

The Concept of Piracy in the Film Industry in Nigeria: Taking a Cue from Other Countries

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Abstract

The film industry in Nigeria, popularly referred to as Nollywood, is the world's third-largest film industry (based on the volume of films produced); however, this does not translate to real economic benefit. It is a highly informal industry created in an informal sector of the economy and addressed to a mass audience with different characteristics from those in the Anglo-American/Anglo-European field. This article argues that piracy is economically harmful to Nollywood. To substantiate this claim, we engage with the body of literature on piracy to understand what piracy is and how it works. The jurisprudence on the concept of piracy is discussed, first at a general level, before specifically discussing the case of Nigeria. An attempt will be made to measure piracy as a statistical phenomenon, comparing several excellent studies carried out in the United States, the United Kingdom, and elsewhere in the world. The trends and lessons learned from these studies were critically considered in the Nigerian context. The impact of piracy was examined, identifying the different models that have successfully tackled piracy. We evaluate how piracy is tackled in the different levels of the Nigerian film industry, pointing out the distinction between legal rule and enforcement thereof and stressing how ignorance of copyright law, coupled with the specific cultural context of Nigeria, exacerbates the problem of piracy. Finally, workable solutions that could aid in curbing piracy in Nigeria were discussed. We conclude by advocating for an essential change of the mindset of the people, which can be achieved through aggressive educational campaigns.

Keywords: Film Industry, Nollywood, Concept of Piracy, Measuring Piracy, Impact of Piracy, Copyright.

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1. Background – the film industry in Nigeria

The Nigerian film industry, popularly referred to as Nollywood, is one of the most robust creative industries in the world. It is a site of celebrity, tabloid media, and intensive, multidisciplinary research interests.¹ And yet, although Nollywood is the world's third-largest film industry (based on the volume of films produced),² this does not translate to real economic benefit, with little or no income going to filmmakers and much less revenue accruing to the government.³ Similarly, the industry is the second largest employer of labour in Nigeria, after agriculture,⁴ but with no corresponding revenue to show for it.

Piracy is often claimed to be the principal reason why the industry is not currently thriving in the global creative economy.⁵ However, it is essential to substantiate this claim with robust evidence. This is done by engaging with the literature on piracy. It is necessary to understand the meaning of piracy and its measurable impact in different sectors. By analysing studies on piracy from the United Kingdom, the United States and elsewhere in the world, trends and lessons will be revealed. These findings will be reconsidered through the prism of the peculiar Nigerian situation – a highly informal film industry created in an informal sector of the economy and addressed to a mass audience that has different characteristics to those in the Anglo-American world.⁶ This will, in turn, enable me to

¹ Chidi Oguamanam, 'The Nollywood Phenomenon: Innovation, Openness and Technical Opportunism in the Modeling of Successful African Entrepreneurship' (*Open AIR*, 17 October 2018) 6 <<https://openair.africa/the-nollywood-phenomenon-innovationopenness-and-technical-opportunism-in-the-modeling-of-successful-african-entrepreneurship/>> accessed 6 May 2020.

² Tara Brady, 'Hooray for Nollywood: How Women Are Taking on the World's Third Largest Film Industry' (*The Irish Times*) <<https://www.irishtimes.com/culture/film/hooray-for-nollywood-how-women-are-taking-on-the-world-s-third-largest-film-industry-1.2870650>> accessed 7 May 2020. In 2009, Nollywood was the second-largest film industry in the world regarding films produced. See 'Nigeria Surpasses Hollywood as World's Second Largest Film Producer – UN' (*UN News*, 5 May 2009) <<https://news.un.org/en/story/2009/05/299102-nigeria-surpasses-hollywood-worlds-second-largest-film-producer-un>> accessed 9 March 2019.

See also Afam Ezekude, 'Nigeria's Anti-Piracy Drive Yields Results' (2012) <http://www.wipo.int/wipo_magazine/en/2012/03/article_0004.html> accessed 16 November 2018.

³ Steve Omanufeme, 'Finance and Development' (2016) 53 *International Monetary Fund* 32.

⁴ Rebecca Moudio, "Over a million people are currently employed in the industry, making it the country's largest employer after agriculture." 'Nigeria's Film Industry: A Potential Gold Mine? | Africa Renewal' <<https://www.un.org/africarenewal/magazine/may-2013/nigeria%E2%80%99s-film-industry-potential-gold-mine>> accessed 9 May 2019.

⁵ Chidi Oguamanam, 'Nollywood' and Piracy: In Search of an Intellectual Property Policy for Nigeria' [2011] NIALS Journal of Intellectual Property Maiden Edition.

See also Volker Treichel, *Putting Nigeria to Work A Strategy for Employment and Growth* (The International Bank for Reconstruction and Development / The World Bank 2010) 28.

See Temi Bamgbose, 'Can Nollywood Beat Piracy? | TRUE Africa' <<https://trueafrica.co/article/for-every-legitimate-copy-sold-nine-are-fake-can-nollywood-win-the-fight-against-piracy/>> accessed 16 January 2019.

