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FILM PIRACY AND NATIONAL CINEMA: A TEMPESTOUS RELATIONSHIP?

INTRODUCTION: IPR LAW, PIRACY AND CREATIVE OUTPUT

On April 17, 1975, the Khmer Rouge seized the Cambodian capital of Phnom Penh, and began the brutal regime that caused the death of nearly two million people in almost four years. During this period, literacy and culture were erased. Books, religion, money, private property, formal education, and freedom of movement disappeared. Emerging from a state of slavery, persecution and torture in 1979 when the regime fell from power, the Cambodian people desperately sought out forms of entertainment and freedom that had been denied to them. Movie theaters began to re-open and Cambodians flocked to the cinema, eager to catch a glimpse of any moving picture on the screen. The period was a reminder of the golden age of Cambodian cinema, which peaked in the mid-1960s. By the late 1980s Cambodian film and video production began again, in what seemed to be a cultural renaissance. In his 1992 *Film Comment* article on the new Cambodian cinema, John Eli Shapiro wrote, "The unstable politics in Cambodia pose little threat to this nascent industry because, in a country with a ruined infrastructure where nothing seems to work right, the business of film production is a singular success story, a source of national pride," adding that. "Cambodia's film and video output continues unabated."ⁱ

The re-birth of Cambodian cinema, however, was short lived. Shortly after Shapiro's article was published, the movie houses began to close, and production essentially halted. Speculators ascribe this phenomenon to a few different problems. One of these was the lack of sophistication of the Cambodian films, as the actors and filmmakers often were without training in their art. The closing of cinemas is often attributed to the increase in inexpensive home entertainment systems that flooded the country in the early 1990s. The main obstacles keeping Cambodian cinema from competing with these markets, officials and filmmakers say, are a lack of resources, censorship, and insufficient copyright protection. Along with the home video systems came a flood of pirated movies from Hong Kong, Thailand, Singapore, and the United States, all of which had been banned under the communist Vietnamese-backed government in the 1980s. The popularity of these films and their sophistication, coupled with the piracy of Cambodian producer's own films, shut down the system. Television stations greatly contributed to the decline: instead of showing locally produced films, which would cost quite a bit, they would simply show inexpensively obtained pirated films.

According to the Pin Sisovann, writing for *The Cambodia Daily*, "Many film companies died out because they could no longer control the distribution of their films and no longer make a profit."ⁱⁱ Ly Bun Yim, one of the major Cambodian filmmakers from the 1960s, stated that, "Today, the survival of Cambodian cinema hinges on the enforcement of copyright and intellectual property laws."ⁱⁱⁱ When these quotes were published in 2002, Cambodia was still one year away from adopting a copyright law.

In 2003, a law was established that allowed Cambodia to join the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO) Treaties. Coinciding with this moment, film production slowly started picking up again in Cambodia. However, it continues to struggle, as the old problems haven't been solved. There is still no training for actors or filmmakers, storylines are banal, funding is limited and piracy continues to run rampant.

Yet the simultaneous emergence of copyright and production is remarkable. Is it simply a coincidence, or has the law given Cambodian filmmakers a sense of security? Does the lack of IP law equal no creative output? On the other end of the spectrum, does a stringent IP law mean a high rate of creative production? Furthermore, do countries with copyright laws manage to protect creations from piracy? Does the protection supposedly guaranteed by copyright law actually give people the incentive to create?

This question of extremes is difficult to assess. One complicating matter is that copyright laws differ between countries. Copyright, as defined by WIPO, is, "a legal term describing rights given to creators for their literary and artistic works."^{iv} Although certain standards must be in place for a country to join WTO and the WIPO Treaties, these may vary and are not always well enforced. Organizations such as the United States Trade Representative (USTR), assisted by the International Intellectual Property Alliance (IIPA), track levels of IPR infringement in other countries and impose trade sanctions if laws are not enforced. Governments conduct raids to instill fear into video and audio pirates and appear compliant with the treaties they have signed on to. Still, piracy continues unabated. In order to approach these questions, it may be productive to look at the level of piracy within other nations, the film industries of those countries, and how one affects the other. The relationship between film production, copyright, and piracy is a complicated one, and even more so in a country as poor as Cambodia. However, I hope that looking at the situation of other countries will shed some light on whether there is a tie between creative output, copyright enforcement, and piracy.

