

# Coda: A Short History of Book Piracy

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## Introduction

The history of media piracy explored in this report is predominantly a history of the digital era. Digital technologies have brought a sharp drop in the cost of reproduction of many cultural goods and, consequently, in the degree of control that producers exercise over how and where those goods circulate. The breakdown of this control has been so rapid that it is no surprise that many see it as a revolution—and indeed, from the perspective of many industry incumbents, as an unprecedented disaster.

But a longer historical lens suggests that the current crisis of copyright, piracy, and enforcement has much in common with earlier periods of change and conflict among cultural producers. From the early days of the book trade in the fifteenth century, cultural markets were shaped by deals within the publishing trade and with political authorities over who could reproduce works and on what terms. While printers and publishers sought protection from competition, state and church authorities wanted to control the circulation of texts. Regulations designed to serve these goals led to a highly centralized printing trade in most European countries, in which state-favored publishers monopolized local markets.

Such monopolies inevitably attracted competitors from the ranks of the less privileged printers, as well as from those outside local markets. Repeatedly, over the next centuries, state-protected book cartels were challenged by entrepreneurs who disregarded state censorship, crown printing privileges, and guild-enforced copyrights. Already in the early seventeenth century, incumbent publishers labeled such printers pirates, evoking maritime theft and plunder.

Such conflicts were not limited to local markets. Pirate printers tended to flourish at the geographical peripheries of markets—often across borders, where the enforcement power of the state stopped. Scottish and Irish publishers competed with London publishers for English audiences; Dutch and Swiss publishers printed for the French market under the *ancien régime*. To a considerable extent, the European sphere of letters emerged through this transnational explosion of print.

Pirate publishers played two key roles in this context: they printed censored texts, and they introduced cheap reprints that reached new reading publics. Both actions fueled the development of a deliberative public sphere in Europe and the transfer of knowledge between more and less privileged social groups and regions.

New pirate entrants always responded to the market inefficiencies created by the cartels. In the short run these distortions could be upheld by state power. But in the long run, pirate practices were almost always incorporated into the legitimate ways of doing business. Over time, regulatory frameworks changed to accommodate the new publishing landscape.

Similar stories could be told in many modern industrial contexts, including computer hardware, chemical engineering, pharmaceuticals, and software. The piggybacking of local industry on the intellectual products of more developed, geographically remote competitors is not an aberrant form of economic development—it is one of its basic features (Johns 2010; Chang 2003; Ben-Atar 2004). This development narrative threads its way through many of the preceding pages as pirate challengers catalyze change in local markets. As a conclusion to this report, we return to the early history of book publishing and piracy to as a way of emphasizing this continuity and clarifying how these dynamics play out in cultural markets. Consistently, we see five loose “laws” of piracy at work in cultural markets:

1. Persistent gaps between supply and demand due to artificial constraints on price or supply will be filled by pirate producers.
2. When faced with piracy, industry incumbents almost always turn to the state to defend their market positions and usually adapt their business models only when other recourse has failed.
3. Conversely, pirate producers tend to operate at the edges of the sphere of influence of incumbents, where differences in law and difficulties of enforcement create spaces of ambiguous or conflicted legality.
4. Piracy, at these economic and political peripheries, has a well-established role as a development strategy that facilitates the circulation of knowledge goods.
5. In many of these contexts, piracy also plays a clear political role as a counterweight to the centralized control of information—whether by states or private interests. The censorship of texts in pre-modern England and France was continually undermined by pirate networks. As this report has described, piracy played much the same role in Russia and South Africa in the 1980s.<sup>1</sup>

1 This last point is not a major focus of our country reports but deserves attention in the context of the current enforcement push. Recurrently, the enforcement of copyright has become mixed up with political or commercial motives for restraining speech. This is hardly surprising: copyright enforcement is, by definition, a form of control over expression, and on that basis has been the subject of innumerable disputes about the proper limits of that control. In practice, in both liberal and authoritarian societies, the last guarantor of freedom of speech has been not formal rights and protections but simply the inefficiency of enforcement. We have little language in our political systems for valuing this inefficiency and the leaky, hard-to-control cultural economy that results from it. In our view, this leakiness is no less important today in an era of growing technological capacity for enforcement and commercial demands to use it.

