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Comment: Reconsidering the Pirate Nation

Lawrence Liang and Achal Prabhala[1]

Locating piracy

What is piracy? According to industry lobbies, it is intellectual property theft, and a revenue loss to their constituents. The Business Software Alliance (BSA) tells us that annual losses to software manufacturers due to piracy are apparently at US$34 billion, and the US Patent and Trademark Office (USPTO) pegs the worldwide figure for losses due to copyright piracy, taken across industry as a whole, at US$250 billion per year.[2]

But what this perspective does is to confirm two simple facts. One: that copyright industries are big businesses with increasingly global ambitions. Two: that the circulation of copyright goods takes on myriad forms in the global south – forms that do not always correspond to market dynamics in the north.

And what is piracy according to progressive academics and activists who work on copyright law? Draft declarations emerging from the global access to knowledge (A2K) movement[3] have no mention of the word. For academics and activists concerned with A2K, piracy is, unfortunately, the elephant in the room – though it cannot afford to be. When the USPTO and the BSA use the term "copyright reform", they do not mean laws that promote access to knowledge, or policies that promote open content licences. They mean increased resources for enforcing criminal sanctions for copyright violation.

In the context of South Africa, with a relatively nascent informal economy in cultural goods, this translates into a focus on learners. In 2004, the Print Industries Cluster Council (PICC), a domestic publishers' lobby, was commissioned by the Ministry of Arts and Culture to report on the state of intellectual property in the print industries. Its analysis of the situation was thus:

1 Lawrence Liang is a legal researcher with the Alternative Law Forum in Bangalore, India and author (2004) of the *Guide to open content licences*, Piet Zwart Institute, Rotterdam, accessible at http://pzwart.wdka.hro.nl/mdr/research/lliang/open_content_guide. Achal Prabhala coordinated the Access to Learning Materials (A2LM) in Southern Africa project based in Johannesburg in 2004/2005, and currently researches IPR issues in Bangalore.

2 See the BSA's *Global software piracy study*, accessed at www.bsa.org/globalstudy/, and the USPTO's *Small business and IP theft: Key statistics*, at www.uspto.gov/smallbusiness/pdfs/USPTOSmallBusinessAndIPTheft.pdf. To put this in perspective, we might consider that just compensation for losses estimated by the USPTO would involve handing over a sum that is about five times the size of the total economy of the Democratic Republic of Congo (DRC).

3 Referring to the campaign mounted by academics and activists from around the world who met through 2005 in Geneva and London to formulate and discuss an access to knowledge (A2K) treaty. The draft text is accessible at www.cptech.org/a2k/consolidatedtext-may9.pdf.

Copyright infringement in South Africa is not a matter – at least not yet – of the mass piracy of trade books, like the pirated editions of Harry Potter titles that have appeared internationally, but of systematic copying of various kinds in the educational sector, public sector and businesses. While piracy of this kind of is causing concern to international rights holders like the IIPA [International Intellectual Property Alliance], popular books have not been the targets of similar piracy... (Gray & Seeber, 2004: 55-56).

With regard to curbing learning materials piracy, the PICC report recommended:

[u]rgent attention to the legislative amendments to remove ambiguity on the limits of photocopying for personal use and in the educational context; the strengthening of enforcement measures; the provision of a stable basis for policy-making on copyright for digital media... [and] [e]ducation and awareness programmes among students and lecturers on the value of intellectual property (Gray & Seeber, 2004).

On the occasion that the issue of piracy is raised by academics and activists who are concerned with the excesses of the copyright system, the perspectives offered in this instance do not differ significantly from the dominant state of the debate. Lawrence Lessig (legal academic, author, and founder of the Creative Commons (cc)), for example, writes:

All across the world, but especially in Asia and Eastern Europe, there are businesses that do nothing but take others people's copyrighted content, copy it, and sell it – all without the permission of a copyright owner. The recording industry estimates that it loses about [US]$4.6 billion every year to physical piracy (that works out to one in three CDs sold worldwide). The MPAA estimates that it loses [US]$3 billion annually worldwide to piracy.

This is piracy plain and simple. Nothing in the argument of this book, nor in the argument that most people make when talking about the subject of this book, should draw into doubt this simple point:

This piracy is wrong.

Which is not to say that excuses and justifications couldn't be made for it. 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.

That excuse isn't terribly strong. Technically, our law did not ban the taking of foreign works. It explicitly limited itself to American works. Thus the American publishers who published foreign works without the permission of foreign authors were not violating any rule. The copy shops in Asia, by contrast, are violating Asian law. Asian law does protect foreign copyrights, and the actions of the copy shops violate that law. So the wrong of

piracy that they engage in is not just a moral wrong, but a legal wrong, and not just an internationally legal wrong, but a locally legal wrong as well (Lessig, 2004: 63-64).