SPECIAL 301

In order to determine what countries are experiencing high levels of copyright infringement for motion pictures, a good starting place is the USTR's "Special 301" Reports. This part of U.S. trade law requires the USTR to identify countries that fail to provide adequate protection for intellectual property rights, or deny fair and equal market access for U.S. persons who rely on IPR. Each year the USTR completes a report that identifies those countries that fail to comply with these standards by varying degrees. Those countries with the most disagreeable policies or practices, or whose acts, policies, or practices have the greatest adverse impact on U.S. rights holders or products are identified as "Priority Foreign Countries." Any country placed on this list may be subject to sanctions and accelerated investigations. The second tier of countries being monitored are placed on the "Priority Watch List," meaning they do not provide an adequate level of IPR enforcement or protection, but are making acceptable steps toward combating the problem. Finally, there is a "Watch List" that implies bilateral agreement has been made

to monitor underlying IPR problems. Countries with extreme IPR problems fall under a different part of the statute, and subject to out-of-cycle reviews.

In 2005, the Ukraine was the only country placed on the “Priority Foreign Country” list. Due to the Government of Ukraine’s, “repeated failure to enact and implement adequate optical disc media licensing legislation in order to comply with the June 2000 U.S.-Ukraine Joint Action Plan to Combat Optical Media Piracy,”^v the United States imposed \$75 million worth of sanctions on Ukrainian imports in January 2002. These remain in effect for 2005. While the Ukraine has drafted amendments to the existing Optical Disc Licensing Law to address inadequacies, they have yet to be passed. The USTR is concerned with Ukraine primarily because the law’s inadequate provisions allow it to produce and distribute illegal optical media, and remain a storage location for illegal media produced in Russia.

Although the Ukraine is the only country on this list, it is not alone in being considered a major threat to U.S. IPR trade. China and Paraguay are under special monitoring by the USTR for 2005. While these two countries have taken steps to combat IPR infringement, piracy remains at epidemic levels. In the IIPA’s “2003-2004 Final Estimated Trade Losses Due to Copyright Piracy and Piracy Level’s In-Country” report to the USTR, China was estimated to account for US\$280 million loss in motion picture trade alone, with a 95% piracy rate for motion pictures. Paraguay’s piracy rates for motion pictures are also at 95%, although trade loss due to this infringement is only an estimated US\$2 million. Piracy rates for motion pictures in the Ukraine are estimated at 90%, with US\$45 million in trade loss.^{vi}

The 2005 report named 13 countries to the “Priority Watch List”. These are listed here with the motion picture piracy levels estimated by the IIPA for 2004: Argentina (45%), Brazil (30%), Egypt (60%), India (60%), Indonesia (92%), Israel (40%), Kuwait (95%), Lebanon (80%), Pakistan (95%*), Republic of the Philippines (85%), Russia (80%), Turkey (45%), and Venezuela (50%*).^{vii} The majority of motion picture copyright infringement in these countries is due to optical disc piracy. Keep in mind that the Special 301 list accounts for other forms of piracy for its determination, including sound recordings, business software, entertainment software, and patent and trademark infringement.

It should be mentioned that although piracy levels are generally below 50% in developed countries such as Australia, the United Kingdom, Germany, Canada, and the United States, it still accounts for significant financial loss for the motion picture industries. Piracy in these countries is often due to peer-to-peer file sharing and other forms of Internet piracy, which increases each year due to larger available bandwidth. In 2002, the Motion Picture Association of America (MPAA) reported that home entertainment piracy levels (VHS and optical disc) in the United States were at 10%, and accounted for \$250 million in losses,^{viii} a dollar amount nearly equal to that lost to piracy in China in 2004. This figure did not include Internet piracy, which the report notes rises every year.

THE MOTION PICTURE INDUSTRIES

Are the motion picture industries of those countries with high piracy rates experiencing a significant negative impact? Is piracy a threat to the creative film and video output of the nations listed above? In order to define any parallels between piracy and productivity, I would like to take a look at the film industries of a few example countries, and how piracy has affected the industry revenue and output. The sample of countries will be taken from the “Priority Watch List” or “Watch List” of the 2005 Special 301 report. Import of foreign films and export of national productions should also be considered, to determine whether piracy is primarily affecting local productions or foreign. Perhaps the answer is not as simple as “piracy prevents creative production due to financial loss.” However, this possibility merits some attention. The relationship between these two industries is a complicated one.