## Synthetic and Crown Rights

In the latter half of the fifteenth century, several decades after Gutenberg's invention of the printing press, the publishing trade was still poorly developed. The knowledge and technical infrastructure needed to support publishing were slow to spread. Demand soon outpaced supply: many cities had an abundance of manuscripts and codices awaiting publication or republication but lacked printers. Governments granted monopolies and other exclusive rights to encourage the local establishment of printing businesses, often by enticing skilled printers and tradesmen to emigrate from other cities.

By the end of the fifteenth century, this scarcity had begun to give way to a more developed culture of print. A wider European book trade was emerging, reflecting not only growth in the number of printers but also higher demand for contemporary works. Expanded trade, in turn, created a market for cheap reprints. A printer in Lyon could turn a high profit reprinting a book first published in Venice or Basel. Reprinting emerged very quickly in the book trade and led printers to seek state support for proprietary publishing claims.

The first such protection was issued in Milan in 1481 to Andrea de Bosis, granting him exclusive rights to print and sell Jean Simoneta's *Sforziade* (Feather 1987). Such privileges were only as good as the geographical reach of the political authority that issued them. Exclusive rights in Milan did not extend to Venice or Rome. Large unified empires, like France and Spain, had some success limiting internal competition but were ineffective against competition from abroad.

The export-driven mercantilist economics of the age further complicated issues of geography and legality. A publisher might be a respected member of society in his home country—if his activities were legal under local law and profited the community—but widely regarded as a pirate outside it if he disregarded the printing rights and privileges of other territories.

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As more publishers began to operate within the pan-European sphere of letters, the potential grew for profit-destroying conflicts between them.

In the absence of an international copyright regime, publishers established informal agreements regarding rights of republication and sale. Often, these “synthetic copyrights” provided more security than locally issued regulations because of the interdependence of the publishing trade (Bettig 1996:17). Internationally active publishers relied on foreign publishers to carry their books and consequently were embedded in a network of relationships that required trust and reciprocity. These thick social and business ties meant that transgressions could be, and often were, punished by the publishing community itself, regardless of local regulations.

Even without state backing, publishers in the international trade had a strong collective interest in establishing rights of exclusivity. Such agreements often encompassed large numbers of publishers within and across state borders. By the late eighteenth century, a system of synthetic rights was in place among Dutch and Swiss publishers printing books for the French market (Birn 1970; Darnton 1982, 2003). Irish publishers had a similar system until the Union with Great Britain in 1800 (Johns 2004). US publishers devised a system of synthetic copyrights to manage competition for foreign works, which were denied copyright protection under US law throughout the nineteenth century (Clark 1960; Khan and Sokoloff 2001). Eighteenth-century German publishers specified the circumstances under which members of the trade could produce and circulate pirated editions: “[if] the original publisher’s prices increased . . . [if] codes of conduct were broken, [if] colleagues as well as the public were damaged, or if pirate editions were only distributed in regions where the original itself was not available” (Wittmann 2004). The exclusivity rights of individual publishers were thus secured within and through the publishing community.

The relationship between rules imposed from above and agreements and norms initiated from below was always complex. Emerging regulatory frameworks of the time sometimes deliberately built upon and exploited community norms, while in other cases they were intended to rewrite existing rules of the trade. Most conflicts between legal publishers and pirates occurred when state rules diverged from community norms, violating community notions of fair competition. Such divergence typically occurred when some players were able to “capture” state favor or regulation in new ways; when new entrants capitalized on weaknesses in regulation or in the capacity to enforce it; or when key stakeholders (such as authors) were left out of the bargaining in ways that destabilized the system in the long run.

## The Elizabethan Book Pirates

In sixteenth century England, Elizabeth I granted monopoly privileges to select publishers over such basic texts as the Bible, alphabet books, almanacs, books of grammar, and law books. These steady-selling, high-volume texts were exceptionally valuable to publishers. Many of the smaller publishers were locked out of these lucrative markets, making it very difficult to

earn a living, raise capital, buy manuscripts, or secure copyrights. With rights to the best texts doled out as political favors, this period saw the emergence of a class of impoverished printers, struggling to stay in business with more obscure texts.

