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Pirate-states-Imagining the geography of media piracy

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Abstract

Intellectual property history has long pointed to certain nations as sources of copyright infringement, but these linkages are now systematically produced through annual Special 301 reporting by the US government and media industries. Exploring connections between infringement and nation, this article poses three concepts. Anti-piracy discourse produces a *pirate repertoire*, a stock of familiar transgressive figures deployed in efforts to combat piracy. These include the *pirate-state*, a figure used to name and shame nations as hotspots for IP infringement. Cumulatively, pirate-states form a broader *geography of media piracy*, mapping the world in terms of hubs for unauthorized flows of cultural content. This article views the Special 301 as a representational mechanism for creating a centre-periphery vision imagining 'the West' and its infringing others. Although 301 reporting can therefore be read as a statement of discursive power, the article argues this influence remains circumscribed, as is shown by the case of Ukraine.

Keywords

media piracy, media industries, intellectual property, United States, Ukraine

For the US media industries today, infringement of intellectual property, colloquially termed 'piracy', is the most egregious act of transgression in the modern mediascape. Identifying and assessing measures taken to combat IP transgression foregrounds one of the foundational logics of the media industries. To combat piracy, US media industries have pursued technological, legal, political, and discursive lines of action (McDonald 2016). Technological protection mechanisms come in the form of digital rights management tools seeking to constrain the circulation of, access to, and uses of, media content. In the courts, the major entertainment corporations individually and collectively litigate against parties allegedly infringing IP rights. In the political arena, the leading trade associations for the US entertainment industries, the Motion Picture Association of America (MPAA) and the Record Industry Association of America (RIAA), heavily lobby Congress to strengthen domestic copyright laws and apply pressure on foreign governments to strengthen their IP regimes. Finally, and most importantly for the purposes of this article, a discursive battle is fought through

anti-piracy campaigning arguing infringement negatively impacts on creativity, jobs, trade, and tax revenues.

This article sees how this discursive battle plays a part in international IP governance. Initially, three core concepts are outlined. First, as anti-piracy discourse names and shames infringing actors, it forms what is described here as the *pirate repertoire*, a stock of transgressive figures regularly deployed in efforts to combat media piracy. Figurations of the pirate produces two common characterizations: the ‘pirate-entrepreneur,’ an individual or group represented as profiting from commercial infringement, and the ‘pirate-consumer,’ understood as any member of the public infringing IPRs for personal gain or pleasure. These figures materialize in legal cases, pro-copyright lobbying, and anti-piracy campaigning. Previous studies have examined the appearance and rhetorical value of these figures in anti-piracy campaigning (e.g. Crisp 2014; Gates 2006; Parkes 2012; Yar 2008) and initially the article elaborates on this work by citing examples of news reports, campaign posters and short-form videos to illustrate how these figures materialize in anti-piracy discourse.

Secondly, the article examines how global IP governance has expanded the pirate repertoire through the production of a further figure, the *pirate-state*. In this case, nations not individuals are conceptualized as transgressive actors. With the pirate-state, a country becomes represented in anti-piracy discourse as a ‘hotspot’ for IP infringement. This construction can appear from multiple sources, but this article links the production of the pirate-state to the mechanisms of global IP governance by focusing on one specific discursive mechanism. Annual Special 301 reporting by the US Trade Representative (USTR) surveys foreign nations to judge how far their domestic IP regimes potentially hinder trade in US goods and services. Where countries are judged to operate weak IP laws or ineffective enforcement actions, Special 301 monitoring carries the threat of unilateral sanctions. To inform this process, the USTR elicits input from public and private sources, providing the mechanism for the US copyright industries - collectively represented by the International Intellectual Property Association (IIPA) - to influence USTR recommendations by submitting reports detailing complaints over the strength of IP protection measures in international territories.¹ Conceptually and methodologically, the article is therefore primarily concerned with viewing Special 301 reporting as a textual instrument of global IP governance, evaluating the influence but also the limits of its rhetorical authority.

By naming and shaming nations as hotbeds for infringement, 301 monitoring systematically forms the IP prism through which US media industries and authorities view and imagine the world. Beyond individual pirate-states, 301 reporting therefore maps what will be described as the *geography of media piracy*. As summarized later in table 1, the USTR’s designation of countries as sources of infringement produces an asymmetrical global mediascape, in which a transgressive bloc of nations become identified as the infringing other to good copyright observance. As the 301 mechanism carries the threat of unilateral trade sanctions, its legal and political authority is not merely discursive. Yet, this influence should not be overstated. As a case study of Ukraine shows, although a long-term *bête*

noire for the USTR and IIPA, by constantly appearing in 301 reports for over two decades, the country has frustrated and rejected US pressure. While it is therefore important to recognize the discursive power of USTR-IIPA reporting, equally it is vital to recognize the many gaps and resistances existing in this vision of globalized infringement.