A UNESCO survey conducted in 1999 found that the world’s top five film producing countries are (by average number of films produced per year 1988-1999) India, China + Hong Kong SAR, Philippines, United States, and Japan.^{ix} These five countries are the only ones in the world that make an average of 200 or more films per year. Followed closely behind is Thailand, with an average of 194 films produced per year, and France, with 183. After these examples, the numbers drop to less than 100 productions per year. The following table represents the population, GDP, and average number of films per year for the top five film production nations, most of those on the “Priority Watch List.” Also included in the table are Cambodia and the Bahamas, as examples of countries with no film industry. The Bahamas is one of the 34 countries listed on the Special 301 “Watch List.”

Country (in order of films produced)	Population^x	GDP in USD (purchasing power parity)	Average No. Films/Year^{xi}
India	1,080,264,388	\$3.319 trillion	839
China + Hong Kong	1,313,212,498	\$7.496 trillion	469
Philippines	87,857,473	\$430.6 billion	456
United States	295,734,134	\$11.75 trillion	395
Japan	127,417,244	\$3.745 trillion	238
Brazil	186,112,794	\$1.492 trillion	86
Egypt	77,505,756	\$316.3 billion	72
Pakistan	162,419,946	\$347.3 billion	64
Turkey	69,660,559	\$508.7 billion	63
Argentina	39,537,943	\$483.5 billion	47
Russia	143,420,309	\$1.408 trillion	46
Indonesia	241,973, 879	\$827.4 billion	14
Israel	6,276,883	\$129 billion	14

Lebanon	3,826,018	\$18.83 billion	5
Venezuela	25,375,281	\$145.2 billion	4
Cambodia	13,607,069	\$26.99 billion	0
Bahamas	301,790	\$5.295 billion	0

For an in depth study on national film production there is more to figure into such a comparison than just these categories. Literacy rates, percentage of population living in cities, social and cultural factors, private vs. government funding for production, and myriad other factors should be taken into account. However, for the purposes of this paper, it will be sufficient to look at the output of film in relation to population and economy. Looking at this table, it is clear that the number of films produced per country does not descend with equivalent decreases in population and GDP. Although the two largest film-producing countries are also the most populated, they are not the wealthiest. The Philippines, which produces the third largest number of films, has a comparatively smaller population and economy to the other top five.

The following discussion will focus on the motion picture industry of three countries listed above, one in each of UNESCO's production categories. For an example of a large producing country (200+ films per year), India's film and piracy industries will be examined. For a medium-producing country (20-199 films per year), I will look at Argentina. Finally, Indonesia will be looked at as a case of a small producing country (1-19 films per year).

a. India

India undoubtedly has the largest film industry in the world. Since gaining independence from Britain in 1947, cinema has been one of the most popular forms of entertainment on the subcontinent. Although Hindi-language films take the largest box office share, the majority of films are made in South Indian languages of Telugu, Tamil, and Malayalam. The Bombay-based Hindi film industry, known popularly worldwide as Bollywood, also produces the largest revenue from foreign markets. The industry competes with Hollywood in international popularity and India's top actors are considered the most famous in the world, with a fan base of over 2 billion, and growing.

The Indian film industry receives a large percentage of its revenue from exports. The UK, United States, and Canada are important markets. Japan, the Middle East, South Africa, Australia and New Zealand are also major export destinations. In a recent conversation I participated in with arguably India's most successful contemporary director, Karan Johar, he reported that up to 20% of the total revenue for his films come from the overseas market.^{xii} While he does sometimes set his films in these countries, they are created with only the Indian audience in mind. Johar says that the growing popularity of his films in other countries is due to a new appreciation by foreign audiences of the Bollywood film style.

An interesting comparison chart created by *Business Week* magazine in 2002 shows that while India creates hundreds more films and sells a billion tickets more per year than

Hollywood, its 2002 revenue was estimated to be around \$50 billion less.^{xiii} However, this is proportional to the average production and marketing costs, as Bollywood films are significantly cheaper to make.

