gain Nigerian control over the country's assets and infrastructure which led to the Indigenisation Decree of 1972. Among other foreign assets, about 300 cinema houses under foreign ownership were nationalised.⁶² Because assets of members of the Motion Picture Association of America (MPAA) had been expropriated, MPAA stopped the legal distribution of Hollywood films to Nigeria in 1981. After this exclusion from official distribution, the availability of Hollywood films in Nigeria actually increased thanks to piracy.⁶³

The oil crisis of 1973 came to the aid of Nigeria which was then the fifth largest oil producer in the world. The country and some of its consumers became wealthy. When in 1976 Victor Company of Japan introduced the analogue VHS technology, video cassette recorders became a widely desired status symbol. Also television stations started to produce their programmes on Beta-cam video at about that time.⁶⁴

By 1979, the oil-boom was over, the economy collapsed, the currency was devalued. Under the regimes that followed, the security situation deteriorated so that people did not dare go out at night and came to prefer home-bound entertainment. As a consequence, the cinemas had to close, many of them were converted into Christian churches. Sales and rental of pirated video films filled the gap. There was a copyright law modelled after that of the U.K.⁶⁵ but essentially no enforcement. When the International Monetary Fund (IMF) came to the

58 <http://www.africine.org/?menu=fichedist&no=2596>

59 Aderinokun 2004

60 Haynes in Haynes 2000: 12

61 During the 1970s travelling theatre troupes started using film projections to visualise effects of magic. Performances were also broadcast on TV. During the economic crisis, filmed performances came to replace live stage shows. With the emergence of video technology, this came to replace the expensive 35mm film. In 1988, Travelling Theatre groups started to sell video films of their performances for private consumption as well. At that time video productions became independent of theatre plays. (Künzler 2006: 1-2)

62 Aderinokun 2004

63 Larkin 2004: 294 f.

64 Igwe 2006: 3 f.; Künzler 2006: 2

65 The first Copyright Act was issued in 1970. It was repealed by the Copyright Decree of 1988 (http://www.wipo.int/clea/docs_new/en/ng/ng001en.html)

rescue it imposed a Structural Adjustment Programme (SAP) that came into effect in 1986 and involved, as usually, removing subsidies from public services, devaluing the Naira, and privatising public infrastructure, including that of the Television Authority. This policy increased the level of poverty throughout the country. „SAP introduced a pervasive social dislocation which hasn't been fully accounted for, such that film-making, film exhibition, in fact, the entire system of cultural production – music, live theatre, book publishing, and so on – totally collapsed.“⁶⁶ Multinational advertisers and investors started to dominate TV production.⁶⁷ It was during that time that the duplication and distribution infrastructure for pirated movies and music was fully established, and it was as a direct result of the IMF policy.

At this point Nigeria was disconnected from the official global economy and turned into an important node in the equally global, parallel network of the unofficial economy, allegedly becoming the largest market for pirated goods in Africa.⁶⁸ Information on piracy is, of course, inveterately unreliable, but the research by cultural anthropologist Brian Larkin on the video culture in northern Nigeria reveals some of its workings. The source copies of Hollywood and Bollywood movies usually originate from inside the industry. They are sent to Asia or the Middle East where they are subtitled and duplicated onto VHS cassettes, VCDs and recently onto DVDs which are then distributed mainly within the developing world. In the 1990s films from India and the USA came to Kano, the economic centre of northern Nigeria, through Dubai and Beirut with subtitles in Arabic and English and openly displaying advertising for the companies doing the copying. With the emergence of the VCD the duplication business shifted to optical disc plants in Pakistan and China. Often within days after – and sometimes even before – the film's official release in its home market, master copies are shipped to Kano in the Islamic north or Lagos in the predominantly Christian south where they are copied onto the cassettes to be sold.⁶⁹ Being excluded from official distribution, piracy thus allows Nigerians to participate in global audio-visual culture.

In the Kano market Indian and Hollywood films, Hausa TV dramas and Islamic religious cassettes are the most popular items, the latter supposedly sold with the consent of the artists, so that legal and illegal copying takes place in the same facilities. In Kano, wholesalers buy their supplies that they sell in other cities in northern Nigeria and in neighbouring countries with Hausa-speaking populations.⁷⁰ At the end of the chain are itinerant peddlers selling the tapes in the streets, reaching even the nomads.⁷¹ As a communications channel these video and audio cassettes reach further than broadcast media, therefore both government uses it at times to spread political messages as well as contestational voices who use these small media to escape government censorship.⁷²

The main buyers of video films are married women from the middle class who watch them at

66 New Nigerian Cinema: An Interview with Akin Adesokan, January, 2006, <http://www.indiana.edu/~bfca/events/akininterview.html>

67 Künzler 2006: 2; Igwe 2006: 3

68 Larkin (2004: 297) cites the U.S. State Department as source, mentioning an estimate that suggests that up to 70 percent of the Nigerian GDP is derived from this shadow economy, making it, in percentage terms, the largest such economy in the world, matched only by Thailand.

69 Larkin 2004: 293, 295 ff.

70 Chad, Cameroon, Benin, Ghana and the Sudan.

71 Larkin 2004: 295

72 Larkin in Haynes 2000: 223

home. This creates what Larkin calls a ‚privatised public sphere‘ that is particularly important for women in the Islamic north who are excluded from public screenings.⁷³ Videos can also be rented. People who cannot afford VCRs or VCD players frequent video clubs where films are shown on TV sets or video projectors.

The first generation of digital consumer technology for movies came to the market in 1993 with the Video-CD that became especially popular in Asia, followed by the DVD in 1996. Digital discs replaced VHS in the developed markets. As an indirect effect of the digital revolution the previous generation of analogue VHS technology was pushed down to a level affordable to the world’s poor. On the production side, analogue and then consumer-grade DV cameras and PCs with pirated editing software likewise dramatically reduced costs compared to producing on celluloid.

By the early 1990s piracy had achieved the original accumulation of media capital and infrastructure. The groundwork was laid for the emergence of a video film industry that was termed Nollywood and today is supposed to be the third largest in the world after Hollywood and Nollywood.

Origin of Nollywood

Most sources name the consumer electronics retailer Kenneth Nnebue in Onitsha and director Chris Obi-Rapu as the founding fathers of Nollywood.⁷⁴ In 1991, Nnebue had produced a Yoruba video for a mere 2,000 Naira (ca. € 30) earning him a fortune.⁷⁵ A year later, as urban legend has it, he was faced with a large stock of blank video cassettes that he had bought in Taiwan. He figured that he could significantly increase sales if he recorded something onto them. So he reinvested the profits from his first movie and produced another one called *Living in Bondage*.⁷⁶

It is the story of a man in Lagos who is promised great wealth by a magic cult if he sacrifices his wife. After the ritual murder he begins to prosper. But the spirit of his wife haunts him and drives him mad.⁷⁷ This story is not only instructive for the cultural universe of Nigeria with its tension between village and city life, the hope for a magic shortcut to wealth and the final exorcism in a Pentecostal church, but also rich in implications for the industry that this pioneering movie has spawned.