The pirate repertoire

Representations of the media pirate appear from a multitude of sources: legal papers, press releases and news reporting, studies on the economic impacts of piracy, statistics estimating economic ‘losses’ due to piracy, academic articles, and the video, poster or website materials deployed in anti-piracy campaigning. Depicting and knowing the pirate in a few standardized ways, these sources contributed to producing the pirate repertoire, the common set of transgressive characterizations imagined in piracy discourse. With origins extending back to the earliest book and sheet music pirates, the *pirate-entrepreneur* emerges from a long history of anti-piracy enforcement actions in which individuals have been subject to complaints from rights holders, police raids, seizures of unauthorized copies, and appearances in court (Johns 2009; Segrave 2003). Over time, this category has been reimagined. For example, by the start of this century, links were alleged between pirate entrepreneurs and a diversified portfolio of illicit activities, including ‘drugs, money laundering, extortion, and human smuggling’ (Treverton et. al. 2009 xii).

In recent years, the pirate-entrepreneur has received a new inflection with the *pirate-mogul*, the individual whose illicit business activities reach a scale to become a massive wealth generator. For example, in July 2016 the Ukrainian Artem Vaulin was arrested during a flight stopover in Poland and detained on charges of criminal copyright infringement and conspiracy to commit money laundering (Farivar 2016). Vaulin was the subject of a criminal complaint filed with the US District Court for the Northern District of Illinois and his arrest resulted from cooperation between US authorities and the Polish Border Guard. As the owner of Kickass Torrents (KAT), Vaulin operated what was described by the US Department of Justice as the ‘most-visited illegal file-sharing website’ (US Department of Justice 2016). Since its launch in 2008, KAT had allegedly enabled millions of users to infringe copyright in books, music recordings, films, TV programmes and games worth over a billion dollars. Available in 28 languages and operating through a network of computer servers around the world, KAT was said to attract 50 million users per month, becoming the 69th most visited site on the Internet. Monetizing that volume of traffic, KAT was estimated to accumulate annual advertising revenues in the region of \$12 million to \$22 million (p. 21). As this case shows, the figure of the pirate-entrepreneur is conceptualized as the criminal capitalist, exploiting market opportunities to profit from infringement. Pirate-entrepreneurialism is conceived as a specialised and vaguely professionalized practice, a sphere of business in which a few people with the commercial acumen and material resources turn infringement into money.

In contrast, the *pirate-consumer* is a more mundane figure. Present across centuries of media history, the pirate-consumer achieved increased prominence during the late twentieth century as audio and videocassettes, then later CDs and DVDs, dispersed, domesticated and, most crucially, despecialized the means for unauthorized reproduction. With personalized recording media, infringement no longer existed at a distance, conducted in a separate, specialised, semi-professional sphere, but instead became an ordinary, quotidian activity, something potentially taking place in the everyday, on the high street or in the home. Instead of infringement being the practice of an entrepreneurial clique, ordinary people – maybe you or I – might be wilfully violating copyrights. Popularization of the Internet gave this category a specific inflection as the pirate-consumer came to be defined in the figure of the ‘file-sharer’.

In the pirate-consumer, anti-piracy discourse pinpoints the self as the potential agent of infringement. Foregrounding the actions and responsibilities of the media consumer, anti-piracy public awareness and education campaigns have made the pirate a figure both spoken of and spoken too. For example, the MPAA, representing the collective interests of the six major Hollywood film and television rights owners, has employed two main strategies in anti-piracy campaigning: one threatening, the other moralizing. In the threatening mode, the consumer is personally addressed and warned that her or his acts of infringement are monitored, and copyright transgressors will eventually be caught and brought to justice. Encapsulating this mode of address, a 2004 poster and billboard campaign from the MPAA showed a hand holding a computer mouse accompanied by the warning ‘You can click but you can’t hide’ (Mbugua 2005). With the other strategy, the morality of piracy is questioned by inviting self-reflection on the possible consequences of one’s actions. This angle was evident with the infamous ‘You Wouldn’t ...’ video campaign, produced by the MPAA’s overseas arm the Motion Picture Association (MPA). Using a montage of scenes of theft, the viewer is invited to contemplate ‘You wouldn’t steal a car,’ ‘You wouldn’t steal a handbag,’ ‘You wouldn’t steal a television,’ ‘You wouldn’t steal a DVD’.² The MPA deployed the campaign internationally, including the video as part of the start-up for DVDs, and translating the on-screen text into multiple languages. Directed at ‘you,’ use of first-person address in both these strategies promotes a strong disciplinary function, promoting a subjectifying discourse predicated on the individual reflecting and acting upon the self to adopt a position in relation to the transgressions of copyright infringement.³

With the pirate-entrepreneur and the pirate-consumer, the individual is conceptualized as the agent of infringement. In the figure of the *pirate-state*, however, the focus shifts to a larger territorial-bureaucratic entity. The main device of 301 monitoring is to link infringement to nation. In this process, certain dominant tropes serve to represent the meanings of the pirate-state. Countries are reported as bases for infringing entrepreneurialism, loci for supplying globally extended flows of infringing content, whether that be as origination points for camcorderd films, sources of illegally reproduced physical carrier media (CDs, DVDs), or as bases for infringing online services. As the reporting of incidents of infringement in a territory multiply and accrue, so infringement is implicated

in nationality: piracy is seen to be so endemic to a country that it takes on the appearance of a national malaise attributable to weaknesses in the nation's legal, political and enforcement systems. Piracy is explained as the consequence of the country's weak IP laws and a government that delays or blankly refuses to revise those laws. Enforcement action is also judged to be weak, with police lacking the organization or resources to implement the law. It is the repetition of these tropes in 301 reporting that has expanded the pirate-repertoire to systematically produce the figure of the pirate-state.

