

DOCTRINE AND OPINIONS

THE PERSISTENCE OF PIRACY: THE CONSEQUENCES FOR CREATIVITY, FOR CULTURE, AND FOR SUSTAINABLE DEVELOPMENT¹

Darrell Panethiere

1. INTRODUCTION

It is a maxim of the law in many countries that a right without a remedy is, in effect, no right at all. This is well-illustrated in the field of intellectual property where authors and other rightsholders are so often unable to enforce the rights which the law gives to them. This in a nutshell is the problem of piracy. The rights of authors, performers, publishers, broadcasters, and many others whose livelihoods depend upon the recognition of rights in intellectual property, particularly of copyright, are too often ignored by persons intentionally, deliberately, and systematically attempting to profit from the creations of others. In a field as complex as that of intellectual property, it is no doubt true that some people do not fully understand the rights of others, and thus may at times negligently infringe copyright. But piracy, properly understood, derives entirely from a wilful determination not to respect those rights.

A leading expert in the field of intellectual property has elaborated in the following terms: "To some persons the term 'piracy' may have a slightly romantic connotation conjuring up visions of swashbuckling Caribbean buccaneers; but there is nothing romantic nor swashbuckling about the pirates of intellectual property. They are criminals, usually operating on a large and organised scale, engaged in the theft of the products of other peoples' talents, skills and investment."² Since this quotation was published, in 1992, the problem of piracy has only grown and has been understood as a worldwide phenomenon often involving the most advanced forms of organised crime. In addition, piracy has in the past decade revealed an entirely new aspect through its emergence and unprecedented growth over the internet.

The problem of piracy has attracted repeated and sustained attention from government policy makers and from law enforcement officials. Treaties and international agreements, implemented in national law, have focused on its elimination. UNESCO in particular has

¹ This study was prepared by Mr. Darrell Panethiere at the request of UNESCO Secretariat for the 13th Session of the Intergovernmental Copyright Committee. Darrell Panethiere is Attorney at Law (Member Illinois Bar; US Supreme Court Bar). Former Chief Counsel, Intellectual Property, US Senate. The opinions expressed in this study are not necessarily those of UNESCO Secretariat.

² D. de Freitas, "Piracy of Intellectual Property and the Measures Needed to Counter It," UNESCO *Copyright Bulletin*, Vol XXVI, part 3 (Paris: 1992), p. 7. (Intergovernmental Copyright Committee, 10th Session, 1995). See: <http://unesdoc.unesco.org/images/0010/001014/101440e.pdf>

long recognised that the rights of authors and artists are jeopardized by the spread of piracy and that measures to prevent piracy were crucial. This for the reason that, "Cultural industries - including books, audiovisuals and multimedia - generate jobs, income and revenue and are at the same time a central vehicle for promoting cultural diversity at local and international level."³ While the full eradication of piracy may not be achievable, it is possible that its worst effects be limited or neutralised.

1.1. Piracy defined

In its usual sense, 'piracy' refers to the activity of manufacturing unauthorised copies ('pirate copies') of protected material and dealing with such copies by way of distribution and sale."⁴ The rights of authorisation infringed by those who make and deal in pirate copies are the rights of authorship generally protected by copyright, as well as the rights of ownership, particularly in the case of sound recordings, which are generally protected by neighbouring rights regimes. In its wider sense, and as often spoken of in the popular press, "piracy" may also refer to acts of "bootlegging" (the making of an unauthorised recording of a live performance) and of "counterfeiting" (selling works made to resemble a genuine copy, as by replicating the label, the packaging, or the recording itself).

1.1.1. Internet piracy

Traditional definitions, particularly as embodied in national criminal codes, generally view piracy in the context of acts intentionally committed with the goal of obtaining a commercial advantage of some kind. More modern formulations, however, recognise that the essential *sine qua non* of piracy consists in significant damage to the interests of those rightsholders whose protection is the aim of intellectual property regimes and that this damage increasingly is sustained by conduct with little or no commercial motivation. Thus it has already become common to see acts of unauthorised distribution of protected works over the internet, such as occurs on a massive scale in the context of peer-to-peer file sharing, termed "piracy", even if an economic motive for the rights violation may not be present. This is appropriate. Infringement of IP rights occurs when the prohibited act, whether of unauthorised copying, distribution or public performance, occurs. Considerations of intent or commercial gain generally go to the issue of appropriate damages rather than having relevance to liability.⁵ When the interests of rightsowners are impacted to the degree that unauthorised copying over the internet has already affected creative industries around the world, then it is no doubt appropriate to speak of this conduct as "piracy."

³ UNESCO, Approved Programme and Budget, 2004-2005, at 201 par. 04321 *et seq.*

⁴ J.A.L. Sterling, *World Copyright Law*, London, 1999, art. 13.12.

⁵ D. Panethiere, "The basis for copyright infringement liability: the law in common law jurisdictions," [1997], *European Intellectual Property Review*, Special Report 15, at 15.

2. THE EXTENT OF THE PROBLEM

That piracy of goods embodying intellectual property is an enormous worldwide problem cannot be denied. The only significant difference of opinion among those who have studied the issue relates to the extent of the problem. But even here there is a remarkable agreement. The World Customs Organization, for example, has found in its most recent survey that around 5% of all world trade is trade in pirated goods. The European Commission has, in similar terms, concluded that between 5% and 7% of world trade depends on piracy, representing 200 to 300 billion euro in lost trade. Surveying the same terrain, OECD puts the estimated loss to world trade as somewhere in excess of 5%.⁶ Other international organisations, industry associations, and non-governmental organisations have published estimates in the same range.