Tensions between wealthy and poor printers increased over time and eventually degenerated into a publishing war. Poor publishers began to pirate protected books in large numbers and militate for a more egalitarian distribution of privileges. Because the prices of authorized copies were kept high, the black-market book trade was very profitable. Even in a context of high risk in which homes of suspected pirates were routinely searched, illegally printed copies confiscated, and printing machines destroyed, illegal publishing proved impossible to suppress.

Roger Ward's case illustrates the scale of the conflict. In 1581/2, Ward confessed to illegally printing 10,000 alphabet books—a massive number in an era in which 1,500 copies was considered a large print run (Judge 1934:48–49). Other records cite similar figures: 4,000 psalm books printed in a ten-month period; 10,000 more alphabet books printed in eight months. Another record of the work of eleven printers lists 10,000 alphabet books and 2,000 psalm books printed and sold in less than a year. Such sales were significant enough to seriously disrupt the legal market.

After many fruitless years of conflict, privilege holders began to change course. Gradually, they adopted a strategy of appeasement and co-optation of the opposition as a means of regaining at least some control of the book market. Some of the pirates were simply bought off. John Wolfe, one of the most notorious pirates, was given part of Richard Day's profitable monopoly on *The A.B.C. with Little Catechism* and admitted to the printers' guild (the Stationers' Company). He soon became one of its most reliable policemen. For others, the Stationers' Company made important concessions: in 1583/84 it authorized non-Company printers to print a wide variety of works, including certain law books; Scottish, French, Dutch, and Italian versions of the Psalms; a list of eighty-two other protected titles; and all out-of-print works.

This strategy of accommodation proved successful and maintained a loose equilibrium in the British book market that lasted for most of the seventeenth century. At the end of the century, however, Parliament upset the status quo.

## Hills the Pirate

By the 1690s, the Licensing Act—the legislation governing publishing privileges—was overdue for revision. The act was a deal between the Stationers' Company and the Crown, involving Crown support for copyright and guild privileges in return for guild support for Crown censorship. Among these privileges, the act capped the number of master printers in England at twenty; regulated the numbers of presses, journeymen, and apprentices; restricted printing to London, Oxford, Cambridge, and the city of York; and limited the importation of books through the port of London (Astbury 1978). For the Crown, the act served as the legal foundation of censorship in England, as well as its mechanism through the control it afforded over publishers.

The prospect of renewal of the Licensing Act generated significant controversy. John Locke made impassioned arguments against its renewal, most famously on the grounds of freedom of the press, which the act clearly constrained. Daniel Defoe connected these arguments to the claims of the emerging class of intellectuals who wanted to earn a living by their pen, rather than through patronage. Other commentators argued against the Stationers' monopoly on the basis of its market consequences: high book prices and restricted access to classical texts.

Parliament let the act lapse in 1695, marking a major victory for freedom of the press in English law. The publishers' trade was also transformed, though in ways that were not immediately apparent. The privileges and copyrights secured in prior years were maintained but only through common law: the legislation that acknowledged these rights and provided the institutional and legal framework for their enforcement had been abolished. The number of printers and publishers was uncapped, and restrictions on imported books went unenforced. These changes set the stage for a brief but turbulent period in which old publishing privileges and copyrights were unenforced and insurgent publishers could experiment with radical new models for selling books.

As the eighteenth century began, printers still treated books as luxury goods, catering to wealthy customers willing to pay for expensive editions. Several categories of books, however, enjoyed wider circulation, including psalm books, alphabet books, and almanacs. These had begun to create not only broader literacy but a nascent mass market for a wider range of literature.

Smaller publishers began to reprint copyrighted works in large quantities, challenging the market structure and pricing of the incumbent publishers. Henry Hills the Pirate, as he became known, was the most famous of these. Beginning in 1707, Hills republished popular poems, pamphlets, and sermons, selling them for between a halfpenny and twopence—a fraction of the typical sixpence price. He published an unauthorized compilation of the first one hundred issues of *The Tatler*, one of the most popular magazines of the time, years before an official compilation was released. The motto on each of Hills's one-penny prints testified to the popular ambition of his publishing model: "For the benefit of the poor." Estimates of the total number of copies printed by Hill reached 250,000 (Solly 1885).

Three factors made Hills's radically lower pricing possible: (1) he ignored rights-holder claims, (2) he used the cheapest possible materials, and (3) he kept his per-copy profit to a minimum. The resulting business model was extremely powerful. Hills was arguably the first businessman of the era to cultivate a mass-market model for books, based on large volume and low profit margins.

