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The Role of Copyright in Creative Industry Development

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Abstract: Does copyright foster the development of creative industries in developing countries? Drawing on case studies from Nigeria, India, and China, this Article sheds some light on these questions. It argues that copyright offers distinct advantages over alternative models. Moreover, copyright law need not function as a monolithic force. Copyright norms can govern some aspects of industry operations, while remaining largely absent in other domains. However, as industries develop, the benefits of copyright become more salient and the logic of copyright formalization exerts a gravitational pull.

Keywords: copyright, piracy, creative industries, content industries, cultural industries, development, film, music, China, India, Nigeria, Bollywood, Nollywood, informal economies, commons, formalization, digital media

Do home-grown creative industries serve the interests of developing countries? What role might copyright law play in developing such industries? Drawing on case studies from Nigeria, India, and China, this Article sheds some light on these questions.

As to the first, a wealth of scholarly and policy literature testifies to the benefits of home-grown media as drivers of both economic and cultural development. As pillars of the knowledge economy, creative industries such as music, film, television, and publishing offer well-paying jobs, above-average economic growth, and sustainable development.[1] Such industries also make vital

1 UNCTAD, *Creative Economy Report 2010, Creative Economy: A Feasible Development Option* (14 December 2010). Other indirect benefits include boosts to tourism, potential marketing tie-ins, and a reversal of brain drain. See Sean Pager, *Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade*, 31 Northwestern Journal of International Law and Business (2011), 108; see generally Diana Barrowclough and Zeljka Kozul-Wright (eds.), *Creative Industries and Developing Countries: Voice, Choice and Economic Growth* (London:

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contributions to public discourse, foster democratic governance,[2] national cohesiveness and social inclusion,[3] and nourish personal autonomy, identity formation, and human flourishing.[4] Moreover, as digital technologies level the playing field for new entrants, concerns over cultural hegemony have given way to a growing recognition of the competitive advantages that emerging creative industries in the global South enjoy in local/regional markets.[5] Indeed, the more successful among them have emerged as global powerhouses.[6]

By contrast, copyright's role in underwriting such creative development presents a far more contentious question on which commentators have divided. Standard economic theory has long viewed intellectual property rights as an essential tool to incentivize creative investments. Property rights avert market failures due to free riding that would otherwise lead to suboptimal production of creative works.[7] Property rights also encourage the efficient allocation of investments; by harnessing private information revealed through market mechanisms, they direct creative resources toward socially valuable ends.[8] For this reason,

Routledge, 2007). The creative industry juggernaut has not been without its detractors. For a summary of some critical perspectives on the inequities of creative labor, see David Hesmondhalgh and Sarah Baker, *Creative Labour: Media Work in Three Cultural Industries* (London: Routledge, 2011), 6–8, 61–78; Zittrain, Jonathan, "The Internet Creates a New Kind of Sweatshop," Newsweek, 7 December 2009, available at: <http://www.newsweek.com/internet-creates-new-kind-sweatshop-75751>.

2 C. Edwin Baker, *Media, Markets, and Democracy* (Cambridge University Press, 2002), pp. 44–51.

3 Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge University Press, 2007), p. 51.

4 *Ibid*. at 39; Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (New Haven: Yale University Press, 2012), pp. 7–11.

5 Sean Pager, *Accentuating the Positive: Building Capacity for Creative Industries Into the Development Agenda for Global Intellectual Property Law*, 28 American University International Law Review (2012), 241–245; Mark F. Schultz, "The Nigerian Film Industry and Lessons Regarding Cultural Diversity from the Home- Market Effects Model of International Trade in Films," in Sean A. Pager and Adam Candeub (eds.), *Transnational Culture in a Digital Age* (Cheltenham, UK: Edward Elgar, 2012), 247–248; Diana Barrowclough, "The Production of Knowledge, Innovation, and IP in Developing Countries," in Neil W. Netanel, *The Development Agenda* (Oxford University Press, 2008), p. 321.

6 Pager (2012), *supra* note 5, at 242–243.

7 William Landes and Richard Posner, *An Economic Analysis of Copyright Law*, 18 The Journal of Legal Studies (1989), 325–363.

8 Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12(1) Journal of Law and Economics (1969), 11–14. Such informational efficiency arguably makes intellectual property preferable to alternative models such as government procurement, despite the deadweight loss associated with private rights. In the context of creative expression, the drawbacks of government funding are even more pronounced, given the propensity for state patrons to wield state subsidies as an instrument for censorship. Indeed, the track record of patronage regimes in conventional wisdom deems intellectual property rights – along with conventional property rights – integral to economic development. Developing countries have been urged to invest in IP capacity building, with the promise that economic growth will follow.[9]

More recently, however, an emerging literature on commons-based production models has challenged the rationale for intellectual property rights,[10] paralleling an analogous literature on commons-management regimes in the context of real property.[11] In both cases, commons scholars have called into question the premise that tragic consequences inevitably follow in the absence of private property rights.[12] Skepticism of propertization rationales has reached its most acute form in the context of copyright. Copyright skeptics observe that digital technologies have underwritten an explosion of creative works, arguing that such abundance renders the need for extrinsic incentives obsolete.[13] They see copyright enforcement as both a futile endeavor and one that imposes unacceptable costs on speech, innovation, and information flows.[14] Instead,

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many developing countries does little to inspire confidence in this regard. See, e. g. Pager (2012), *supra* note 5, at 271; "The Art is Red: Propaganda Art is Enjoying a New Lease of Life," The Economist, 20 December 2014, 65–66.

9 Pager (2012), *supra* note 5, at 227.

10 See, e. g. Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA Law Review (2012); Sprigman and Raustiala, *The Knockoff Economy, How Imitation Sparks Innovation* (Oxford University Press, 2012); Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 Yale Law Journal (2004), 273–358.

11 See, e. g. Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990).

12 See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. (1986), 711, 740–742; Aaron Perzanowski and Kate Darling, "Introduction" in Darling and Perzanowski (eds.), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (New York University Press, 2017), pp. 1–5. The rationale for protecting intellectual property (IP) differs from real property because the former is typically non-rivalrous: many people can typically use information goods at the same time without diminishing their value. For this reason, Garrett Hardin's famous "tragedy of the commons," which provides the rationale for private rights in real property – does not apply in intellectual property domain: Instead, IP rights aim to prevent a different tragedy: underproduction, rather than over-use. Such differences notwithstanding, the commons literature calls into the rationales for both types of property by attacking their central premise of tragedy as a default condition.

13 See, e. g. Mark Lemley, *IP in a World Without Scarcity*, 90 NYU Law Review (2015), 463–464; Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263 (2002), 266–268.

14 Eben Moglen, *Anarchism Triumphant*, First Monday, 2 August 1999, available at: < http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/684/594 >.

commons-based production is held out as a normatively superior alternative for the digital age.[15]

While these normative debates have largely played out in the context of developed economies, commons advocates have recently extended their prescriptive gaze to the developing world context as well. The pervasive presence of piracy there appears to validate claims that digital enforcement is futile.[16] Meanwhile, the proliferation of vibrant creative industries across the developing world has accordingly been haled as harbingers of a post-copyright future.[17] Because such emerging content industries effectively function in a *de facto* copyright commons, they serve as a laboratory in which the viability of alternative business models can be tested and evaluated.[18] Such entrepreneurial innovation, we are told, offer lessons for us all.[19]

This Article agrees that there are lessons to be learned from the experience of creative industries in the developing world. However, it casts a skeptical eye on claims that their experience justifies an endorsement of commons-based production. A close examination of the film and music industries in Nigeria, India, and China in recent decades reveals the challenges such industries have encountered and calls into question the extent to which the commons offers a conducive environment in which to nurture successful creative industries. Far from embracing the open distribution models celebrated by commons advocates, creative industries in these countries have relied on alternative control mechanisms that replicate the exclusivity that copyright would otherwise afford. Yet, such alternative mechanisms present significant shortcomings. As a result, as these industries have developed, they have tended to embrace copyright formalization. Such findings accord with prior hypotheses regarding a "crossover point" whereby countries reach a stage of development at which the benefits of copyright outweigh the costs.[20] Yet, rather than a single inflection

15 *Ibid*.

16 Joe Karaganis (ed.), *Media Piracy in Emerging Economies* (New York: Social Science Research Council, 2011), p. 66.

17 See Chris Anderson, *Free: The Future of a Radical Price* (NY: Hyperion Books, 2009); Lucy Montgomery, *China's Creative Industries: Copyright, Social Network Markets and the Business of Culture in a Digital Age* (Cheltenham, UK: Edward Elgar, 2010).

18 Nagla Rizk, "From De Facto Commons to Digital Commons? The Case of Egypt's Independent Music Industry," in Jeremy de Beer, Chris Armstrong, Chidi Oguamanam and Tobias Schonwetter (eds.), *Innovation & Intellectual Property: Collaborative Dynamics in Africa* (University of Capetown Press, 2014).

19 See Anderson (2009), *supra* note 17, at 62–64.

20 See Peter K. Yu, "Intellectual Property, Economic Development, and the China Puzzle", in Daniel J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (New York: Oxford University Press, 2007).

point at which copyright suddenly takes off, embrace of formal copyright norms often remains partial, selective, and contextually contingent. Moreover, formalization is far from inevitable. Nigeria's experience, in particular, shows the dangers of an informality trap that impedes formalization and hinders long-term development.

The account provided in this Article has implications for the existing debate on commons-based development and serves to delimit some parameters within which commons models can succeed. It also speaks to a broader literature on informal media economies and informal economies in the development context. In particular, the dynamics of copyright formalization recall Hernando de Soto's pathbreaking work on the role that formal property rights – or lack thereof – play in economic development. The last part of this Article explores these connections.

The remainder of this Article is organized as follows: Part I introduces the three case studies, surveying the experiences of the Nigerian, Indian, and Chinese film and music industries in recent decades. Part II then addresses the question of causation: assessing to what extent has the success of these industries occurred because of copyright law. Finally, Part III situates these findings in the context of existing literature on commons-based production and informal economies and, in particular, de Soto's theories on property formalization and the dangers of informality traps. Part IV concludes.

1 Overview of the case studies

The transformative effects of digital technologies in democratizing the production and distribution of creative content are well-recognized. Their implications for creative industries in the Global South, while less acknowledged, have been no less dramatic. Nigeria, India and China are each home to burgeoning content industries whose successes in recent decades put paid to outdated notions about the cultural hegemony of Western media.[21] The role that copyright law has played in these successes, however, is more ambiguous.

1.1 Nigeria

The origin of Nigeria's video film industry – Nollywood – reflects a confluence of factors specific to the Nigeria context: the macro-economic crisis of the late

21 This Articles uses the terms "content industries," "creative industries," and "cultural industries" largely interchangeably. Similarly, it refers to the product of such industries variously as artistic, creative, or cultural expression, media, works, content, or output.

1980s, the closing of cinema houses due to urban violence, the collapse of Nigeria television production.[22] Yet, there is also an element of technological determinism to the tale: Earlier efforts to market filmed productions of Yoruba folk theater – perhaps Nollywood's closest cultural antecedent – had foundered on the high costs and logistical hurdles associated with celluloid films. Nollywood's shift to video media – initially analog VHS tapes then later digital VCD discs – proved a game-changer. Perhaps not coincidentally, Kenneth Nnebue, an electronics dealer who imported VCR equipment and blank videotapes, is credited with discovering the medium's potential.[23] Nnebue bet that his tape stock would sell better filled with content than empty. His 1992 hit film, "Living in Bondage," galvanized attention, and a direct-to-video film industry sprang up almost overnight.[24] Within a decade, Nollywood had grown to become Africa's dominant film producer, churning out hundreds of films each year, watched by millions daily across Africa.[25] By volume of production, it is widely hailed as the world's second most prolific film industry.[26]

As a world-leading fully digital film industry, Nollywood exemplifies the potential for developing countries to leapfrog outdated technologies.[27] With annual revenues numbering in the hundreds of millions (in US dollars), Nollywood has become the country's largest private employer.[28] It serves as a

22 Jade L. Miller, *Nollywood Central* (London: BFI Palgrave, 2016), pp. 9–10.

23 While VCR technologies were widely available in Nigeria by the mid-late 1980s, the cost of such technologies plummeted in the 1990s, and, in particular, massive quantities of blank tapes became available at cut-rate prices as dealers in developed markets shifted to more advanced technologies; Miller (2016), *supra* note 22, at 12–15.

24 Miller (2016), *supra* note 22, at 16–19.

25 Sean A. Pager, *Folklore 2.0: Preservation through Innovation*, 2012 Utah Law Review (2012), 1853–1855. Nigerian video film production is as diverse as the country itself. Each of Nigeria's main ethnic groups produce films in their local language. However, Nollywood has come to signify the English-language films produced in Southern Nigeria, which enjoy the widest distribution. Miller (2016), *supra* note 22, at 3.

26 A widely cited 2009 UNESCO report ranked Nollywood second only to Bollywood; however, this claim hinges on a statistical anomaly: Nollywood's count is based on video film production, whereas other countries count only films released for theatrical distribution and omit direct-to-video films. Alexander Bud, *The End of Nollywood's Guilded Age? Marketers, the State and the Struggle for Distribution*, 6 Critical African Studies, no. 1 (2014), 92.

27 Olufunmilayo B. Arewa, "Nollywood and African Cinema: Cultural Diversity and the Global Entertainment Industry", in Irene Calboli and Srividhya Ragavan (eds.), *Diversity in Intellectual Property* (New York, NY: Cambridge University Press, 2015).

28 "Lights, Camera, Africa", The Economist, 16 December 2010, available at: <http://www.economist.com/node/17723124>. The industry also generates indirect benefits such as road construction by film crews in rural villages; John C. McCall, *Nollywood Confidential: The Unlikely Rise of Nigerian Video Film*, 13 Transition, no. 1 (2004), 98–109.