Another measure of the extent of the problem can be seen in the number of job losses directly attributable to piracy. These have been estimated at 120,000 a year in the United States of America and over 100,000 in the European Union (referring to the 15 member states, constituting the EU pre-2004).⁷

2.1. Piracy of cultural goods embodied in physical carriers.

2.1.1. Music

The piracy of recorded music embodied in physical carriers - primarily of CD's, but also in many territories of cassettes - continues without let-up. And despite widespread press attention to the newer phenomenon of internet piracy, commercial piracy in its traditional form continues to be an important, and in some territories, a growing problem. In its most recent report summarising the extent of the problem, the International Federation of the Phonographic Industry (IFPI) estimates that commercial piracy of physical formats in the year 2003 accounted for US \$4.5 billion in illegal sales worldwide. This compares to an estimated global loss the previous year of US \$4.6 billion⁸, and of US \$4.3 billion in 2001.⁹ In 2003, more than one in three CD's sold in the world were pirate products. If music cassettes are considered, the figure is even higher, as the IFPI estimates that piracy now amounts to 40% of all music products sold worldwide.

But in measuring the full economic effects of the piracy of music, it is necessary to look beyond just the losses of phonogram producers. There are in addition the recording artists, from all over the world, whose principal source of income is derived from the royalties that these sales, had they been legitimate, might have been expected to produce. In addition, a significant percentage of this lost income would have gone to the music publishers, and the songwriters and composers they represent, as all of these illegal CD's

⁶ K. Idris, *Intellectual Property: A Power Tool for Economic Growth*, Geneva, 2001, at 301.

⁷ Idris, *supra*, at 301.

⁸ IFPI, *Commercial Piracy Report 2003*, London, 2003.

⁹ IFPI, *Music Piracy Report 2002*, London, 2002.

and cassettes embody the unauthorised mechanical reproduction of copyrighted songs and other compositions. Secondary to these direct losses are all of the other consequential losses that piracy inevitably triggers: loss of employment opportunities in recording studios and retail stores, as well as losses from all of the other ancillary industries which contribute to the music industry, such as graphic artists and musical editors, video and film support, and marketing, promotional, and advertising experts. A knock-on effect on live music and touring can also be expected, particularly in high piracy territories, as recording companies have less incentive to develop and promote touring opportunities where no incremental effect on legitimate sales can be expected. Indeed, investment of all kinds that would traditionally have been devoted to developing and marketing new music and new sound carriers is strangled by the spectre of piracy. The music business is a risky enough enterprise even in the most secure of territories - but when the spectre of piracy is added on top of all the other variables, it is not surprising that investors migrate to safer industries.

The reasons for the persistence of such a high level of commercial piracy of music, despite some significant gains in enforcement in key territories, are various. One significant factor is the rapid spread of CD-R burners. This is coupled with continuing increases in the duplication speed that CD-R burners are capable of. It is now, for example, possible to make a new copy of a standard 74 minute disc in just over three minutes. Another factor is the rising global overcapacity for the manufacture of legitimate discs. While this factor affects the piracy of film and computer software products as well, its impact is perhaps felt most strongly in the music sector. IFPI estimates that there are now approximately 1,040 optical disc plants worldwide, 300 of them coming online in only the past four years, despite declining legitimate markets for their products.¹⁰

2.1.2. Films

It is estimated that the U.S. motion picture industry loses in excess of US \$3 billion annually in potential worldwide revenue due to commercial piracy, without even taking into account losses from internet piracy.¹¹ The losses suffered by the film industries of all the other nations of the world are, in aggregate, likely to amount to a further US \$1 billion in losses every year to the local economies of countries such as India (which has the world's largest film industry), as well as Japan, Egypt, and many other countries which have established film industries.

With regard to online piracy losses, losses of an additional US \$ 850 million for the year 2004 have been estimated.¹² One in 5 European households already has a broadband connection sufficient to send music and audiovisual files over computer networks.¹³ As broader bandwidth capacities are developed for consumers around the world, the losses attributable to online piracy are certain to grow considerably.

¹⁰ *Id.*

¹¹ Source: Motion Picture Association of America; see: <http://mpaa.org/anti-piracy/> .

¹² See, W. Triplett, 'Online pic pirates face more lawsuits,' *Daily Variety*, 24 February 2005.

¹³ Keith Jopling, Director of Market Research, IFPI, quoted in 'Broadband boosts music piracy,' *The Australian*, 8 February 2005.

A look at specific countries reveals problems on an enormous scale. China already generates US \$2.3 billion annually in video revenues (there are more than 100 million video and DVD players in Chinese homes), while box office receipts from motion picture exhibition equal only US \$300 million. And, according to film industry sources, only around US \$400 million of this multi-billion revenue is spent on legal product.¹⁴ In Russia alone the US film industry is said to have lost more than US \$500 million in 2004.¹⁵ Comparable figures have been reported for Brazil. Between 1998 and 2002, economic losses to the US motion picture industry due to audiovisual piracy in Brazil were estimated at US \$605 million.¹⁶

But film industry losses from piracy are not a problem only for the major US studios. Thousands of Bollywood DVDs and CDs are sold in the UK annually, yet it is estimated that at least 4 out of 10 (and some would say as many as 7 out of 10) of these are pirate products.¹⁷ That is a far higher average of piracy in the UK, than is experienced by Hollywood movies or other western DVDs.

2.1.3. Software

In the field of computer software, the value of losses to the economy of developed and developing countries alike is immense, far greater even than that seen with respect to music and films. The Business Software Alliance, estimates that thirty-six percent of the software installed on computers worldwide was pirated in 2003, representing a loss of nearly US \$29 billion.¹⁸ In other words, while US \$80 billion in software was installed on computers worldwide last year, only US \$51 billion of that was legally purchased, a worldwide piracy rate of 36%. In key regions of the world far greater rates of piracy have been seen. The piracy rate in the Asia/Pacific region was 53%, with dollar losses totalling more than US \$7.5 billion. In Eastern Europe, the piracy rate was 70%, with dollars losses at more than US \$2.2 billion. The average rate across Latin American countries was 63%, with losses totalling more than US \$1.2 billion. In the Middle Eastern and African countries, the rate was 55% on average, with losses totalling nearly US \$900 million.