Why should cc care about piracy? Because, while the movement has emerged as a significant alternative to proprietary copyright regimes, a key issue to be addressed, in terms of its relevance and translation beyond markets like the United States and Europe, is the challenge of conceptualising its relationship with, and interaction to, the informal information economies of the global south.

Without reifying simplistic, universal notions of north and south (such as differences based on economic power or inherent culture), our analysis of the implications of piracy for a cc movement in South Africa relies on experiences of the informal sector of the economy[4] in Asia and Africa. While we would deny that practices of piracy are exclusive to economically marginalised people and nations, or that they should be navigated with an alternative moral compass when located in the south, we do assume that the relative prevalence, functionality and size of the informal economy in parts of the south (seen against the strong rule of law which inhibits similar forms from proliferating – when intended – in the north), bears analytical significance.

While the concept of piracy has a rich intellectual legacy,[5] our use of the word in this commentary is confined within the informal economy in cultural goods, broadly taken.

Interrogating piracy

If piracy is a widespread global phenomenon, as almost universally agreed by a range of actors, then we need to understand why this is so. First, in Tables 1-3 below, we consider a cursory exercise insurveying the cost of books as a proportion of national average income, in three countries,for three titles. [6]

This exercise provides several different insights. One: absolute prices of books can be higher in the south than in the north. Two: consumers in the south have to commit significantly higher proportions of their income to consume these books. Three: if consumers in the United States had to pay the same proportion of their income towards these books as their counterparts in South Africa and India, the results would be ludicrous: US$1027.50 for

4 Though the use of the term "informal sector" (and its corollary, the "informal economy") has been highly naturalised, it would serve us well to remember that it is, in fact, only 35 years old – coined by the British anthropologist Keith Hart in a study on Ghana in 1971 – and that the set of practices it refers to have always existed, but without the recent level of economic policy scrutiny.

5 See, generally, Linebaugh, P & Rediker, M (2000) *The many-headed Hydra: The hidden history of the revolutionary Atlantic*, Verso, London; see also chapter 2 of Drahos, P & Braithwaite, J (2003) *Information feudalism*, Norton, London.

6 Average income figures from UNDP *Human development report* 2005 (South Africa: US$3,489, India: US$564, US: US$37,648). Book prices: lowest-priced similar editions compared on www.amazon.com, www.kalahari.net and www.firstandsecond.com, accurate as of 14 February 2006.

Country	*The God of Small Things* (US$) (Arundhati Roy)	*Long Walk to Freedom* (US$) (Nelson Mandela)	*Oxford English Dictionary* (US$)
South Africa	16.23	24.30	47.00
India	6.60	15.40	14.10
US	10.50	12.10	21.50

Table 1: Absolute cost of three book titles in South Africa, India, United States (US)

Country	*The God of Small Things*	*Long Walk to Freedom*	*Oxford English Dictionary*
South Africa	0.0046%	0.0069%	0.0134%
India	0.0117%	0.0273%	0.025%
US	0.0002%	0.0003%	0.0005%

Table 2: Cost of three book titles as a percentage of average income in South Africa, India, US

Book	Projected cost in US at South Africa proportions (US$)	Projected cost in US at India proportions (US$)
The God of Small Things	173.00	440.50
Long Walk to Freedom	259.77	1027.80
Oxford English Dictionary	504.50	941.20

Table 3: Cost of three book titles in US if at proportions of income paid in India and South Africa

Mandela's *Long Walk to Freedom* and US$941.20 for the *Oxford English Dictionary*. It is instructive, then, that the prospect of paying US$440.50 for Roy's *The God of Small Things* in the United States is evidently alarming; whereas paying US$6.60 for the book in India (which in Indian terms is exactly the same value as US$440.50 in the United States, by this logic) is not treated with similar alarm.

Under-interrogated naturalisations of what is "cheap" form the basis, in part, of the general ire against piracy in the south. But how can we read this more accurately? Rather than supply the unreasonably high cost of cultural goods in certain markets of the south as a justification for piracy, we might see it as one part of the explanation: piracy as an organic market reaction to the exclusion of consumers by copyright industries.[7]

It is also possible that under-interrogated notions of what it means for a commodity to be "available" inform the stigmatisation of piracy.