"model of entrepreneurial achievement" in a country plagued by corruption and rent-seeking.[29] Nollywood's success has inspired similar film industries in other African countries and among expatriate Nigerian communities.[30]

The cultural significance of Nollywood is equally notable. Africa has a deeply ingrained storytelling tradition, but has long lacked a mass media vehicle to harness its creative energies. For first time, African stories told by Africans can be shared by audiences across the continent.[31] That Nigerian films regularly outsell Hollywood imports made with far higher budgets and more sophisticated production values testifies to the hunger of African consumers for a genuinely popular medium of expression.[32] African diasporal communities overseas have proven equally avid consumers for whom watching Nollywood film provides a cultural connection to Africa.[33]

Nollywood films are made by a decentralized network of producers who operate at extremely low cost using rudimentary equipment. A budget of $50,000 and production calendar of four weeks from script to final release are not uncommon. Over 90 % of revenues come from sales of physical media routed through four central market hubs and then resold across Nigeria and beyond. Films are sold for roughly $2, and sales average anywhere from 50,000 to 200,000 authorized copies per film, with the occasional blockbuster surpassing one million copies.[34]

Funding and distribution of Nollywood films is dominated by shadowy guilds of "marketers" who operate through informal networks that originally served to smuggle pirated copies of foreign movies. As a result, although it has grown into a billion dollar, global industry, Nollywood still operates almost entirely through informal mechanisms. Cash predominates over credit. Trust relationships replace contracts. Copyright formalities are ignored. Instead, Nollywood guilds enforce order through informal disciplinary measures and actively discourage recourse to formal legal institutions. Accurate records of sales and revenues are impossible to obtain. Nor it is easy to establish who holds the rights to a given title; fraudulent sales agents abound.[35]

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29 John C. McCall, *Madness, Money, and Movies: Watching a Nigerian Popular Video with the Guidance of a Native Doctor*, 49 Africa Today, no. 3 (2002), 79–94.

30 Pager (2012), *supra* note 25, at 1859; Jonathan Haynes, "The Nigerian Diaspora: A Nigerian Video Genre", in Matthias Krings and Onookome Okome (eds.), *Global Nollywood: The Transnational Dimensions of an African Video Film Industry* (Bloomington, IN: Indiana University Press, 2013).

31 McCall (2002), *supra* note 29, at 95.

32 Schultz (2012), *supra* note 5, at 253.

33 Miller (2016), *supra* note 22, at 127–129.

34 *Ibid*. at 40, 52.

35 *Ibid*. at 47, 54–59, 112, 139.

While Nollywood's reliance on erstwhile pirate networks gave it far greater reach than conventional distribution channels could have achieved, piracy today is the industry's Achilles heel.[36] Unauthorized copies of Nollywood films usually appear within a couple weeks and cannibalize sales. Anywhere from 60–80 % of revenues may be diverted in this fashion. Pirate sales likely account for an even greater percentage of international revenues. Unauthorized distribution of Nollywood films occur even in developed country markets that have functioning copyright regimes.[37]

Because filmmakers reap only a fraction of the total revenue that their movies generate, the industry suffers from chronic underinvestment. Lack of copyright protection also introduces perverse incentives. Filmmakers are forced to mass produce films at a breakneck schedule to stay ahead of the pirates. Slapdash productions featuring formulaic plots, wooden acting, and crude production values are the predictable result.[38]

In recent years, a group of successful filmmakers has sought to launch a "New Nollywood" comprising more ambitious, higher budget films, with glossier production values, splashy marketing, and international financing.[39] The opening of high-end multiplex cinemas in Nigeria's largest cities has allowed New Nollywood films to tap theatrical exhibition revenues. These films also travel the international film festival circuit and are increasingly shown on airline flights, satellite TV, Netflix, and even at London cinemas. An online service, iROKOTV, backed by Western private equity funds, offers an extensive film catalog to subscribers in over a dozen countries.[40]

The reality remains, however, that these alternative revenue sources do not suffice to cover the costs of production. New Nollywood, like old Nollywood, remains dependent on revenues from sales of physical media which the marketers control. Attempts to establish alternative distribution channels in Nigeria have thus far failed. As a result, New Nollywood remains a largely marginal presence, and Nigerian film production remains centered on the high-volume, direct-to-video model, whose financing and distribution remains firmly under control of the marketers' guilds.[41]

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36 Cole Paulson, *Marketers and Pirates, Businessmen and Villains: The Blurred Lines of Nollywood Distribution Networks*, 7 St Antony's International Review, no. 2 (2012), 51–68.

37 Miller (2016), *supra* note 22, at 127–131; Pager (2012), *supra* note 5, at 266.

38 Pager (2012), *supra* note 5, at 264.

39 Lande Pratt, *Good for "New Hollywood": The Impact of New Online Distribution and Licensing Strategies*, 3 International Journal of Cultural and Creative Industries, no. 1 (2015), 70–84; Miller (2016), *supra* note 22, pp. 36–37.

40 Miller (2016), *supra* note 22, at 132–136.

41 *Ibid*. at 36–37, 45.

Some have argued Internet distribution offers a means to bypass the marketers' stranglehold over the industry.[42] However, although internet penetration rates in Nigeria have risen in recent years, low bandwidth speeds, and high data costs limit the domestic potential for video distribution. The online video market thus remains primarily comprised of diasporic communities.[43]

The attitude of Nigeria's government has been ambivalent. Initially ashamed and embarrassed by the industry's vulgarity, Nigeria's leaders gradually have come to take pride in Nollywood's accomplishment and also view the industry as a juicy tax source. However, government initiatives to formalize the distribution sector and curtail piracy have largely failed,[44] notwithstanding some positive developments in recent years.[45]

Nigeria's music industry has made a more successful transition to digital distribution platforms, taking advantage of the lower bandwidth requirements for music. Piracy has devastated sales of physical media, but mobile music offers a promising replacement. Working through telecommunications companies facilitates online payment – an otherwise difficult hurdle in a country where credit cards are rare, albeit at the cost of 70 % of revenues. Licensing of ring-back tones alone comprises a $150 + million market.[46] Nigeria's revitalized collecting society, Coson, has also stepped up enforcement and licensing of music performance rights, yielding expanded revenues.[47] The extension of YouTube's Partner Program to Nigeria has unlocked additional revenues from

42 Pratt (2015), *supra* note 39.

43 Miller (2016), *supra* note 22, at 133–136.

44 Bud (2014), *supra* note 26, at 91–121; Email correspondence with author, 20 June 2016; Ramon Lobato, *Shadow Economies of Cinema: Mapping Informal Film Distribution* (UK: British Film Institute, 2012), pp 60–61.

45 See, e. g. Afam Ezekude, "Nigerian Courts Step Up Against Copyright Piracy: 18 Convicted", IP Watch.org, 21 March 2012, available at: https://www.ip-watch.org/2012/03/21/nigerian-courts-step-up-against-copyright-piracy-18-convicted/; Jackie Opara, "Court Ruling on IP Struggle Between Movie Producers Shows Level of Copyright Awareness In Nigeria," IP Watch.org, 24 April 2017, available at: < https://www.ip-watch.org/2017/04/24/court-ruling-ip-struggle-movie-producers-shows-level-copyright-awareness-nigeria/.

46 Dana Sanchez, *How Big is Africa's Music Industry? Ringtone Sales In Nigeria: $150 M*, available at: < http://afkinsider.com/68131/big-africas-music-export-industry/#sthash.FbP9y8Iv.dpuf >, accessed 8 August 2014. Ring-back tones are personalized music clips played to an incoming caller in lieu of a ringing sound. Informal statistics from Nigerian entertainment executives further indicate that global live performances brought in an additional $105 million, and album sales reached $30 million in 2008 (three times more than 2005). *Ibid.*

47 See, e. g. Michael Abimboye, "COSON Signs Copyright Royalty Agreement with Nigerian Broadcast Stations", Premium Times, 23 May 2014, available at: < http://www.premiumtimesng.com/entertainment/161359-coson-signs-copyright-royalty-agreement-nigerian-broadcast-stations.html >.

digital streaming. However, despite this rebound in revenues from music recordings, concerts and endorsements deals remain the largest source of income for musicians.[48]

Steady growth has led Nigeria's music industry to become Africa's largest. In contrast to Nollywood, the industry has attracted investment interest and distribution deals from Western music industry multinationals.[49] Hip-hop icon, Jay Z, has also reportedly explored investment opportunities in Nigeria.[50] Meanwhile, i-Tunes launched a Nigerian version of its online store offering both local and international music, and a pair of Western-backed online music platforms, Freeme Digital and iRoking, have launched in recent years.[51]

1.2 India

On its face, India's film industry presents a very different context than Nollywood. India has had a long, successful history producing celluloid films, and the industry remains focused on theatrical exhibition, with video sales largely an afterthought. India's annual production of over a thousand films makes it the world's most prolific industry, and over three billion box office admissions each year give it a claim to the world's largest audience.[52] Movies are central to public life in India. Indian films are also avidly consumed not only across South Asia and among its diasporal communities, but also by native populations in much of Asia and Africa, for whom the films' wholesome family values supply an attractive alternative to Hollywood.[53]

48 Ana Santos Rutschman, *Weapons of Mass Construction: The Role of Intellectual Property in Nigeria's Film and Music Industries*," 29 Emory International Law Review (2015), 679, 683.
49 Tim Ingham, *Sony Music Open Nigeria Office As It Expands Across Africa*, available at: <http://www.musicbusinessworldwide.com/sony-music-opens-nigeria-office-as-it-expands-across-africa/>, accessed 23 September 2016.
50 Samuel Abulude, *Nigeria: Jay Z to Invest in Nigerian Music Industry*, available at: <http://allafrica.com/stories/201504290086.html>, accessed 29 April 2015.
51 Rutschman (2015), *supra* note 48, at 688–689.
52 Lawrence Liang and Ravi Sundaram, "Chapter 8: India," in Joe Karaganis (ed.), *Media Piracy in Emerging Economies* (New York: Social Science Research Council, 2011), p. 362; Bertrand Moullier, *Whither Bollywood? IP Rights, Innovation, and Economic Growth in India's Film Industries*, study given at the Creative and Innovative Economy Center, George Washington University Law School (2007), 4.
53 Pager (2012), *supra* note 5, at 119 and n. 334; Ashish Rajadhyaksha, "The 'Bollywoodization' of the Indian Cinema: Cultural Nationalism in Global Arena," in Anandam P. Kavoori and Aswin Punathambekar (eds.), *Global Bollywood* (New York, NY: New York University Press, 2008).

Bollywood's global reach may long predate Nollywood's, and its theatrical orientation contrasts with Nollywood's direct-to-video model, but on closer inspection, the two industries have much in common as decentralized, low-cost, high volume producers. Bollywood properly refers only to the Hindi-speaking film industry based in Mumbai, whose films circulate primarily in North India, just as Nollywood usually refers to English-language films from Southern Nigeria. Both represent the global face of their country's ethnically and regionally fragmented film industries.[54]

The parallels between the two become even stronger if one compares Nollywood's current position to Bollywood three decades ago. In the 1980s, Bollywood was a largely informal industry revolving around loosely organized, highly decentralized studios that churned out an endless stream of musical melodramas. Fueled by "dubious money" supplied by gangsters and tax dodging money-launderers, the industry was characterized by shambolic management and murky accounting.[55] Little heed was paid to copyright norms. Storylines were widely recycled, often taken from successful films produced elsewhere. Sheltered from foreign competition by protectionist barriers and restricted in its ability to export, the industry relied on its captive domestic audience to consume its often formulaic output.[56]

Things began to change, however, with the spread of VCR technologies in the 1980s, which suddenly exposed Indian film producers to competition from widely available pirated video-tapes. Concerned over mounting losses to piracy, the industry mobilized to place copyright enforcement on the policy agenda. India's national government had been long indifferent to Bollywood, except to exploit it as a tax cow. IP law was also generally suspect, seen as an imperialist imposition and viewed through patent-centric prism.[57]

Local governments have proved more amenable to industry concerns, however, especially in the South. Police conduct sweeping anti-piracy raids to accompany big releases of local films. The effective result is akin to the guild-created window in Nollywood: a short period to recoup investment at the box

54 Hindi films only command 40 % of domestic market, and several of India's regional film industries are commercially significant, global exporters as well; Pager (2011), *supra* note 1, at 119–120, 125.

55 Adrian Athique, *The Global Dynamics of Indian Media Piracy: Export Markets, Playback Media and the Informal Economy*, 30 Media, Culture & Society, no. 5 (2008), 699–700; Moullier (2007), *supra* note 52, at 16–18.

56 Pager (2011), *supra* note 1, at 117.

57 Arpan Banerjee, *Copyright Piracy and the Indian Film Industry: A 'Realist' Assessment*, 34 Cardozo Arts & Entertainment Law Journal (2016), 618–623.

office. Some state governments have also pressed anti-gangster legislation into service against commercial pirates.[58]

Despite initial skepticism toward IP rights, the national government eventually responded to industry lobbying by passing more stringent laws, modernizing the Copyright Act in 1994 and 1999, and stepping up enforcement. A crackdown on cable piracy, in particular, bore fruit, and television became an important revenue source.[59] The recent shift to digital distribution has made further inroads against piracy, by allowing nationwide release of blockbuster movies, thus avoiding problematic delays in rural distribution of popular movies that created openings for pirated distribution as the default provider.[60]

Other developments around the turn of the millenium further enhanced the commercial prospects of the film industry. The government's 2001 decision to grant formal industry status to the film industry enabled it for the first time to turn to conventional sources of finance. "Corporatization" became the watchword of the day, as industry leaders worked to attract investors by putting their operations on a more professional footing and taking strides toward horizontal and vertical integration.[61]

The development of modern shopping malls, encouraged by tax incentives, also led to investment in high-end, multiplex theaters that catered to urban professionals. By providing a superior theatrical experience, the multiplexes could charge much higher admission fees, yielding far greater revenues.[62] Relaxation of trade restrictions also allowed the industry to develop profitable export markets tapping affluent Indian diasporal communities. The combination of these two more sophisticated audiences led Indian filmmakers to produce more ambitious, high budget productions that pushed the envelope beyond the usual formulas.[63] These developments have spurred a renaissance in Indian filmmaking.[64]

58 Liang and Sundaram (2011), *supra* note 52, at 348. State enforcement initiatives are often organized along starkly parochial lines, targeting only piracy of *local* films, while otherwise ignoring trade in illicit media. *Ibid*.

59 Rahul Telang and Joel Waldfogel, *Piracy and New Product Creation: A Bollywood Story*, Working Paper given at Carnegie Mellon University, 6 August 2014, available at: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id = 2478755 >.

60 Digital distribution also has allowed single-use copies to be sent to individual theaters, enabling watermarking to to trace the source of pirated copies and thereby break-up camcording rackets; Liang and Sundaram (2011), *supra* note 52, at 368.