While the rates of piracy in Western Europe (36%) or in the United States (23%) may be less, the costs in terms of lost sales are immense: US \$7.2 billion and US \$9.6 billion respectively, in 2003 alone.

2.1.4. Book publishing

The cultural industry with the longest history of dealing with piracy is, of course, book publishing. Piracy continues to plague authors, particularly in poorer countries where trade in pirated books often exceeds the legitimate market, but also in established markets. As of 2001, the annual turnover of the legal publishing industry in Latin

¹⁴ See, D. Groves, 'Warners steps up China bid; WB takes on piracy one market at a time,' *Daily Variety*.

¹⁵ N. Holdsworth, 'Piracy Group Urges Action Against Russia,' *Hollywood Reporter*, 15 February 2005.

¹⁶ Source: MPAA: '2003 Brazil Piracy Fact Sheet,' Washington: 2003.

¹⁷ See, O. Gibson, 'Bollywood claims scalp in fight against bootlegs,' *The Guardian*, 23 February 2005.

¹⁸ See, O. Gibson, op. cit.

America and Spain was estimated to be US \$5 billion a year, compared with a pirate book market of US\$8 billion. The specific loss to authors' royalties was nearly US\$500 million.¹⁹ In Mexico, by contrast, only 2 of every 10 books sold are pirate products, but this still causes a loss to the Mexican publishing industry and its authors of 1.25 billion Peso's.²⁰ In South Africa, to take another example, it is estimated that 40-50% of the R400-million textbook market is lost to piracy and illegal photocopying.²¹ And the Association of American Publishers estimates that American publishers lost over US\$500 million in 2004 due to copyright piracy.²² This takes the form both of illegal commercial photocopying, as well as print piracy, and electronic piracy of books and other printed material in digital form. A growing problem of particular concern to book publishers is the increasing numbers of illegal downloads of online journals, as well as the unauthorized digitisation of collections by libraries, together with a marked rise in the sharing of such digitised versions of works.

2.2. Broadcast, cable, satellite, and other forms of signal piracy

The market for broadcasts, and in particular for satellite transmissions, is worldwide, and so is the growing problem of signal piracy. While in some developed markets such as Germany and Australia, the level of signal piracy is as low as 1%; in others, such as the UK, the level of signal theft piracy is thought to be approximately 10%.²³

Broadcasters and others who transmit commercial programming have long complained about the problem of signal piracy and view the existing international framework for protecting broadcast organisations,²⁴ as insufficient to adequately protect against this form of theft of services. Presently, WIPO's Standing Committee on Copyright and Related Rights continues, after several years of deliberations, to consider a new draft Treaty for the Protection of the Rights of Broadcasting Organizations. While the draft Treaty contains provisions beyond those needed simply to regulate signal piracy on an international basis, its most fundamental requirement would establish (or in the view of some, merely reinforce) an international norm providing broadcasters with protection against the unauthorised recording, retransmission, and reproduction of their broadcast signals.

As an example of the problem in this area faced by regional broadcasters in smaller markets, a broadcasting representative has given the following example: "If a broadcaster in, say, Belize has paid for the right to broadcast the Olympics and takes its feed from [US broadcaster] NBC, it needs broadcast rights to be able to get an injunction

¹⁹ L. I. Kuntz, "Pirates and the Paper Chase," *UNESCO Courier*, March, 2001, at 41, citing figures provided by the Interamerican Publishers' Group.

²⁰ "Mexico: Recording, Video Game and Software Sectors Lose US \$ 1.5 Billion in 2004," *El Economista*, 29 March 2005.

²¹ B. Wafawarowa, "Legislation, law enforcement and education: copyright protection in the developing regions," BPN Newsletter, Issue No. 30, May 2002.

²² <http://www.publishers.org/antipiracy/index.cfm>

²³ MPAA 2003 Full Ten Country Piracy Fact Sheet, p. 28; <http://www.mpa.org/PiracyFactSheets/PiracyFactSheetTenCountries.pdf>

²⁴ Rome Convention, art. 4.1 *infra*.

against other stations that might copy the feed and send it out.”²⁵

2.3. Internet and online piracy

Online piracy is widespread, and its continued growth is a function of high-speed internet access and improving forms of compression technology. Already, for example, 58% of South Koreans internet users have, according to a recent study, downloaded a commercial film without authorisation.²⁶ It has been estimated that around the world almost 3 billion copyrighted songs are illegally downloaded each month, the equivalent of 200 million stolen compact discs or 85 million songs per day.²⁷ The consequences of this technological revolution for enabling even further piracy of cultural goods are obvious and well-known. Yet some aspects of online piracy are fundamentally different from traditional commercial piracy and should be borne in mind:

- online piracy is frequently not committed for profit or other commercial gain, but the losses it causes can be catastrophic;
- online piracy is, at least from a technical perspective, more easy to detect and its perpetrators more easily discoverable;
- online piracy cannot be wholly committed by a criminal enterprise, as traditional piracy always is, but instead requires for its successful completion the active participation, usually for profit, of legitimate commercial enterprises, either as facilitators of the piracy or as processors of illicit payments.

2.3.1. The nature of the internet

From the copyright perspective, it is important to note that the internet, in its essential public aspect (World Wide Web), is a system designed primarily for the distribution of works and information in the form of copies. These can be distributed - though much more slowly and less efficiently - in other forms, as through pure transmission services that leave no copies. But the internet is entirely a copy-based enterprise, and thus engages the regimes of copyright and neighbouring rights in a fundamental sense. Copies of works of any description that can be rendered in digital form are the heart of the internet. This reliance upon multiple and repeated acts of copying in the transmission of works is a design decision underlying the structure of the internet; it is not an inevitable aspect of the technology nor of the internet's function as a vast public forum for discourse. Many further instances of copying on the internet (particularly acts of 'caching') reflect further design decisions to achieve economies of scale, speed, and reliability on the part of the copier.