Shot in Igbo, *Living in Bondage* sold 20,000 copies within days. It was later subtitled in English and eventually sold around 750,000 copies. From then on Nnebue continued

73 Larkin 2004: 302; Künzler 2006: 5

74 The claim is not uncontested (s. I Started Nollywood. Interview with Alade Aromire, September 29, 2007, <http://nigeriamovies.net/news/news186.php>). Even the Nigerian Television Authority also claims „its place as the initiator and forerunner of Nollywood.“ (<http://www.bobtvinteractive.com/portal/2007/?cmd=news&id=32>) While there were earlier film productions, it is safe to say that the success of *Living in Bondage* triggered many to try to repeat it (s. I am the father of Nollywood. Interview with Chris Obi-Rapu, Friday, June 10, 2005, <http://www.sunnewsonline.com/webpages/features/showtime/2005/june/10/showtime-10-06-2005-003.htm>).

75 *Aje Ni Iya Mi* (Künzler 2006: 7; Haynes and Okome in Haynes 2000: 55)

76 Künzler 2006: 7; Igwe 2006: 4

77 For a more extensive synopsis s. Haynes and Okome in Haynes 2000: 79

producing video films in English and most Igbo producers followed suit opening a much wider market than that for Yoruba and Hausa productions. Markets for consumer electronics in Lagos and Onitsha emerged as the centres for Igbo video production.

While it is evident that it is easier to sell value-added, pre-recorded cassettes than blank ones, it is less clear why Nnebue did not simply copy popular foreign movies onto them. What made him switch sides from film pirate to film producer and inadvertently to midwife of Nollywood? Was it the urge to foster national culture or more selfish economic incentives? Was the profit margin on his 1991 movie so phenomenal that he could hope to earn more from creating an original work than from copying that of others?

Charles Igwe is a banker by training and now a film-producer. Together with his wife Amaka Igwe he runs the African Film and Television Program Market,⁷⁸ he provides financial consultations for parties interested in investing in the motion picture industry, runs a replication plant, and one of the biggest distribution companies in Nigeria. His explanation for the success of *Living in Bondage*: „It was a story being told by our people to our people. That was key!“⁷⁹

Igwe implies that an audience starved for local cultural expressions made the returns on investment into an original Nigerian film larger than that into a master-copy of an Indian or U.S. American movie. Duplication and marketing costs are the same for both, but while foreign films are still readily available 15 years after the start of Nollywood, their relative market share has dropped due to the massive popularity of Nigerian products. *Living in Bondage* had demonstrated a huge untapped demand.

Nollywood filmmaking started out fast and cheap. Most feature-length films are shot in less than two weeks and with a budget starting from several hundred Euros. After 2000 budgets escalated to several million Naira (several ten thousand Euro) but market saturation led to a decrease. Today the average is estimated at between €8,000 and €80,000.⁸⁰

There are no bank loans available for filmmakers. Often merchants of VCRs and cassettes imported from Taiwan or Korea put up the money to increase the attractiveness of their goods. After the start-up phase, producers now often finance their next film with revenues from previous productions. Producers also ask marketers to advance them loans on the next product.⁸¹ Increasingly money is also coming in through sponsoring and product placements. Swiss sociologist Daniel Künzler assumes that there is also some money-laundering by drug dealers, advanced fee-fraudsters and other dubious businessmen.⁸²

Films are shot directly on video, in the beginning on analogue Beta-cam, then on DV. With the capital accumulated, producers today can afford the same high-definition equipment that their colleagues in the West are using.⁸³ The material is then edited and mastered on PC-based

78 Best of the Best Television Programmes Market (BOBTV), held annually in the Nigerian capital Abuja (<http://www.bobtvinteractive.com/>).

79 Igwe 2006: 5

80 Künzler (2006: 12) gives an average of two million Naira (€13,000) in 2006.

81 Ukpabio 2007: 14

82 Künzler 2006: 9. Both Larkin and Künzler call advanced fee fraud aka *Nigerian scam* one of Nigeria's main currency earners (Künzler 2006: 15; Larkin 2004: 293)

83 Igwe 2006: 5

systems. Scriptwriters, actors, cameramen are all paid up-front. Once the product is finished, everybody in the creative process has been paid.

The finished movie is then transferred onto VHS cassettes⁸⁴ which are sold for €1.60. An estimated breakdown of the price shows that two thirds is for the blank tape, 22 percent for the film production, leaving a net profit of €0.20. Recently the market has started to shift to optical discs with players spreading among the urban middle-class. For producers, this entails a more expensive process and greater risk. If a retailer copied a movie onto 100,000 VHS tapes and sold only half of them, he would simply record another film onto the left-over tapes until all had gone. But VCDs are not reusable in case a retailer had overestimated demand.⁸⁵ A set of two VCDs is needed to hold a ninety minute movie which costs €0.35 to produce and retails for €2.50.⁸⁶

All figures relating to Nollywood are unreliable⁸⁷ but various sources based on the number of films reviewed by the National Film and Video Censors Board (NFVCB) indicate that production has been rising explosively. Allegedly in 1995, 205 Nigerian films were reviewed by the NFVCB. In 2000 the number was 712 and in 2005 more than 1,700 films produced in Nigeria were submitted to the NFVCB, compared to 934 produced that year in India and 611 in the USA.⁸⁸

New movies are released every Monday in the four principle wholesale markets Lagos, Onitsha, Aba and Kano. A few weeks earlier, the producer has put the trailers of the new releases onto national TV so audience demand has been created when the product arrives in the the shops and market stalls. For the largest market in Lagos, a number of sixty new titles per week is given for 2003.⁸⁹ One third of the sales price goes to the producer, one third to the distributor and the final third covers the marketing costs.⁹⁰ Producers make their money during the initial sale before the pirates fill in the remaining demand.

The buyers come from all over the country. Typically they are still consumer electronics dealers with offices in all the main markets. They serve as wholesalers from whom retailers across the country come to buy. From the retail points, sellers take the tapes in baskets to the

84 Even with the spread of optical disc players VHS is still the widely preferred medium because a defective tape will have dropouts but still play, whereas a VCD with a scratch will often not play at all.

85 Igwe 2006: 6

86 Igwe 2006: 12

87 Larkin (2004: 298) calls statistics on Nigeria „simulacral.“ The size of the GDP or even of the population is simply not known.

88 <http://www.nfvcb.gov.ng/statistics.php>; Künzler 2006. The actual number is higher because not all movies produced in Nigeria are submitted for review. Numbers for India and USA from Cahiers du Cinéma, Atlas du Cinéma, 2005.

89 Igwe 2006: 7

90 Nathan 2002

streets peddling them to people in their cars during the perpetual traffic jam of the big cities.