61 Moullier (2007), *supra* note 52, at 18–19; Tejaswini Ganti, *Producing Bollywood* (Durham, NC: Duke University Press, 2012), pp. 260, 267.

62 Liang and Sundaram, *supra* note 52, at 366.

63 Pager (2011), *supra* note 1, at 118 and n. 333.

64 Indian filmmakers did not, however, break entirely with the formulas of the past. Rather, the industry bifurcated between more ambitious "crossover" films that catered to wealthy urban

The industry has grown to $2.3 billion annual revenues, with double-digit growth in recent years forecast to continue.[65] Online piracy rates are rising as broadband speed and penetration increases.[66] However, the industry's main revenue source – theatrical exhibition – remains relatively insulated due to the distinctive nature of India's movie-going culture based on active audience participation.[67] As a result, pirated wares are not a direct substitute for the theatrical experience.[68]

The Indian music industry has had a less illustruous past. For much of its existence, recorded music has been viewed as an adjunct to film production.[69] Most popular films feature extended musical segments and rely on catchy new music to help market the movie. Roughly 70 % of album sales are based on Indian movie soundtracks, and Indian film music constitutes its own distinctive genre of popular music that dominates industry production.[70]

Toward the end of the twentieth century, the music industry had begun to exploit new playback media to lower prices and expand its distribution. Sales duly exploded and rapid growth ensued. As profits rose, newcomers joined the industry and pioneered new markets. Producers diversified into neglected genres besides film music, and began to record music in languages other than Hindi. For a little more than a golden decade, the industry began to view recorded music as an independent revenue source, worthy of investment in its own right.[71]

The advent of digital piracy abruptly reversed these trends. As pirates and producers of unathorized "version" recordings increasingly diverted revenues, the industry retrenched sharply. Language and genre diversity suffered, as

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and expatriate audiences and a reinvorgation of the old-style musical melodramas that had long thrilled rural masses, now filmed with ever-more elaborate production values and exotic locales.

65 Liang and Sundaram (2011), *supra* note 52, at 363, 366.

66 *Ibid*. at 356.

67 Brandon Hammer, *Smooth Sailing: Why the Indian Film Industry Remains Extremely Successful in the Face of Massive Piracy*, 5 Harvard Journal of Sports & Entertainment Law, no. 1 (2014), 147–187.

68 Because the overseas market is less theatrically based, it is more directly affected by piracy; Arul Scaria (2014), *supra* note 65.

69 Gregory Booth, *Copyright Law and the Changing Economic Value of Popular Music in India*, 59 Ethnomusicology, no. 2 (2015), 263, 267.

70 *Ibid*. at 266; Liang and Sundaram (2011), *supra* note 52, at 388.

71 Athique (2008), *supra* note 55, at 701; Liang and Sundaram (2011), *supra* note 52, at 353; Booth (2015), *supra* note 69, at 267.

production of recorded music largely reverted back to its prior diminished status as a loss-leading investment primarily intended to sell film tickets.[72]

1.3 China

Whereas the Indian and Nigerian content industries largely comprise private actors functioning autonomously from the government, China's modern content industries operate in a very different context. Although China has undertaken a remarkable program of privatization and liberalization in recent decades, the state retains considerable control over the media. Key distribution channels remain state monopolies, and state censorship continues to impose restraints on expressive content. On its face, the Chinese government remains committed to fostering a "quality culture" that will instill the correct moral values in its citizenry. At the same time, the need to cater to popular demand and fend off the competitive pressure from foreign media has led to a progressive liberalization of censorship standards.[73]

As state subsidies were gradually withdrawn in the 1990s, China's culture industries have had to manage the transition from churning out state propaganda to courting audiences with crowd-pleasing fare. Private investment has flown into a host of new enterprises, and the content industries have enjoyed considerable success in recent years.[74] The film industry has benefited from extensive construction of state-of-the-art cinemas in urban centers that have made going to the movies a fashionable leisure activity for China's newly affluent professionals, commanding box office ticket prices as high as $26.[75] The Chinese box office is now the second largest in the world, and Chinese domestic films have claimed an ample share of the proceeds, in recent years rivaling the take of Hollywood's blockbusters. As explained below, the music industry has had a tougher road, but even it has perked up recently.[76]

72 Booth (2015), *supra* note 69, at 270–272, 280–281.
73 Eric Priest, *Copyright and Free Expression in China's Film Industry*, 26 Fordham Intellectual Property, Media and Entertainment Law Journal (2015), 43–53.
74 Lucy Montgomery and Eric Priest, "Copyright and China's Digital Cultural Industries," in Michael Keane (ed.), *Handbook of Cultural and Creative Industries in China* (Cheltenham, UK: Edward Elgar Publishing, 2016), p. 341.
75 Priest (2015), *supra* note 73, at 37.
76 Mengxing Song, "China Shifts Toward Paid-service Model for Audio Services", China Daily, COM.CN, 20 April 2016, available at: <http://www.chinadaily.com.cn/cndy/2016-04/20/content_24686138.htm>.

Censorship aside, however, the biggest challenge that China's content industries face remains extraordinarily high rates of domestic piracy. Chinese consumers have long relied on informal distribution mechanisms to access popular media that may not have been available through legitimate channels. With almost ubiquitous access to pirated wares on the Internet, they have grown accustomed to obtaining all manner of creative media instantly, free of charge. A "culture of unauthorized reuse" pervades even commercial enterprises, with amusement parks, media firms, and even state television making liberal use of unlicensed creative content.[77]

China's content industries have therefore struggled to devise business models that allow them to appropriate revenue in a climate of pervasive piracy. Unsurprisingly, performance models – theatrical exhibition for films; concerts for music – have provided the main source of income as these delivery models are subject to physical exclusion (admission controls) and offer a marketable experience that is distinguishable from pirated copies consumed at home.

The digital content market has faced even graver challenges. The market for recorded music all-but imploded in the first decade of the millenium, with sales and investment in new music plummeting dramatically.[78] Until recently, the only way that "Chinese musicians and music companies [could] actually make money via music sales [came from] two narrow markets: ringback tones sales [for mobile phones] and overseas sales."[79]

Until recently, copyright law played little or no role in China's content industries. However, this has begun to shift. China has made considerable improvement in its copyright infrastructure in recent decades. Much of its efforts were undertaken in response to treaty obligations and external pressure. Public enforcement campaigns against piracy have often served as a form of kabuki theater performed for foreign consumption, with showy, albeit ultimately ineffective raids to seize and destroy illicit material.[80]

Private enforcement of copyright law, however, tells a different story. China has become the most IP-litigious society in the world, and almost 98 % of the plaintiffs have been Chinese. Chinese rightholders have thus expressed an enthusiastic vote of confidence in the benefits of IP law.[81] Chinese policy-makers

77 Montgomery and Priest (2016), *supra* note 74, at 342; Jiarui Liu, *Copyright for Blockheads, an Empirical Study of Market Incentive and Intrinsic Motivation*, 38 Columbia Journal of Law & Arts (2015), 517.
78 Liu (2015), *supra* note 77, at 512; Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in Chia's High-Piracy Environment?*, 27 Harvard Journal of Law & Technology, no. 2 (2014), 474.
79 Liu (2015), *supra* note 77, at 484.
80 Montgomery and Priest (2016), *supra* note 74, at 343–344.
81 Priest (2014), *supra* note 79, at 496.

have also come to recognize that copyright law has a role to play in building the strong creative content industries that they see as underpinning China's soft power.[82] As a result, copyright law has increasingly become seen as a matter of domestic concern, rather than an unwanted foreign imposition – the long-heralded "crossover point" for IP development.[83]

Furthermore, in what some commentators have hailed as "watershed moment for China's cultural and creative industries," the last few years have witnessed a major transformation in China's digital content landscape.[84] China's leading online music and video streaming platforms have begun to purge their sites of pirated works.[85] Having long attracted traffic by hosting a vast sea of unlicensed content of variable quality, the websites have shifted strategies and are now focusing on negotiating exclusive licenses for professionally produced content, as well as investing in production in-house. Having purchased exclusive rights to such valuable content, Chinese firms are also increasingly turning to litigation to enforce them, with all of the leading sites vigorously prosecuting claims and counterclaims against one another.[86]

2 Copyright and creative development: an assessment

Nigeria, India and China have managed to develop content industries of impressive scope notwithstanding the relatively weak copyright norms and pervasive presence of piracy in their home markets. Copyright skeptics argue that their success therefore calls into question the necessity of copyright incentives. Moreover, skeptics further contend that such successes demonstrate the normative superiority of the commons-based development over proprietary models. By avoiding the dead-weight losses that exclusive rights engender and reorienting creative production around more egalitarian,

82 Montgomery and Priest (2016), *supra* note 74, at 355; Priest (2015), *supra* note 73, at 59–60.

83 Yu (2007), *supra* note 20, at 202.

84 Montgomery and Priest (2016), *supra* note 74, at 339.

85 Several factors likely account for this turn to licensing. Government edicts, pressure from advertisers, litigation by rightholders, and even the prospect of stockmarket flotations in Western bourses have all been cited as possible explanations. Eric Priest, *Acupressure: The Emerging Role of Market Ordering in Global Copyright Enforcement*, 68 *SMU Law Review* (2015), 188–198. Priest credits advertisers as playing the decisive role. *Ibid*. at 188–190.

86 Montgomery and Priest (2016), *supra* note 74, at 348, 354.

collaborative lines, the commons is said to offer a fairer, more sustainable pathway to nurture creative development. This begs several questions: to what extent did the success of these industries occur because of versus in spite of weak copyright norms? Does their experience demonstrate the viability of alternative revenue models in place of copyright? And how to explain the shift toward copyright formalization over time?

2.1 Thriving or surviving?

The claim that emerging content industries can thrive in the absence of copyright deserves scrutiny. Eric Priest uses the metaphor of “extremophiles” to describe the hardy creative industry life forms that survive in the exigent conditions of a copyright desert.[87] It does not follow, however, that the *absence* of copyright facilitates their survival any more than a camels flourishes *because* it is denied water. Weak copyright norms may encourage the pioneering of new markets, but such conditions arguably hinder the development of creative industries later on.

2.1.1 Pirate innovators

Nollywood’s origin story present an archetypal example of piracy’s generative potential. The extensive transnational distribution networks that pirate operators had cultivated were instrumental in popularizing Nigeria’s nascent video film industry.[88] Nigerian marketers were skilled at evading censors and customs officials alike, ensuring a steady supply of Nollywood videos that reached audiences across Africa. India’s content industries have similarly benefited from the pioneering of new markets by pirate entrepreneurs. Liang and Sundaram chronicle the successful development of a new mass market for low cost audio cassettes filled with unauthorized recordings of popular film music.[89] The pioneer in this nascent market, T-Series, also “expanded the music-consuming public by focusing on genres and languages that had been

87 Priest (2014), *supra* note 79, at 470.
88 Ana Santos, *Nurturing Creative Industries in the Developing World: The Case of the Alternative Systems of Music Productions and Distribution*, 21 Michigan State International Law Review (2013), 601.
89 Liang and Sundaram (2011), *supra* note 52, at 353. Many of T-series’ recordings were technically not pirated, as they exploited a loophole in Indian copyright law that allowed the release of new versions of existing songs. *Ibid*.

ignored by the dominant Indian record labels."[90] Adrian Athique tells a similar story of new export markets for Indian film developed by selling pirated video cassettes to South Asian emigres through a decentralized network of Indian grocery stores. By doing so, such informal distribution cultivated a new generation of Indian film devotees.[91] Chinese search engines and content hosting sites similarly lured online traffic with a limitless supply of pirated media.[92]

Initially, the producers of the creative works in question received little benefit from such entrepreneurial efforts. In most cases, however, the leading players in these new distribution networks eventually legitimized their operations by entering into licensing arrangements with producers – or became producers themselves – in part, to assure a more regular supply of new works and to preclude competition from upstarts.[93] Such entrenched incumbents would often be challenged in turn by a new generation of pirates exploiting newer technology to once again disrupt existing distribution.[94]

2.1.2 Depressed revenues

The absence of effective copyright enforcement in these markets, however, means that piracy never really disappears. Such unauthorized distribution not only diverts revenue from content producers, it also exerts a downward pressure on pricing both in the (legal) market and on the licensing fees that can be extracted from intermediaries.

The effects of such diminished revenues are perhaps most visible in Nollywood. Despite the massive global audience that its films enjoy, the industry has struggled to effectively monetize its customer base. While Nollywood films remain profitable, the industry operates on a breakneck schedule, perpetually starved of funds. Filmmakers are forced to pursue a churn strategy that rushes

90 *Ibid.*
91 Athique (2008), *supra* note 55, at 705–706 As with Nollywood, the informal, decentralized nature of such distribution networks served to evade formal barriers to media exports, of particular value in Pakistan where Indian films had long been banned; Athique (2008), *supra* note 55.
92 Montgomery and Priest (2016), *supra* note 74, at 343.
93 Miller (2016), *supra* note 22, at 128–129; Athique (2008), *supra* note 55, at 712; Montgomery and Priest (2016), *supra* note 74, at 348–349.
94 Athique (2008), *supra* note 55, at 706, 713.

new videos to market weekly to beat the pirates.[95] Pricing of discs is kept close to marginal cost, in a further effort to deter piracy.[96]

Such high-volume, low margin production restricts the creative ambition that can be invested in developing any single project. Moreover, without enforceable copyrights in their work, filmmakers cannot offer collateral to obtain financing. Instead, they must either surrender control to marketers or tap informal short-term lenders at punitive interest rates – reinforcing the "rush to market" mentality that fosters slap-dash productions.[97] And while the industry has expanded the reach of authorized distribution channels both domestically and abroad, the specter of rampant piracy drives down the prices such licensing arrangements garner.[98] The "New Nollywood" filmmakers whose higher-quality productions compete for screening in domestic cinemas and global festivals offer a glimpse of the industry's broader creative and commercial ambitions. Yet, it is far from clear that the industry's existing revenue base can support such lavish productions. Without a more effective means to monetize consumption, Nollywood remains a shadow of its potential.

Filmmakers in China and India are doing better, thanks in part to robust and expanding revenues from theatrical distribution. Such reliance on theatrical revenues has its downsides, however. Bollywood reaps over 70 % of its total revenue from box office sales.[99] By comparison, the theatrical take of its namesake, Hollywood, represents less than 20 % of total revenue.[100] Relying so heavily on this single income stream makes Bollywood vulnerable to shifts in consumption.