⁶ Jonathan Haynes, 'Keeping Up: The Corporatization of Nollywood's Economy and Paradigms for Studying African Screen Media' (2018) 64 *Africa Today* 3, 59.

critically address the question of whether piracy is economically harmful to the film industry in Nigeria and how this aligns with Nigerian copyright policy.

2. The Concept of Piracy

The Nigerian Copyright Act⁷ uses the term 'Piracy' but does not define that term. For our purposes, piracy can be defined as the use without permission of copyright-protected works.⁸ Piracy relates to the act of violating the rights of the copyright owner by the unauthorised or illegal reproduction of his work,⁹ and can prove damaging to the original creator, lessening his incentive to create new works.¹⁰ Creators are sometimes hesitant about putting out their work for fear the work will be immediately pirated and their economic rights violated. The reproductions prohibited are often perpetrated on a commercial scale.¹¹

Exceptions allow for lawful (permitted) use. Under the Nigerian Copyright Act, the 2nd to 4th Schedules of the Act provides for exceptions and limitations. These exceptions can be understood as statutory permissions – that is, a form of use with permission. As such, any activity falling within the scope of these exceptions is lawful and does not constitute piracy. The first exception provided for under the 2nd Schedule is the fair dealing exemption.¹² Closely related to this is the use for an academic purpose; the educational use exception. However, there must be an acknowledgement of title and authorship of the work.¹³ The Act also provides an exception for uses that are considered to be in the interest of wider society; this covers public interest use by government, public libraries and institutions for the disabled.¹⁴

See also Alessandro Jedlowski, 'Small Screen Cinema: Informality and Remediation in Nollywood' (2012) 13 *Television & New Media* 431.

⁷ Cap C28, Law of the Federation of Nigeria, 2004.

⁸ The term 'use without permission' does not, however, extend to limitations and exceptions as they – *de facto* – fall under the umbrella of a statutory permission to use. Certain types of use without permission are lawful. These fall under exceptions to copyright infringement. In Nigeria, the exceptions include fair dealing, research, criticism and educational instruction, and are listed in the Second Schedule to the Copyright Act 1988 as amended in 1992 and 1999, Cap 28 Laws of the Federation of Nigeria 2004.

⁹ See Ayoyemi Lawal-Arowolo, 'Influence from United States and Europe: Exploitation of Copyright Law and New Trends in Nollywood (Nigeria's Filmmaking Industry)' (2019) 41 *European Intellectual Property Review* 284, 286.

¹⁰ Devdatta Malshe, 'What Is the Difference between Copyright and Piracy?'

<<https://www.quora.com/What-is-the-difference-between-copyright-and-piracy>> accessed 28 October 2020.

¹¹ Some statutory exceptions enable wide scale commercial use.

¹² See the Second Schedule Nigeria's Copyright Act, Cap C28, Law of the Federation of Nigeria, 2004. See also JO Asein, *Nigerian Copyright Law & Practice* (Books and Gavel Publishing 2012) 246–248.

¹³ See Para (f) Second Schedule.

¹⁴ See Para (k) Second Schedule.

The mode of copying is irrelevant; it could be analogue, digital, amongst others. The concept of piracy, an actionable offence under the Nigerian Copyright Act, is concerned with both the reproduction of physical replicas and the virtual reproduction of copyrighted material. This includes peer-to-peer services – file sharing and illegal streaming services on internet servers. Indeed, many people have participated in small-scale piracy at one time or another, every time they share a song¹⁵ or copy a video.¹⁶ Indeed, in some jurisdictions, for example, in the United Kingdom,¹⁷ and in Nigeria, even sharing content with family members constitutes infringement (although, in other jurisdictions, such as France, this type of copying is lawful).

It is routinely claimed that piracy negatively impacts both the financial interests of the copyright owner as well as the economy.¹⁸ Piracy is said to undermine IP, innovation, economic growth and employment.¹⁹ For example, a 2017 study carried out by the International Chamber of Commerce the report highlighted that globally, the value of digital piracy in movies, media and software amounted to \$213 billion (in 2015) and that the estimated value of trade in counterfeit and pirated goods could reach \$991 billion by 2022.²⁰ In the opinion of Nhan et al., the financial loss attributed to digital piracy is significant and is growing.²¹

However, there are counter-arguments that piracy can be pro-innovation. For example, some have suggested that piracy can be turned to profit.²² Minniti and Vergari claim that the existence of a private, small-scale file-sharing community positively affects the profitability of producers of digital goods companies. Their study demonstrates that firms

¹⁵ However, where an appropriate exception exists, this will not constitute piracy. So, in France and some other EU countries, copying and sharing with family and friends is permitted by statute; but in the UK and in Nigeria, this would not be lawful.

¹⁶ See Bert Markgraf, 'Copyright & Piracy From Moral & Legal Standpoints' (*Your Business*) <<https://yourbusiness.azcentral.com/copyright-piracy-moral-legal-standpoints-14141.html>> accessed 27 October 2020.

¹⁷ 'Quashing of Private Copying Exception' (*GOV.UK*) <<https://www.gov.uk/government/news/quashing-of-private-copying-exception>> accessed 12 April 2021.