Pirate-states

To what extent do nations hold any meaning in piracy discourse? Operating outside the purview of the law, media piracy is seemingly liberated from territoriality, spreading without respect for, or obedience to, the border controls that conventionally dictate channels of import and export.

Describing this uncontainability, critical studies of copyright and media piracy frequently posit evocative liquid metaphors, describing piracy as 'porous' activity (O'Regan 1991 120-21), causing 'seepage' (Liang 2005 14), creating 'leakages of culture' (Arvanitakis and Fredriksson 2014 2), a 'bleeding culture' (Sundaram 2010 13) formed of 'clandestine flows' (Mattelart 2009 311).

Seemingly, piracy is all fluid, taking the form of a river or ocean rather than terra firma. Online networks corroborate this thinking, for by potentially 'streaming' data anywhere, theoretically at least it is reasonable to presume media piracy, particularly online piracy, forms a distinctly placeless and disembedded media economy, a realm of media exchange 'floating' free of nation states.

Such terms succinctly, even poetically, communicate the mobile unboundedness of unauthorized media spread. At the same time, with this fluid imagination there is always a danger of ignoring the place-specificity of piracy, the materially sited conditions that sustain and restrain dematerialized online exchanges. Geographic variations in infrastructural provision produce divisions in broadband speed and connectivity, while geo-blocking at least seeks to contain territorial licensing within defined spaces. Even once end users gain access to online content, the 'cultural discounts' of linguistic markets or taste formations still sway consumer choices. Fansubbing may bypass language obstacles, yet localized cultural preferences assert influence over media choices. It is precisely because acts of online copyright infringement are specifically embedded in certain places that they become subject to prosecution under national laws. All forms of online exchange are therefore thoroughly spatially situated, and while not operating as absolute constrainers for media traffic, nation states ensure unauthorized flows always remain to some extent grounded.

Linkages between territory and copyright piracy are deeply entrenched in IP history, for over centuries nations have been singled out as sources for cross-border flows of unauthorized media. From the very beginnings of copyright law, media industries have pointed towards specific nations as bases for the illicit production or supply of infringing material. To take just one example. When passed in 1709, the Statute of Anne, the first state regulated copyright law, offered statutory protection to books in Great Britain (England, Wales and Scotland). Until the Act of Union in 1800,

however, the law didn't extend to Ireland, and literary property was not recognized under Irish law. Consequently, British books could be legally reprinted in Ireland. Amongst London's book trade, reprinters in Dublin or Holland were commonly regarded as the suppliers of unauthorized editions to Britain's provincial booksellers (Pollard 1989, 66-87).

Given the role that the United States would eventually occupy in the international IP regime, coercing other nations to strengthen their protection of copyrights, it is profoundly incongruous how for over 90 years, US copyright law afforded no protection to foreign publishers. For a country seeking to assert its independence from British colonial rule, passage of the country's first Copyright Act in 1790 (modelled heavily on UK law) was just one marker of sovereignty. While the Act afforded protections to domestic publishers, these were refused for works imported from foreign sources. With the infringement of foreign copyrights effectively sanctioned under US law, unauthorized printing of imported works was widely practiced. Not until the International Copyright Act of 1891 (the 'Chace Act') was passed did foreign rights holders obtain protections, but these were restrictive (books had to be published on US soil to secure US copyright), selectively granted to only a few nations (mainly Western European and some parts of Latin America), and weakly observed or illusory (Balázs 2011 408-09). From 1886, first steps were made towards formalizing minimum standards for international copyright protection as nations became signatories to the Berne Convention for the Protection of Literary and Artistic Works. For nearly the next century, however, US abstention from the Convention set limits on the reach and efficacy of Berne (Fredriksson 2012).

This IP-belligerence was a double-edged sword. On the one hand, securing strong copyright at home boosted the size and value of the domestic market. On the other, it offered justification for not protecting American works across global cultural markets: if the US did not protect imported works, why shouldn't 'foreigners' retaliate? In the last years of the nineteenth into the first decade of the twentieth century, as US copyright law struggled to conceptualize and accommodate the status of moving images, 'film,' were not recognized or protected as a discreet medium (Decherny 2012). Although the Townsend Amendment of 1912 extended US law to cover film, exports went out to insecure markets, for not only did other advanced capitalist nations take longer to grant protections to film, but US absence from Berne left prints of American films easily vulnerable to theft, unauthorized duplication and circulation overseas (Karmina 2002 11-52; McDonald 2015 73-4). During the 1920s, trade reporting for the American industry identified parts of Europe (Bulgaria, England, Greece, Poland, and Romania), the Middle East (Egypt, Palestine, Syria), the Caribbean (Cuba), Latin America (Mexico) and Asia (India, Japan) as key locations for the illegal reproduction or distribution of film prints (Segrave 2003 35-40). Individually and collectively, US film suppliers acted to prevent these practices, conducting investigations to identify and seize illegal duplicated prints, and then filing civil suits against perpetrators. Overseas courts, however, were at liberty under the existing law to ignore these complaints (McDonald 2015 75). The ironies are obvious: the country that eventually assumed leadership in global IP governance was once a pirate nation. By refusing to

be fully integrated into the nascent international IP regime, the US enabled unauthorized flows of copyrighted works.