²⁵ Comments of Ben Ivins, Senior Associate General Counsel for the [US] National Association of Broadcasters, quoted in W. Grossman, "Broadcast Treaty Battle Rages On", *Wired Magazine Online*, Aug. 28, 2004.

²⁶ B. Fritz, "Pic Piracy Rampant in South Korea," *Variety Technology*, 8 July 2004.

²⁷ Brief filed by 40 US State Attorneys General in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster* (US Supreme Court), <http://www.copyright.gov/docs/mgm/StatesAG.pdf> , citing L. Grossman, 'It's All Free', *Time*, 5 May 5 2003.

These points are important to consider as an introduction to internet piracy, because so much of the structure of the internet is presented in public discourse as inevitable, pre-ordained, and essentially unalterable, whereas in point of fact there is no necessary reason why this should be so. From the perspective of public policy, it is possible to regulate the internet to serve the interests of authors, and of culture - just as the airways are regulated - and to modify and restrain some of the worst features of an internet that has to date been allowed to develop in an essentially unregulated manner, accommodating instead the convenience of software designers, of telecommunications companies, and, it must be said, of pirates.

2.3.2. The myth of internet anonymity

A commonly-misunderstood feature of the internet is reflected in the widespread view that activities conducted through internet transmissions - including most acts of online piracy - cannot be measured or traced. Thus, it is often said that new forms of piracy, particularly over the internet, present problems not seen before because these acts are often undetectable.²⁸ This is not, strictly speaking, correct. No transaction, or act of copying over the internet, particularly over the World Wide Web, is inherently undetectable. Instead, common internet transactions are usually detectable unless barriers to detection are intentionally erected. And more de-centralized operations, such as peer-to-peer file-sharing, can be designed to be less anonymous. This after all is true of traditional telephone calls, which are only tracked and recorded because systems have been designed and implemented to do just that. Thus, it is simply a matter of software design and corporate responsibility.

Many acts of unauthorised copying over the internet are carefully tracked, recorded, and measured by volume of bandwidth consumed as well as by increments of time elapsed down to the smallest micro-second. This contrasts sharply with the situation in the physical world where every small market trader, car boot sale proprietor or street corner vendor who might deal in pirated goods, enjoys an anonymity that an online pirate can only aspire to. The reasons why online pirates appear to be anonymous, when in fact they are not, have nothing to do with technology and have everything to do with policy and government resolve, or lack thereof, to address the problem of online piracy.

Privacy concerns must be recognised, but only on the same terms as privacy concerns are recognised in other aspects of private life. Internet piracy is not a form of free speech or legitimate civil disobedience.²⁹ And one surely has no greater expectation of privacy for internet communications than for telephone calls or other private communications where the full tools of law enforcement are regularly employed in the detection of crimes, through wire taps, search warrants and other means.

²⁸ See, e.g., BSA statement on internet piracy at <http://www.bsa.org/usa/antipiracy/Internet-Piracy.cfm>; ("The Internet allows products to move from computer to computer, with no hard media transaction and little risk of detection").

²⁹ "[T]he [free speech provisions of the] First Amendment do not protect copyright infringement. . . Nor is this an instance where the anonymity of an Internet user merits free speech and privacy protections." *In re Verizon Internet Services, Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003).

Last but not least, a certain lack of clarity and of a harmonised approach in the application of the exceptions and limitations to copyright protection, to some acts of exploitation of protected works on the Internet (particularly the acts of uploading and downloading) can be considered another reason for the expanding phenomenon of internet piracy. As provided in UNESCO's Recommendation on the Promotion and Use of Multilingualism and Universal Access to Cyberspace *an updating of national copyright legislation and adaptation to cyberspace should be undertaken, taking full account of the fair balance between the interests of authors, copyright and related rights-holders, and of the public, embodied in international copyright and related rights conventions.*³⁰

2.3.3. The online criminal enterprise

Those who engage in piracy of physical goods generally manufacture, distribute, and market their illicit goods themselves or through underground networks of accomplices. At no stage in the process of committing their crimes, except perhaps in the context of money laundering the profits, are traditional pirates forced to rely on obtaining assistance from legitimate businesses. Online piracy is different. No online pirate has the ability, acting solely through illegitimate operators, to infringe the rights of rightholders. The internet transmission facilities required to commit acts of online piracy are too complicated and expensive to be replicated by pirates. Instead, it is essential that pirates employ legitimate online service providers and others to make and distribute the illicit copies that they distribute in the millions; and, where online piracy is committed for profit, that legitimate credit card and online billing services be used to facilitate these crimes. Thus, there are, at least in theory, numerous points at which online piracy could be stopped through the cooperation and assistance of legitimate businesses.³¹

Given these trends, it is perhaps not surprising that online piracy is growing far faster than piracy in the physical world. One can only imagine how easily and uncontrollably signal piracy, for example, would proliferate if pirates had no need to construct their own transmission facilities but could simply, for a small monthly subscription fee, employ the services of legitimate commercial transmitters to carry their pirated signals, safe in the knowledge that the commercial facilitator of this piracy faced no liability for its conduct

³⁰ Recommendation on the Promotion and Use of Multilingualism and Universal Access to Cyberspace, par. 23.