Showing this threat is more than theoretical, Telang and Waldfogel document the effects in the late 1980s and early 1990s of the diffusion of home video technologies (the VCR) and independent cable television operators.[101] These emerging channels provided conduits for pirate distribution that allowed consumers to watch home movies for free, including films currently in the cinema.[102] Such illicit competition led Bollywood's per movie revenues to

95 Pierre Barrot, *Nollywood: The Video Phenomenon in Nigeria* (Bloomington, IN: Indiana University Press, 2009), pp. 12, 15.

96 Miller (2016), *supra* note 22, at 53–54.

97 Pager (2012), *supra* note 5, at 265.

98 Miller (2016), *supra* note 22, at 48.

99 Jyotsna Singh, "Booming Bollywood Turns 100," Financial Times, 5 May 2013.

100 S. Mark Young, et al., *The Business of Making Money with Movies*, Strategic Finance (2010), 35–40.

101 Telang and Waldfogel (2014), *supra* note 59.

102 Geographically sequenced theatrical releases meant that rural audiences particularly proved receptive to such pirate distribution. Because the high cost of celluloid limited the decline by as much as 50 % during the period 1985–2000.[103] Reduced revenues in turn led to fewer movies being produced. Telang and Waldfogel also analyze IMDb ratings data and conclude that the quality of Indian films produced in this period also declined.[104]

While piracy remains rampant in China, China's audiovisual producers have enjoyed comparatively healthy growth in recent years due to expanding markets for both theatrical distribution and online streaming platforms. However, the turnaround in online revenue is a recent phenomenon, and some question its sustainability. Moreover, the ready availability of pirate media elsewhere continues to inhibit consumer willingness to pay for creative content, restricting the revenue available to fund new productions.[105]

The situation in the music industry broadly parallels that of audiovisuals. The dystopian effects of piracy are perhaps most visible in China. Priest describes the massive drop in revenues experienced in China from roughly 2003 onward as online distribution of pirated music rapidly displaced legitimate sales. At a time when Chinese spending on entertainment and leisure was steadily rising, revenue from recorded music dropped by more than half.[106] The revenue drop-off was not for lack of consumer demand. Accessing music remained one of the most popular activities on the internet. However, Chinese consumers became accustomed to not paying for something that was abundantly available for free, and alternative revenue sources could not make up the shortfall. Liu's survey evidence indicates that declining revenues led to reduced investment in music.[107] Arguably, as a result, the Chinese music market became increasingly dominated by imported music from neighboring

number of film copies that could circulate at a time, Indian theatrical exhibition followed a staggered release schedule with new films shown first in big cities, then regional towns, only reaching village theaters only at the end of the sequence. Film copies were often worn out by this time leading to a impaired viewing experience, and many rural residents were, in any case, impatient to wait; Liang and Sundaram (2011), *supra* note 52, at 350–351.

103 Telang and Waldfogel (2014), *supra* note 59. A separate study of the effects of "camcording" on film revenues in seven developing countries reached similar conclusions, showing that the availability of pirated movies online significantly reduced box office earning; Jason Koch, Mike D. Smith and Rahul Telang, *Camcording and Film Piracy in Asia-Pacific Economic Cooperation Economies*, presented by International Intellectual Property Institute, Washington, Carnegie Mellon University (2011).

104 Telang and Waldfogel (2014), *supra* note 59.

105 Montgomery and Priest (2016), *supra* note 74, at 351–352.

106 Priest (2014), *supra* note 79, at 496.

107 Liu (2015), *supra* note 77, at 512.

countries.[108] Industry revenues have rebounded in the past few years as online intermediaries have entered into licensing deals and largely weaned themselves off pirated content. However, China's music industry remains comparatively undeveloped for a country of its size and affluence.[109]

Digital piracy has had similarly harmful effects on the Indian music industry, decimating legitimate sales channels and causing industry-wide retrenchment.[110] Toward the end of the twentieth century, the music industry had begun to expand beyond its historic role as an adjunct to the film industry and to diversify into other genres. However, the advent of digital piracy meant that music reverted to its focus on selling movie soundtracks.[111] As in China, music industry revenues remain significantly lower than film.[112]

The story in Nigeria is somewhat less dismal. Digital piracy certainly caused revenues to plummet, leading labels to close and investment to fall.[113] However, the growing popularity of Nigerian music across Africa has helped to cushion the losses and open up alternative revenue sources. In recent years, the industry has grown steadily and attracted outside investment.[114]

2.1.3 Copyright's positive role

In each of these countries, a revival of industry fortune may be partly attributable to copyright. This turnaround is most dramatic in the Chinese online market, where the leading websites have executed a remarkable turnaround from havens of piracy to platforms populated almost entirely by licensed content. While several factors appear to have contributed to this industry shift, all of

108 Jiarui Liu, *The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China*, 27 Cardozo Arts & Entertainment Law Journal (2010), 630, 658–659.

109 Liu (2015), *supra* note 77, at 474–475. Music industry revenues are also paltry compared to other Chinese content industries such as books and films, a result which both Liu attributes to music's greater exposure to piracy; *Ibid*. For example, the market for digital music in China is comparable to the total domestic box office take. However, whereas the film industry receives roughly 40 % of box office sales, almost none of money generated from digital music actually goes to the music industry; Priest (2014), *supra* note 79, at 503.

110 Booth (2015), *supra* note 69, at 280–281.

111 *Ibid*.; Liang and Sundaram (2011), *supra* note 52, at 388.

112 Liang and Sundaram (2011), *supra* note 52, at 388. By comparison, music industry revenues in the U.S. are comparable in size to that of film.

113 Rutschman (2015), *supra* note 48, at 685.

114 *Ibid*. at 682–684, 688; Dara Rhodes, *Nigeria's Music Industry Set to Hit a High Note*, available at: < http://www.cnbcafrica.com/news/western-africa/2014/05/28/nigeria%E2%80%99s-music-industry-set-to-hit-a-high-note/ >, accessed 28 May 2014.

them reflect direct or indirect pressure to comply with copyright law.[115] As the leading streaming platforms purged their sites of pirated content and embraced licensing norms, they have competed for exclusive rights to prime content. Per episode costs of popular dramas have risen from $1500 in 2009 to as much as $290,000 by 2011.[116] Soaring licensing fees have in turn spurred investment in better quality films and television shows and provided much needed revenue for indie films that are denied access to theatrical distribution.[117]

The revival of India's film industry after 2000 also partly reflects stepped up copyright enforcement. Telang and Waldfogel describe how more effective enforcement measures after 2000 curbed the threat from pirate cable channels.[118] Other factors also contributed to the industry's improving outlook, including the growth of multiplex theaters, television licensing, and overseas revenues. While these factors are not directly tied to copyright enforcement, it is should noted that all of these revenue streams depend, to some degree, on copyright exclusivity to function effectively. Most people do not watch a movie more than once, and it is hard to get customers to pay for something that is available for free, underscoring the importance of suppressing unauthorized distribution.

A positive role for copyright is harder to trace in Nigeria. Government initiatives to combat piracy and formalize distribution have achieved meager results. However, a few bright spots are apparent. COSON, a music rights management organization, has launched a vigorous campaign to license public performances and filed a series of lawsuits against holdouts, yielding tangible payoffs to musicians.[119] IRokoTV continues to expand its catalogue of Nollywood film rights, and airline in-flight entertainment systems have contributed additional licensing revenues.[120] Overall, copyright norms remain shaky, however, and benefits slim.

2.2 Pursuing "Copyright" by other means

Just because creative industries can operate in developing countries where copyright norms are weak or non-existent does not prove the viability of

115 *See* Priest (2015), *supra* note 85, at 188–198.
116 Priest and Montgomery (2016), *supra* note 74, at 348.
117 *Ibid*. at 348–349.
118 Telang and Waldfogel (2014), *supra* note 59.
119 Ufuoma Akpotaire, *Ten Intellectual Property Cases that Made Headlines in 2016*, Nigerian Law IP Watch, Inc., available at: < https://nlipw.com/10-intellectual-property-cases-that-made-headlines-in-2016/ >; Miller (2016), *supra* note 22, at 98–110.
120 Miller (2016), *supra* note 22, at 48.

"open access" business models. In the cases examined here, it is notable the extent to which industries revenues depend on exclusionary strategies. Far from the unconstrained flows of "free" content that commons enthusiasts often contemplate, such strategies sharply restrict access to copyrighted works in order to limit unauthorized copying.

Most obviously, the theatrical film exhibition model that has been the mainstay of Chinese and Indian film industry revenues relies on physical exclusion: patrons must purchase tickets to enter the cinema.[121] Here, physical control over access substitutes for copyright exclusivity. Sale of concert tickets for musical performances also relies on physical access control. However, there is a difference: Music concerts are less threatened by open distribution of copyrighted media. Indeed, many musicians promote their concerts by releasing free music recordings or encouraging them to be pirated.[122] By contrast, cinema revenues are much more vulnerable to cannibalization by distribution of recorded media.[123] As a result, strict controls across the entire theatrical distribution chain are essential to preserve content exclusivity.

Most Nollywood films do not enjoy theatrical release, and the bulk of their earnings come from distribution of physical media, which are even more vulnerable to piracy. In the absence of viable copyright protection, Nollywood producers have again developed workarounds based on a combination of lead-time and physical exclusion. The marketers guilds control the principal urban markets in which film copies by employing brawny enforcers to prevent pirates from setting up rival stalls; here, physical muscle substitutes

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121 As noted above, theatrical exhibition models also depend on backdrop norms of copyright law to function effectively – i. e. to prevent camcording and subsequent distribution or exhibition of pirated versions of the films. However, physical exclusion backed by real property law provides the first line of defense.

122 Rutschman (2015), *supra* note 48, at 689; Liang and Sundaram (2011), *supra* note 52, at 354. The music business is better suited to a commons-based business model because studio production costs are significantly lower than film, and live concert performances offer experiential value whose spontaneity and emotional resonance cannot be readily duplicated by recordings. Pager (2012), *supra* note 5, at 269.

123 The social experience of going out to the movies makes home viewing an imperfect substitute; some customers will still pay for the experience. The vocal participation of Indian cinema audiences, in particular, makes theatrical consumption a distinctive communal event; Hammer (2014), *supra* note 67. For its part, Hollywood has turned to technology to preserve a similar premium on the theatrical experience through a combination of lavish production values and special effects that showcase best on giant screens, with 3-D images and high quality sound. Yet, the investment levels required to achieve production qualities sufficient to make the theatrical experience significantly more appealing than home viewing keep rising and may be out of reach of most developing countries.

for legal writ.[124] The marketers guild have also developed informal distribution norms that further extend exclusivity based on mutual interest.[125] Such informal norms recall the "trade courtesies" that Stephen Breyer touted, in his influential 1970 copyright-skeptical essay, as regulating the nineteenth century trans-Atlantic book trade in copyright's absence.[126]

In the case of digital music in China, technologically enabled access controls do copyright's work. Priest notes that 90 % of recording industry revenues in 2010 derived from an extremely narrow source: cell-phone ring-back tones.[127] Ring-back tones are essentially hold music that a caller hears while awaiting an answer on the other end. Mobile phone users pay a small monthly fee to the phone company to select personalized music. Ring-back tones are extremely popular in China; they generate US $4 billion in annual revenue – an amount comparable to the entire gross revenues for recorded music in the United States.[128] Because the tones are stored on the centralized architecture of the phone company rather than individual users' phones, they are insulated from piracy.[129] As such, they offer a rare context in which Chinese consumers are willing to pay for recorded music.

Such replication of copyright exclusivity by other means hardly seem like proof of copyright's irrelevance. It is not as if the content industries profiled here are blind to the potential offered by non-exclusionary revenue models. Sponsorship deals, merchandise, product placement, social media engagement, and the like are widely employed and furnish a welcome source of ancillary revenues. However, it is no accident that these industries rely on exclusionary models for the lion's share of their revenues; the revenue potential from alternatives sources is too limited.

Some might suggest, however, that use of these exclusionary alternatives is still preferable to copyright. As examples of "order without law"[130] or "IP

124 These practices are not unique to Nollywood. Spike Lee apparently fell back on such "muscular enforcement" tactics to combat piracy of his films in New York City. Lobato (2012), *supra* note 44, at 69.
125 Miller (2016), *supra* note 22, at 45.
126 Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harvard Law Review, no. 2 (1970), 299–300.
127 Priest (2014), *supra* note 79, at 501.
128 *Ibid*. at 502.
129 Liu (2015), *supra* note 77, at 481. Ring-back tones are also popular in Nigeria, accounting for an estimated $150 million market. Sanchez (2014), *supra* note 46.
130 Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991).

without IP",[131] these regimes arguably embody the virtues of private ordering, providing bespoke solutions that serve the needs of particular communities and contexts. Could it be that these "non-legal regulatory tools … enable more granular, and potentially more effective, management of creative incentives"[132]? Such commons-based management systems potentially minimize much of the dead-weight losses of the copyright system, in that access controls tend to be shortlived in practice. Despite their revenue limitations, these "synthetic copyright"[133] models therefore merit further exploration. Yet, closer examination reveals that copyright's alternatives – both exclusionary and non-exclusionary – come with substantial drawbacks of their own.

2.3 The hidden drawbacks of copyright alternatives

2.3.1 Lack of scalability

Copyright law, at least in theory, functions as a seamless, global system. International agreements such as Berne and TRIPS ensure a minimum standard of protection across national boundaries. By contrast, the alternative revenues models described above often rely on local arrangements that do not readily scale to broader horizons.