¹⁸ For arguments of that nature, as they relate to Africa, see: Aurelia J Schultz, 'Africa's Been Raided Enough: Collateral Damage to Intellectual Property Systems and Alternatives to Obtain Value' (2017) 12 *Journal of Intellectual Property Law & Practice* 168, 168.

¹⁹ See Omotayo F Awomolo-Enujiugha, 'Piracy and Its Burden on Copyright in Nigeria: Challenges and Solutions' (2020) 23 *The Journal of World Intellectual Property* 413, 413. Where the author is of the opinion that piracy 'cheats' the owner of the copyright work and the economy.

²⁰ International Chamber of Commerce, 'The Economic Impacts of Counterfeiting and Piracy' (*ICC - International Chamber of Commerce*) <<https://iccwbo.org/publication/economic-impacts-counterfeiting-piracy-report-prepared-bascap-inta/>> accessed 28 October 2020. The report was prepared for the Business Action to Stop Counterfeiting and Piracy (BASCAP) and the International Trademark Association (INTA), the data and figures in this report have not been contested.

²¹ Johnny Nhan, Kendra Bowen and Aaron Bartula, 'A Comparison of a Public and Private University of the Effects of Low-Cost Streaming Services and Income on Movie Piracy' (2020) 60 *Technology in Society* 101213, 2.

²² Antonio Minniti and Cecilia Vergari, 'Turning Piracy into Profits: A Theoretical Investigation' (2010) 22 *Information Economics and Policy* 379.

can benefit from piracy as it allows them to reach a larger customer base that otherwise would not buy at all.

Similarly, Gregory Day argues that piracy enhances competition and efficiency in certain situations.²³ He points out that the goods most likely to suffer from piracy are those where a holder sells for significantly above its marginal cost of production. In turn, he argues, the most appropriate anti-piracy strategy would be for rights holders to compete directly with the infringing goods in an open market. They can do this by lowering the price of their goods to approximate the cost of infringing goods. The right holder can thus persuade consumers to purchase the legitimate item instead of the pirated version.²⁴

Kim, Lahiri and Dey's research considered the illegal downloads on the television series *Game of Thrones*, rated the most pirated television program in 2014. Its season four finale was illegally downloaded 1.5 million times. They concluded that 'a moderate level of piracy — not too much, not too little — can actually benefit the manufacturer, the retailer, and consumers, all at the same time'. That is, a moderate level of piracy can limit the negative impact of double marginalisation from, benefiting all parties in the supply chain. Moreover, consumers enjoy a lower price. In this way, they argue, piracy injects a degree of 'shadow' competition into a supply chain, competing with the manufacturer and the retailer simultaneously, limiting each just enough so that both are better off. The caveat, of course, is that the piracy must be 'just enough'; there will be no measurable benefit where the piracy is 'clearly immoderate'.²⁵

As can be seen, the existing literature offers an array of conflicting and often contradictory messages about the nature and effect of piracy. However, key themes emerge, such as measuring piracy, understanding its impact, and how best to address piracy both in a personal and commercial context. We examine each of these issues in turn before turning our attention specifically to piracy in the film industry in Nigeria. In the opinion of Adonu, piracy is a formidable obstacle inhibiting the growth of Nollywood,²⁶ and it has been estimated that the film industry loses about \$2 billion every year to piracy.²⁷ However, what

²³ Gregory Day, 'Competition and Piracy' (2017) 32 Berkeley Technology Law Journal 775.

²⁴ Day (n 23) pp 802–803, 823.

²⁵ Antino Kim Kane Atanu Lahiri, Debabrata Dey, and Gerald C, "'Just Enough" Piracy Can Be a Good Thing' (*MIT Sloan Management Review*) <<https://sloanreview.mit.edu/article/just-enough-piracy-can-be-a-good-thing/>> accessed 25 November 2020. See also Antino Kim, Atanu Lahiri and Debabrata Dey, 'The "Invisible Hand" of Piracy: An Economic Analysis of the Information-Goods Supply Chain' (2018) 42 MIS Quarterly 1117. E where they state that piracy can actually reduce, or completely eliminate at times; piracy reacts with double marginalisation in a curious interplay that could lead to higher profits for both the manufacturer and retailer as well as a higher surplus for consumers. In their opinion, a moderate level of piracy appears to have a surprisingly positive impact on the profits of the manufacturer and the retailer. Such moderate level of piracy simultaneously enhances consumer welfare, and they conclude that in such instances piracy is a 'win-win-win' situation.

²⁶ Geoffrey Adonu, 'Copyright Piracy in Nigeria Untying the Gordian Knot' (2017) 8 The Gravitas Review of Business & Property Law 103.

²⁷ Tade Oludayo, 'Pirates Are Threatening to Take down Nollywood' (*Newsweek*, 20 April 2016) <<https://www.newsweek.com/who-and-how-pirates-threatening-nollywood-film-industry-449994>> accessed 29 October 2020.

is unclear is: what amount of actual profit of creators is diminished by piracy? How can we effectively and accurately analyse the scourge that is piracy? How can we measure how it affects the economy generally and, more specifically, the film industry?