³¹ Internet service providers have consistently argued that the traditionally prevailing rules of liability for direct infringement of copyright should not apply to their acts of copying and distributing illicit material over electronic networks, and have sought legislative solutions to lessen their liability. Compromises embodying a general exemption from direct liability for ISP's coupled with new obligations for ISP's to cooperate in the control of online piracy have been enacted into law in both the US (Digital Millennium Copyright Act of 1998; Pub. L. No. 105-304, 112 Stat. 2860 (1998)) and the European Union (Directive on Electronic Commerce; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market). Despite these solutions, rightholders have still repeatedly been forced to pursue litigation over several years simply to get to the first step in any piracy investigation, disclosure of the identity of known pirates. See, e.g., *Recording Industry of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

and would even take affirmative steps to shield the pirate from detection.³²

2.3.4. New piracy problems for additional cultural goods

Online piracy is also broader in scope. In addition to the creative industries traditionally burdened with significant levels of piracy, online theft extends to categories of rightholders - including photographers, illustrators, and graphic artists - whose works in the physical world were more rarely pirated due to the difficulties involved in reproducing photographic images, graphic arts, and quality books, through traditional means. This development disadvantages traditional culture and regional heritage in a way that traditional commercial piracy did not, and the widespread unauthorised online copying of these works of local authorship threatens the secondary market for all those industries. Another aspect of online piracy's broader scope is the fact that it has sprung up in developed countries, particularly in Nordic countries, where commercial piracy has been largely held in check.

3. THE EFFECTS OF PIRACY

3.1. Negative effects on creativity and on the cultural sector generally

The cultural and information industries now form important and well-recognised contributory components of the economic and cultural development of any country. They add considerably to national wealth, and therefore pirate activities which undermine these industries, have a corresponding negative effect on national wealth.

The copyright industry provides employment in Australia, for example, for over 200,000 workers (over 3% of the Australian labour force); in Germany, the same industries account for 800,000 jobs (over 3.6% of the German labour force). Similar statistics are seen in the United Kingdom, where just under a million people work in the copyright sector, producing a share of the British Gross National Product that exceeds the share of both the automobile and food manufacturing industries.³³

3.1.1. Specific effects in developing countries

While it is possible to summarize the negative effects of piracy on the economy of any developing country in purely economic terms - as so many jobs lost or so much in lost investment dollars - it is important to appreciate as well the many other deleterious effects of piracy. And while these effects - such as the presumed absence of works of art that might otherwise have been created - are inherently difficult to measure, no one

³² See, e.g., *Recording Industry of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

³³ See generally, S. Alikhan, *Socio-Economic Benefits of Intellectual Property Protection in Developing Countries*, Geneva, 2000, at 57 *et seq.*

doubts their existence. Beyond the simple economic loss caused by piracy, inadequate respect for cultural works, and the heritage they embody, is the inevitable further consequence of piracy, an effect that runs entirely counter to national efforts to promote indigenous culture and identity.³⁴

To consider only the example of pirated music, it is plain to see that allowing pirated musical products to be sold freely in local markets effectively eliminates all opportunities for a national recording industry to develop. This is because pirates are only interested in dealing in a small range of the most popular international recording artists, sure-fire in demand entertainment products that are highly sought after and can be easily sold. They have no interest in making works of local artists, or works less widely known, available. And those independent producers who might in other circumstances have been willing to invest in local recording artists find themselves unable to compete with illicit product.

Pirates pay no advances to performers, no royalties on sales, no licensing fees to composers, songwriters, and music publishers, no fees to graphic artists and photographers, and no tax revenues on their sales. They take no risks and ride along on the promotional and marketing spend of legitimate producers of the musical albums that they illicitly reproduce. A legitimate enterprise, which does incur all of those necessary costs of production, cannot possibly compete with pirate CD's.

From this situation where the recording of local musical artists and local composers becomes economically not viable, many consequential effects follow. Recorded music represents the musical life of a society in a particular time. If the best of a nation's performers are not being commercially recorded, then their works are not being preserved and the losses to local culture are incalculable. A key element of the historical memory of the nation is lost. Similar effects are seen with regard to all other creative works.

Another important aspect flows from the fact that music, films, and other copyright works, represent a key cultural export by which countries, including some of the smallest and least developed nations, have a voice and a presence in other lands. Small Caribbean islands are known in very distant countries by people who will never visit them because recordings of their calypso or reggae artists have found an international audience. With familiarity of this kind, comes increased opportunities and demand for live touring of local artists in foreign territories. But if those artists are not recorded in the first place, then their songs, and the culture they represent, are necessarily exported no further than the small audience within the sound of their voices.

3.2. Negative effects on creative industries and local economies

Wherever piracy flourishes, it is virtually impossible for local software, film, and music industries to compete, to grow, or, in emerging economies, to develop at all. All of these industries require significant investment and, even in the absence of piracy, involve considerable risk to investors given the highly competitive markets for these works and the difficulty of predicting consumer tastes and desires. Where any considerable degree

³⁴ *Supra*, at 57.

of piracy exists in a particular market, making the risk of success even slighter still, it is not surprising to see investors staying away, with the consequence that new films are not produced or CD's recorded, and all of the employment and trade opportunities that might have derived from such investment is lost.

For example, Mexico was for many years among the 10 top-ranking markets for recorded music. In 2000, its US \$665 million market was 8th in the world. Only 3 years later, retail sales had fallen by 50%, and job losses throughout the industry have halved the number of individuals working in the music industry. Industry sources attribute these setbacks directly to increased street-level piracy (51,000 points of sale for pirate music have been identified in Mexico).³⁵

Recent polls published in Russia are perhaps indicative of a common view: they show that Russian citizens are not concerned about piracy involving music, films and software products, because they believe the only victims of this type of piracy are major Western recording and film studios, which, in their view, have no need for the extra revenue generated by sales in Russia.³⁶ While this view is short-sighted for many reasons, it may be sufficient to point out that critically acclaimed Russian artists, such as the conductor Valery Gergiev or the soprano Anne Netrebko, enjoy the benefits of being exclusive recording artists for Western record companies, and thus suffer from the piracy of 'Western' CD's, just as Russians whose livelihoods depend on retailing and promoting international music in Russia lose out when those same CD's are pirated. It is an inter-dependent enterprise, not a nationally demarcated one.