Such limitations are most apparent in the Nigerian context, where the marketing guilds' control is highly localized: confined to specific urban street markets in a handful of cities. Although the guilds' internal self-regulation have helped to extend this zone of exclusivity, such informal norms are themselves limited in scope: they function best in close-knit communities where trust is based on personal relationships or kinship and monitoring against defections is feasible. A similar critique can been made of Bollywood's film families.[134] Such

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131 Christopher Sprigman and Kal Raustiala, *When are IP Rights Necessary? Evidence from Innovation in IP's Negative Space*, in Peter Menell and David Schwartz (eds.), *Handbook on the Law & Economics of Intellectual Property*, (forthcoming, Cheltenham, UK: Edward Elgar 2017).
132 Perzanowski and Darling (2017), *supra* note 12, at 12.
133 Stan Liebowitz, *Paradise Lost or Fantasy Island? The Payment to Authors without Copyright Protection in 19th Century America*, Journal of Law & Economics, August, 2016.
134 *See* Liang and Sundaram (2011), *supra* note 52, at 341; see also Jennifer Davis, *Review of Robert Spoo, Without Copyrights: Piracy, Publishing, and the Public Domain*, 119 American Historical Review, no. 3 (2014), 917–918 (describing the membership of the publishers participating in the trade courtesy regime for nineteenth century trans-Atlantic book publishing as similarly bounded by class and ethnicity).

closed networks also limit the entry of outside talent and can be discriminatory in operation.

The Chinese ringback-tone architecture, while national in scope, is subject to its own scale limitations. First, it only applies to music – and only to specific types of music at that. Second, it only works for music consumed in this one very narrow context. Third, the market could eventually become saturated, if Chinese consumers tire of continually updating their tone files with newer offerings.[135]

Finally, while cinema exhibition is certainly scaleable in theory; there are practical limitations in this regard. China still lacks sufficient screens to meet domestic demand for movies (although it is building more), and state distributors further limit the number of films authorized for theatrical distribution.[136] Movie theaters in developing countries are typically concentrated in urban areas, whereas potential audiences can be widely dispersed across the countryside[137]; diasporic audiences can be similarly scattered. High crime rates make evening cinema-going unsafe in some areas. Indeed, most cinemas closed in Nigeria in the 1980s for this reason. Moreover, in many Muslim regions, including Northern Nigeria, women are denied access to public cinemas due to prohibitions against gender mixing.[138]

These limitations apply to music concerts as well. In China, in particular, there is a shortage of suitable venues. The Communist party's distrust of public gatherings outside their control further limits the number of concerts and festivals that can be staged, as well as the types of musical acts that are allowed to perform.[139] Moreover, whereas multiple copies of a movie can be screened simultaneously, concert performers can do at most one show per night (and even that quickly becomes too much).[140]

By contrast, copies of recorded media can reach dispersed audiences wherever they are located. Such decentralized distribution affords the convenience of on-demand consumption in the home and can easily be scaled to meet global demand. Yet, monetizing such consumption is difficult without copyright.

135 Indeed, revenues from ringback tone appear to have declined of late. Email correspondence with Eric Priest, April 12, 2017.
136 Priest (2014), *supra* note 79, at 484, 493.
137 Pager (2012), *supra* note 5, at 269.
138 *Ibid*. at 269–270.
139 Lucy Montgomery, *China's Creative Industries: Copyright, Social Network Markets and the Business of Culture in a Digital Age* (Cheltenham, UK: Edward Elgar Publishing Limited/Inc., 2010), pp. 65, 68; Liu (2015), *supra* note 77, at 486.
140 Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 University of Richmond Law Review (2009), 685.

2.3.2 Abuse of power

Another drawback of alternative models to copyright is their vulnerability to power asymmetries and abuses. Global copyright law requires that protection be administered in a evenhanded fashion subject to principles of fairness, due process and non-discrimination,[141] and compliance is enforceable through binding WTO dispute resolution backed by trade sanctions. This is not to say that deviations never occur in practice. In many countries, for example, enforcement practices tend to favor the products of local industries over imports.[142] In South India, such favoritism is amplified by the close ties between local film industries and provincial political parties.[143]

However, informal, norm-based alternative regimes are often marred by even more grievous breaches of transparency and discriminatory treatment. This is certainly the case with the Nigerian marketers guilds, where power and strength of relationships often trumps principle, and Nigerian "big men" have a tendency to flout rules with impunity. When informal norms are combined with private violence, the potential for abuse becomes all the more grievous.[144]

A different sort of power asymmetries govern the Chinese ring-back call tone market. This market is controlled by mobile phone companies, and in China two firms dominate. Because the Chinese music industry lacks other viable source of income (due to piracy), it is obliged to license music to this duopoly on starkly unequal terms: the Chinese mobile operators keep over

141 See, e. g. TRIPS, Art. 3, 4, 41–42.

142 Karaganis (2011), *supra* 16, at 28–29.

143 The starkly provincial bent of enforcement practices in South India reflects the intimate connection between film and politics: Politicians fund movies that burnish the leading stars' heroic image, and the stars, in turn, campaign for the politicians (and often become politicians later in their own right). As a result, vendors of pirated discs who dare to sell pirated versions of local films face punishing police crackdowns. Such highly selective enforcement remains locally bounded: Tamil police protect the Tamil film industry; Kannada police protect Kannada films, etc.; Liang and Sundaram (2011), *supra* note 52, at 348. Accordingly, despite their formal use of police power and ostensible basis in copyright law, such practices are not that different from Nigeria's marketers' guild, and suffer from the same limitations: lack of scalability, vulnerability to abuse, distorting effects in production signals, and potentially inequitable distribution of benefits.

144 Miller (2016), *supra* note 22, at 45–46, 101, 113; Paulson (2012), *supra* note 36, at 57–59. While not directly related to copyright, it should also be noted that Bollywood's flirtation with mafia financing in the 1980s led to similarly extralegal uses of force to exert control over film production; the sometimes fatal consequences for industry participants represent a particularly sinister form of dead-weight loss. Athique (2008), *supra* note 55, at 701–702.

97 % of the proceeds, with less than 3 % split between the record labels and musicians.[145]

Stanley Liebowitz documents how the trans-Atlantic trade courtesy regime operated by nineteenth century publishers was similarly marred by exploitative behavior. American authors (whose works were subject to copyright) received much less generous terms compared to British authors (whose works were not). Moreover, the publisher's regime treated the latter as permanently bound to whichever publisher first published his or her work, accentuating the potential for monopsonistic abuse.[146]

Different, but equally objectionable proprietary attitudes toward artists are displayed by corporate sponsors today. In China and Nigeria, such funders often seek to exert creative control or impose other conditions that inhibit artistic autonomy.[147] Moreover, public patronage has proven no less objectionable than its private analogue in the strictures it imposes.[148]

Of course, power asymmetries between authors and intermediaries exist in the copyright system as well. Different jurisdictions provide doctrinal safeguards against the resulting inequities to varying degrees.[149] Moreover, copyright's structure seeks to ensure that authors can benefit from a competitive market and work under conditions of creative autonomy.[150]

2.3.3 Distorting effects of alternative revenue sources

A further critique of alternative business models and other copyright substitutes is that they tend to monetize only a limited segment of total consumption as their revenue source. Because producers only internalize benefits from one part of the market, they receive distorted signals as to societal demand. This in turn can channel future production in suboptimal directions. For example, Chinese musicians and record labels who rely on ring-back tones for the bulk of their income have an incentive to create new music that is suitable for use in the ring-tone market and to ignore competing sources of audience demand that they are

145 Priest (2014), *supra* note 79, at 502.
146 Liebowitz (2016), *supra* note 133, at 555, 560–564.
147 Liu (2015), *supra* note 77, at 490; Pager (2012), *supra* note 5, at 272–273.
148 See Liu (2015), *supra* note 77, at 488; Pager (2011), *supra* note 1, at 1858.
149 Sean A. Pager, *Making Copyright Work for Creative Upstarts*, 22 George Mason Law Review (2015), 1044–1045.
150 Robert Merges, *Justifying Intellectual Property* (Cambridge, MA: Harvard University Press, 2011), pp. 195–231;, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale Law Journal (1996), 283–387.

unable to monetize. This means composing short, catchy melodies suitable for the low quality acoustics of the ringback context at the expense of more sophisticated works with higher production values. Jiarui Liu describes how Chinese music companies are doing exactly that.[151] The Indian music industry has similarly reverted to its traditional subsidiary role as a supplier of Bollywood film music, forsaking the linguistic and genre diversity that had emerged when music could be sold directly to consumers as a standalone good.[152]

This distorted incentive critique can be applied more broadly to other commons-based alternative business markets.[153] For example, Nagla Rizk describes the ability of Egyptian singers to earn a living performing at weddings and other live parties.[154] Such singers naturally have an incentive to develop a repertoire of sentimental ballads rather than, say protest songs or devotional hymns in order to cater to the narrow niche of Egyptian music demand that happens to be monetizable.[155] Indeed, Rizk suggests that Arab authorities deliberately favor pop stars over more socially conscious "underground music" as a "means to distract the masses."[156]

Katherine Strandburg predicts similar distortions will occur in U.S. content markets funded through online behavioral advertising, invoking an analogous theory of price signal mismatches.[157] Advertising supported creative markets are already subject to a host of undesirable biases, from the undue influence of sponsors[158] to the prevalence of click-bait[159] and the distorting effects of two-

151 Liu (2015), *supra* note 77, at 481, 513.

152 Booth (2015), *supra* note 69, at 263, 280.

153 One can speculate as to the extent to which such distortions occur in other markets. For example, do South Indian filmmakers overinvest in heroic star-vehicles in order that their political funders can reap the electoral benefits?

154 Rizk (2014), *supra* note 18, at 350.

155 Capacity constraints on performance models impose further selection biases, favoring mass market over niche content. The types of musicians who succeed as concert performers can also diverge from those whose strength lies in the recording studio. Rewarding only the former not only affects who succeeds but will also influence the type of music that get produced, as not all songs lend themselves to live performances.

156 Rizk (2014), *supra* note 18, at 350.

157 Katherine J. Strandburg, *Free Fall: The Online Market's Consumer Preference Disconnect*, 2013 University of Chicago Legal Forum (2013), 95–172.

158 C. Edwin Baker, *Giving the Audience What It Wants*, 58 Ohio State Law Journal (1997), 333–337.

159 Bryan Gardiner, "You'll Be Outraged at How Easy It Was to Get You to Click on This Headline", Wired, 18 December 2015.

sided markets.[160] More generally, any reliance on ancillary revenues to subsidize the production of creative content is vulnerable to distortions where the proxy market represents an imperfect substitute for the social value of the primary good.[161] For example, the ability to sell happy meals figurines only imperfectly captures the value of a film qua film. When merchandising potential and product placements provides the primary value proposition underlying motion pictures, the quality of the film itself becomes secondary.[162]

Such distorted signals can be contrasted with the allocative efficiency that a properly functioning copyright system ensures. Copyright's broad bundle of rights allows producers to internalize benefits across the full range of demand for a given creative work, thereby capturing market signals that orient future production accordingly.[163] The result is a mix of creative works that serves a broad range of societal tastes and interests.[164]

2.4 Distribution of benefits

The aforementioned potential for abuses and distorsions has obvious distributional consequences as to who benefits from these regimes. Moreover, relying on alternative revenues may engender further biases. Particular types of creators may be favored for particular traits that have little to do with the quality of their

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160 Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 NYU Journal of Law & Business (2011), 731–809. This is not to mention the privacy concerns that invasive online advertising implicates; Kapczynski, *supra* note 10, at 1019–1020.

161 One can also raise questions of fairness: Why should consumers in one market subsidize products consumed in a different market. And of sustainability: What happens if demand for the proxy market disappears?

162 The Pixar movie "Up" provides a real-life example of such dystopian incentives: Although the film was hailed as a critical success and made a profit at the box office, Disney stock still fell due to the movie's lack of merchandisable characters.

163 Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Revised Edition, Stanford, CA: Stanford Law & Politics, 2003). We can debate how far down the chain of derivative revenue streams we *want* to allow authors to internalize benefits. The primary point, however, is that copyright does a better job of capturing a broad spectrum of market signals than many alternatives.

164 Of course, intellectual property markets are not without their own distortions. As Amy Kapcyznski points out, only consumers who have the ability to pay get counted; Kapczynski (2012), *supra* note 10, at 1004. Moreover, pricing of media goods in some developing markets can be disproportionately oriented toward the wealthy – although query whether this trend would persist if piracy were better controlled, allowing for more effective price discrimination strategies; Karaganis (2011), *supra* note 16.

work. For example, sponsorship models place a premium on attractive, charismatic pitchmen.[165] Similarly, a concert performance models works best for established bands whose fan base is concentrated in major urban areas. Performers whose following is dispersed across a wide geographic area may struggle to fill venues. Touring on the road also imposes hardships that not everyone can readily endure (e. g. single parents). Some artists' talents and certain musical genres simply lend themselves to studio projects better than live concerts. Such groups could be systematically disadvantaged were concert revenues the only source of remuneration.[166] At minimum, such biases call into question claims that commons regimes yield a fairer distribution of benefits than copyright.

Such claims deserve further scrutiny on other grounds. Much of the skewed distribution of benefits that skeptics criticize under the copyright system reflect superstar economics and other inherent biases of media markets that have nothing to do with copyright per se.[167] Indeed, the same skews can result under alternative business models based on sponsorship, concert performances, and sale of merchandise.[168] Copyright models may exacerbate distributional skews to the extent that they generate higher levels of revenue and encourage industry consolidation.[169] However, at least some of the money that superstars and Big Content conglomerates earn trickles down to a host of subsidiary personnel (session musicians, composers, camera-men, editors, etc.), many of whom support their artistic avocations and hone their skills while they await their turn in the limelight.[170]

165 *Ibid*. Similarly, Rizk notes that since MTV-style "video clips" have become the primary marketing tool and lynchpin of Arab popular music consumption, the result has been an emphasis on good looks at the expense of singing talent. Of course, physical attractiveness and charisma provide advantages even under traditional album-driven revenue models. However, the effect of this benefit is likely to be particularly emphasized under a sponsorship or performance model.

166 Schultz (2009), *supra note* 141, at 759–760.

167 Michal Shur-Ofry, *Copyright, Complexity and Cultural Diversity: A Skeptic's View*, in Sean A. Pager and Adam Candeub (eds.), *Transnational Culture in a Digital Age* (Cheltenham, UK: Edward Elgar Publishing, 2012).

168 Liu (2015), *supra* note 77, at 485, 490–491.

169 *See* Mark S. Nadel, "How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing," 19(2) *Berkeley Technology Law Journal* (2004), 785–856.

170 Branislav Hazucha, "Cultural Diversity and Intellectual Property Rights: Friends or Foes?," in Lilian Richieri Hanania (ed.), *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (London, UK: Routledge, 2014).