Repeated and long-term coverage of infringements produces the transgressive image of a country as a heartland for piracy. During the 1920s, trade reporting for the US film business described how the Department of Commerce claimed pirate-entrepreneurs in India distributed illegal prints supplied from New York (*Variety* 1927). Three-quarters of a century later, widespread videocassette and DVD piracy was reported to be hampering the growth of India's domestic film business (Bronstad 2002). This vision of India as a country rife with IP infringement has not remained restricted to film piracy alone. According to a 2011 article in *The Wall Street Journal*, the biggest obstacle confronting the launch of legitimate online music services in India was the \$4 billion revenues claimed to be lost to piracy each year by India's media and entertainment industries (Sahni and Sharma 2012). Similarly, US news reporting has identified a mixture of poverty, corruption, weak copyright enforcement, the paucity of legitimate outlets, and steady demand as the main drivers for a vibrant illicit trade in unauthorized books in India (Faleiro 2013).

As this example indicates, producing the pirate-state is an iterative process, whereby various discursive sources cumulatively create the image of a country as a pirate 'hotspot'. In media industry trade reporting or the national press, repeated but occasional representations produce the pirate-state in an irregular and fragmentary manner. Amongst the sources of piracy discourse, therefore, what marks out the Special 301 forms a regularized and statutorily mandated representational mechanism for the production of pirate-states. According to Section 301 of the US Trade Act of 1974, the President is authorized to impose unilateral economic sanctions against countries that 'burden or restrict US commerce'. During the 1980s, pressure from the pharmaceutical and copyright industries led to the policy becoming expanded to include violations of IP protection as a trigger for 301 investigations and sanctions (Flynn 2013b). Since the first 301 was published in 1989, the annual reporting cycle has monitored trading partners for evidence of IP violations presenting barriers to the export of US goods and services. There is a statutory requirement to Special 301 reporting: according to Section 182 of the Trade Act, the USTR must identify 'those foreign countries that deny adequate and effective protection of intellectual property (IP) rights, or deny fair and equitable market access to United States persons that rely upon intellectual property protection' (quoted in USTR 2017, 70). While the focus of this article is on media piracy, as the USTR monitors all categories of IP - copyright, trademarks and patents - then 301 reporting serves not only the media industries but also the pharmaceutical and computer software industries as well. As noted earlier, the 301 envelops all categories of IP, so is equally relevant to multiple industries.

Designation is the key outcome of the 301 process. Transgressive states are identified and hierarchically classified on the 'Watch List' (WL) or 'Priority Watch List' (PWL), or as a Priority Foreign Country (PFC). WL or PWL designation 'indicates that particular problems exist in that country with respect to IP protection, enforcement, or market access for persons relying on IP rights';

PFC status is reserved for ‘those countries that have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact (actual or potential) on the relevant U.S. products’ (USTR 2017, 70). WL and PWL placements operate as warnings to countries that do not comply with international standards for IP protection. Elevation to PFC status then triggers a 30-day countdown in which countries are expected, in good faith, to commence bilateral or multilateral negotiations, or otherwise face sanctions (Flynn 2013b). From 2006, the reporting mechanism changed, as the Special 301 began including details of international ‘notorious markets,’ physical marketplaces or online services where unauthorized copyrighted content was believed to be made available. To increase public awareness of these outlets, however, since 2011 the USTR separately reported on these outlets through the biannual ‘Out-of-Cycle Review of Notorious Markets’ (USTR 2016). As no media-specific list of country designations is produced, the 301 fuses media piracy into a generalized universe of IP infringement. Only at the level of reading individual country reports do areas of complaint specific to media infringement become discernible, such as is the case of Ukraine covered later.

Conducted under the auspices of the USTR, 301 reporting draws on ‘substantial information ... solicited from U.S. Embassies around the world, from U.S. Government agencies, and from interested stakeholders’ (USTR 2017). Amongst these interested parties, the IIPA is pre-eminent, annually submitting to the USTR country-level reports documenting complaints against territories where piracy is deemed to hinder trade for the US copyright industries. Three complaints are most commonly levelled against transgressive states. It is alleged that offending countries: operate domestic IP laws falling short of US standards; have weak court systems that fail to impose deterrent sentences for copyright infringements; and allow lax or non-existent police enforcement against such IP crimes. Detailing these failings, IIPA reports make recommendations to the USTR for the placement of countries under the PFC, PWL and WL categories. In this collaborative arrangement, the IIPA and USTR represent research and policy arms of a joint initiative to globally regulate IP according to US interests (Karaganis and Flynn 2011).