3. Measuring Piracy

In this section, we consider piracy as a statistical phenomenon, albeit one that is problematic to measure. Specifically, we draw on successful studies that are reliable in terms of consistency and methodology.

One such study is the Online Copyright Infringement (OCI) Tracker, carried out by the Intellectual Property Office (IPO) in the UK since 2010. The study provides insights relevant to accessing and using copyright materials online. Using a sample of 5,000 people, the study offers a body of reliable figures in terms of both consistency and methodology. The OCI Tracker is reviewed and updated annually and adopted in different jurisdictions.²⁸ It is a methodologically robust report and can be relied on to reveal certain trends in piracy. It is important to note that nearly two-thirds (62%) of the internet users surveyed claimed to be confident in their ability to identify legal content from illegal content online;²⁹ as such, we can surmise that the infringement recorded was conscious and deliberate.

We begin by analysing the 9th Wave of study,³⁰ as it provides a pre-pandemic snapshot, allowing for a meaningful comparison with a post-pandemic world. Like previous studies,³¹ the infringement was examined by the consumption of six key content types: Music, Film, TV programmes, Computer Software, eBooks, and Videogames. The study reveals that about 25% of people engage in some form of unlawful activity at some point within a three-month cycle. However, that finding had remained relatively static for the previous five years, while the number of people paying for lawful content increased.

The study also reveals interesting narratives about class and lawful activity. In the social-economic class, piracy appears to be going down; and this has been the case in the last four years. Interestingly, the preponderance of people involved in pirating activities are from the upper-middle class and the middle class. That is, those whom one would assume can

²⁸ The methodology developed for this survey has also been successfully utilised in Canada and Australia. See 'Online Copyright Infringement Tracker Survey (8th Wave)' (GOV.UK) 7 <<https://www.gov.uk/government/publications/online-copyright-infringement-tracker-survey-8th-wave>> accessed 9 July 2021.

²⁹ See 'Online Copyright Infringement Tracker Survey (8th Wave)' (n 28) p. 54.

³⁰ 'Online Copyright Infringement Tracker Survey (9th Wave)' (GOV.UK) <<https://www.gov.uk/government/publications/online-copyright-infringement-tracker-survey-9th-wave>> accessed 9 September 2020.

³¹ From 'Online Copyright Infringement Tracker Survey (8th Wave)' (n 28) to the first Online Copyright Infringement Tracker Benchmark Study 2012.

afford the content that is being pirated. The other main drivers of increased online consumption were access to a wide range of content and cost-effectiveness.³²

Generally, it would appear that there will always be some piracy; however, when aligned with the fact that lawful consumption is on the increase and that industries continue to thrive, then the piracy in the UK evidenced by this report appears tolerable if not necessarily desirable. Therefore, there appears to be no crisis. Moreover, 10% of the survey group admitted that they will still infringe, no matter what happens. Thus, the response may simply be to tolerate piracy as an inevitable aspect of monetising creative content, in much the same way as the retailers of physical goods allow for a standard percentage of 'shrinkage' or loss, typically, 7% of stock per annum every year, and adjust their profit/loss margins accordingly.

The key enabler concerning infringement is believed to be accessibility. The process of accessing content via illegal sources was considered to be relatively easy and convenient whenever needed. Many felt that the responsibility of tackling whether the content was illegal or not rested with those making such content available. Some understood the ramifications behind the use of unlawful sources but were nonetheless willing to take the risk. The offer of more choice was another strong theme. Consumers claimed that having a 'wide range' of content is one reason behind the infringement. Finally, the cost was a mitigating factor, with consumers stating the content was 'free or cheap'.³³

The 10th Wave of the OCI Tracker was published in March 2021. This Wave of research addressed a period significantly different from previous years. Respondents were asked to reflect on the period when the UK was in a state of lockdown owing to the COVID-19 pandemic. Not surprisingly, many respondents agreed that their engagement with the various content categories remained robust during the COVID-19 pandemic and formed a significant part of their day-to-day activities. Overall, there was a significant increase in those streaming films, up 8% from the previous years to 42%. This, however, represented the total number of those streaming films. Indeed, while the number of legal users increased, the number of illegal users remained static.³⁴

Building on the IPO's OCI Tracker Survey, the Digital Culture Consumer Tracking Study – The Creative Industries Policy & Evidence Centre³⁵ commissioned six waves of study into the online habits of consumers in the UK during the COVID-19 lockdown. The six waves of the survey took place between April 9 and May 20, 2020. The report concluded that,

³² 'Online Copyright Infringement Tracker Survey (9th Wave)' (n 30) p 5.

³³ 'Online Copyright Infringement Tracker Survey (9th Wave)' (n 30) pp. 137-138.

³⁴ 'Online Copyright Infringement Tracker Survey (10th Wave)' (GOV.UK) 27

<<https://www.gov.uk/government/publications/online-copyright-infringement-tracker-survey-10th-wave>> accessed 21 July 2021. Some key differences when compared with previous years include a decline in the proportion of people who had downloaded music and TV, and who had streamed live sport.