Other distributional consequences are similarly ambiguous. To the extent the commons-based management regimes minimize deadweight losses, they confer a consumer surplus that copyright denies. Yet, such gains have to be set against the diversion of revenues from producers to pirates. Commons enthusiasts often fail to recognize the potential for such diversions to undermine alternative revenue models. For example, absent some means to enforce exclusivity, there is no guarantee that sales of concert t-shirts will actually benefit musicians. Similarly, although licensing of Nollywood movies for television broadcast has increased in recent years, all-too-often the payments are fraudulently pocketed by opportunists masquarading as sales agents.[171]

2.5 Context-specific copyright

What about the claim that eliminating piracy is futile – akin to King Canute's struggle to hold back the tide? Should creators in the digital age just learn to live with it? There's undeniably some truth to this claim. Digital technologies reduce the marginal costs of reproduction and distribution to almost zero, whereas production costs remain high, allowing pirates an opportunity for profitable arbitrage.

However, copyright enforcement does not have to be an all-or-nothing proposition. Reducing or delaying piracy by even a small amount can make huge differences to an industry's bottom line, as the Indian and Chinese cases demonstrate. Furthermore, even if piracy remains rampant at the retail distribution level, this does not obviate the benefits of copyright entirely. Although our usual image of "piracy" conjures up shadowy figures in trench coats peddling misbegotten wares, content industries face a range of potential appropriators which includes competitors, intermediaries, broadcasters, cable networks, airlines, hotels, and other established enterprises. Enforcing copyrights against such entities may be more feasible than preventing retail piracy as such high profile enterprises can hardly hide in the shadows. As noted, India has made tremendous headway toward enforcing copyright norms in this regard: bringing pirate cable operators into the fold; ensuring that public performances are licensed; and clearing rights for film inputs. Nigeria has made recent progress in this regard as well; the main holdup is a lack of reliable proof of ownership. China too has moved toward a licensure model on many fronts, even though state broadcasters and other government entities remain largely untouchable. Such incremental gains belie claims of copyright's inevitable doom.

171 Miller (2016), *supra* note 22, at 139.

Enforceable copyrights can also facilitate collaboration internally within content industries.[172] Small creators who furnish inputs for content production such as songs or scripts are particularly vulnerable to predatory corporations in the absence of copyright.[173] Lack of copyright protection also introduces perverse incentives in the way that creative industries operate. For example, fear of script piracy has led some Nollywood directors to withhold scripts from their actors; instead, actors are only given their lines for individual scenes as they are shot.[174] Recent developments, including a favorable Nigerian high court ruling on script piracy as well as the Nigerian Copyright Commission's newly launched platform for electronic registration of copyrighted works, offer Nigerian creators the prospect of greater protection against such internal threats of misappropriation.[175] Such safeguards could make a tangible contribution to creator's bottomlines.

The preceding discussion shows that copyright norms can operate according to a variable geometry whose contours remain highly contextualized. Even if it is true that digital piracy can never be eradicated, achieving more modest enforcement and licensing goals can still yield palpable benefits that enhance the incentives for creativity and reduce transaction costs.

2.6 The formalization imperative

The value of adhering to copyright norms typically grows as industries develop over time. Greater capital investments increase the benefits of securing property interests through exclusive rights. Copyright's risk-reduction functions go beyond its protection against copying. Copyright law provides a set of building blocks around which to structure transactions. As an intangible property right, copyright defines a cluster of relational rights and obligations whose contours

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172 *See generally* Casey, Anthony J. and Andres Sawicki, *Copyright in Teams*, 80 University of Chicago Law Review (2013), 1683–1741.

173 Opara (2017), *supra* note 45; Justin Hughes, "*Recoding" Intellectual Property and Overlooked Audience Interests*, 77 Texas Law Review (1999), 923–1010.

174 Pager (2012), *supra* note 5, at 265. More generally, the lack of legal recourse against internal misappropriators leads employers in developing countries to hire based on family ties or other trust networks, privileging loyalty over competence or credentials, with predictable losses of efficiency. Such tendencies are well-established in the content industries profiled here.

175 Opara (2017), *supra* note 45; "Copyright Commission Launches e-Registration of Copyright (NCeRS)," Nigerian Copyright Commission, 3 September 2014, available at: <http://www.copyright.gov.ng/index.php/news-events/item/310-copyright-commission-launches-e-registration-of-copyright-ncers.>

are predetermined by statute. It thus provides a convenient focal-point that simplifies contractual transactions and reduces uncertainty. Authors can transfer rights to publishers; publishers, in turn, shift risks onto investors, financiers, and distributors. The divisibility of copyright's propertarian "bundle of sticks" facilitates such private ordering. Indeed, pre-sales of distribution rights allocated by national territory often provide a crucial source of financing for film production.[176] Copyright law also provides default ownership and evidentiary rules that further enhance predictability and facilitate creative collaborations.[177] Finally, by providing a robust set of remedies that transcends contractual privity, copyright law provides an added measure of security against the risks of defection.

Furthermore, there are benefits to operating within the copyright system that derive from preexisting understandings and institutions. Creative industries are governed globally by a complex system of private ordering arrangements premised on formalized understandings of copyright law. Content industries that conform to such arrangments can plug into global system and thereby to derive a host of network benefits. Advantages range from reciprocal benefit-sharing between collective rights organizations to standardized chain of title protocols for international distribution. Such institutions exert a powerful pull toward copyright formalization, and as content industries develop, they may increasingly pressured to comply with global norms.

For example, a filmmaker that seeks a bank loan for an upcoming production will usually be required to offer the copyright as collateral. Completing such transaction will require the filmmaker to demonstrate generate a host of formal copyright instruments that collectively establish the chain of title needed to prove ownership. Similarly, if the filmmaker seeks an international distributor or a film festival exhibitor, they will likely have to document clearance of all the film's copyrightable inputs – music, screenplay, background art, etc.[178] It may not take too many iterations of this exercise before such formalities becomes routinized as a business practice.

Potential sponsors of the work can also apply pressure toward formalization. Advertisers of international brands do not want to be associated with

176 Dale, Martin, *The Movie Game: The Film Business in Britain, Europe and America* (London, UK: Cassell & Company, 1997), 79–83, 97; Lobato (2012), *supra* note 44, at 27; Ganti (2012), *supra* note 59, at 249; *see also* Ganti (2012), *supra* note 59, at 253 (noting importance of pre-sold music rights as a source of finance for Hindi films).

177 *See* Casey, Anthony J. and Andres Sawicki, *Copyright in Teams*, 80 University of Chicago Law Review (2013), 1683–1741; Lichtman, Douglas, *Copyright as a Rule of Evidence*, 52 Duke Law Journal (2003), 683–743.

178 Miller (2016), *supra* note 22, at 131.

illegal practice, as Nollywood filmmakers discovered when their penchant for using unauthorized music tripped them up.[179] Similarly, pressure from foreign advertisers is said by Priest to have played a decisive role in motivating Chinese web video sites to embrace licensure norms.[180]

Even without such overt pressure to embrace copyright, other structural forces exert their own pull, tugging emerging content industries toward global copyright norms. For example, participating in the reciprocal arrangements that govern international collecting societies brings with it the prospect of royalty payments from wealthy diasporal populations, but requires investment in formal record-keeping and local monitoring/enforcement. Similarly, engaging in joint productions with Western content industries can expose local partners to global copyright "best practices" and bring with it the concomitant expertise required for compliance.[181] Such structural forces can push creative content industries toward embracing copyright formalization even in absence of credible enforcement threats. Indeed, exposure to global copyright norms can potentially exert a ripple effect that shifts industry behavior merely by making such norms a focal point of attention.[182]

A shift toward embracing copyright norms over time can also arise for competitive reasons. As noted, there is a tendency for content distributors exploiting new technologies or business models to build their platform and attract users on the back of unauthorized content. However, once they have achieved critical mass, the now-established incumbents then seek to entrench their position through exclusive content licensing deals that give them a leg up over competitors. China's internet video industry, and, more recently, its music streaming services have followed this path, and indeed are now busy suing each

179 Pager (2012), *supra* note 5, at 277 and n. 220.

180 Priest (2015), *supra* note 85, at 188–190.

181 Such collaborations are especially common in the music industry where world music is a growing market niche and Western stars such as Paul Simon and Ry Cooder have made a habit of collaborating with artists across the developing world. Joint ventures in film are also becoming more common. India has produced a steady of diet of crossover films combining India talent with Western funding, direction, and distribution: e. g. Monsoon Wedding, Slumdog Millionaire, Best Exotic Marigold Hotel, etc. A forthcoming Chinese film by Zhang Yimou is to be made in English starring Matt Damon. See Lamarco McClendon, "The Great Wall' Director Addresses 'Racist' Matt Damon Casting Controversy," Variety, 4 August 2016. New Nollywood has also begun to move in this direction, drawing backing and distribution from Nigerian expatriates. Miller (2016), *supra* note 22, at 37, 129.

182 Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 Virginia Law Review (2000), 1649–1729.

other for copyright infringement.[183] A similar pattern emerged in the Indian music industry.[184] Piracy certainly has not gone away, but at least some powerful incumbents have taken a stake in upholding the copyright system.[185]

Even consumers can sometimes play an informal role in policing copyright norms, filling a void left by ineffectual state institutions. For example, Chinese and India fan groups monitor distribution of works by their favored artists and can mobilize to exert sanctions against unauthorized distributors.[186] Over time, such collective mobilizations could conceivably pave the way for a transition toward a norm of copyright compliance. As both industry and consumers internalize copyright norms through their behavior, this could alter the underlying calculus for those inclined to deviate from such norms.

3 Theoretical implications

This Article has offered a nuanced account of the interaction between copyright law & development, and the extent to which commons-based models offer a viable alternative. The case studies examined show that copyright law is not a sine qua non for creative development. Yet, they also suggest that the ability of creative industries to grow beyond a certain level in its absence is limited and that there are structural imperatives that push toward copyright formalization. This part connects these findings to three sets of prior theoretical literatures: (1) the notion of a "crossover point" for IP & development; (2) ideas about commons-based development; and (3) an emerging literature on informal media economies.

183 Montgomery and Priest (2016), *supra* note 74, at 347, 354. Google arguably has played a similar game with YouTube and GoogleBooks (pre-settlement collapse); although its licenses are non-exclusive, it arguably enjoys market power due to network effects that allow it to achieve more favorable terms than an upstart competitor.

184 Liang and Sundaram (2011), *supra* note 52, at 393.

185 This pattern can be cyclical as it progresses through iterative evolutions toward new technology and new platforms. Thus, the shift toward formalization is not necessarily continuous. However, as industries develop, the long-term trend seems toward embrace of copyright norms. The biggest hold-out remains Nigeria, but even here the emergence of new licensing platforms backed by Western investment such Iroko in audiovisuals and Feeme in music offers hope that formalization may yet arrive as an industry norm.

186 Hammer (2014), *supra* note 67.

3.1 Crossover pointology

In some respects, the account here resembles earlier narratives that posit a "crossover point" whereby countries reach a stage of development at which the net benefits of copyright protection outweigh the costs.[187] In positing such an inflection point, commentators have proffered various accounts of its underlying mechanics. The empirical economics literature has generally described a "U-shaped curve" between the strength of intellectual property rights and economic development, "which initially falls as income rises, then increases after that."[188] Such accounts do not, however, specify the causal forces driving such a progression.

Other commentators have offered diverging narratives. Some suggest that policy-makers set IP policy based on calculations of aggregate national interest. Others point to the critical influence of IP stakeholders domestically.[189] On this theory, changes in IP rights are primarily a function of lobbying from domestic producers whose industries stand to gain from increased protection. Still others link piracy to poverty, predicting that piracy rates will decline as consumers' discretionary incomes rise.[190]

Empirical support for these theories is spotty at best.[191] Moreover, the very notion that IP policy can be reduced to a discrete set of causal variables is itself suspect. IP rights function within a complex institutional context. The "strength" of IP rights reflects multiple variables, and law as applied may be very different than that on the books. Executing policy changes thus requires significant investments in both public and private capacity-building, and there is no assurance that the results will be those intended.[192]

More recent commentary has suggested there may be multiple "crossover points" as countries develop. Different content producing industries may adopt different positions with regard to copyright's value.[193] Indeed, the clash between

187 Yu (2007), *supra* note 20, at 202–220.
188 Emmanuel Hassan, Ohid Yaqub, and Stephanie Diepeveen, *Intellectual Property and Developing Countries: A Review of the Literature* (Europe: RAND Corp., 2010).
189 Yu (2007), *supra* note 20, at 202–220.
190 See Priest (2014), *supra* note 79, at 480.
191 *Ibid*.
192 See Pager (2012), *supra* note 5, at 274–277, 286–290; Michal Shur-Ofry, *IP and the Lens of Complexity*, 54 IDEA: The Intellectual Property Law Review (2014), 55–102.
193 *See* Yu (2007), *supra* note 20, at 208–213 (noting salience of sectoral disparities in China); see also *ibid*. at 203–207 (noting regional disparities in attitudes toward IP rights as well); Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 The WIPO Journal (2009), 13–14.

Nollywood producers and marketers reveals sharply diverging viewpoints even within a single industry.

This Article adds a further refinement: rather than emphasizing specific crossover points at which copyright protection suddenly takes off, it suggests copyright formalization functions as more of an asymptotic process than a sharp inflection point. Embrace of formal copyright norms, when it comes, will often remain partial, selective, and contextually contingent as the logic and external benefits of copyright formalization exert their gradual pull over time.

3.2 Commons-based development

The findings of this Article also bear on the burgeoning literature regarding commons-based models of economic production. As noted at the beginning of this Article, commons theorists have mounted a frontal assault on the theoretical underpinnings of private property rights. Such challenges have been particularly insistent in the context of copyright, where scholars have catalogued a wide array of contexts in which creativity occurs in the absence of intellectual property rights. From user generated content on the internet to comedy routines and magic tricks, such commons-based production call into question the need for copyright incentives.[194]

Some commentators have argued that the success of content industries in the developing world where copyright norms are weak further validates the commons as a developmental model. The alternative business models pioneered by such emerging content industries are heralded as guideposts to a "post-copyright" future from which the entire world can learn.[195] Commentators have also suggested that commons models are particularly suited to the communal, collaborative traditions of developing countries – as opposed to the "rugged individualism" of Western commodification culture.[196]

The case studies examined in this Article hardly offer an unvarnished endorsement of these claims. However, before exploring further their

194 *See* Sprigman and Raustiala (2012), *supra* note 10, at 1–18; Perzanowski and Darling (2017), *supra* note 12, at 6–11.