3.3. Negative effects on sustainable development

Investment in the cultural sector of any country can be significant and sustained over many years, if investors find in place both an adequate legal system for the protection of the rights in intellectual property and effective enforcement of those rights. If either element of this formula is lacking, a nation's ability to attract such investment and to develop its own cultural industries - together with all of the additional benefits of increased employment opportunities, wealth creation, and tax revenues - will be lost. Examples of successful IP industries flourishing in countries throughout the world are numerous. One could cite, for example, the Indian software industry which expects its worldwide outsourcing business to grow overall by 26-28 % in 2005 (38 percent worldwide for higher-level business process outsourcing). India's information technology sector exported US \$10 billion worth of goods and services in 2004 and projects that it will reach US \$21-24 billion by 2008.³⁷ So long as its market is not undermined by increasing piracy.

³⁵ IFPI, *Commercial Piracy Report 2003*, London, 2003, p. 8.

³⁶ See, "Piracy Against Progress," Remarks of Alexander Vershbow, U.S. Ambassador to Russia, *The Moscow Times*, 25 Nov. 2003.

³⁷ Source: [Indian] National Association of Software & Service Companies (Nasscom), quoted in J. Kulkarni, 'Best Practices in IP Protection When Of Shoring', website of [UK] National Outsourcing Association, www.noa.co.uk.

3.4. Negative effects on society

Failing to deal adequately with the problem of piracy clearly has wide-ranging consequential effects on society. The close connection between organised crime and many forms of piracy has long been recognised and has recently been authoritatively documented in the report “Proving the Connection,” published by the UK Alliance Against Counterfeiting and Piracy.³⁸ For the purposes of this study, the definition of ‘organised crime’ propounded by the UK National Crime Intelligence Service was followed: “Organised crime constitutes any enterprise, or group of persons, engaged in continuing illegal activities which has as its primary purpose the generation of profits, irrespective of national boundaries.”

Less widely publicized are the links between intellectual property crime and the financing of international terrorism. Interpol has already identified such a connection amongst terror organisations and piracy.³⁹ Involvement by these groups ranges from control or investment in manufacturing to taxing the market stalls where counterfeit goods are sold. Given the fact that piracy and counterfeiting are more profitable than drugs trafficking, that the penalties are significantly less, and that the entire enterprise is less likely to attract the attention of law enforcement, Interpol has predicted that this connection is nearly certain to increase in the future. A UK legislator studying the problem has summarised it succinctly: “Perhaps the most invidious thing about copyright theft and piracy is that organised crime has realised that it’s a high margin, low risk way of funding so many other activities – from drugs and paedophilia, to even gunrunning and terrorism.”⁴⁰

A more wide-ranging effect of continuing to allow piracy to flourish around the world is the negative effect this has on the basic respect for the rule of law and for the property rights of others. A mentality has clearly developed on the internet in particular that views any activity that can be committed over the internet as permissible unless and until some authority affirmatively acts to stop it. Far beyond the confines of copyright infringements, it is common now to see internet users committing violations of local laws regulating matters as disparate as gambling; dealing in stocks, securities, and insurance; or selling alcohol, pharmaceutical products, or other controlled substances. Local and national laws that otherwise would constrain this conduct are apparently thought no longer applicable if the prohibited conduct can be committed through the agency of an online partner, particularly one located in another country. While empirical evidence on this commonly-seen phenomenon is difficult to come by, it must be likely that any significant success in breaking the cycle of online piracy of intellectual property can be

³⁸ See: <http://www.aacp.org.uk/Proving-the-Connection.pdf>.

³⁹ See, "The links between intellectual property crime and terrorist financing," Testimony of Ronald K. Noble, Secretary General of Interpol, before the US House Committee on International Relations, 16 July 2003.

⁴⁰ Dr Vincent Cable MP, Liberal Democrat Trade and Industry, quoted in *British Video Association Yearbook 2002*, London, 2002, at 23.

expected to have the further benefit of instilling a renewed respect for the law and for the rights of others generally.

4. COMBATING PIRACY

4.1. The international legal framework

From its inception in 1886 the Berne Convention for the Protection of Literary and Artistic Works has recognised, in specific terms, the problem of piracy, providing in its original text that, "Pirated works may be seized on importation into those countries of the Union where the original work enjoys legal protection". (Art. 12). Yet the Berne Convention, even in its several subsequent versions, never imposed detailed obligations on member states to address the problem of piracy. Protection for works and categories of creators outside the scope of Berne was embodied in the Rome Convention of 1961⁴¹ providing important rights to record producers, recording artists, and broadcasting organisations and, with respect only to sound recordings, in the Geneva Phonograms Convention of 1972.

The details as to how rights under these Conventions were to be enforced were largely left to national legal developments. This gap in the international legal framework was filled in significant part by the WTO's 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). That agreement obliges all WTO members to comply with the substantive provisions of the Berne Convention, imposes obligations mirroring the Rome Convention protections against unauthorised copying of sound recordings (art. 14) - but applying them to a far larger number of countries than those who belong to the Rome Convention - and provides detailed requirements relating to the enforcement of rights. The goal of the TRIPS enforcement provisions is "to permit effective action against any act of infringement of intellectual property rights" covered by the agreement. (Art. 41.1).

The TRIPS agreement now applies to all 135 WTO members, having come into effect on 1 January 2005 for least-developed countries. Thus, it has only been for a few months that most countries of the world have been constrained by international agreement to provide significant and detailed provisions in their law to effectively deter and punish piracy of intellectual property. Should WTO member states fail adequately to implement the TRIPS minimum enforcement provisions - and rightsholders frequently complain that they do not - the agreement, like others administered by the WTO, may ultimately be enforced by a complaint brought by one member country against another.

4.2. National and regional solutions

Increasingly over the past two decades, regional and bi-lateral trade agreements have included chapters on intellectual property rights and their enforcement. Examples

⁴¹ International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (Rome Convention, 1961).

include the Free Trade Agreement of the Americas (FTAA) and the North American Free Trade Agreement (NAFTA). This is also a useful means of focusing national legislatures on the importance of upgrading national law to achieve the higher levels of protection that would encourage increased regional, and worldwide, trade in this important sector of a nation's economy.