³⁵ 'Creative Industries Policy & Evidence Centre' <<https://pec.ac.uk/policy-briefings/digital-culture-consumer-panel>> accessed 10 August 2020.

contrary to what would have been expected, there was no increased online infringement during the lockdown period based on evidence from the survey.

The OCI Tracker series is an excellent example of disinterested and objective reporting. Taken as a whole, they suggest that neither the government nor the creative industries may be able to eradicate piracy completely. Content providers may have to accept and absorb some level of piracy within their business models as standard, especially given that one in ten of the people under review are 'hardcore' infringers. Instead, perhaps efforts should be made to persuade 'the 90%' towards lawful consumption overall, which may involve a tolerable balance of lawful/ unlawful, paid for/unpaid for content. For example, the number one criterion likely to change people's behaviour was the reduction of subscription prices to streaming sites. Indeed, dropping prices may be far more effective than the threat of litigation in reducing piracy over the longer term.

4. Impact of Piracy

Online piracy is generally considered a threat to the profits of owners of copyrighted material. However, the impact of piracy, as well as the consequences of addressing piracy, may not affect all right holders equally. For example, research indicates that while those studios making blockbuster films may benefit from stopping internet piracy, small and medium-sized firms may not.³⁶ Moreover, a number of researchers have argued that piracy can have a dual impact, both negative and positive.³⁷ This section considers some of the lessons to be learned from the existing research in this area.

In their paper, Ma, Montgomery and Smith draw on data from all major movie releases in the United States between 2006 and 2008. In measuring the cannibalisation and promotional impacts of piracy, they opine that the impact of piracy on box office is that it lowers the potential from box-office revenues by about 15% or \$1.34billion for each year under study.³⁸

³⁶ Caitlin Dewey, 'Study: Piracy Actually Helps Small Films Make Money' *Washington Post* <<https://www.washingtonpost.com/news/the-switch/wp/2013/08/26/study-piracy-actually-helps-small-films-make-money/>> accessed 6 November 2020.

³⁷ On the negative impact, see Liye Ma, Alan Montgomery and Michael D Smith, 'The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2736946 <<https://papers.ssrn.com/abstract=2736946>> accessed 5 November 2020. See also Awomolo-Enujiugha (n 19). See also Adonu (n 26). On the positive impact, see Day (n 23). Antino Kim, Atanu Lahiri and Debabrata Dey, 'The "Invisible Hand" of Piracy: An Economic Analysis of the Information-Goods Supply Chain' (2018) 42 MIS Quarterly 1117. See also Antino Kim and others, "'Just Enough" Piracy Can Be a Good Thing' (2019) 61 MIT Sloan Management Review.

³⁸ Liye Ma, Alan Montgomery and Michael D Smith, 'The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2736946 <<https://papers.ssrn.com/abstract=2736946>> accessed 5 October 2020.

Moreover, in a later study by Herz and Kiljański, carried out from January 2011 through December 2013, this percentage remained consistent. They concluded that predicted revenue would increase if piracy was removed entirely from the theatrical release window. Therefore, they concluded that the negative effects of piracy due to cannibalisation dwarf any positive promotional benefits. All of the movies in their analysis would have experienced increased box-office revenue if piracy had been eliminated.³⁹

Having considered studies that indicate sales displacement, I turn to studies that suggest a different narrative. In their study examining the aftereffect of the shutdown of *Megaupload*, Peukert, Claussen, and Kretschmer compared the box office revenues after the shutdown of *Megaupload.com*.⁴⁰ This infamous file-hosting site once accounted for as much as four per cent of daily Internet traffic. Using weekly revenues from movies from 14 countries, they observed that revenues from box office sales of movies uploaded on *Megaupload* did not increase after the shutdown.

Having considered whether piracy (or what type of piracy) may have a displacement effect, next, I consider how addressing that piracy might yield different results depending on the strategy deployed. Thus, I consider types of intervention. In their recent empirical study Danaher, Hersh, Smith and Telang⁴¹ examined the effect of piracy website blocking in the United Kingdom. They observe that *Megaupload* involved the complete shutdown of a significant piracy cyberlocker⁴² and found that the more piracy sites blocked decreased overall piracy and increased usage of legal subscriptions. The shutdown caused the removal of vast amounts of copyright-infringing content from the Internet, which consequently affected piracy 'link sites'. Therefore, with such a large amount of content removed, the cost to pirates to source content would have been high. Indeed, it would have been extremely difficult to replace *Megaupload*. A similar conclusion was reached in the study by Danaher and Smith; the results of their research showed that consumers would turn to legal channels when a major file-sharing site is shut down.⁴³

³⁹ See Benedikt Herz and Kamil Kiljański, 'Movie Piracy and Displaced Sales in Europe: Evidence from Six Countries' (2018) 43 *Information Economics and Policy* 12. The results from their led them to conclude that unpaid movie viewings diminished sales by 4.4%, and a good amount of this loss were from a relatively small group of consumers.