Business Week's data shows that Bollywood's annual growth rate is approximately 12.6%. Despite this fact, the industry cites piracy as its largest problem, and sees growing intellectual property infringement as an enormous threat. Indian filmmakers and producers claim that their profits are shrinking. The problem is not only within the country, but also abroad. While the USTR has targeted India as a priority, partially due to U.S. copyright industry loss and India's light IPR laws (India is not a member of the Berne Convention and has no optical disc piracy law), the Indian motion picture industry has also experienced significant loss from piracy within the U.S. Indian distribution companies have worked with the police in the United States and Britain to conduct raids, and offenders have been given punishments of up to \$50,000 in fines and three years in prison.^{xiv} Still, the pirated DVDs of Indian films are easily found in these countries. I can personally think of at least three shops in the East Village of New York City that openly sell pirated Bollywood films, a few in mid-town Manhattan, and countless others in Jackson Heights, Queens. If one wanted to purchase a cheap Bollywood flick in New York, she wouldn't have to look far.

Smuggling between the Pakistan-India border is also an issue. Despite a ban on Bollywood in Pakistan after the Indo-Pakistan war of 1965, Bollywood DVDs and music CDs are quite easy to find in Pakistan. Pakistan makes very few productions of its own, and its audiences are hungry for entertainment from their neighbors. This has created a booming market that is essentially 100% pirated.

The problem in India is also very large scale. Producers estimate that approximately 70% of the home video market is controlled by the organized pirating industry. Because of the country's light IP laws, offenders usually get off with about Rs. 1,000 in fines (approximately US\$22).^{xv} Returning to the original question then, does this relatively light IP enforcement in any way influence the output of films? It certainly doesn't appear to. As piracy increases, producers' fears grow exponentially. Still, in 2005 India released over 1,000 films and experienced a growth of around 20%.^{xvi} And 2006 is predicted to be an especially good year, with highly anticipated releases from some of India's top directors.

b. Argentina

In countries other than the United States and India, the success of national film production hinges on its ability to compete with these powerful foreign imports. Argentina is no exception. Like many countries, Argentina's film industry has experienced periods of extreme growth and decline. The 1930s and 40s was a period of high production output, marked by films that addressed social criticism of national and popular themes. When the industry became more heavily influenced by European cinema, it lost its popular appeal, and couldn't manage to compete with American and European imports. Nonetheless, production continued steadily, until the industry flourished in the early 1970s, falling back into a slump in the late 1970s and early 1980s.

During the Argentine economic crisis of 1989 film production crashed again. The 1990s were a very slow period of production.

Since the late 1990s, however, Argentina has been experiencing a major boom in cinematic production. The number of films produced each year has been steadily increasing, from 37 in 1999^{xvii} to between 50-70 since 2002.^{xviii} This period also coincides with an increase in optical disc and Internet piracy, part of the reason Argentina continues to be on the USTR's "Priority Watch List." Although Argentina's IP laws are up to international standards, enforcement of these seems to be a problem for the U.S. Still, even with a fairly strong piracy level (45% according to the IIPA), producers in Argentina do not place this threat very high on their list of fears. For them, the main obstacle has always been competition with foreign films, particularly Hollywood pictures. Films from the United States control between 80-85% of the market. Today, the problem is also one of funding. To make a big-budget feature, co-production money from foreign investors is needed.^{xix} And even with financial assistance, the domestic market is not lucrative enough to turn over a profit. Filmmakers are now looking to export their films to other Latin American countries. Thus, it appears that though piracy in Argentina is considered a menace to the foreign market, is not a major deterrent to the output of local productions. With a large cinema-going public, and good training programs for film careers, it can be hoped that Argentina's film industry will only to continue to improve.

c. Indonesia

UNESCO's average number of films produced in Indonesia over the 11-year period doesn't accurately describe the picture of the industry. In 1990, there were 115 films made in Indonesia. However, these numbers quickly declined. According to scriptwriter, archivist, and educator H. Misbach Yusa Biran, in 1992 there were 37 films produced, and by 1999 there were only three.^{xx} By the late 1990s, Indonesian cinema was feared to be close to extinction.