Another explanation for why piracy exists as a market phenomenon lies within the issue of distribution. Instead of seeing the copyright industries and the informal economy as two air-tight categories, observations on the ground inform us that there is seepage, and the relationship is complex and mutually dependent, with the informal economy sometimes serving as a means to go where the traditional economy cannot. In other words, it is not just the consumer in the south who needs the informal economy: it is sometimes, also, the artist

7 See, generally, Wang, S (2003) *Framing piracy: Globalisation and film distribution in greater China*, Rowmann and Littlefield, Oxford; see also Larkin, B (2004) Degrading images, distorted sounds: Nigerian video and the infrastructure of piracy, *Public Culture*, Vol. 16, No. 3, Fall.

and the copyright industry. Peter Manuel recounts, in this excerpt from an interview with an executive from a maverick start-up music company in India, that piracy could also be a deliberate distribution and publicity strategy:

> *'...I tell you that back then, the big Ghazal singers would come to us and ask us to market pirate versions of their own cassettes, for their own publicity, since HMV wasn't really able to keep up with the demand...' (in Manuel, 2001: 76).*

Implications for the Creative Commons

Creative Commons is heavily influenced by theories of transformative authorship, referring to the practice of constantly remixing and re-creating material, thereby contributing to, and growing, the public domain of culture and creativity. One of the reasons for a general discomfort with piracy is the alleged lack of creative transformation in the process. Can we then turn away in embarrassment at this culture of rampant illegality? Do we then declare that piracy is absolutely unacceptable, since it does, after all, violate existing law?

By looking for transformative authorship we may be addressing a particular content problem, but in countries plagued by problems of infrastructure (such as the lack of adequate bandwidth or electricity, and the relative scarcity of public libraries and computers), the problems associated with information translate very differently. Content is only one of the issues that arise. It would, therefore, be insufficient to analyse piracy solely from a content perspective, and it might be valuable to look, instead, at the ways in which piracy facilitates the lowering of the costs of technologies.

In India, for example, while the video cassette recorder (VCR) never became a mass commodity, the availability of cheap video compact discs (VCDs) and digital versatile discs (DVDs) propelled a vibrant, indigenous market for low-cost VCD players (Sundaram, 1999: 59-66). Similar processes are observable in the market for other electronic commodities, such as cameras. In most cases, the reason for the fall in prices of electronic goods or computers is not through (the radical revolution implied in) such things as free software or open content, but, in fact, through the easier availability of mainstream software and entertainment commodities such as Windows XP and the Hollywood film.

It is difficult to speak of ordinary people becoming content producers without also considering that changes in the means of production of culture might be a necessitating factor. For example, there is currently a wave of excitement over the contemporary art scene in China – and, indeed, it seems to be the flavour of the month in global art circles. There are thousands of people who are lining up to join art schools in the country, and one Chinese curator had this to offer by way of explanation for this sudden enthusiasm: "When you can buy Tarkovsky for a dollar, you will obviously produce many artists" (personal communication with authors).

When we look a little closer at these (apparently non-transformative) acts of piracy, we find that they have much in common with the aspiration to create a more plural, more diverse public sphere of cultural production and participation. Even as bandwidth is a significant access barrier to participation in this global public sphere, yet participants in countries of the south do find ways out of the problem – and this is usually in the form of the neighbourhood pirate who supplies cheap DVDs, or through Internet hotspots in Indian cities, which, through free software,[8] allow vast swathes of the population entry into the worlds of technology and media. The pirate, then, is the subterranean other of the hacker, lacking his urbane *savoir-faire*, and bereft of the moral higher ground afforded to the renegade free/libre and open source software (FLOSS) developer.

Conclusion

If, for a moment, we might consider shifting the focus away from what piracy *is* to what piracy *does*, that might allow us to see its close links with the normative considerations that public domain advocates argue for – and are yet, often, unable to achieve immediately. Consider the case with books: while public domain advocates might attempt to reform copyright law in order to enable exceptions and limitations that expand access to knowledge, the pirate can churn out an unauthorised, affordable photocopy, thus autonomously enabling exactly the same effect.

A final point to note is that the social conflict and struggle that mark the enforcement of copyright, and the manner in which they play out, must be seen in context with lived reality in the south – a world where the lines between livelihood and legality are, and have always been, thin. When one translates the terms of a cc licence into countries such as India and South Africa, and honestly observes who gets to participate, produce, share, and benefit, one is faced with the uncomfortable fact that it is, still, mainly the elite. And since all of us, Creative Commonists especially, believe in a more equitable vision of culture and information, we could only benefit from remixing the criminality that copyright industries produce around quotidian piracy. ❑

8 Referring here to Microsoft, and implying the rampant piracy in software, rather than FLOSS

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