195 See, e. g. Anderson (2009), *supra* note 17, at 162–164; Montgomery (2010), *supra* note 17, at 93–106.

196 Jeremy de Beer, Chris Anderson, Chidi Oguamanam and Tobias Schonwetter (eds.), *Innovation & Intellectual Property: Collaborative Dynamics in Africa* (University of Cape Town Press, 2014), 4–5; Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 Denver Journal of International Law and Policy (1995), 141.

implications, some clarity as to the meaning of the "commons" is required, as usage of this term varies considerably. Some use "the commons" as a synonym for the public domain.[197] Others associate commons-based production with amateur creativity and other explicitly non-commercial forms of enterprise.[198] Neither has any bearing on the commercial industries examined in this Article whose works are undeniably subject to copyright (at least *de jure*). Nor are commons-models based on collaborative, peer production germane.[199] The industries profiled here organize production along the classic hierarchical lines of conventional content industries.

Instead, the case studies in this Article arguably fit within the rubric of commons scholarship in two respects: First, the creative industries profiled here embody commons-based production in so far as the commons is equated with "open distribution." This characterization reflects the fact the industries in question operate under conditions of weak copyright enforcement, and thus much of their output circulates through channels outside their control. Such involuntary "openness" can described as a *de facto* commons.[200] Second, some aspects of these industries – in particular, the Nollywood guild system – arguably fit within the general definition of a "knowledge commons" characterized by the collective governance of shared resources through social norms.[201] These diverging conceptions of the commons will be addressed in turn.

"Open distribution" or "free culture" models offer the allure of maximizing public access and avoiding the dead-weight losses of copyright. Proponents argue they allow for more inclusive models of creativity based on shared access and collaboration. Examples of content industries in the developing world successfully built on open distribution models do, in fact, exist. Beyond Rizk's aforementioned Egyptian wedding singers, the tecnobrega music scene in Northern Brazil offers a well-chronicled case, and there are several others like it.[202] Proponents argue that IP law should facilitate such "bottoms-up"

197 Michael Madison, Katherine Strandburg, and Brett Frischmann, "Knowledge Commons", in Peter Menell and David Schwartz (eds.), *Handbook on the Law & Economics of Intellectual Property* (forthcoming, Cheltenham, UK: Edward Elgar 2017).
198 See, e. g. Kapczynski (2012), *supra* note 10, at 973, 991, 1020.
199 *Cf.*Benkler, Yochai, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 Yale Law Journal (2002), 369. Indeed, peer production models are inherently ill-suited to the development of original esthetic/narrative works.
200 Rizk (2014), *supra* note 18, at 355–357.
201 Madison, et al. (2017), *supra* note 197; *cf.*Ostrom (1990), *supra* note 11, at 88–89.
202 Santos (2013), *supra* note 88. In fact, the economics of Arab popular music appear more complex in that some of the revenues that sustain the industry appear to flow from leveraging exclusive control over satellite television channels to broadcast music videos. Rizk (2014), *supra*

innovation in local contexts as based on tacit preferences that reflect "the specific needs of particular creative communities."[203]

The problem with this narrative is that the "tacit preferences" expressed by industries in this Article point strongly in the other direction. Lack of copyright has led to depressed revenue and impaired production. Moreover, the "alternative paradigms" that these industries rely on in copyright's absence entail use of non-legal methods to exert control over content distribution.[204] In other words, rather than embracing "openness," the industries profiled here have actively resisted it. Moreover, as the industries have developed, they gravitated toward copyright formalization. Accordingly, the "bottoms-up" preference here seems to reject openness.

Are these industries clinging to outdated paradigms out of ignorance? Perhaps they just need to open their eyes to the brave new world of alternative revenues that digital technologies enable?[205] Or that they are, in fact, better off without copyright, even if they do not realize it.[206] Yet, as noted previously, the industries in question already tap alternative revenue streams, but have found them insufficient. Keeping content "closed" rather than "open" improves their bottomline.

Rather than rejecting the case studies here simply as outliers, perhaps we can reconcile these conflicting examples by identifying some distinguishing criteria. In particular, the cost structure of the relevant industries arguably plays a salient role in determining the viability of "open" paradigms. Open

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note 18, at 345–346. As such, this may not be an example of an entirely "open" distribution model.

203 Rizk (2014), *supra* note 18, at 358; Perzanowski and Darling (2017), *supra* note 12, at 2. Brazil's former minister of culture, Gilberto Gil, was a notably high-profile advocate of open creativity and backed several policy initiatives along these lines while in office. See Martin LaMonica, "Brazil's Minister of Culture Calls for Free Digital Society", CNET, 27 September 2007.

204 See *supra* notes 95–113 and 121–133 and accompanying text.

205 For a particularly glaring example of such patronizing viewpoints expressed by a Western commentator, himself woefully ignorant of the development context, *see* Mike Masnick, "A Hunger Strike Isn't A New Business Model And It Won't Stop File Sharing," Techdirt.com, August 28, available at: < https://www.techdirt.com/articles/20090827/0302056018.shtml > (dismissing hunger strike by African musicians protesting piracy of their music as futile and arguing that should they accept "filesharing" and develop "new business models" instead, while oblivious to fact that "filesharing" was not what the musicians were objecting to and that, in fact, internet-based business models were largely infeasible in the African context at a time when few consumers were online and bandwidth was severely lacking).

206 For a plausible argument in the developed economy context that the fashion industry is, in fact, better off without copyright, despite its repeated pleas for protection. See Sprigman and Raustiala (2012), *supra* note 10, at 19–56.

business models typically involve creative environments characterized by low costs of creativity and coordination.

Sprigman and Raustiala observe that their studies of creative communities that thrive despite high rates of copying involved creative contexts that "fall on the low-cost end of the spectrum."[207] Creators in fields such as comedy, foods, fonts, and fashion do not need to invest significant amounts of time and money to produce creative breakthroughs. As such, they will find it easier to recoup their investment indirectly by tapping ancillary revenues or relying on first-mover advantages.

Film production costs typically fall on the higher-end of the spectrum. It is therefore difficult to recoup such steep, up-front investments without some degree of exclusive control over distribution. An industry such as Nollywood with only limited protection against piracy has to pare its costs to the bone to remain profitable. Filmmakers in China and India have more leeway because they retain control over theatrical distribution.

Music may be an intermediate case. Some types of music are cheap to produce. However, more ambitious studio projects involving multiple contributors and significant production and post-production can get costly. It is notable that successful "open" music industries often involve music remix genres that fall on the lower-end of the spectrum.[208] For example, Brazilian tecnobrega music is typically produced in garage studios by remixing preexisting recordings. A single DJ using simple computer equipment and synthesizers can thus turn out new albums with minimal capital or labor costs.[209]

The costs of creative inputs may not be the only criterion that matters. Coordination between teams of creative collaborators imposes its own set of transaction costs, including the risk of misappropriation (e. g. leaking bootleg copies) and the potential for ownership disputes should creative disagreements arise. Because copyright offers a more secure and efficient framework to engage in collaborative production compared to alternative safeguards, high coordination costs may affect the choice between open vs. closed models. Comedy, food, and fashion typically involve innovation by solitary creators or small teams, reducing coordination costs to a minimum. As such, this factor favors openness.

207 *Ibid.* at 177.

208 *Cf.* Santos (2013), *supra* note 88, at 603–633 (offering multiple examples).

209 Sean Pager, "Digital Content Production in Nigeria and Brazil: A Case for Cultural Optimism?," in Sean A. Pager and Adam Candeub (eds.), *Transnational Culture in the Internet Age* (Cheltenham, UK: Edward Elgar Publishing, 2012), pp. 270–271. Production costs for the Arab popular music appear to be significantly greater – out of reach of indie musicians. Rizk (2014), *supra* note 18, at 348. As noted, such higher outlays may be sustained by leveraging exclusive control over commercial television broadcasts. *Ibid.* at 345–346.

Filmmaking, by contrast, implicates a diverse gamut of creative inputs and sustained, sequential collaboration between artistic and technical actors – witness the lengthy credits that roll at the end of every film. The value of enforceable property rights as a hedge against misappropriation and ownership disputes may thus be more salient in this context.

Of course, the choice between open vs. closed business models is hardly an all-or-nothing matter. As noted above, copyright formalization often arrives in a selective and contextually-contingent fashion. And even companies that assert their proprietary rights vociferously may choose to license content on an open access basis in particular contexts.

Another model of commons-based development is based on collective governance of knowledge resources. In this model, social norms often do the work of constraining undesirable copying in lieu of formal IP rights.[210] Such norms can protect against internal sources of misappropriation during collaborations. More generally, commons management schemes regulate access and copying within a broader creative community.[211]

The salience of social norms can also be correlated with costs of creativity. It is easier to rely on informal norms when innovation costs are low because less up-front investment is potentially at risk of copying by other members of the community.[212] Conversely, as the cost of creativity climbs, social norms may prove insufficient restraints against defection. The same relationship may apply to coordination costs. Where creative industries require coordination between multiple, disparate groups along an extended production and distribution chain, norms may lose their power to restrain opportunistic actors.

Other factors affect the viability of norms as a source of constraints. They are most likely to prove effective when shared between a relatively discrete, homogeneous group of professional creators who have a mutual interest in restraining one another from copying their creative works and where potential appropriators are primarily confined to the group itself. Because norms are grounded in social ties and relationships, they also work better as between individuals than firms.[213] Finally, the ability to monitor and detect defections provides crucial

210 Sprigman and Raustiala (2012), *supra* note 10, at 177.
211 *Ibid*. Such communal norms typically function to constrain copying by competitors. However, in some circumstances, they may also inhibit consumer copying. *Cf*. Mark Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us about Persuading People to Obey Copyright Law*, 21 Berkeley Technology Law Journal (2006), 651.
212 Sprigman and Raustiala (2012), *supra* note 10, at 171.
213 *Ibid*. at 177.

reassurance to members of the creative community whose willingness to respect communal norms remains contingent on reciprocity by others.[214]

These principles serve to explain some of the different outcomes observed in case studies. Comedians and magicians appear to adhere fairly scrupulously to communal norms regarding copying the routines of other members in their communities. They represent discrete professional groups who collectively benefit from their ability to offer the public mutally distinctive repertoires.[215] Because the only potential appropriators who pose a threat are fellow professionals, they share a mutal interest in adherence to communal norms. Moreover, because these artists perform their creative routines in a discrete number of highly public settings, it is easy to detect copying and hold perpetrators accountable.[216]

By contrast, trafficking in pirated copies of music or film can operate in a distributed fashion that it is hard to detect and even harder to trace to a particular source. Potential appropriators may have very different interests from creators, thus shared norms are hard to come by. Furthermore, Nigeria, India, and China are ethnically and linguistically diverse countries, marred by high levels of social inequality, kleptocratic elites, and weak communal solidarity outside of kinship groups or personal networks. Such low-trust societies may be less hospitable to communal governance norms as a general matter.

The Nigerian marketers guilds' ability to leverage ethnic ties provides a partial exception. However, such networks remain porous and vulnerable to defection and opportunistic behavior. Moreover, because the guilds are both ethnically and geographically bounded, they have little ability to constrain copying outside the group.

Because norms weaken as "the relevant social group grows and disperses,"[217] this may further explain the trend toward copyright formalization as industries develop and creative ambitions expand. As the stakes get higher, trust in reciprocity norms may falter. As individual creators give way to corporate entities, communal solidarity may weaken. And monitoring of defections becomes more difficult across a more dispersed group. Indeed, Jonathan Barnett argues that commons-based regulation of information goods is inherently limited in scale.[218]

214 Ostrom (1990), *supra* note 11, at 36, 44–45.
215 Nobody wants to go to a magic or comedy show and see the same routine you saw performed by someone else at the last show.
216 Sprigman and Raustiala (2012), *supra* note 10, at 178.
217 *Ibid*.
218 Jonathan M. Barnett, *The Illusion of the Commons*, 25 Berkeley Technology Law Journal, no. 4 (2010), 1751–1816.

In sum, the case for proclaiming the superiority of commons-based development as a universal model appears suspect. It is easy to romanticize "sharing" as morally preferable to privatized "hoarding." Communal norms sound more appealing than corporate hierarchies. And the commons has notched some undeniable achievements from the refreshingly subversive energy of the digitally revitalized folk culture online to the success of open-source software and Wikipedia. Yet, while self-regulating creative communities have achieved stable equilibria in particular niches, the viability of the commons remains unproven as a basis generally for developing sustainable creative content industries. Moreover, the case studies in this Article underscore some enduring advantages of more conventional "closed" models.

More generally, just because a creative community is able to partially regulate internal appropriations using non-legal regulatory tools, one should not assume that such "bottoms-up" solutions represent a more effective, contextually tailored accommodation of communal interests than formal IP rights. Such conclusions may be plausible where the relevant group has chosen deliberately to opt out of the formal IP system and self-regulate through alternative norms,[219] although even here, critics have challenged the "efficient social norm" hypothesis in analogous contexts.[220] Where creative industries are obliged to operate without IP protection through external circumstances, such assumptions of optimality seem far less warranted. What appears at first to be an admirable example of private ordering based on enlightened communal interest, may upon closer inspection turn out to be desperate stop-gap measures to stave off total descent into a Hobbesian state.

3.3 Informal media economies

The previous discussion of social norms provides a seagueway to a further point of theoretical intersection. Social norms often prove salient in informal contexts, and the case studies in this Article can themselves be situated within

219 *Cf.*Sprigman and Raustiala (2012), *supra* note 10, at 177 (noting that although comedy is copyrightable, "[c]omics prefer the[ir own] system of norms because it is more tailored to their needs and much more useful to them").