Surprisingly, the reasons for this phenomenon did not include piracy. As Biran explains, "The factors generally regarded as responsible for the decline in production of feature films since 1991 are three: firstly the strengthening of competition from imported films, especially from the USA; secondly the building of Sinepleks cinemas since the early 1990s; and thirdly the emergence of private television stations, which began in the late 1980s."^{xxi} Indeed, strict regulation of cinemas by former dictator Suharto allowed little local production make it to theaters. Censorship was severe. In addition, there was a monopoly over the film import business that tied directly back to the government. These same import and distribution groups owned the Sineplek theater chains, and to turn a profit, showed only imported productions. The combination of these factors didn't allow the local producers, who had relatively small budgets, to compete.

The history of Indonesian cinema is strikingly similar to that of Cambodia. Cinema was brought to both countries in the early part of the 20th century by their European colonizers. After gaining independence, both experienced a golden era of filmmaking in the 1960s and 1970s. The decline in production in the 1990s is also comparable. And

like Cambodia, Indonesia is now experiencing a re-birth of cinematic production. However, in this case, the new creative output is attributed to the fall of the oppressive Suharto regime in 1998, and a new sense of freedom that was felt by the creative community. Although only a small number of films are being produced each year, they are of a quality that is catching the attention of the international community. In 2005, 32 productions were made and were celebrated at the Indonesian Film Festival in December.

The country and the industry are hopeful that production will continue to increase. Filmmakers still feel there are problems facing complete re-growth of the motion picture industry, though these worries are primarily centered around a lack of funding for production. The fact that over 90% of Indonesia's home video market is dominated by pirated discs does not appear to be a deterrent for filmmakers. The USTR reports that Indonesia passed Optical Disc Regulations in 2004, and has been conducting raids on retail outlets that sell pirated discs, yet this doesn't appear to be slowing down piracy. Over the next few years, it will be interesting to check on the country's film industry and see if it continues to grow and if piracy of local productions becomes a complaint for filmmakers. However, it appears that, like Argentina, the biggest threat to the film industry is a lack of public and governmental support for local production.

CONCLUSION

Looking at these examples, it can be concluded that there isn't a direct link between the level of IPR laws and their enforcement and output of local productions within specific countries. Indeed, each country's situation emerges as being quite distinct. Of these three examples, only India's film industry sees piracy as a major threat, yet it produces exponentially more pictures than the others. India also has possibly the lightest IPR laws when it comes to motion pictures, as they have no optical disc law. On the opposite end, the United States, which has some of the tightest IPR laws, produces fewer pictures per year than India. These two countries in particular seem to have the greatest fears of piracy at home and abroad, and yet their industries continue to grow and control the world market.

In his introduction to the very unique book, *Film in South East Asia*, editor David Hanan writes, "The struggle to maintain a national cinema is something experienced by most national cinemas outside of the USA and India."^{xxii} As can be seen from the examples of Argentina and Indonesia, this struggle existed long before the home video market was invented, before piracy was a thought in anyone's mind. These smaller producing countries continue to feel that their industry is struggling to compete with foreign productions, which dominate the market. Perhaps due to the popularity of these foreign films and the enormous home video market that they command, piracy tends to avoid local films. On the other hand, perhaps filmmakers in the countries that produce a smaller number of films have bigger worries than whether their films are being sold on the streets by someone other than their authorized distributor.

Cambodia has experienced the same ups and downs in its industry, yet many cite piracy as the biggest threat to its national cinema. Still, there are many other factors that can be attributed to the problem in this country. The lack of training programs for filmmakers

and actors means the productions continue to be of lower quality than the foreign competitors. Deficient funding is still a serious problem. Hopefully, the first of these issues will soon be combated as Cambodia is beginning to build a training facility and audiovisual archive in the capital, Phnom Penh. Once local productions have a quality that the public can appreciate, the industry may have a chance to improve.

The relationship between piracy and creative production in each country is different. Yet in every part of the world, they are absolutely dependent on one another. Without the films, there would be nothing to pirate. While the increase in pirated films is a problem for some, it may be seen as a blessing for others. As the market for illegal copies grows, so does the audience. It will be crucial to monitor this relationship over the years in both large and small producing countries. The struggle to maintain a national cinema may never cease, but whether piracy is its biggest threat is debatable.

ⁱ John Eli Shapiro. "Life with Video: Hollywood on the Mekong." *Film Comment*. No. 28, 1992: 2.