Sales figures vary widely. While for the early 1990s average figures of 100,000 copies were given, ten years later due to market saturation and increased competition including by pirates, an average film is said to sell 30,000 to 50,000 copies, and a top seller several hundred thousand.⁹¹ Igbo films produced in English or with English subtitles have the largest circulation, while Yoruba and Hausa produce primarily for their language audiences.⁹² For 2005 these figures would yield revenues of between €100,000 and several million Euro per film. According to Igwe the value of the local core-market in 2005 was four billion Dollars, excluding business in the West, and excluding business related to Nollywood magazines and music.⁹³

The Economist estimated the value of the films sold outside the wholesale centres at about the same as the legal sales. This money and that from films sold in other African countries mostly goes to pirates.⁹⁴ Igwe added that that should be multiplied by *twenty* taking into account the „supply problem“, i.e. piracy.⁹⁵

The television market is another source of revenue for Nollywood producers. The South-African direct satellite network MultiChoice established a channel dedicated to Africa called *Africa Magic*. It started out with exclusively Nigerian content. Within three months it was the most watched channel in Africa.⁹⁶ This in turn creates demand by terrestrial TV stations. „African television stations didn't have much of a choice. To run a TV station you had to go to Paramount and buy content. It was the only place to buy content in the world. Then this Nigerian thing showed up and people love it, and it's cheaper than everything else. It is culturally relevant, and they are not endangering their culture by watching Nigerian movies because we share commonalities, we share value systems.“⁹⁷

The early boom period of Nollywood is over. The market is consolidating and professionalising. In the beginning, very few people in the industry had formal training. Often the same person would write the script, produce, direct and play one of the roles in the movie. From 2003, task specialisation and training increased.⁹⁸ Professional associations for film producers, directors, camera-men and distributors like the Kano Cassette Sellers Recording and Co-operative Society Ltd. have been established. There are a number of specialised video magazines, festivals like the Abuja International Film Festival⁹⁹ and the African Movie Academy Awards (AMAA),¹⁰⁰ and trade fairs like the annual Best of the Best African Film

91 Haynes and Okome in Haynes 2000: 69

92 Künzler 2006: 12.

93 2006: 5 f.

94 Nollywood dreams. Nigeria's film industry, The Economist, 27 July 2006, http://www.economist.com/displaystory.cfm?story_id=E1_SNNGDDJ

95 Igwe 2006: 13

96 <http://www.africamagic.co.za/>; Igwe 2006: 11. Aderinokun (2004) indicates the number of subscribers in March 2004 at 1.5 million in Africa, Europe and the Middle East. Rupert Murdoch's British pay-television BSkyB followed with Nigerian programming.

97 Igwe 2006: 11

98 Künzler 2006: 7

99 <http://www.nffo.org/>

100 <http://www.ama-awards.com/> The African Movie Academy that is presumably behind the award was founded by lawyer Peace Anyiam-Fiberesima exclusively to stage the glamorous award ceremony (s. Dorothee Wenner who was a member of the jury of the AMAA in 2005, Das andere Afrika, Tagesspiegel

and TV Programmes Market.¹⁰¹ The international recognition is increasing as well. In 2004, Nollywood was featured at international film festivals like the ones in Berlin and in Rotterdam. Politics is starting to recognise the potential of the film industry for the country. Nigeria's president Olusegun Obasanjo mentioned the film industry in his 2004 budget speech and in 2006 appointed a panel to devise ways to intervene in the industry to help it grow further.¹⁰² The hope is that as a job creator and income earner it could one day match the oil industry, and as a cultural ambassador it could project an image of Nigeria that attracts tourists.

According to the NFVCB, about a million people are working in the Nigerian film industry, half of them in production, half in distribution, which would make it the second largest employer in the country after agriculture and before the oil industry.¹⁰³ Whatever that actual production, sales and employment figures, it is evident that Nollywood has become a major industry.

Strategies in markets for creative goods in the absence of copyright

A film industry that has its roots in piracy must itself expect to fall victim to it. „After a start-up financing by people involved in media piracy, the production is now mainly financed by the revenues generated.“¹⁰⁴ Domestic video producers now have something to lose.

One of the main culprits mentioned by most people in the business are the video clubs. In the beginning of Nollywood consumer electronics retailers who were either themselves film producers or kept business ties with them were the main outlets for video films. Igwe mentions that they had not responded fast enough to a changing market. The video clubs have taken over as the main outlets for pirate sales and rentals of copies they themselves produce. „This has created a lot of stress in the distribution system in Nigeria.“¹⁰⁵

„Piracy is an ambivalent phenomenon in countries like Nigeria. It is widely feared by indigenous film- and music makers as destructive of the small profits they make by way of intellectual property. It has had disastrous effects on indigenous music makers and contributes substantially to the erosion of the industry as a whole. Yet at the same time, many of these same people consume pirate media both privately and professionally.“¹⁰⁶

The Nigerian video film industry employs many of the same strategies as the book industry

5.07.2005, <http://archiv.tagesspiegel.de/archiv/05.07.2005/1915524.asp>).

101 <http://www.bobtvinteractive.com/>

102 The Economist, op. cit.

103 Künzler calls that figure exaggerated (2006: 12). A French film festival that in 2001 featured Nollywood gave a figure of 3,250 people working in the sector (21. Festival International du Film D'Amiens 2001, http://www.filmfestamiens.org/archives/2001_PANO_Nigeria.html)

104 Künzler 2006: 12

105 Igwe 2006: 6

106 Larkin 2004: 297

in 19th century USA to deal with a market for creative goods in the absence of copyright.

The main strategy is speed in distribution. New films earn their money in the first few days until the pirates catch up. Hence Igwe calls piracy „a supply problem.“ Demand has been created for a new movie, but if not enough copies are available or not at an affordable price, the pirates fill the gap. The response of the industry is to expand duplication capacities in order to be able to release new products in numbers that fill the demand, and to decentralise distribution so that new releases are available everywhere across the country. The shift from VHS to optical discs and from CD burners to pressing plants is considered crucial by Igwe for this strategy. According to him in mid-2006, there were 24 optical disc plants in Nigeria, and he expected the number to rise to seventy plants by the end of that year.¹⁰⁷

In order to gain control of the retail sector, Igwe together with his wife, film producer and director Amaka Igwe, set up Tmc BoxOffice to supply and distribute movies and music on discs through several thousand branded shops across Nigeria and beyond.¹⁰⁸ According to their market estimate out of a population of 150 million, about 20% have the economic resources to purchase and enjoy Nigerian movies and music. While long-term relations with retail stores might indeed improve returns on the products supplied to them, with 80% of the population not able to afford Nollywood movies, there remains a huge potential for continued piracy.

What the Igwes are doing on their own might also be achieved by cartellisation of the industry. This requires a trade community that honours nonlegal contracts and agreements. This exists to a degree in the Islamic north. Transactions between producers and marketers here are made on a commission basis. While in the wholesale markets in the south, the distributor pays the film producer up-front for the copies he takes, in Kano according to Larkin no money is paid to the producer until the film has been sold.¹⁰⁹ This leads him to speak of „a complex balance of credit and trust.“¹¹⁰

It was also here that one of the first trade associations was formed. After the promulgation of Shari‘a in Kano State in 2000, a ban of videos was discussed. In response filmmakers organised in the Kano State Filmmakers Association in order to negotiate with the government as an interest group. Also the Kano Cassette Sellers Co-operative attempts a self-regulation, e.g. by restricting the number of films released per month.¹¹¹

In other parts of the country cartellisation is less successful. When producers‘ associations in the south tried to deal with glut by limiting output for a time they found that it did not work because „copy cats make this self-limitation impossible to work.“¹¹² Also filmmaker Ukpabio complains: “Bringing people to form a particular professional body is very difficult here. There are always breakaways.”¹¹³

107 Igwe 2006: 12. In comparison, in South Africa there were five CDs plants in operation. Production facilities for DVDs were being built as well, among others by Igwe himself.