4.3. Means of enforcing copyright and best practices in the field of enforcement of IP rights

But it is at national level, and through highly localized customs, police, and courts systems that piracy must ultimately be confronted if it is to be successfully curtailed. In recent years many countries have shown a greater willingness to tackle the problem of piracy, demonstrated a greater awareness of its characteristics, cooperated more frequently across national borders, and have undergone advanced training aimed at developing best practices in this area. Nonetheless, specific problems in successfully enforcing IP rights are frequently reported by rightsholders in the following areas.

4.3.1. Civil damages

Damages recoverable in civil actions must be sufficiently high so that potential pirates are not tempted to take the risk of being caught. If the pirates know that the worst that can happen is that they may ultimately be required to reimburse a rightsholder on the basis of 'lost profits' or some other insignificant nominal sum, there is little no deterrent effect whatsoever. As a coalition of rightsholders most affected by these limitations has stated in a joint communiqué, "An infringer that expects to pay the same price or less in damages as it would have paid had it acted legally has *no reason* to obey the copyright law."⁴² It is also important that the costs of maintaining legal actions to enforce IPR's be among the compensable damages recoverable by successful plaintiffs. This is particularly important if the goals of diversity and cultural pluralism are to be advanced by an anti-piracy agenda, as there are far more small and individual rightsholders than major corporations concerned with this problem. But enforcement of IP rights through litigation is an unrealistic prospect for any small business or individual unless their costs and attorneys fees are recoverable.⁴³

⁴² "Enforcement of Intellectual Property Rights: Existing Shortcomings and Best Practices", Copyright Industries' Response to WIPO Request for Information, Geneva, 2001.

⁴³ In recent developments, the Recording Industry Association of America (RIAA) has pursued litigation against online users that it identifies as the most prolific purveyors of unauthorised music files online. It has filed suit against approximately 9,100 file swappers since September 2003. Settlements have been reached in 1,925 cases. The lawsuits are generally against users who have uploaded, and not simply downloaded music, and who have committed large numbers of copyright infringements. In light of this, the average settlement of these cases - reported to be between \$3,000 and \$4,000 - is modest considering the amount of statutory damages recoverable under US law for these offences. The British and French recording industries and the US film industry have also recently begun similar litigation campaigns. See, W. Triplett, 'Online pic pirates face more lawsuits,' *Daily Variety*, 24 February 2005; L. Jury, "Music Fans Pay £50,000 Fine for Illegal Filesharing," *The Independent*, 5 March 2005.

4.3.2. Criminal penalties

Wide discrepancies in the penalties applicable to piracy are still encountered around the world. In India, a convicted pirate may face a term of imprisonment between six months and four years; in Hong Kong special administrative region, China, sentences may range up to eight years; while in the UK, terms of imprisonment up to ten years are possible.⁴⁴ Unfortunately, in some countries, penalties are so low that the full investigative powers of the police, including the ability to obtain search warrants, are not applicable for that category of crime. It is important as well that a minimum term of imprisonment be available upon conviction in order to provide a true deterrent effect, as does the Indian Copyright Act, cited above.

A further difficulty encountered in criminal prosecution of piracy stems from the fact that in some countries, law enforcement authorities do not have the power to investigate criminal infringements of intellectual property or to themselves initiate criminal actions, unless a rightholder has first complained. The combined effect of low penalties and restrictions on the investigative power of law enforcement is inevitably to reinforce the view in some quarters that intellectual property offences are a low priority. The Council of Europe, acknowledging this problem, underscored the importance of permitting *ex officio* actions in a recent recommendation: "In cases of piracy, member states should provide for appropriate criminal procedures and sanctions. Over and above action based on complaints by the victims, member states should provide for the possibility of action by public authorities at their own initiative."⁴⁵

4.3.3. Provisional measures

Prosecutions in the field of IP depend on reliable evidence gathered usually in the face of concerted efforts to destroy the evidence. It is thus necessary that effective provisional measures, permitting rightholders to seize evidence of IP crimes, as well as relevant documentary evidence in the possession of pirates. While most countries do provide some form of provisional relief, such measures are often cumbersome and law enforcement authorities in criminal prosecutions, as well as rightholders maintaining civil actions, frequently are unable to secure such measures with the necessary speed.

4.3.4. Rights to obtain information and related measures

Because commercial piracy involves the concerted actions of numerous individuals, often in various territories, it is essential that courts have the power to order defendants to disclose other persons involved in infringing activities. The TRIPS agreement recognises the importance of this 'right of information' in a general sense⁴⁶, and national laws such as the German Copyright Act, have enacted this principle in specific terms, requiring,

⁴⁴ Indian Copyright Act (section 63); Hong Kong Copyright Ordinance (section 119); UK Copyrights, Designs, and Patents Act of 1988 (sections 107, 198).

⁴⁵ Council of Europe, Rec. (2001) 7.

⁴⁶ TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights , art. 47.

among other things, that those who infringe copyright may be required to divulge information as to the origin and distribution channels of the infringing copies in their possession.⁴⁷

4.3.5. Evidentiary rules

Rightsholders also frequently assert that they are faced with unreasonably restrictive evidentiary rules concerning proof of ownership and subsistence of rights in seized and obviously pirated works. These rules have the effect of delaying court procedures, and, in many instances, of allowing pirates to escape justice and are fundamentally incompatible with the Berne Convention, WTO TRIPS agreement, and the national laws which all require that the person whose name is on the protected material should be presumed to be the rightsholder. It is common for seizures of significant pirate operations to include literally hundreds of thousands of different infringing optical discs of pirated CDs, DVDs, CD-ROMs, and other protected works. Requiring proof of ownership of every disc, or sometimes even of every track or program embodied on every disc, obviously represents an unjustified expenditure of time and resources for rightsholders as well as for courts and law enforcement. The availability of workable presumptions thus is a critical element of effective enforcement.