The pirate state is therefore a well-established and familiar figure in the pirate repertoire. Over centuries, complaints against specific territories as the sources or destinations for unauthorized copyrighted works have been mounted in a piecemeal fashion. What changed with Special 301 reporting, however, was the emergence of a representational mechanism that systematized the production of the pirate state, institutionalizing the review, evaluation and categorization of territories according to their policing of US IP rights.

The geography of media piracy

The discursive power of Special 301 reporting operates at two levels: designation pinpoints individual nations as pirate-states, cumulatively charting a global geography of media piracy, the representation of the world through national sites of infringement. When published in 1989, the first

Special 301 designated 17 countries on the WL and 8 on the PWL (Brazil, China, India, Mexico, Saudi Arabia, South Korea, Taiwan and Thailand) (USTR 1989 1). Two years later, China, India and Thailand became the first countries given PFC status for perceived inadequacies in protecting pharmaceutical patents (USTR 1991 2). Since the start of this century, 69 countries have been listed in Special 301 reports, mostly under the WL category. Some countries appeared once, or for a few years only, while others became regular features, shifting their status between reporting categories according to whether their domestic IP regimes were judged to improve or not. While Canada, New Zealand, and some Western and Northern European nations have featured, Special 301 reporting has largely located the geography of piracy in Eastern, Southern and Western Asian territories, together with the Caribbean, Latin America, and Eastern and Central European nations (table 1). Critical studies of media globalization may have challenged the binary model of centre-periphery thinking but in Special 301 reporting divisions are implicitly drawn between ‘the West’ and the rest, or between the developed countries of the Global North and countries or regions of the Global South. Explicitly tying infringement to territory, Special 301 monitoring produces a geography of media piracy that conceptually maps of the world in terms of hubs for unauthorized flows of cultural content, spatializing power relationships in international IP governance as the world’s most copyright rich nation projects a unilateral vision of infringement onto other parts of the world.

Through the Special 301 process, private sector media stakeholders and the USTR work together to produce a criminalizing discourse naming and shaming countries according to WL, PWL and PFC designations. Reporting places obligations on governments to protect US copyrights: the 2017 report called for foreign governments to ‘avoid creating a domestic environment that offers a safe haven for piracy online’ (USTR 2017 16). At this level, the state’s relationship to piracy is merely implicit: by failing to sufficiently curb acts of piracy conducted within their jurisdiction, foreign governments appear to condone or at least turn a blind eye to pirate-entrepreneurialism. At a further level, foreign administrations are explicitly picked out for their complicity in piracy, most evidently when bureaucracies are alleged to infringe IP by running illegal software on their computing. In the 2017 301 report, Argentina, Greece, Tajikistan, Turkmenistan, Uzbekistan, and Venezuela were identified by as countries which ‘do not have in place effective policies and procedures to ensure their own government agencies do not use unauthorized software’ (USTR 2017 2). Special 301 reporting therefore represents foreign governments as at least facilitating, and maybe even practicing, the infringement of US IP. Under the watchful eye of the USTR-IIPA, responsibility is placed on governments to get their houses in order, implementing strong domestic IP regimes wherever these are perceived to be missing, or allocating greater resources to support IP enforcement. ‘It is important for governments to legitimize their own activities,’ it is argued, ‘to set an example of respecting IP for private enterprises’ (p. 17).

Despite carrying government-approved authority, 301 reporting continually attracts criticism concerning its credibility and purpose. Digital rights group the Electronic Frontier Foundation (EFF)

Table 1 The geography of piracy: country designations in Special 301 reporting since 2000

	Watch List	Priority Watch List	Priority Foreign Country
Australasia	New Zealand		
Eastern Asia	Taiwan, Thailand	China, Taiwan, Thailand	
Southeastern Asia	Brunei, Indonesia, Malaysia, Philippines, South Korea, Vietnam	Indonesia, Malaysia, Philippines, South Korea, Vietnam	
Southern Asia	Pakistan	India, Pakistan	
Central Asia	Kazakhstan, Tajikistan, Turkmenistan, Uzbekistan		
Western Asia	Armenia, Azerbaijan, Israel, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Turkey, UAE	Israel, Kuwait, Lebanon, Turkey	
Northern Africa	Algeria, Egypt	Algeria, Egypt	
Eastern Europe	Belarus, Bulgaria, Latvia, Lithuania, Moldova, Ukraine	Russia, Ukraine	Ukraine
Northern Europe	Finland, Norway,		
Central Europe	Croatia, Czech Republic, Greece, Hungary, Poland, Romania, Slovakia, Switzerland	Greece, Hungary, Poland	
Western Europe	Denmark, Republic of Ireland, Italy, Spain	Italy	
Caribbean	Bahamas, Barbados, Belize, Dominican Republic, Jamaica	Bahamas, Belize, Dominican Republic	
Latin America	Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Ecuador, Guatemala, Mexico, Paraguay, Peru, Uruguay, Venezuela	Argentina, Brazil, Chile, Columbia, Costa Rica, Ecuador, Guatemala, Mexico, Peru, Uruguay, Venezuela	
North America	Canada	Canada	