## The War for the Public Domain

Established publishers used the radicalism of Hill and others like him to mobilize political support for the renewal of English publishing laws. A long and tumultuous debate ensued that

began with claims of harm from piracy but quickly expanded to include the freedom of the press, the dangers of print monopolies, the benefits of copyright, and the political and financial independence of the intelligentsia.

The Parliament finally passed a law in 1710, the Statute of Anne, which is usually described as the first modern copyright law. Because the debate had moved well beyond piracy, the new law brought a number of profound changes to how print was regulated. The best known of these was the establishment of the author as the source and original holder of the copyright. This change diminished the monopoly power of publishers and clarified the transactions of rights involved in the production of a book. It was not, however, a clear assertion of authors' rights:

Emphasis on the author in the Statute of Anne implying that the statutory copyright was an author's copyright was more a matter of form than of substance. The monopolies at which the statute was aimed were too long established to be attacked without some basis for change. The most logical and natural basis for the changes was the author. Although the author had never held copyright, his interest was always promoted by the stationers as a means to their end. Their arguments had been, essentially, that without order in the trade provided by copyright, publishers would not publish books, and therefore would not pay authors for their manuscripts. The draftsmen of the Statute of Anne put these arguments to use, and the author was used primarily as a weapon against monopoly. (Patterson 1968:147)

The second and—it later turned out—very consequential change for the larger book market was the establishment of a short, fixed term for copyright. Under the previous system, registration in the Company's Registry guaranteed perpetual ownership of the text. Under the act of 1710, however, newly created works were protected for a period of fourteen years (with the possibility of renewal for an additional fourteen). Already-published works retained copyright protection for twenty-one years. This dramatic restriction of copyright reflected the changing intentions of lawmakers. Where earlier laws were intended primarily to ensure the Crown's control of information, the Statute of Anne was intended to regulate trade—acting in the interest of society by preventing monopoly and in the interest of the publisher by protecting works from piracy (Patterson 1968:144).

The protection for already-printed works had been a compromise with London printers, who feared the loss of property invested in the copyrights registered by the Stationers' Company. When the twenty-one-year grace period came to an end, publishers renewed their efforts to secure the perpetual copyright established under earlier common law. These efforts were triggered by the rush of Scottish publishers into the market for works emerging from copyright.

Although the Scottish publishers were treated as pirates in London, their situation reflected an underlying problem of legal pluralism within the English system. The key issue was whether the limited copyright period established by the act of 1710 took precedence over the perpetual copyright consolidated under English common law, which did not apply in Scotland. Thus began a new period of public controversy and political conflict around copyright—this time between London-based and Edinburgh-based publishers. As copyrights on popular works expired in the 1730s, Scottish printing houses flooded northern English markets with cheap reprints. London publishers objected to this piracy of their back catalogs on the basis of the perpetual copyright established under English common law. Distance favored the Edinburgh publishers, and Edinburgh soon became an important publishing center. The conflict was finally resolved in 1774, when the House of Lords ruled against the common-law precedent in the case of *Donaldson v. Beckett*.

*Donaldson v. Beckett* ended the concept of perpetual copyright in English law and affirmed what we now know as the public domain—the body of work that can be used and republished without permission. According to the publishers' estimates, the ruling erased property vested in copyright totaling approximately 200,000 pounds. Nonetheless, the dissolution of the book market foretold by London publishers failed to occur. On the contrary:

The decision of 1774 transferred, through lower prices, a huge quantum of purchasing power from book producers to book buyers. With more firms entering the business, increasing price competition, and the prices of pretender copyrights plummeting towards zero, the British book industry as a whole moved to a faster growth rate. Bankruptcies tripled, a sign of boom, and the industry as a whole prospered as never before.