108 <http://www.bobtvinteractive.com/tmc/>

109 Larkin 2004: 301

110 Larkin 2004: 295

111 Larkin 2004: 301

112 Künzler 2006: 11

113 Ukpabio 2007: 8

The video film industry is characterised between an uneasy relation between the producers and the distributors who control the market.¹¹⁴ There have been struggles over their respective share of risk and profit. Larkin mentions that on at least one occasion, producers organised in the Kano State Filmmakers Association threatened to boycott distributors in order to increase the price of their products.¹¹⁵ In other cases producers try to cut out the middlemen altogether and get control of more of the chain of exploitation. The large distributors like Infinity Merchants often invest in the production of the films they carry, thereby claiming the copyright on the finished product.¹¹⁶ Says Igwe: „A company like mine, we own all of our system. So from everything we produce, we are guaranteed that we’ll receive 60 or 70% of our revenues all the way down. The thing is to keep control of what you are doing.“¹¹⁷

Price discrimination by added value and quality is another important strategy employed. Producers shrink-wrap cassettes and discs to prove it is an original copy, thus allowing them to build a reputation among consumers who may then decide whether to go for the cheaper but possibly defective pirate product or the original quality copy. They also include raffle tickets to encourage people to buy the genuine product.¹¹⁸

A peculiar system has emerged in several Nigerian markets where producers do not sell the finished products to wholesalers but a master copy of the film and several thousand printed covers for the tapes. The distributor then replicates the copies to be sold. The high quality of the original jacket prints make the products distinguishable at first glance from low-quality pirate reprints. Says filmmaker Ukpabio: “I carefully select where I print my jackets. I make an agreement with the man in charge, and after that anywhere I see the jackets of my video films, I hold him responsible. ... And I also allow him keep the photo-films that we use in producing the jackets because without the original photo-films, pirates may find it difficult to do a good job of pirating the video film covers.”¹¹⁹ „Intellectual property is vested not so much in the tape, which is the prerogative of the distributor, but in the jacket, which is created and controlled by the filmmakers themselves.“¹²⁰ This is a remarkable case where the older, Gutenbergian media technology is less piracy-prone than the electronic, analogue or digital, carrier of the actual information.

We have seen that foreign authors in 19th century USA earned significant amounts from readings and lectures. Similarly Nigerian film producers shift from product to performance. Larkin mentions that “videomakers often try to recoupe their expenses by arranging screenings at cinema halls all over the north before releasing the video for general sale.”¹²¹

The remaining cinema halls in Nigeria have become unsavoury places. With the success of Nollywood there is now a movement to restore them and build new ones. Up to 50 new halls were expected to operate in 2007.¹²² These high-priced multiplexes constructed by a

114 Ibid.: 5

115 Larkin 2004: 301

116 Nathan 2002

117 Igwe 2006: 8

118 Nathan 2002

119 Ukpabio 2007: 17

120 Larkin 2004: 301

121 Larkin in Haynes 2000: 230

122 The Economist, op. cit.; Haynes and Okome in Haynes 2000: 70.

multinational corporation cater primarily to the elites preferring imported films.¹²³ In this way also foreign film companies that had ceased distribution to Nigeria now benefit from the Nigerian film boom that piracy has helped to create.

Finally just as in the U.S. example, the Nigerian video film industry increasingly calls on government to increase copyright enforcement. „We have possession of our markets now and I think the government has now come to realize that there is real value in protecting that body of work and providing a system that allows who creates things to exploit what they have created profitably.“¹²⁴

The Nigerian Copyright Commission is the key government agency in this area. It employs ‚awareness raising‘ by creating slogans like "Pirates, Pack and Go" (PPG) and producing anti-piracy trailers showing special squads arresting pirates that are screened in video parlours and cinemas.¹²⁵ In 2005 President Olusegun Obasanjo himself launched the Strategic Action Against Piracy (STRAP) as a demonstration of this administration's commitment to the eradication of piracy.¹²⁶ In January of 2006, Loretta Njoku, then acting director general of the NCC mentioned a number of raids conducted mostly in Lagos, leading to the confiscation of DVDs, CDs, software and books worth several hundred million Naira each. But she also said that the pirates have become more sophisticated and their locations more prestigious, implying that people in high social strata are involved which makes them difficult to touch.¹²⁷ This clearly indicates that piracy is not going to go away soon.

Why in Nigeria?

Pirated foreign movies created the demand for VCRs and television sets. This led to the original accumulation of capital by electronics dealers like Nnebue that they could invest in film production. Piracy also established the networks of duplication and distribution that the Nigerian video film producers could then use. And it developed a market in the most populous African country with the economy of scale that was ready to soak up domestic video films. In a country where a third of the population is illiterate, films provide an important bridge between oral culture and contemporary media culture.

This situation, of course, is not unlike that in most developing countries. The question then arises why Nigeria is one of the rare cases to have brought forth a strong domestic film industry. Bollywood developed at the beginning of the 20th century in synch with the Western film industry. The audio-visual production in countries like Brazil and Egypt is based on television. In Ghana, in fact, video film production started even earlier than in Nigeria, in the late 1980s. The circumstances were very similar to the ones on Nigeria, with a strong theatre tradition and an extensive pirate market. Films produced in Ghana are in English allowing a wide circulation, and they were so popular as to replace foreign films. Different from Nigeria, government has even been promoting the industry. Censorship seems to be stricter in Ghana,

123 Künzler 2006: 15. See e.g. Silverbird Cinemas in a fashionable shopping-mall in Lagos (<http://www.silverbirdcinemas.com/aboutus.php>)

124 Igwe 2006: 11

125 Künzler 2006: 11

126 <http://www.nigcopyright.org/strap.htm>

127 Justin Akpovi-Esade, Pirates, pack and go! Copyright commission sign [sic] new song, Online Nigeria Daily News, January 22, 2006, <http://nm.onlinenigeria.com/templates/?a=6739&z=3>

but not so strict as to explain why a „Ghollywood“ has not yet emerged.¹²⁸ One preliminary explanation is that the Ghanaian production seems to have been overwhelmed by the flood-tide of Nigerian films. From about two dozen Ghanaian producers, making about fifty films a year, by 2002 there were only about ten active producers left. Even import restrictions against Nigerian films were attempted but failed.¹²⁹