Source: author's analysis of IIPA (2018)

Note: Using the USTR's annual listings, this table identifies which countries were identified in Special 301 reporting over the period 2000 to 2018, grouping these according to WL, PWL or PFC designation and geographic region. As certain countries shifted their status over this period, they appear under more than one designation.

condemns how the report lacks any ‘consistent methodology for assessing what is "adequate and effective"' IP protection and enforcement, and alleges that by making ‘heavy reliance on submissions rather than primary sources, the countries called out in the report and the misdeeds for which they are called out change’ subject to ‘the winds of U.S. foreign policy’ (Malcolm 2018). As an example, the EFF cite Canada’s elevation to the Priority Watch List in the 2018 Special 301. With Canada then still to negotiate the IP chapter of the North American Free Trade Agreement (NAFTA), legal academic Michael Geist (2018) dismissed ‘the decision to elevate Canada ... [as] an obvious effort to place negotiators on the defensive. In doing so, the U.S. has further undermined the credibility of a review process that is widely recognized as little more than a lobbying exercise’. Without methodological validity or objectivity, the standing of the 301 is therefore dependent on its status as a rhetorical weapon.

Ukraine and the ‘export of piracy’

Intended to coerce, the 301 report is a text with an exact purpose: disciplining IP-infringing outlaw nations. Authored through public-private collaboration between USTR and IIPA, the 301 is a tangible sign that a ‘global prohibition regime’ (GPR) for the protection of intellectual property has emerged. GPRs seek to enforce global standards for ‘prohibit[ing], both in international law and in the domestic criminal laws of states, the involvement of state and nonstate actors in particular activities’, for example slavery, people or drugs trafficking, money laundering, terrorist financing, and the killing of endangered species (Nadelmann 1990 479). GPRs follow a common evolutionary pattern in which an area of activity becomes progressively subject to prohibition. Initially accepted as legitimate under certain conditions and when conducted by particular parties, including government, the activity is delegitimized as it is redefined as a problem by religious groups, moral entrepreneurs, and other interest groups. Consequently, advocates for prohibition agitate for suppression and criminalization by states and international conventions. Where this is successful, the activity becomes subject to criminal laws and police actions, coordinated internationally by institutions and conventions (Andreas and Nadelmann 2008 20-21). The resulting norms ‘strictly circumscribe the conditions under which states can participate in and authorize these activities. Those who refuse or fail to conform are labelled deviants and condemned’ (p. 17). Introduction of 301 reporting should therefore be seen as providing a key textual instrument for the emergence of an IP GPR (Logan 2014 145-146).

But how powerful or effective is that instrument? While recognizing the coercive rhetoric of Special 301 reporting, at the same it is important to note limits to that power. During the 1980s, Section 301 was used to authorize unilateral sanctions against Brazil and South Korea, and after Special 301 reporting commenced at the end of the decade, PFC designations prompted 301 investigations and in some cases sanctions. In 1995, implementation of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, administered by the World Trading Organization (WTO), established a new multilateral framework for international IP governance. By making WTO

membership conditional on meeting minimum standards of IP protection, TRIPS linked IP protection to the international trading system. TRIPS aimed to prevent exactly the kind of unilateral actions undertaken through the Special 301 process by requiring members direct IP-related complaints through the agreement's dispute resolution procedure. Special 301 survived, however, after amendments to the Trade Act allowed the USTR to commence actions against foreign countries deemed to allow acts, policies, or practices denying adequate and effective IP protection, even if these comply with the obligations of TRIPS. Still, the tangible effects of Special 301 reporting are bounded, for how far can the USTR implement sanctions while still operating within the WTO/TRIPS framework? Consequently, it has been suggested the significance of 301 reporting resides in its power to threaten rather than initiate action. 'Whereas in the pre-1994 period the US appeared to be relying on a credible threat of sanctions as its main tool to promote compliance with its wishes,' the function of the Special 301 has become 'to list many countries as subject to the watchful gaze of USTR [rather] than ... to actually impose sanctions' (Flynn 2013b). Special 301 reporting does not therefore exercise any monolithic disciplinary influence.