After 1780, the minimum price for high-demand out-of-copyright texts fell to half, and then to a quarter, of previous levels. Print runs for major editions grew by a factor of three or four, and there were many more editions, often on sale at the same time. . . . Within a generation, the book-binding industry doubled in size—a more reliable indicator of the growth of book production than printing capacity or titles published. . . . The period also saw a rise in the annual growth rate of book titles published nationally, much of it accounted for by reprints of older titles, as well as a rise in the rate of growth of provincial book publishing, provincial bookshops, and provincial circulating libraries. There was a boom in anthologies, abridgements, adaptations, simplified and censored versions, as well as books sold in parts. We see the rapid growth of a new children's book industry, which also drew on anthologies and abridged out-of-copyright authors, and which drove out or absorbed the long-frozen ballad and chapbook canon within a few years.

The quantified estimates I have assembled match the more impressionistic judgement made by the remainder bookseller Lackington writing in 1791:

“According to the best estimation I have been able to make, I suppose that more than

four times the number of books are sold now than were sold twenty years since . . . In short all ranks and degrees now read.” (St. Clair 2004:115–18)

## Market Research in Continental Europe

Beyond England, pirate publishers also played an important role in contesting the extensive censorship of texts practiced in seventeenth- and eighteenth-century France. Authors such as Voltaire, Rousseau, Mercier, and Restif de la Bretonne were banned in France but widely available in editions printed abroad. Foreign editions smuggled back into France often became the standard editions for such works (Darnton 1982). In practice, much of the Enlightenment in pre-revolutionary France passed through Dutch and Swiss publishers (Birn 1970:134).

The business environment for such extraterritorial publishers was extremely complex, as they were competing not only with the legitimate publishers in France and elsewhere but also with each other. As pirates, they could not rely on formal protection mechanisms, such as royal privileges, to mitigate some of the risks associated with publishing. Business practices adapted to this highly competitive environment:

What really set the pirate publishers apart was their way of doing business. They practiced a peculiarly aggressive kind of capitalism. Instead of exploiting privileges from the protected position of guilds, they tried to satisfy demand, whatever, wherever it was. (Darnton 2003:28)

The key component of this business strategy was market research on both local demand and potential competitors’ plans (Darnton 2003:28). Frédéric Samuel Ostervald, an alderman in the Swiss town of Neuchâtel and one of a small network of pirate publishers serving the French market, left an extensive record of how such networks operated (Darnton 2003:4).

Over two decades, Ostervald received close to 25,000 letters from a network of French booksellers, Dutch and Swiss pirate publishers, traveling agents, and authors writing in French across Europe. Such letters were first and foremost a way of gauging audience and potential competition. But they also provide evidence of informal agreements among pirate publishers about who would publish which works for different markets. These were quintessential gentlemen’s agreements, operating on easily violated trust, but they proved strong enough to create a stable market that minimized cannibalization among publishers and counterbalanced the effects of fragmented and often restrictive local regulations.

Collectively, these pirate networks invented an international regulatory regime for copyrights more than a century before the Berne Convention codified copyright relations on the international level. Pirate correspondence and gentlemen’s agreements limited unfair competition in local markets among the members of the network in an era in which state-sponsored mercantilism still favored the enforcement of local claims and the raiding of foreign copyrights.

## The American Pirate Century

In the second half of the nineteenth century, there were several efforts to curb state-sponsored cross-border piracy through bilateral agreements, but a truly international copyright standard came together only in 1886, when Germany, Belgium, Spain, France, the United Kingdom, Italy, Switzerland, and Tunisia signed the Berne Convention for the Protection of Literary and Artistic Works. From Berne forward, local and cross-border piracy became a more explicit subject of national attention, if not always of new regulations or sanctions. For many countries, copyright and enforcement remained exercises in triangulation between the desirability of cheap access to foreign works, the interests of local publishers, and the demands of international trading partners. One of the chief pirate nations, in this context, was the United States of America.

For roughly a century, American copyright law was a clear-cut case of situational piracy—of behavior legalized under US law but widely condemned abroad. The US federal copyright statute implemented in 1790 was based closely on the Statute of Anne and replicated its limited fourteen-year renewable term. But—possibly due to a misinterpretation of the English statute (Patterson 1968:200)—the US law granted copyrights only and exclusively to US citizens. As a major importer of British titles, this clause created a massive subsidy for US publishers and helped establish a *de facto* cultural policy of cheap books, which in turn became an essential component of mass public education. This situation persisted until the 1891 Chace Act granted limited copyright to foreign authors. Another century would pass before the United States joined the Berne Convention, in 1989.