According to Jonathan Haynes, the decisive factor for the Nigerian success was the same that led to the rise of Hollywood after World War I: economies of scale. „Like America, Nigeria has a huge domestic market. (Nigerian producers complain that their average sales have fallen to 20,000 copies, but Ghanaians sell a quarter as many.) A relatively large market permits relatively large budgets, which lead to relatively higher production values – better equipment, better acting from more professional actors, fancier sets and special effects, etc. Relatively higher production values mean it is easier to export, which leads to more profits and still higher production values, and soon one film industry can afford car chases while the other is stuck with domestic melodramas filmed in modest homes. What originally was a minor difference in quality becomes an unbridgeable gulf.“¹³⁰

Another important factor was the nearly complete lack of local audio-visual production. In other countries with a similar mix of ingredients there is an existing if small film and TV industry with film schools, public funding, international co-productions, film-festivals, professional organisations, and an active presence of production companies from the global north. To some degree this meets the hunger for local creative expressions. Pirates therefore have no incentive to invest in filmmaking. Filmmakers experience the same empowerment by digital technology to produce low-budget works as their colleagues in Nigeria but they have less of an incentive to try to ‚reform‘ the pirate infrastructure so as to yield returns because they have a chance of income from the official market, public funding, the art circuit and niches like the NGO market.

Media-technological timing certainly also played a role. All other factors being equal, without the historic shift from 35 mm celluloid to lower-cost video production equipment the development of a native Nigerian film industry would have been unthinkable. While the emergence of Nollywood remains somewhat of a mystery, the unique combination of a pirate-based technical infrastructure for film distribution and consumption, economy of scale and the nearly complete lack of native content decisively set Nigeria apart from other developing countries.

Brazil: Tecnobrega

As a last example for the beneficial effects of piracy on creative production we now take a brief look at a music culture in Belém, the capital of the North-Brazilian state of Pará. Tecnobrega is electronic dance music that just like Reggae and Hiphop has emerged from the periphery of society and traditional market. In the beginning it was excluded from radio and

128 Künzler 2006: 14

129 Wenner 2005

130 Jonathan Haynes, "Nollywood": What's in a Name?, The Guardian, July 3, 2005, <http://www.odili.net/news/source/2005/jul/3/49.html>

still has no chance to ever get produced by a major record company. Thus it had to find a distribution channel open to this music innovation: street vendors who otherwise sell pirate music or video CDs.

Tecnobrega is dance music played at aparelhagens, sound system parties taking place in the poor outskirts of Belém, the biggest of which attract more than five thousand people every weekend. “Aparelhagem” refers to the sound system equipment, the group of musicians and DJs operating it and the party itself. Technology is at the core of the aparelhagem phenomenon. They started in the 1950s. Rubi from the largest aparelhagem Tupinamba who is approaching 60 and is still with the scene says the parties were always huge with lots of lighting. In the 1980s, TV walls were the main attraction. In the 1990s technology escalated. The bass speakers became so strong that vinyl and even CD players would jump so the DJs had to switch to laptops. Today a party without lasers, hydraulic stage, smoke machines and other special effects will simply not attract an audience. There are about 400 aparelhagens of all sizes in Belem. The small ones play in bars or in the streets. Sometimes businessmen invest in the creation of a new sound-system.¹³¹

The Tecnobrega musicians record their music in a studio. The genre mixes a 1980s drum box beat with elements of the cheesy popular music of Pará called Brega and with pretty much any other kind of music past and present that the musician happens to like. It goes without saying that the rights for these samples are not cleared with their owners. In many cases the same person composes and records the music and performs it as a DJ during the party. He then gives the master recording to the street vendors, either directly or to intermediaries who compile collections of songs, replicate the discs and then provide the street vendors with their goods. Legitimate and illegal music CDs are equally sold at R\$3 (€1). No revenues from sales are flowing back to the artists. Composers and musicians do not explicitly release their works under a free license, but wide distribution is welcome as advertising for the live performances where Tecnobrega artists earn their living. The relation between musicians and vendors is genuinely convivial.

The Party organisers hire the aparelhagens who set up their own equipment and play the show. Organisers make their money from the entrance fee and from selling drinks and merchandise like T-shirts. The bands also sell their own CDs and DVDs at the parties, sometimes also live recordings of the set the audience has just heard, at a premium price.

More than 400 new CDs are released in that way every year writes Ronaldo Lemos, the director of the Center for Technology & Society at the Fundação Getulio Vargas Law School in Rio de Janeiro.¹³² „During the interviews conducted by the Open Business project, some artists mentioned that they had previously tried to market their music through traditional channels, and they know that it has become impossible to make money through recording contracts and CD sales in today’s market. The Open Business tecnobrega research indicates that 88% of all artists on the scene have never had any contact with record companies.“¹³³

Tecnobrega has become a significant economic factor in the poor state of Pará, moving about

131 Personal communication, November 2005.

132 Lemos 2007: 36

133 Lemos 2007: 40

US\$5 million a month through Belem's economy, according to the study directed by Lemos.¹³⁴ The main strategy of dealing with an environment without copyright enforcement in this case is performance over product. This is complemented by price discrimination where the discs sold at the parties by the bands themselves have a added experience value over comparable products sold by the pirates.

Legalising small-scale physical copyright piracy

The point is not to give the people in the Third World more but to steal less from them.
(Jean Ziegler, Empire of Shame)

To summarise my arguments so far: I started from the premise that copyright piracy is intrinsically linked with media markets and that therefore public policy must strive to strike a balance between its benefits and its harms. My goal was then to work out the beneficial effects of piracy for various parties involved. As the examples of book publishing of foreign works in 19th century USA, of the development of the Nigerian video film industry and the north Brazilian dance music sector have shown the benefits are significant.

Piracy allows audiences who are reached by advertising for global culture products but cannot afford them to participate in the global information society. The buyers are not ideological. If their options are to see a movie through pirate means or not see it at all, the choice will be easy. Readers in the U.S. got access to foreign books, viewers in Nigeria to foreign films, listeners in Brazil to a wide range of music, and all eventually were able to perceive a wealth of native expressions whose emergence was aided by piracy.

Publishers and producers were able to benefit from the original accumulation of media capital, infrastructure and market achieved by piracy. They managed to create a market for creative goods in the absence of (enforceable) copyright law. The strategies they employed include a race to be first on the market, price discrimination by quality and added value, cartellisation and trade rules, and performance over product. Such mechanisms of informal copyright have recently gained considerable interest in the academic debate.¹³⁵

Native authors as well benefit from the infrastructure and the economy of scale achieved by piracy. The connection between reception and creation of cultural works is worth further exploration. While the link between reading and writing any media format is obvious in the

134 'Brega' sound turning industry on its ear, CNN, 19 October 2007,

http://edition.cnn.com/2007/TECH/10/19/brazil.tecnobrega.ap/index.html?eref=ib_technology

135 Fauchart & von Hippel 2006, Loshin 2007. Another example is television formats which in Germany are not protectable by copyright but are nevertheless traded as if they were property (see BGH, Urteil vom 26.06.2003; ger. Az.: - I ZR 176/01, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=26713&pos=4&anz=18>; press release on this decision: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&anz=18&pos=4&nr=26381&linked=pm&Blank=1>. It is also remarkable in this context that the highest profit margins in book publishing today are derived from reprints of out-of-copyright classics.