Ukraine provides a suitable case for observing not only how 301 reporting produces the figure of the pirate-states but also how nations defy their folding into this US-authored geography of piracy. First appearing on the Watch List in 1998, Ukraine consolidated its reputation as a pirate-state by continually being designated in WL, PWL or PFC categories over the subsequent two decades. In theory, Ukraine has complied with the IP GPR, becoming a member of the Berne Convention in 1995, and committing to implementing the TRIPS agreement after accession to the WTO in 2008 (WIPO 1995; WTO 2008). From the perspective of the US copyright industries at least, Ukraine still falls short of meeting its obligations under these agreements. Repeated failures by the Ukrainian government to adequately respond to calls for the closure of unauthorized CD production facilities led in 2001 to the USTR designating Ukraine a PFC (USTR 2001 2). In August that year, the US government withdrew Ukraine's benefits under the Generalized System of Preferences (GSP), and the following year imposed \$75 million in trade sanctions (USTR 2002 16). Only after the original issues were sufficiently tackled did those privileges become reinstated (USTR 2013, 6). This did not settle the matter, for continued complaints led in 2013 to the IIPA recommending that Ukraine be designated a PFC once more (IIPA 2013). This decision was made on three grounds: '(1) the unfair, nontransparent administration of the system for collecting societies, which are responsible for collecting and distributing royalties to U.S. and other rights holders; (2) widespread (and admitted) use of illegal software by Ukrainian government agencies; and (3) failure to implement an effective means to combat the widespread online infringement of copyright and related rights' (USTR 2013, 6). Alleging Ukraine provides a home for several of the world's largest BitTorrent sites, the IIPA has repeatedly said the country 'exports piracy' (IIPA 2017 63).

Despite concerted pressure from the US government and copyright industries, Ukraine has not complied with demands to tighten IP protections. Setting out a range of commitments for

strengthening enforcement actions against online and hard copy piracy, a 2010 US-Ukraine Action Plan was drawn up but never implemented. According to the IIPA, gaps in Ukrainian laws create a space in which piracy can operate. Low response rates to notice and takedown requests by ISPs is attributed to how the current Law on Telecommunications explicitly states ISPs need take no responsibility for the content on their sites (IIPA 2017 64). By not imposing ISP liability, the law provides no incentive for service providers to collaborate with enforcement agencies. Under the Criminal Procedure Code, police do not have the authority to commence criminal action against alleged online piracy until a rights holder first files a claim for damages (p. 65). One area where Ukraine's IP regime is viewed as particularly flawed is in the means afforded to protect film copyrights. The private copy exemption in the country's current Copyright Law does not prevent camcording. Between 2011 and early 2017, more than 126 recordings were traced to Ukraine. Furthermore, theatrical piracy is also considered a problem, with some small theatres screening unauthorized prints (p. 67). As Ukraine's Law of Cinematography requires all film prints and digital encryption keys must be locally produced to gain a state distribution certificate, existing legislation disadvantages the protection of high-quality masters and prints when films circulate on theatrical release (p. 70). Inevitably, Ukraine has become a target for the MPAA/MPA. Responding to the USTR's request for public submissions regarding notorious markets outside the US, in October 2015 the MPAA reported open air markets in Odessa, Kharkov, Donetsk, and Kiev sold counterfeit movies, and alleged Ukraine was home to the streaming site Kinogo.co and BitTorrent indexer Extratorrent.cc (McIntosh 2016).

It would be mistaken to take this recalcitrance as signs of Ukraine actively rejecting US pressure to tighten its domestic IP regime. Ukrainian authorities have motioned towards curbing infringement. Coinciding with the first trip to the US by Ukraine's Deputy Prime Minister Valery Khoroshkovsky, during summer 2016 BitTorrent tracker Demonoid was temporarily closed-down, a move combining IP enforcement with international diplomacy and public relations (Enigmax 2012). Following an MPAA complaint, in November 2016 the cybercrime division of the Ukrainian police shut down the site FS.to, and two days later the file-hosting site EX.UA was closed (Andy 2016a and 2016b). To avoid trade sanctions, in October 2015 Ukraine's Cabinet of Ministers approved Bill no.3353, a draft anti-piracy law including notice and takedown provisions (IIPA 2016 7). Yulia Kuznetsov, Deputy Minister of Economic Development and Trade, acknowledged the measures were designed to shake off perceptions of Ukraine as a hotspot for infringement by getting 'rid of the dubious image the country has with its high levels of Internet piracy' (quoted in Andy 2015). Three months later, Bill no.3081-d aimed to tackle online piracy by proposing legislative amendments to the Copyright Law, the Law on Telecommunications and the Code on Administrative Offences, including provisions for ISP liability, camcording sanctions, and notice and takedown procedures. Although adopted by the Verkhovna Rada (the Ukrainian parliament), the bill was vetoed by the President and sent back for reconsideration (IIPA 2017 68).

Ukrainian officials certainly acknowledge their country's responsibilities. When Alexander Strigunov, the owner of FS.to, was arrested, the prosecutor declared: 'I think it is necessary to compensate the losses incurred to foreign companies so that each company knows that its rights are protected not only by their national legislation, but the legislation of the countries where their rights are violated or affected. It is our image at stake' (quoted in Andy 2017). In May 2017, when Ukraine again appeared on the PWL, Stepan Kubiv, the First Vice Prime Minister of Ukraine, declared Ukraine's commitment to continuing the work of strengthening IP protection:

Our task is to ensure proper protection of intellectual property for all creative works.... This will improve the assessment of the Office of the US Trade Representative and the position of Ukraine in the Special 301 Report. That will improve the economic development of Ukraine, encouraging inventions and innovations while attracting significant investment to Ukraine.