The US rejection of British claims, in particular, persisted for a century because it served the interests of a developing nation and its nascent publishing industry. This rejection was itself often construed as both a sovereign right and an explicit policy of national improvement. As one publisher put it during one of the many Senate debates on the subject:

All the riches of English literature are ours. English authorship comes to us as free as the vital air, untaxed, unhindered, even by the necessity of translation; and the question is, Shall we tax it, and thus impose a barrier to the circulation of intellectual and moral light? Shall we build up a dam, to obstruct the flow of the rivers of knowledge? (Solberg 1886:251)

By the second half of the nineteenth century, the combination of high literacy, plummeting printing costs, and the most advanced postal and transportation system in the world had produced rapid growth in the US book and magazine markets (Beniger 1986). Cheap pirated literature helped strengthen the book publishing industry and educate the rapidly expanding American reading public:

Piracy had created audiences and large-scale publishing operations, including the elaboration of editorial, production, and critical functions. Meanwhile, the availability of pirated British literature may have stimulated the development of the profession of authorship in the long run, as well as the invention of distinctive themes and new literary forms and techniques. (Bender and Sampliner 1996/97:268)

Even though American authors actively lobbied for greater respect for international copyrights, the country's pirate century only ended when the biggest stakeholders, the East Coast publishers, threw their weight behind such efforts. This conversion was, as usual, more a product of competitive concerns than moral ones: by the late nineteenth century, eastern publishers faced competition from new West Coast firms. Notably, these new entrants operated outside the system of gentlemen's agreements that governed competition among the East Coast publishers (and mollify British publishing houses through informal royalty payments) (Clark 1960). When efforts to restrict competition through the courts failed, the East Coast firms decided that international copyright would provide them an advantage in securing and defending publishing rights against their less-capitalized and -connected West Coast competitors. The shift in attitudes toward foreign copyrights was quick, and the move to join the international community got underway.

The 1891 Chace Act extended copyright protection to foreigners but was clearly written to serve the competitive interests of domestic publishers. It had enough loopholes, one scholar has noted, to "make the extension of copyright protection to foreigners illusory" (Ringer 1967:1057). This situation persisted long after the United States officially complied with international norms and was a constant source of tension with European publishers. By the mid-1930s, some Dutch publishers had given up on legal remedies and adopted a policy of retaliation:

Two outstanding incidents involved *The Yearling* by Marjorie Kinnan Rawlings and *Gone With The Wind* by Margaret Mitchell. At the trial in the Netherlands involving the latter book, it is interesting to note, the Dutch publishers, in the words of the presiding judge, "stated that they would have been quite prepared to pay for the right of translation if it were not for the fact that works copyrighted in the Netherlands are published in the United States time and again without any compensation. The only way to compel the United States to accede to the Berne Convention is to disregard, in the countries which have acceded to that Convention, the copyrights of the citizens of that country." (Kampelman 1947:421)

In the long run, the decisive factor in shifting US policy on international copyrights was the growth of American export industries based on intellectual property (IP). By the 1930s, the United States was an exporter of a wide array of knowledge goods and services. The rise of

Hollywood, in particular, consolidated this role in the cultural sphere, but it was a small piece, overall, of a much larger shift toward an IP- and services-driven US economy. Eventually, this shift produced an international policy agenda. By the 1980s, “American exporters heavily reliant upon intellectual property—such as the computer, entertainment and pharmaceutical industries—were growing ever more frustrated with both legitimate competition and proliferating piracy, while the White House found itself casting about for a politically painless way to address the growing trade deficit” (Alford 1992:99).

A uniform IP protection regime that would support the global trade of assets and services became more attractive in this context. But the weakness of international conventions based on voluntary adherence had also become clear. A number of countries stayed away from the international copyright conventions. Others joined one or the other but failed to fulfill their obligations. Developing countries had their own cheap-books policies, and confrontations with Western rights-holders were common in the 1960s and 1970s.

The parallels were obvious. After the breakup of the colonial empires, developing countries faced challenges similar to those faced by the United States a century before. Nearly all were IP-importing countries; nearly all saw the path to development passing through mass education and literacy. What were developing countries to do in this situation? By the 1980s, the new trade agreements promoted by the United States and other developed countries offered an answer: higher standards of protection and enforcement.