process of enculturation in general, more empirical evidence is needed in the context of piracy. Lawrence Liang, head of the Alternative Law Forum Bangalore, has observed that the changing dynamics in pirate markets in China and India has recently led to the availability of films not only from Hollywood but from other cultures, independent films, art-house, documentaries and experimental films. This in turn has inspired thousands of people in China to line up to join art schools. He cites a Chinese curator saying: “When you can buy Tarkovsky for a dollar, you will obviously produce many more artists”. Liang's conclusion: “It is only a matter of time before young people inspired by the new cinema that they see via the grey market fancy taking a shot at becoming the next Jonathan Caouette.”¹³⁶

This is, in fact, what has happened in Nigeria. Both creatives and audiences have a desire for local cultural expressions that is excluded from official media. As Charles Igwe had explained the success of the first Nollywood movie: It was a story „being told by our people to our people. ... What is most important is that movies aren't just business, they are cultural expression.”¹³⁷ The observation of the crucial role of local demand for local expression disproves the idea of a global levelling of differences through dispersion of hegemonic culture industry products. There is certainly a flow of U.S. American, Indian, European, Japanese, and Chinese movies and music that reaches the most remote corners of the planet. But it leaves something to be desired. There is a *genius loci*, that cannot be absorbed in globality, a linkage of place, language, ethnicity, religion, stories, songs that is permeable to outside influences but creates a density of interactions out of which new cultural forms are born, forms for which there is no space either in multinational culture industry nor in its pirate double and that are able to bring forth and sustain a local environment for cultural expression.

Foreign authors were able to obtain payments from the U.S. printers. Foreign film companies are now able to derive profits from Nigeria after multiplexes for the middle-class are emerging from the film boom that Nollywood has created. Foreign bands playing in Brazil could, just as their Tecnobrega colleagues, utilize the street vendor networks for advertising their shows.

For the pirates themselves, of course, piracy is profitable. Pirates are not ideological. They are business people like any others. They take whatever opportunity arises to match demand with supply, following a purely economic logic.¹³⁸ They could not care less whether they are selling Hollywood or Nollywood movies, Microsoft or free software. If street vendors were not marginalised by illegality cooperations could develop for the distribution of Wikipedia, AIDS information and other educational materials.¹³⁹

From a public policy perspective, nurturing cultural innovation and diversity is a value by itself. Major economic growthh approaching that of the largest industry – in Nigeria

136 Liang 2006

137 Igwe 2006: 5

138 What they do not do is marketing. They do not create demand beyond the immediate presentation of what they have to offer. They do not have to. The original provider of the information has always already done that.

139 Media activists in Sao Paulo were talking to street vendors to get them to sell free software (personal communication, Alexandre Freire, 6/2005). In Ethiopia there was a campaign launched by musicians who are harmed by piracy to get street vendors to differentiate between foreign and domestic content playing out nationalist sentiments (personal communication, Eddan Katz, 11/2007).

Nollywood is said to be second to the oil industry, in Belém Tecnobrega is said to be second to the rubber industry – is another positive factor. Piracy itself and the original creative expression it supports creates jobs, and even if the pirates do not pay taxes, by spending their earnings they do contribute to the overall economy.

On the negative side of piracy the main problems arise from the fact that the activity is illegal, and therefore more profitable than if it were not. The claim that piracy attracts organised crime seems plausible. This means that people in money laundering, the trade in arms, drugs and trafficking in human beings get involved in copyright infringement. This introduces a culture of violence and sets up new forms of serfdom, especially of the street vendors.

Illegality draws police repression onto piracy. The street vendors are the most exposed and vulnerable link in the system. They are most affected by the raids. If they receive their goods from organised crime groups on commission, confiscating their goods only serves to drive them further into slavery. They are also the most dispensable for the piracy trade. Even if they are imprisoned, there are numerous others to fill their place. The big guys in the big business of piracy, just like in any other business, rarely if ever get caught.

If copyright piracy has such significant advantages for access to knowledge and creative works as well as for creativity and innovation, and the negative sides arise from its illegality – why not simply legalise it?

A remarkable precedent of drawing a line between activities deemed tolerable by society and those that cause serious harm is the *de facto* if not *de jure* legalisation of soft drugs in the Netherlands. The pragmatic policy rationale behind it is that when a wide-spread practice cannot be eradicated it should be permitted and controlled rather than continuing attempts to suppress it. Where it ever was the case that hard and soft drugs were dealt in the same scene, the official sanctioning of marijuana (plus a realistic and meaningful policy towards users and importers of hard drugs) effectively served to separate the two.¹⁴⁰ It also creates legal and taxed jobs in coffee shops and youth centres and, not the least, a tourist attraction. The same can be seen with respect to prostitution. Where it is legal, sex service work is removed from the culture of violence and slavery that illegality breeds and becomes a regular profession with rights and entitlements and duties like paying taxes.

„In fact, the easier it is to copy music, the less of a threat piracy will become. When piracy gets easier, professional pirates have less to offer. The only ‚pirates‘ left will be fans. The real question should not be, ‚How can I keep my fans from hearing my music for free?‘ It should be, ‚How can I best make money from my fans?‘“
(Jaron Lanier, *Piracy is Your Friend*, 1999)

Legalising small-scale physical reproduction and sales of works without permission from and compensation to their creators would have the same beneficial effects. If anybody who can afford consumer-grade copying equipment would be permitted to sell copies, piracy would become unattractive to organised crime. Especially if there is the slightest chance of some

140 Drug Policy Alliance: The Netherlands,
<http://www.drugpolicy.org/global/drugpolicyby/westerneurop/thenetherlan/>

truth to the claim that copyright infringement funds terrorism then certainly drastic and novel measures like legalising piracy are called for.

It would remove power relations and violence in the business. It would create respectable jobs, offering a real service to audiences, even if street vendors would not start keeping books and paying taxes overnight. One could imagine people taking out Grameen-style micro-loans to buy two VCRs or a CD burner and start a family replication business. Their micro-marketing would reach audiences who have never been served with information and culture goods before, taking them as far as no commercial distribution network was able to or cared to reach. It would be in their self-interest to do micro-market research to ensure that their information services would meet the needs of their local customers, again something no commercial mass marketing could ever achieve. Most of all such a replication and distribution infrastructure would provide a fertile ground for the emergence of new original forms of creative expression.

As Khan and Lessig have indicated the relation between pirate and non-pirate business models depends on economic and social development and the state of development of a given media technology. One can therefore expect de-criminalised piracy to be naturally transitional. With a growing middle-class the number of people who can afford books, music and movies at a price that includes remuneration of the artists and their service-providers rises. If not out of respect for the creatives, they would buy the official product because they want the full set of features that burned VCDs lack, they will want a booklet and not just a photocopied cover, and rather than in the streets they will want to buy in the stylish atmosphere of a shopping mall. This self-selection by consumers is at the base of the price-discrimination by quality, reputation and added value found in all three cases discussed.