220 See generally Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation*, 57 Alabama Law Review (2005), 1–30; Douglas Litowitz, *A Critical Take on Shasta County and the "New Chicago School*," 15 Yale Journal of Law & Humanities (2003), 295–299.

an emerging literature of informal media economies.[221] Much of this literature focuses on the distribution side, and in particular explores the dynamics of piracy.[222] However, scholars have also turned their attention to exploring the industrial production of creative media through informal means as alternative centers of cultural expression and influence that challenge the dominant global media networks.[223] The informal basis on which such industries operate typically includes, but is not limited to indifference to copyright norms. However, the lines that divide formal and informal sectors are fluid and reflect shifting topologies that overlap and interpenetrate one another.[224] Moreover, technological developments can further destabilize these boundaries, as the preceding discussion highlighted, injecting a dynamic element to such partitions.[225]

3.3.1 contested terrain

Informal economies "should be understood as a contested idea rooted in developmental theory."[226] For commentators who value the rule of law, "informality is a threat to modern governance, portending the erosion of the hard-won gains of the regulating state. From this point of view, the informal economy is all about tax evasion, corruption, organized crime, under-the-table employment, unsafe workplaces and exploitation."[227]

The content industries examined in this Article certainly exhibit features that conform to this critique. As noted, Nollywood got its start by leveraging pirate distribution networks used to smuggle bootleg tapes across Africa. China's content hosting platforms, and Baidu, its leading search engine, all built market share on the back of pirated content. And some of India's leading media

221 See Ramon Lobato and Julian Thomas, *The Informal Media Economy* (Cambridge, UK: Polity Press, 2015), p. 8 (defining informal economies generally as "the sum of economic activities occurring beyond the view of the state"). Informal media can be partially distinguished from amateur creativity (user generated content and the like) as the former are the subject of economically significant activities that are typically commercial in nature.
222 See generally *ibid*.; Karaganis (2011), *supra* note 16; Lobato (2012), *supra* note 44, at 81–85.
223 Miller (2016), *supra* note 22, at 4.
224 Lobato and Thomas (2015), *supra* note 221, at 11; Alessandro Jedlowski, *Small Screen Cinema: Informality and Remediation in Nollywood*, 13 Television & New Media, no. 5 (2012), p. 435.
225 See *supra* notes 88–94 and accompanying text.
226 Lobato and Thomas (2015), *supra* note 221, at 12.
227 *Ibid*. at 8.

companies also got their start as pirate operators. All of these industries are notorious for tax evasion. Moreover, links to deeper currents of criminality are not hard to find. Bollywood has struggled to shake its unsavory history of mafia connections and even today remains implicated in large-scale money laundering.[228] Indeed, the non-trivial organizational efforts required to operate commercial-scale pirate networks may offer economies of scope to diversify into other illegal trafficking activities.[229]

However, the informal economy has its appealing side as well. "Some ideas about informality have a utopian character, whether in the form of a romantic longing for a pre-modern, trust-based, face-to-face society; a quicksilver 'new economy' freed from the shackles of over-regulation; or a laissez-faire dream of unfettered individual entrepreneurialism."[230] The case studies here offer supporting evidence for this viewpoint as well from the entrepreneurial efforts of pirate distributors to evade censors and pioneer new technologies and markets to the informal networks that facilitate high-volume commerce with nary a contract in sight.[231]

However, despite the contested terrain of media informality, some economic realities are apparent. "[W]hile the informal media economy means diversity and dynamism, it usually also means ephemerality, fragility, undercapitalization and – sometimes – inefficiency."[232] Lobato cautions against "constructing teleologies of industry evolution."[233] Yet, the fact remains that the development of durable, sophisticated, capital-intensive mass media content industries almost always entails embrace of formalization for the structural reasons explored in this Article.[234]

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228 Pager (2011), *supra* note 1, at 116 and n. 320; Ashish Rajadhyaksha, "The Guilty Secret: The Latter Career of the Bollywood's Illegitimacy," *Asia Research Institute*, Working Paper Series No. 230, December, 2014.

229 Carsten Fink, *Enforcing Intellectual Property Rights: An Economic Perspective* (Geneva: International Centre for Trade and Sustainable Development, 2008), at 17 (citing OECD findings of links between media piracy and other criminal activities, including trafficking of drugs and humans and prostitution); *see also ibid*. (noting that "working conditions in the informal IPR-infringing sector are poor, with low levels of pay and workers being exposed to health and safety risks).

230 Lobato and Thomas (2015), *supra* note 221, at 8.

231 *See supra* notes 35–36, 85–91 and accompanying text.

232 *Ibid*. at 41.

233 Lobato (2012), *supra* note 44, at 61.

234 See *supra* notes 173–183 and accompanying text. To be sure, one should not assume that the progression from informal to formal represents a universal law of capitalist development akin to the evolution from status to contract. Industries can and do deformalize their operations out strategic necessity (e. g. to evade overweaning regulation). Hollywood's migration to the

The case studies in this Article underscore the salience of copyright formalization in this regard. In emphasizing the central role that intellectual property rights play in content industry development, this Article invites comparisons with the work of Hernando de Soto, who similarly stressed the importance of formal property rights as a lynchpin of economic development. The next subsection explores this analogy further.

3.3.2 the mystery of copyright?

The mystery of capital, according to Hernando de Soto in his book by this title, is encapsulated in the book's subtitle: "why capitalism triumphs in the West and fails everywhere else."[235] The answer that de Soto provides concerns the comparative efficiency by which Western economies unlock the productive value of real-world assets through the magic of formal property rights. Formal property rights convert such assets into fungible commodities that can alienated in a myriad capacities and leveraged to tap into capital markets, all of which keeps citizens accountable for their behavior, encourages efficient use of specialized labor, and generally improves economic productivity.[236]

The problem with developing economies that de Soto identifies is not that people in poor countries lack assets or the entrepreneurial drive to develop them. Rather, de Soto argues that bureaucratic obstacles prevent ordinary citizens from formalizing their property rights by acquiring title to their land or registering their businesses.[237] As a result, they are relegated to the informal economy where their assets languish as "dead capital," whose defective form cannot be productively harnessed. "The result is that most people's resources are commercially and financially invisible. Nobody really knows who owns what or where, who is responsible for losses and fraud, [or] who is accountable for the performance of obligations."[238]

This failure of governments to confer the legitimacy that formalized property brings forces the poor "to invent extralegal substitutes for established law … [whereby they] deal only with people they know and trust. Such informal, ad

West Coast to evade Edison's cinema patents offers a classic example. See Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (NY: Penguin, 2004).

235 Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

236 *Ibid*. at 49–59.

237 *Ibid*. at 18–21.

238 *Ibid*. at 32.

hoc business arrangements do not work very well … and fastens would-be enterpreneurs to smaller circles of specialization and low productivity."[239] Profitable transactions must be foregone because the "unfixed nature and uncertainty [of potential collateral] leave[s] too much room for misunderstanding, faulty recollections, and reversal of agreements."[240]

De Soto's prescriptions to remedy such chronic underdevelopment is to bring the "extralegals" in from the cold by facilitating entry into the formalized economy through titling initiatives, less onerous regulation, and more user-friendly bureaucracies. His work has been tremendously influential, but also highly controversial. Empirical studies of reform initiatives that sought to implement his prescriptions have shown mixed outcomes.[241] However, subsequent scholarship has generally confirmed de Soto's assertions that firms in informal economies tend to be less productive, less able to obtain loans, or enter into long-term supply contracts, and more likely to rely on unfair practices such as personal connections to beat out competitors.[242] Policy circles have devoted considerable attention to finding ways to help developing economies break out of "informality traps."[243]

De Soto's property theories focused primarily on real property, and only addressed intellectual property tangentially.[244] There are some important differences between the two domains: Intellectual property rights often have uncertain boundaries and are notoriously difficult to value.[245] The Berne Convention forbids mandatory formalities for copyright, and thus many countries do not

239 *Ibid*. at 71.
240 *Ibid*. at 32.
241 D. Benjamin Barros, "Introduction," in D. Benjamin Barros (ed.), *Hernando de Soto and Property in a Market Economy* (Surrey, UK: Ashgate, 2010), p. 1. De Soto himself has conceded that property rights, by themselves, may be insufficient to create functioning markets in developing countries. *Ibid*. at 2.
242 Vincent Palmade and Andrea Anayiotos, *Rising Informality: Reversing the Tide*, Public Policy for the Private Sector, Note No. 298, The World Bank Group on Private Sector Development, August 2005.
243 See, e. g. Kanbur, Ravi, "Avoiding Informality Traps", in E. Ghani (ed.), *Reshaping Tomorrow: Is South Asia Ready for the Big Leap?* (Oxford University Press, 2011), p. 260 ("There seems to be a consensus in the development economics and development policy discourse that 'informality' is 'bad.' It is bad for economic growth, for equity, and for poverty reduction.").
244 *Cf.*De Soto (2000), *supra* note 235, at 82, 224
245 See generally Menell, Peter S. and Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 Journal of Legislative Analysis (2013), 1–59.

maintain copyright registries.[246] There are also normative distinctions: tangible property rights are governed primarily by economic efficiency concerns. By contrast, copyright regulates speech; as such, it implicates public law values that transcend efficiency.[247]

Notwithstanding such distinctions, the main thrust of de Soto's arguments parallel the points made above regarding the limitations of relying on alternative mechanisms in lieu of copyright and the structural imperatives that push creative industries toward copyright formalization. The ability to enforce copyright exclusivity and to produce the formal paperwork that documents ownership of creative works eases commercialization transactions and opens the door to formal finance mechanisms and to a host of network benefits that the global copyright system makes possible.

One should not make the mistake of overselling IP as a "power tool" for development, as happened during the run-up to the TRIPS Agreement.[248] Copyright formalization is not a magic bullet that guarantees successful outcomes, any more than de Soto's prescription of titling and deregulation could. Rights on paper are worthless without functioning institutions to enforce them. Substantial capacity-building may be required before benefits can be realized.[249]

Furthermore, the benefits of promoting such development must be balanced against other social priorities, not to mention the social costs that copyright itself imposes. Such balancing lies beyond the scope of this Article. However, for countries that recognize the potential long-term benefits of nurturing homegrown content industries, it may be prudent to lay the foundations to sustain such development by investing in incremental capacity building as developmental progress warrants. Such investments could include a working registration system, ideally based on a modern electronic database that incorporates robust search-functionalities and inter-operability protocols to liaise with other private registries.[250] Nor should capacity-building investments be limited to the public sector. Copyright law is far from intuitive, and the institutionalized protocols and practices required to operate effectively within the global copyright system require experienced private sector lawyers with specialized knowledge.[251]

246 See generally Silke von Lewinski, *Copyright Throughout the World* (Thomson West, December 2009 ed.).
247 See Netanel (1996), *supra* note 150; Shubha Ghosh, *Deprivatizing Copyright*, 54 Case Western Law Review 387 (2003), 387–393.
248 See Pager (2012), *supra* note 5, at 234.
249 *Ibid*. at 285–286.
250 See Pager (2015), *supra* note 149, at 1047–1048.
251 *Ibid*. Cf. Patrick Brzeski, "China's Looming Entertainment Problem: Not Enough Lawyers, Hollywood Reporter, June 21, 2013; *Conceptual Study on Innovation, Intellectual Property and the*

Such proactive policies may have a further benefit. Laying the foundation for copyright formalization and publicly signaling its value may serve to prevent creative development on a purely informal basis from becoming entrenched within a content industry's DNA. Nollywood's experience serves as a cautionary example on this score, as the following subsection elaborates.

3.3.3 piracy traps & vested interests

The logic of a "crossover point" assumes that when the right developmental stage is reached, the economic logic of IP formalization will naturally prevail. This ignores the possibility that vested interests might block such a progression. Peter Yu has noted the concern that pirates could play such a blocking role, advocating forceful efforts to prevent the development of "an entrenched pirate industry [that would otherwise] lobby the local government actively against stronger copyright protection even if such protection would be in the country's interest."[252] Such a "piracy trap" would appear to be a variant of the "informality traps" noted in mainstream developmental policy circles.[253]

In the case of Nollywood, the vested interests blocking formalization are not pirates per se, but rather a faction of producers. More precisely, it is the marketers who fund and distribute production that stand in the way of reform. As noted, many of the marketers began as pirate distributors and diversified into becoming patrons of local production; as a group, they are not so far removed from their pirate origins. Yet, they also exercise an near-absolute stranglehold over much of the industry. Hiding behind the opaque nature of their informal networks and willing to deploy private violence when pushed, the marketers have managed to ward off successive government efforts to bring the industry within a formalized structure. In doing so, they have protected their existing business model against the likely emergence of better capitalized, more professional competitors should formalization take root.[254] Meanwhile, they continue to evade taxation, accountability, and pressure for reform,[255] while Nollywood's development remains forestalled.

Informal Economy, WIPO Committee on Development and Intellectual Property, March 19, 2013, at 48 (lack of IP knowledge constraint on SME), p. 48; Pager (2012), *supra* note 5, at 288.

252 Peter K. Yu, *The Copyright Divide*, 25 Cardozo L. Rev. (2003), 441.

253 See *supra* note 239 and accompanying text.

254 See Miller (2016), *supra* note 22, at 47.

255 See Bud (2014), *supra* note 26, at 116–117.

4 Conclusion

This Article has explored the relationship between copyright and creative development. It shows that copyright is neither a magic elixir of growth, nor an obsolete paradigm. Rather, copyright law provides a pragmatic tool to encourage investments in particular kinds of cultural production oriented toward market demand. Having examined case studies based on the Nigerian, Indian and Chinese music and film industries, several conclusions emerge. First, we can see that copyright offers some important advantages over alternative models. While the downsides of copyright exclusivity have been widely chronicled, the drawbacks of commons-based production strategies are less recognized. Second, the logic and external benefits of copyright formalization exert their own gradual pull over time. As industries develop, the respective advantages of copyright become more salient. Third, copyright formalization need not be an all-or-nothing matter. Benefits from copyright law can be realized even without committing to a full-scale war on piracy. These findings have implications for the literature on crossover points, commons-based development, and informal media economies.

It should be acknowledged that the preceding analysis has largely elided questions related to competing visions of development. This Article has generally, but not exclusively framed development in economic terms and treated it as synonymous with industry success. Yet, discussion of creative development should include cultural metrics as well as economic. Some may want to know about audience welfare, cultural diversity, or other markers of societal progress.[256] Exploring such distinctions will have to await future work.[257]

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256 *Cf.*Sunder (2012), *supra* note 4, at 10–17 (emphasizing a "cultural capabilities" approach that frames development as cultural freedom to participate in the communal making of meaning).

257 For some tentative thoughts along these lines, see Sean Pager, "Creative Development: Copyright and Emerging Creative Industries", in Peter Menell and David Schwartz (eds.), *Handbook on the Law & Economics of Intellectual Property* (forthcoming, Cheltenham, UK: Edward Elgar 2017).

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