4.4. Training and public awareness

Given the vastness of pirate operations now underway and the necessity to deploy numerous individuals to investigate, regulate, and prosecute offences in this area, a great deal of training and instruction in best practices is needed on a continual and worldwide basis. It is necessary to train both the officials and to train the trainers too, in a consistent program of shared information and principles for any headway to be made here. It is beyond the scope of this paper to summarise the programs of education, public information, and training currently being undertaken by UNESCO, particularly within the framework of the Global Alliance for Cultural Diversity,⁴⁸ by WIPO, by the European Union, and by national governments around the world, except to note that these efforts have resulted in training being offered to concerted local authorities and their staff in virtually every country of the world. The continuation of, and enhanced support for, the work of this training programs is essential to seeing any true improvement in the situation of piracy worldwide.

4.5. Regulation of optical media manufacturers

As indicated above, a significant indicator of the continued growth of worldwide piracy is seen in the ever-increasing global overcapacity for the manufacture of optical discs. A

⁴⁷ German Copyright Act, art. 101(1).

⁴⁸ The site <http://www.unesco.org/culture/alliance> contains detailed description of on-going projects in this area.

program of regulating manufacturing plants to ensure that this enormous pressing capacity is not used to produce pirate products has produced impressive results, but so far only in a limited number of territories (China, Malaysia, the Philippines, Bulgaria, Ukraine, and Poland).⁴⁹ While legislative instruments to regulate optical disc plants are under discussion also in Indonesia, Singapore, and Thailand, the IFPI identifies Russia, India, and Pakistan as countries in which such regulation is most urgently needed.

5. THE ARGUMENT AGAINST STRICT ENFORCEMENT OF IP RIGHTS

It must be acknowledged that there are those who challenge the need for strict enforcement of intellectual property rights. They usually base their argument on two principal points: (1) that piracy, properly understood, actually provides considerable benefits to rightsholders in the form of free promotion in the form of increased visibility for their cultural goods; and (2) that the alleged damage caused by piracy is misleading when calculated in terms of lost legitimate sales being equivalent to the level of transactions in pirate works.

Both arguments are fundamentally flawed. The only authors and artists who would, even in theory, benefit from accidental promotional effects arising from the circulation of pirated works such as CD's would largely be the most popular and most sought-after international artists. It seems doubtful that these artists, already well-established, receive much, if any, incremental promotional benefit in this way. A further weakness of the argument is that it depends on there being in existence a flourishing and vibrant local legitimate market in order for the promotional goodwill to be translated into legitimate sales. But, as seen above, piracy drives out legitimate markets, particularly in the developing economies. The benefits, therefore, if any, of widespread circulation of pirate titles can only be quite illusory in this context.

And one further point must be made in refutation of this argument. In order for the critics' view that piracy actually provides significant promotional benefits to be correct, it is necessary that virtually all rightsholders affected - whether in the music, film, publishing, software, or other fields - must be fundamentally mistaken as to the economic forces that underlie their industries. This is because any book publisher, music company or film studio is free to allow its works to be circulated solely for the supposed promotional benefits that this may provide, and such a company could also realise significant savings by not investing in anti-piracy efforts. Surely, at least some rightsholders would follow this business model if, as the critics postulate, it were actually in their economic interest to do so. But it is very hard to find examples of this occurring. The author submits that it cannot be due to sheer coincidence, and is even less likely to be attributable to universal ignorance, that no significant rightsholder has accepted the promotional benefits argument by voluntarily acting upon it.

The argument that piracy losses should not be measured in equivalent terms has a surface attraction. Of course, works which can be purchased for significantly less than legitimate

⁴⁹ IFPI, Commercial Piracy Report 2003, p. 17, London: 2003.

product can be expected to sell more units. But pirated works do not always sell for less than legitimate,⁵⁰ and lost sales alone is not the full measure of the cost of piracy to rightsholders. To conceive of piracy only in these terms is to ignore its character as a civil wrong, in all cases, and as a crime in many. It is precisely because infringement of copyright is a species of civil wrong, or tort, that the measure of damages recoverable for even a single instance of copyright infringement is often far higher than the economic value of the works being pirated. When copyright infringements can also be prosecuted as crimes, fees and other penalties seeking to have a deterrent effect are also in order. In territories that guarantee minimum statutory damages, infringers do not simply have to return the profits they have wrongly realised from their infringing activity but are required, in most cases, to pay damages far in excess of the lost sales that the rightsowner could claim. These principles then - and not the concept of lost sales alone - reflect the true measure of the economic loss suffered by rightsowners whose works are pirated.

Even if all losses from piracy suffered by authors and performers could be calculated in terms of lost sales alone, this would still only address the issue of losses deriving from infringement of an author's economic rights. The *droit d'auteur* recognises that authors enjoy further rights and that injuries to reputation, honour, and integrity are also actionable and can provide the basis for the recovery of damages.⁵¹ Given this further dimension, the simplistic view that missed sales alone should constitute the measure of loss suffered by rightsowners must be seen as incompatible with the basic principles that underlie the protection of intellectual property and which signify its role as a component of every country's cultural heritage.

6. CONCLUSION

While the problem of piracy clearly persists, improvements are seen on many fronts; and the goal of actual eradication of piracy continues to be at the forefront of policy goals for the world's literary and artistic communities and for the industries that have grown up around them. But this goal cannot be achieved by a single means, such as litigation – whether civil or criminal – or through training and education alone. As the Director General of the World Intellectual Property Organization, Dr. Kamil Idris, has observed, "Concerted action, enhanced public awareness, and galvanization of political will to eventually eradicate this problem and its negative effects on society" are all required.⁵²

⁵⁰ See, Kuntz, *supra*, at 41, for examples of pirated books selling at higher prices than original legitimate titles in Latin American markets.

⁵¹ See, Berne Convention, art. 6*bis*; WIPO Performances and Phonograms Treaty [1996], art. 5

⁵² K. Idris, *supra*, at 300.