⁴⁰ Christian Peukert, Jörg Claussen and Tobias Kretschmer, 'Piracy and Box Office Movie Revenues: Evidence from Megaupload' (2017) 52 *International Journal of Industrial Organization* 188.

⁴¹ Brett Danaher and others, 'The Effect of Piracy Website Blocking on Consumer Behavior' (2020) 44 *MIS Quarterly* 631.

⁴² See at page 632 where they describe a cyberlocker as 'a cloud site or server that provides file storing and sharing. In the context of piracy, cyberlockers are repositories of illegal content that users can download, whereas other types of sites merely provide links or tracker files that link to pirated content stored elsewhere'.

⁴³ Brett Danaher and Michael D Smith, 'Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales' (2014) 33 *International Journal of Industrial Organization* 1.

On the other hand, the study carried out by Poort et al.⁴⁴ and Aguiar et al.⁴⁵ showed two different interventions cutting off access to pirated content through particular websites. The actual source content in both interventions was still available on the Internet. Thus, the decrease in piracy was short-lived; in both instances, the pirates very quickly and easily found alternative paths to accessing the illegal content.

In short, different studies investigating similar questions have provided mixed findings. The literature on the effectiveness of interventions such as these is divided. Some argue that shutting down illegal sites does increase legal sales of blockbusters,⁴⁶ while others⁴⁷ suggest that interventions of this kind do little to affect legitimate sales revenue. The findings of Peukert et al.,⁴⁸ by distinguishing between the types of movies under review, find that wide-release films benefit from a shutdown such as this, while narrow-release movies do not.

The research also suggests that the type of intervention will shape the impact of the strategy. When sites are merely blocked, there are still several ways pirates may find access to source content and thus resume pirate activities through alternative sources. Such a scenario should be distinguished from a situation where the source content is removed completely. The blocking of one major piracy site or a dominant channel is unlikely to change consumer behaviour, as seen in the study of Aguiar et al.,⁴⁹ where it caused no increase in legal consumption. On the other hand, blocking several sites at a time will affect consumer use of legal and illegal media channels. The researchers used a panel of 24,620 UK Internet users found that in November 2014, blocking 53 major piracy sites in the UK decreased not only visits to the blocked sites but also caused a decrease in usage of other unblocked piracy sites and increased usage of paid legal streaming sites.⁵⁰

Consequently, a blanket policy on piracy may not be the solution to the debate on digital infringement as such a policy may affect firms differently, depending on the firm's product portfolio, business model and market presence. A policy based on the type of content affected by a particular invention is what is required. Piracy thus has diverse effects with varying degrees on different movies, and on the distribution channel, and the type of intervention used in combating piracy – hence tackling and controlling its scourge will necessarily require different models and strategies.

⁴⁴ Joost Poort and others, 'Baywatch: Two Approaches to Measure the Effects of Blocking Access to The Pirate Bay' (2014) 38 Telecommunications Policy 383.

⁴⁵ Luis Aguiar, Jörg Claussen and Christian Peukert, 'Catch Me If You Can: Effectiveness and Consequences of Online Copyright Enforcement' (Social Science Research Network 2018) SSRN Scholarly Paper ID 2604197 <<https://papers.ssrn.com/abstract=2604197>> accessed 3 March 2020.

⁴⁶ Danaher and Smith (n 43).

⁴⁷ Poort and others (n 44).

⁴⁸ Peukert, Claussen and Kretschmer (n 40).

⁴⁹ Aguiar, Claussen and Peukert (n 45).

⁵⁰ Danaher and others (n 41) p. 646.

5. Models of Tackling Piracy

We may measure piracy by characterising different types of responses. This section explores various models of combating piracy and their success.

5.1 Graduated Type Responses/Policy

Sometimes referred to as the ‘three-strike’ policy,⁵¹ graduated type responses have been used in many jurisdictions in an attempt to contain online infringement. Under a graduated-response system, information concerning an infringement, obtained by monitoring illegal downloading of their content, is submitted to the Internet Service Providers (ISPs) by copyright holders. After receiving this information, the ISPs relay the same to the offending subscriber.⁵²

In France, the ‘three-strike’ policy was known as *The French Haute Autorité pour la Diffusion des oeuvres et la Protection des droits d’auteur sur Internet* (HADOPI) Law (2009). HADOPI was a highly publicised anti-piracy law and probably the most well-known and widely discussed example of a graduated-response policy. The law empowered HADOPI with administrative authority to monitor online infringement and to act against Internet ‘pirates’ based on information submitted by rights holders.

Danaher, Smith, Telang and Chen,⁵³ in their empirical study on government anti-piracy enforcement, examined the HADOPI system and its effectiveness in combating piracy. The researchers found that there was an increased consumer awareness in the HADOPI intervention, and it was reasonably effective in combating music piracy. Consequently, there was an increase in music sales. They noted that with the intervention, there was approximately a twenty-five per cent increase in digital music sales.