Furthermore, once original forms of creative expression arise aided by the infrastructure of legalised piracy their actors will likely start calling for a meaningful level of copyright protection. This was the case in both in the U.S. and the Nigerian examples but so far there is no indication for such calls from the Brazilian Tecnobrega world where money is earned not by sales of product but purely by performances. If creators feel that they are harmed by one form of piracy or other they voluntarily have an incentive to call for and recognize an adequate level of copyright. This situation would be very different from today where strong copyright rules are imposed on developing countries from outside.¹⁴¹ It is also possible that a stable situation arises where the poor by means of legalised piracy serve the poor while the middle- and upper-class sustain the production of creative works.

You will have noticed that the proposal for legalising piracy does not imply abolishing copyright altogether and it contains three caveats. It refers to copyright matter only. Needless to emphasise that the issues are very different for medicine, car parts and other forms of non-copyright counterfeit products. Second, it refers to physical piracy in the form of books, analogue tapes and optical discs that can be replicated with readily available technology and that is a relevant means for providing access to knowledge until the Internet becomes widely available. With the Internet the issues become quite different and call for different solutions

¹⁴¹ Alford (1995) argues that Taiwan has successfully integrated international intellectual property laws because these rules were endogenously adopted as a result of internally-generated domestic political and economic changes. He contrasts these policies to China, where Western institutions were externally imposed with little regard for the local culture and conditions.

outside the scope of this paper.¹⁴²

The third caveat is that legalisation should be restricted to small-scale piracy. Where to draw the line between small and not so small-scale? For optical discs there is a clear difference between burning and pressing. While the former uses consumer technology the latter requires industrial plants and capital investments on an industrial scale attracting organised crime. While there are millions of burners in Nigeria there are only four mastering facilities and 15 optical disc plants.¹⁴³ These should be fairly easy to control. Also cleanroom technology, stampers and raw materials required for the process could be controlled at source.

Could it be justified?

Assuming that legalising small-scale physical copyright piracy would be beneficial could it be justified? Lessig has clearly pointed out that the record industry, radio and cable TV originated in piracy. But when discussing commercial piracy he unambiguously opposes it. While in case of those forms of piracy he finds defensible he devotes several pages exploring origins and individual cases, weighting arguments of both sides, here he spends not even seven lines on laying out what commercial piracy is. He refers to businesses especially in Asia and Eastern Europe that without permission take other people's copyright protected content, copy it and sell it, and he simply quotes the recording and the movie industry with the billions of Dollars they claim to be losing that way every year. He does not differentiate between small- and large-scale piracy and summarily declares: „This piracy is wrong.“¹⁴⁴

He does make somewhat of an attempt to discuss three justifications offered in defence of piracy. „We could, for example, remind ourselves that for the first one hundred years of the American Republic, America did not honour foreign copyrights. We were born, in this sense, a pirate nation. It might therefore seem hypocritical for us to insist so strongly that other developing nations treat as wrong what we, for the first hundred years of our existence, treated as right.“¹⁴⁵

This observation is crucial to every debate on copyrights and development but strangely enough Lessig's refutation is strictly formalistic. Technically, he writes, the American law at that time did not ban the taking of foreign works while the laws in Asian countries do ban it today. He even goes on: „True, these local rules have, in effect, been imposed upon these countries.“ Again, a fact that every realistic evaluation of the copyright environment has to critically take into account. Lessig has been involved in law reforms in East European countries after the end of the Cold War, so he has seen first hand the forms of coercion applied to sovereign states. Still his response is strictly formalistic: „If a country is to be treated as a sovereign, however, then its laws are its laws regardless of their source.“¹⁴⁶

He does mention the flexibilities in international copyright law, and writes: „In my view,

142 Lessig suggests that “we should be securing income to artists while we allow the market to secure the most efficient way to promote and distribute content.” (2004: 78). For a proposal on a flat-rate compensation for legalised peer-to-peer file-sharing see also Grassmuck 2008.

143 According to the IIPA 2008 report on Nigeria, <http://www.iipa.com/rbc/2008/2008SPEC301NIGERIA.pdf>

144 Lessig 2004: 63

145 Ibid.

146 Ibid.: 64

more developing nations should take advantage of that opportunity,¹⁴⁷ but only to continue: „but when they don't, then their laws should be respected.“¹⁴⁷ International treaties like TRIPs do grant some small manoeuvring space to developing and least developed nations but Lessig makes it very clear that in his opinion „local rules“ may not deviate too far from the global, one-size-fits-all rules imposed by his nation: „No country can be part of the world economy and choose not to protect copyright internationally. We may have been born a pirate nation, but we will not allow any other nation to have a similar childhood.“¹⁴⁸

Ben-Atar said this on this issue: „When I say, America is the first original pirate of technology, ... they say: but there were no international agreements then, so it was OK. These are good arguments to lawyers, but they sound disingenuous to me. It's like the immigrant who comes off the boat and says those after me are really bad, let's not allow them in.“¹⁴⁹

The second argument in defence of piracy Lessig discusses is that it does not harm the copyright industry. „The Chinese who get access to American CDs at 50 cents a copy are not people who would have bought those American CDs at \$15 a copy. So no one really has any less money than they otherwise would have had.“¹⁵⁰ He does grant some truth to this statement but again wipes it off with a formal argument: „However, although copyright is a property right of a very special sort, it *is* a property right.“ And as with every property right, the owner gets to decide. Therefore piracy is wrong „even if the wrong does no harm.“ He even mentions the principle of balance in property rights but at this point only in the form of a condition: „If we have a property system, and that system is properly balanced to the technology of a time, then it is wrong to take property without the permission of a property owner. That is exactly what ‚property‘ means.“¹⁵¹ What exactly ‚property‘ means and what constitutes this evasive quality of a ‚proper balance‘ is at the heart of Lessig's work. But here he does not raise the questions and takes the dogmatic answers of the law for granted.

The final argument he discusses is that piracy actually helps the copyright owner. Chinese stealing Windows become dependent on Microsoft and over time will buy the software. Economic research provides quite a bit of evidence to support this rational. Lessig's response is the same as to the previous argument: It is property and therefore only Microsoft gets to decide.

Lessig's conclusion on commercial piracy opens the way for other forms of infringement that he does find defensible: „This kind of piracy is rampant and just plain wrong. It doesn't transform the content it steals; it doesn't transform the market it competes in. It merely gives someone access to something that the law says he should not have.“¹⁵²

At this he moves on to the „many kinds of ‚piracy‘ [that] are useful and productive.“ His foremost example of this „piracy“ (now placed in between quotation marks) is peer-to-peer sharing. His approach here is very different than in his discussion of commercial piracy. „We must determine whether and how much peer-to-peer sharing harms before we know how

147 Ibid.

148 Ibid.: 63 f.

149 Ben-Atar, personal communication, 23.11.2005.

150 Ibid.: 64

151 Ibid.: 65, emphasis added

152 Ibid.: 66

strongly the law should seek to either prevent it or find an alternative to assure the author of his profit.¹⁵³ Where before he did not admit economic arguments – actual harm is irrelevant because property is property –, here he takes it as his starting point.¹⁵⁴ Where before he took the law and its balancedness as given in order to condemn piracy, here he asks what the law should do in order to strike the right balance.