(quoted in Andy 2017)

It is debatable whether such statements just pay lip service to external pressures from the US. Still, any perceived weaknesses in Ukraine's IP environment cannot be read as representing state-sanctioned piracy. Law-makers may have made few concessions to calls for changes to the country's criminal and IP laws, yet at the same time closure of a few infringing services through isolated enforcement actions shows authorities at least gesturing towards compliance with the wants of the US copyright industries.

State deviancy and the limits of the IP GPR

Special 301 monitoring is integral to the IP global prohibition regime. Although the target and means of representation are quite different, the 301 holds a similar disciplinary function to the moral lessons found in anti-piracy campaigning directed at the public consumer: countries allowing infringement can't hide. Just as the figure of the pirate-consumer has the subjectifying purpose of encouraging media users to self-reflect on their actions, so the figure of the pirate-state is produced to urge nations to regulate their behaviour in line with the protocols of good IP conduct. The threat of sanctions makes participation in the global trading system contingent on becoming a fully integrated member of the international IP community. Still, there remains the question - just far do nations position themselves in this subjectifying mode of address? After appearing on the Watch List two years in a row, in late 2017 Swiss authorities bowed to US complaints that loopholes in the country's copyright system created a 'safe haven' for the hosts of infringing websites, and uncertainty over the collection of Internet data for copyright enforcement. Amendments to the country's copyright law not only introduced a 'stay down' obligation for hosting providers to permanently remove infringing content, but also made permissible the processing of data for prosecuting copyright infringement (State Secretariat for Economic Affairs SECO / Swiss Federal Institute of Intellectual Property IPI 2018).

Enforcement of prohibitive norms by GPRs can lead to proscribed activities being reduced, however authorized standards prove ineffective when forbidden activities require limited and easily available resources, can be committed without any advanced expertise, are simply concealed and unlikely to be reported, and where consumer demand is large, stable, and cannot be catered for by substitutes (Andreas and Nadelmann 2006 22). Faced with mass consumer non-compliance with IP norms, facilitated by user-friendly general-purpose technologies, the IP GPR cannot ‘dam’ the porosity, leakages, flows or streams of media piracy.

Faced with this inevitability, the discursive power of the Special 301 is forever limited. Naming and shaming countries cannot guarantee obedience. For two decades, Ukraine has been marked as a pirate-state, a rogue, aberrant, deviant figure in the international IP community. After Ukraine’s PFC designation was reinstated, the ensuing 301 investigation concluded the ‘practices of Ukraine are unreasonable and burden or restrict United States commerce and are thus actionable’, although with the country in the midst of war, conceded that ‘[i]n light of the current political situation in Ukraine, the Trade Representative has determined that no action under section 301 is appropriate at this time’ (Office of the Federal Register 2014 14327). Likewise, the 2015 IIPA report noted that in ‘light of recent political developments, the Government of Ukraine clearly has a limited capacity to effect certain legal reforms, and has its priorities elsewhere’ (IIPA 2015 1). Armed conflict and political instability, however, may be read as one explanation for this reluctant tolerance, for taking unilateral action against Ukraine may potentially violate the WTO/TRIPS framework (Flynn 2013a and 2014). For the time being, therefore, Ukraine remains a country intensely watched but not acted upon. This reflects on the efficacy of the 301 more generally. It is certainly important to note how, through 301 monitoring, the IP GPR produces pirate-states as evocative figures in the geography of media piracy. At the same time, and without underestimating the surveilling power of the Special 301, the actual influence of these representations must be kept in perspective, for the threat of USTR-IIPA monitoring now appears more implied than real.

Long preceding Special 301 reporting, the pirate-state has historically appeared as a persistent figure in media piracy discourse. Alongside the pirate-entrepreneur and the pirate-consumer, the pirate-state operates in the pirate repertoire as a convenient target for asserting the privileges of copyright owners. As such, the pirate-state cannot simply be dismissed or discounted as a mere construct of anti-piracy discourse. While the vocabulary of ‘flow,’ ‘porosity,’ or ‘leakages’ eloquently communicates how the fluid mobility of media will escape territorial constraints, at the same time, the discursive production and rhetorical influence of the pirate-state reminds us the geo-politics of media piracy is anchored in national-specific conditions. For critical studies of media piracy, foregrounding how states are configured as a transgressive IP actors in piracy discourse provides a valuable analytic viewpoint for grasping how the representational work of the IP GPR is conducted through the mapping of a global geography of infringement.

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Notes

¹ Formed in 1984, the IIPA operates as ‘private sector coalition ... of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers’ (IIPA n.d.). Currently, the IIPA membership includes the Association of American Publishers, Entertainment Software Association, Independent Film and Television Alliance, Motion Picture Association of America, and Recording Industry Association of America.

² See <https://www.youtube.com/watch?v=HmZm8vNHBSU>

³ This aggressively accusatory tone was maybe only a brief historical creation, for in the UK context at least, MPAA-sponsored anti-piracy campaigning moved away from implicating the self in acts of infringement and towards more a conciliatory tone that either ‘othered’ pirates as social deviants (i.e. you wouldn’t pirate but others would) or otherwise praised and thanked the self for respecting copyrights by obtaining films by legal means (Parkes 2012).