Adermon and Liang’s 2014 study concerned the effect of the Enforcement of Intellectual Property Rights, the IPRED law, which came into force in Sweden on April 1, 2009.⁵⁴ In their opinion, the law was promising in its attempt to combat online piracy. They discovered that this intervention led to a decrease in Internet traffic by 16 per cent and that there was an

⁵¹ Charn Wing Wan, ‘Three Strikes Law: A Least Cost Solution to Rampant Online Piracy’ (2010) 5 Journal of Intellectual Property Law & Practice 232. See also David W Quist, ‘Three Strikes and You’re Out: A Survey of Foreign Approaches to Preventing Copyright Infringement on the Internet’ (2010) 66 The Business Lawyer 261. Adopted in Australia on April 8, 2015; see Claire Reilly, ‘New Anti-Piracy Code Proposes the “three Strikes” Policy for Australia’ (CNET) <<https://www.cnet.com/news/new-anti-piracy-code-brings-three-strikes-to-australia/>> accessed 9 November 2020.

⁵² For more on Graduated Response, see Rebecca Giblin, ‘Evaluating Graduated Response’ (2013) 37 Columbia Journal of Law & the Arts 147. See also OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (OECD Publishing 2011) 149–155.

⁵³ Brett Danaher and others, ‘The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France’ (2014) 62 The Journal of Industrial Economics 541.

⁵⁴ Adrian Adermon and Che-Yuan Liang, ‘Piracy and Music Sales: The Effects of an Anti-Piracy Law’ (2014) 105 Journal of Economic Behavior & Organization 90.

increase in music sales by 36 per cent. They, therefore, concluded that piracy decreased and music sales increased after the reform.

In her study concerning box office revenues, Jordi McKenzie described the graduated type response as a means by which to reduce the unauthorised reproduction of copyrighted content over the Internet and protect and increase sales in legitimate markets.⁵⁵ She examined the success of the 'three-strike' approach across six countries: France, New Zealand, South Korea, Taiwan, the United Kingdom and the United States. The United States system differed from the other countries, with its approach being a six-step approach. In the United States, a Copyright Alert System was implemented in February 2013 as a private system for alerting, educating, and punishing offenders found to be in breach of copyright. Although policies differed between countries as to administering the graduated response, it took off in all the countries except in the United Kingdom, where the scheme was passed into law on April 7, 2010, but never implemented.⁵⁶

McKenzie observed that one commonly stated objective of graduated response policies was to protect and consequently increase sales in legitimate markets. However, from her study of the six countries under review, there appears to be no proof of this assertion. She found no consistent evidence to support increased theatrical box office revenues in any of the markets.⁵⁷ She stated that some of the reasons why no increase in sales was detected include the fact that consumers do not substitute illegal downloading for paid theatre attendance. Besides, sophisticated downloaders usually switch to unmonitored methods to avoid detection. In her opinion, graduated response policies are weakly enforced. Participants in illegal consumption activity viewed the probability of detection as low and thus did not alter their behaviour in any way.

5.2 Education Campaigns

In their study concerning digital movie piracy, Phau, Teah and Liang, advocate for marketers, managers, and policymakers to embark on aggressive awareness campaigns to 'invoke the guilt factor' in consumers.⁵⁸ In Nigeria, the high rate of copyright piracy can be generally attributed to the attitudes/perceptions of the public. Although the average

⁵⁵ Jordi McKenzie, 'Graduated Response Policies to Digital Piracy: Do They Increase Box Office Revenues of Movies?' (2017) 38 *Information Economics and Policy* 1, 2.

⁵⁶ See sections 2-18 of the Digital Economy Act 2010 which dealt with the 'online infringement of copyright' commonly known as 'three-strikes-and-you're-out'. Under this rule, an infringer would be warned three times before the application of 'technical measures' leading to possible disconnection from the Internet.

See Anne Barron, "'Graduated Response' à l'Anglaise: Online Copyright Infringement and the Digital Economy Act 2010' (2011) 3 *Journal of Media Law* 305.

See also Dinusha Mendis, 'Digital Economy Act 2010: Fighting a Losing Battle? Why the "Three Strikes" Law Is Not the Answer to Copyright Law's Latest Challenge' (2013) 27 *International Review of Law, Computers & Technology* 60.

⁵⁷ McKenzie (n 55) p.11.

⁵⁸ Ian Phau, Min Teah and Johan Liang, 'Investigating the Factors Influencing Digital Movie Piracy' (2016) 22 *Journal of Promotion Management* 637.

person is conversant with copyright and piracy, they regard the purchase of pirated or illegal copies as the norm – they have known it always to be so,⁵⁹ especially as lax law enforcement is also the norm.⁶⁰

In a study carried out in Nigerian universities, Onyejelem and Duru⁶¹ found that the students who infringe copyrighted material were aware that they were using infringing material and aware of the implications; however, they chose to ignore them. The university students in this study are distinguished from the layman, the artisans. Unfortunately, the average layman in Nigeria is not conversant with the issues of the law; they do not know or appreciate what copyright is, nor do they understand what constitutes infringement.⁶²

Tade and Akinleye, in their study, discovered that movie pirates in the film industry see themselves as legitimate marketers and promoters.⁶³ On their part, Adum, Ekwenchi, Odogwu, and Umeh, found that infringers favoured corrective measures over punitive measures.⁶⁴ Findings from all three studies advocated for educational campaigns to remedy the anomaly.