With the architecture of liberalized, global markets taking shape, it became important to articulate how and why poor countries would benefit from stronger IP protection when the United States and many other countries had clearly taken a different path. One simple strategy was to suggest that the loose positive correlation between IP protection (or, inversely, piracy rates) and wider indicators of socioeconomic development is in fact a causal relationship<sup>2</sup>—that stronger IP protection spurs development. But of course correlation is not causation, and a wide range of commentators have observed that “the causation might very well run the other way, with richer countries both more able and more willing to protect intellectual property since they have a larger share of their economy devoted to such pursuits” (Thallam 2008).

We see growing evidence for the latter view. Unqualified claims that strong IP protection is necessary for foreign direct investment (FDI) are rarely heard anymore, not least because they have been contradicted by rapid rates of FDI growth in many high-piracy industrializing countries—notably China, which has climbed the industrial value chain through massive copying of foreign goods and technologies.<sup>3</sup> The claim that strong IP protection is necessary

2 A wide range of socio-economic indicators play a role in these contexts, variously rendered in terms of GDP (gross domestic product) (Varian 2004), institutional development (Thallam 2008), foreign direct investment (Mansfield 1994), and business leaders’ perceptions of national “competitiveness” (World Economic Forum 2010). For a typical example of the causal argument, see the International Chamber of Commerce’s 2005 white paper “Intellectual Property: Source of Innovation, Creativity, Growth, and Progress.”

3 When the Organisation for Economic Co-operation and Development examined the literature on this issue in 2008, it reached the conclusion that “other factors outweigh the negative effect of counterfeit-

for the growth of local industries, for its part, is hard to sustain in such sectors as film, music, and software, where US and multinational firms completely dominate most local markets.

As we have argued throughout this report, our study suggests that the main differentiator between widely served, relatively affordable media markets (for example, in India or the United States) and anemic, high-priced media markets, like those of most of the rest of the developing world, is not income but competition, and that such competition is likely to be strongest where domestic firms control large shares of production and distribution. Local firms, broadly speaking, are much more likely to aggressively compete for local audiences and to innovate on pricing and services. Multinationals operating in low-value markets, in contrast, seek primarily to protect their high-value markets and to maintain their positions as they wait out the slow process of economic growth. Fostering local ownership, control, and competition within national media markets is, in our view, a key challenge for developing-country governments.

At the same time, we see little reason to think that changes in IP protection or enforcement will significantly affect this playing field. Such changes do little to alter the balance of power in local media markets, and as we have shown, the ease with which enforcement resources are captured tends to reinforce those inequalities. In our view, the key question looks much the same in both low-income countries and high-income countries: how to serve the new, larger publics catalyzed by the pirate economy? To return to Robert Bauer's formulation of the problem for the MPAA: "Our job is to isolate the forms of piracy that compete with legitimate sales, treat those as a proxy for unmet consumer demand, and then find a way to meet that demand."<sup>4</sup>

Not surprisingly, the economic arguments for stronger enforcement tend to ignore how IP regimes are actually made. The history of book publishers and pirates, on the other hand, tells us something of this story—one in which the distribution and enforcement of IP rights marks less a state of development than a set of power relations among firms within cultural markets. In periods when no major political, economic, cultural, or technological transformation challenged the status quo, copyright laws tracked conventions between dominant producers and served to reinforce and refine the prevailing order.

But while some of these arrangements were long-lived, they were also fragile and easily disrupted by competition outside the jurisdiction of the dealmakers, by technological change, and—above all—by the combination of the two. In such cases, incumbents ultimately had to assimilate the pirates, together with their marketing strategies, their novel approaches to production and distribution, their expanded audiences, and above all their lower prices. Now three hundred years after the passage of the Statute of Anne, we find ourselves in a moment of similar necessity.

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ing and piracy on foreign direct investment." See also Chang (2003) and, on China in particular, Yu (2007).

4 Interview with Robert Bauer, director of strategic planning for the Motion Picture Association, 2009.

## About the Coda

This chapter draws on portions of the book *Necessity Knows No Laws: the Role of Copyright Pirates in the Cultural Ecosystem from the Printing Press to the File-Sharing Networks*, to be published in early 2011 in Hungarian. This study revisits copyright history from the perspective of copyright pirates in order to understand the functions they fulfilled in the production and circulation of knowledge.

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