ⁱⁱ Pin Sisovann. "Behind the Screen: A Closer Look at the Troubled World of Modern Cambodian Cinema." *The Cambodia Daily*. June 29-30, 2002. Accessed January 13, 2006 from

<http://www.camnet.com.kh/cambodia.daily/selected_features/behind_screen.htm>

ⁱⁱⁱ Ibid.

^{iv} "Copyright and Related Rights." *WIPO website*. Accessed January 13, 2006 from <<http://www.wipo.int/about-ip/en/copyright.html>>

^v USTR. "Priority Foreign Country." *2005 Special 301 Report*. April 29, 2005: 24. Accessed January 14, 2006 from

<http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Special_301/Section_Index.html>

^{vi} These statistics and those that follow for the "Priority Watch List" come from: "IIPA 2003-2004 Final Estimated Trade Losses Due to Copyright Piracy and Piracy Level's In-Country" *2005 "Special 301" Recommendations*. February 11, 2005. Accessed January 14, 2006 from <<http://www.iipa.com/statistics.html>>

^{vii} A * next to the percentage means piracy levels were unavailable for 2004 and 2003 data was used instead.

^{viii} MPAA. *2003 Piracy Fact Sheets: U.S. Overview*. December 2003. Accessed January 16, 2006 from

<<http://216.239.51.104/search?q=cache:XoVCMSgOISsJ:www.mpa.org/PiracyFactSheets/PiracyFactSheetUS.pdf+piracy+levels+united+states&hl=en&client=safari>>

^{ix} UNESCO. "A Survey on National Cinematography." *Cinema and Audiovisual Media*. March 2000. Accessed January 16, 2006 from

<http://www.unesco.org/culture/industries/cinema/html_eng/intro.shtml>

^x Population and GDP figures were obtained from the CIA's *The World Factbook 2005*. Accessed January 16, 2006 from

<<http://www.cia.gov/cia/publications/factbook/index.html>>

^{xi} UNESCO.

^{xii} Karan Johar was recently in New York shooting his upcoming film *Kabhi Alvida Na Kehna*. I was fortunate to meet him and a few of the stars of this film on November 18, 2005 at a shoot in Sleepy Hollow, New York. I will be forever grateful to Professor Ranjani Mazumdar for arranging this visit.

^{xiii} Manjeet Kripalani and Ron Grover. "Bollywood: Can New Money Create a World-Class Film Industry in India?" *Business Week*. New York: December 2002, No. 3810.

Chart also available from Wikipedia. Accessed January 18, 2006 from

<http://www.businessweek.com/magazine/content/02_48/art02_48/a48tab37.gif>

^{xiv} Ramola Talwar Badam. "Bollywood Pirates." *Span*. July/August 2005. Accessed January 18, 2006 from <<http://usembassy.state.gov/posts/in1/wwwhspjulaug058.html>>

^{xv} Ibid.

^{xvi} These numbers are averaged from a few different sources. For some information on the success of the industry in 2005, see for example: Priyanka Khanna. "Bollywood Scripts Box-Office Success in 2005." *Yahoo! Movies, India*. December 25, 2005.

Accessed January 18, 2006 from <<http://in.movies.yahoo.com/051225/43/61pfa.html>>

^{xvii} "Despite the 2001 and 2002 crisis, the Argentine film industry broke the record of movies released in the past 20 years." *Nueva Mayoria*. February 24, 2003. Accessed January 21, 2006 from

<<http://nuevamayoria.com/EN/INVESTIGACIONES/sociedad/030224.html>>

^{xviii} Charles Newbery. "Argentina Picking Up the Pace." *Variety International*. January 1, 2006. Accessed January 21, 2006 from

<<http://www.variety.com/article/VR1117935347?categoryid=19&cs=1>>

^{xix} Ibid.

^{xx} H. Misbach Yusa Biran. "The History of Indonesian Cinema at a Glance." *Film in Southeast Asia: Views from the Region*. Ed. David Hanan. (Manila, Philippines : SEAPAVAA in association with the Vietnam Film Institute and the National Screen and Sound Archive of Australia, 2001): 242.

^{xxi} Ibid.

^{xxii} David Hanan. "An Introduction." *Film in Southeast Asia: Views from the Region*: 21.