„For (1) like the original Hollywood, peer-to-peer sharing escapes an overly controlling industry; and (2) like the original recording industry, it simply exploits a new way of distributing content; but (3) unlike cable TV, no one is selling the content that is shared on peer-to-peer services. These differences distinguish peer-to-peer sharing from true piracy. They should push us to find a way to protect artists while enabling this sharing to survive.“¹⁵⁵

Let us test our three example cases against these criteria: (1) The MPAA had stopped all legal distribution to Nigeria. Even if consumers were ready and able to pay the price they would have asked, Hollywood movies were simply not available. Therefore piracy clearly served to escape an overly controlling industry. The same argument holds that Lessig gives for works shared in peer-to-peer networks that are no longer sold by their rights holders: „This is still technically a violation of copyright, though because the copyright owner is not selling the content anymore, the economic harm is zero.“¹⁵⁶

(2) Dubbing VHS tapes and selling them in the streets might not have been a new way of distributing content per se but it was certainly new for Nigeria, and it brought content to people that was not accessible otherwise. Different from peer-to-peer sharing one could not even argue that a copy bought in the street is a lost sale in the store. More important, the infrastructure for distributing pirate videos created the incentive to produce new works, not transformed works like fan dubs or mash-ups, but original works, a whole new genre and a whole new industry. Does this positive cultural and economic effect justify the original sin of piracy from which it was born?

(3) Like cable TV, the VHS cassettes available in the streets of Lagos and the Tecnobrega recordings in Belém are indeed sold. But is it really the content that is sold or rather the service of duplicating and making it available? Competition drives prices in pirate markets down close to marginal cost, i.e. to little more than the price of a blank tape. In Germany, beneficiaries of the private copying exception can ask a library to make copies for them, for which the library copy shop asks a fee. It does not sell the content, it sells the service. Indeed, cable TV operators argued that they were not selling the content but the service of making content available. Lessig himself mentions used book and record stores that do make money

153 Ibid.: 66 f.

154 Compare e.g. this statement to the arguments in principle that Lessig brought against commercial piracy: „If the record companies sold more records through sampling than they lost through substitution, then sharing networks would actually benefit music companies on balance. They would therefore have little *static* reason to resist them.“ (Ibid.: 70)

155 Ibid.: 66

156 Ibid.: 68

from the content they sell without paying the author. And also some providers of peer-to-peer services are making money, either through advertising or through subscriptions. True, the bulk of transfers in peer-to-peer networks is done not by commercial enterprises but by individuals who contribute their own resources (hardware, bandwidth). The same can be said of small-scale piracy, i.e. individuals who own two VHS recorders or a disc burner with which they produce a small number of copies that they sell for the price of the recordable medium plus a fee for their service.

„Thus, consistent with the tradition that gave us Hollywood, radio, the recording industry, and cable TV, the question we should be asking about file sharing is how best to preserve its benefits while minimizing (to the extent possible) the wrongful harm it causes artists. The question is one of balance. The law should seek that balance, and that balance will be found only with time.“¹⁵⁷ While agreeing with Lessig on industrial-scale piracy, this paper is attempting to find answers to these questions with respect to small-scale piracy.

The main arguments in its favour have already been presented. Two questions remain to be asked. Why should authors or rather the copyright industries from the North be made to pay this kind of development assistance? This raises the counter question: Why should their products be treated any different than local creative works like Tecnobrega music or Nollywood movies? The national treatment principle stipulated in the Berne Convention¹⁵⁸ should mean that Robby Williams must compete with Tupinamba in the same national environment on local terms. In fact it is made to mean that U.S. national law is forced onto every sovereign state on the planet.

One could point to the U.S. itself that until 1891 by not recognising foreign copyrights unilaterally claimed development assistance from European nations. In the mid-19th century Britain officially instituted an expropriation of its domestic authors as a form of intellectual development help for its colonies.¹⁵⁹ One could generally mention the centuries' long plunder of the South, a guilt for which the North is now repaying with the best (and unfortunately also the worst) it has to offer: information, knowledge, culture. In fact, those who are screaming the loudest likely have the least to lose. As our examples have shown: people in the U.S. most of all wanted to read U.S. authors, people in Nigeria primarily want to watch Nigerian movies, people in Brazil primarily want to listen to music rooted in their own culture.

And finally: could it be done? No and yes. Most countries have bound themselves to international instruments like the Berne Convention and TRIPS that would prevent them from permitting piracy.¹⁶⁰ The Dutch example again points to a solution. The Netherlands are

157 Lessig 2004: 73

158 „Works originating in one of the contracting States (that is, works the author of which is a national of such a State or works which were first published in such a State) must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals (principle of "national treatment")“ http://www.wipo.int/treaties/en/ip/berne/summary_berne.html

159 “Britain administered a two-tiered international intellectual property system that attempted to address the needs of its colonies. In 1847 Britain passed the Foreign Reprints Act which allowed colonies to import the works of British authors without copyright protection, and also allowed legal price discrimination with significantly lower prices for overseas editions.” (Khan 2007: 30)

160 The Berne Convention in its appendix does contain special provisions regarding developing. Under narrowly confined conditions it grants exceptions to the rights of reproduction and translation of literary works and audio-visual fixations but only for use in connection with systematic instructional activities and providing a just compensation to the owner of those rights

member of the international drug control treaties. Therefore it keeps its anti-drug laws on the books while limiting enforcement to certain offences. Technically cannabis is still illegal but factually the country benefits from its decriminalisation. A similar arrangement could be found for de-criminalising small-scale piracy.

The comparison to drugs remains instructive. In March 2007 the Bolivian Coca Commission that was deliberating proposals for the new Bolivian constitution decided to seek a ban on the use of the word ‚coca‘ by a multinational soft-drink company. Bolivia is not allowed to market its leaves and herbal teas. Bolivian coca farmers were pointing to national cultural tradition, a principle that is carrying much weight in the debate over global harmonisation of copyrights. Bolivians use coca as medicine and in religious ceremonies and want to have the significance of the holy leaf written into the constitution as a „renewable, economic and strategical crop resource.“ Bolivia’s President Evo Morales had already announced that coca growing will be extended in 2007 from 12,000 to 20,000 hectares. For the former head of the union of coca farmers, cocaine consumption is a problem of the industrialised nations, and that is where it should be solved. „For us, coca is part of the culture and the national identity.“¹⁶¹ In the same sense every current and former developing country could convincingly argue that piracy is part of its tradition and the problem that industrialised nations have with it should be solved there.

Legalising small-scale piracy would achieve a short-term relief for street vendors from the effects of criminalisation, a mid-term effect of establishing an infrastructure of media distribution that the market has fails to create in Nigeria and in many other developing countries, and a long-term effect of nurturing domestic cultural production that can then serve to convert the pirate networks and compete in the international arena on truly equal terms with the cultural products of the North.

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