In the case of *Nigerian Copyright Commission v. Emordi Henry Chukwuma*,⁶⁵ The Federal High Court in Abuja had to decide on a one-count charge of broadcast piracy brought against the accused. The accused pleaded guilty to the single count for broadcast piracy, stating:

I did not know that what I have done was an offence. I did it to feed my children and family. I also was doing it to pay school fees for my children. The place I was doing the business was in the open and not hidden, because I never thought it was

⁵⁹ In Nigeria we need to change narrative on piracy. The quotation of Lemony Snicket is particularly apt in this situation: 'Just because something is traditional is no reason to do it, of course. Piracy, for example, is a tradition that has been carried on for hundreds of years, but that doesn't mean we should all attack ships and steal their gold.'

⁶⁰ See Chidi Oguamanam, 'Nollywood Phenomenon: "The Nollywood Phenomenon: Innovation, Openness, and Technological Opportunism in the Modeling of Successful African Entrepreneurship"' (2020) 23 *The Journal of World Intellectual Property* 518, 541.

⁶¹ Timothy Ekeledirichukwu Onyejelem and Henry Chigozie Duru, 'Awareness and Attitude to Copyright Implications of Online Music Download among Undergraduate Students of Nnamdi Azikiwe University, Awka' (2018) 8 *International Journal of Social Sciences and Humanities Review* <<http://www.ijsshr.com/journal/index.php/IJSSHR/article/view/417>> accessed 13 August 2020.

⁶² The National Commission for Mass Literacy, Adult and Non-formal Education (NMEC), states that about 35 per cent of the nation's adult population are illiterate. See Vanguard Newspapers, 'THE GROWING ILLITERACY IN NIGERIA' (*THISDAYLIVE*, 11 April 2019) <<https://www.thisdaylive.com/index.php/2019/04/12/the-growing-illiteracy-in-nigeria/>> accessed 31 August 2021.

⁶³ Oludayo Tade and Babatunde Akinleye, 'We Are Promoters Not Pirates': A Qualitative Analysis of Artists and Pirates on Music Piracy in Nigeria' (2012) Vol 6 *International Journal of Cyber Criminology* 1014.

⁶⁴ Allen Nnanwuba Adum, Ogochukwu Ekwenchi, Emeka Odogwu, and Kobimdi Umeh, 'Awareness of Copyright Laws among Select Nigerian University Students' (2019) 86 *Journal of Law, Policy and Globalization* 183.

⁶⁵ 56 NIPJD [FHC. 2013] ABJ/CR/90.

wrong to do what I have done. I was only giving DSTV programs to my neighbours so that they can help me recharge the smart card. I beg the court to have mercy on me.

This is indeed true of the many who have stalls offering services for watching broadcasts in public places for a fee. In my opinion, the public also needs to be sensitised on the reasons why they should not patronise pirated works.

On the other hand, although educational campaigns are necessary, on their own, they may not be sufficient to tackle piracy. What needs to be aggressively undertaken are campaigns to *change the attitudes* of Nigerians concerning piracy. It may seem like an uphill task, but it is achievable with persistence and hard work, as seen in Sweden's example.

In Sweden, in a survey published on February 7, 2020, by Kantar Sifo on behalf of the Swedish Patent and Registration Office, 'changed attitudes to illegal streaming' has seen the use of illegal digital services by internet users aged 16 to 29 decrease significantly.⁶⁶ Sweden is infamous for the world's most notorious file-sharing site, The Pirate Bay – with 22 million users at its peak in 2005.⁶⁷ Furthermore, it is where the political movement, the Pirate Party, originated. Sweden had earlier adopted some of the world's most stringent enforcement laws on internet piracy, including the Liability for Bulletin Board Systems law from 1998. This law attempted to regulate pornographic material. The Swedish *Försvarets radioanstalt* (FRA Law) has been in force since January 1, 2009. The full implementation of the EU Directive on the Enforcement of Intellectual Property Rights (the IPRED Directive) has been in force in Sweden since April 1, 2009. The impact on copyright infringement was that although the reform resulted in a decrease in piracy levels and an increase in legal sales; however, this decrease was short-lived. There was a return to normal levels of piracy because of the lax enforcement of the law. All this changed with aggressive educational campaigns, which gradually led to a change in attitudes.

The 2020 survey carried out by Swedish Patent and Registration Office revealed that interest among previous users is decreasing. Several activities from Swedish authorities and the Swedish Patent and Registration Office, as well as schools, have contributed to this turnaround, educating students and teenagers of the importance of adequate IP protection and the risks of using fake copies.

⁶⁶ Swedish Intellectual Property Office, 'Changed Attitudes to Illegal Streaming - PRV' <<https://www.prv.se/en/copyright/stream-legally/the-media-habits-of-the-general-public/the-public-aged-16-74-survey-2019/>> accessed 30 October 2020.

⁶⁷ Maria Zamkova, 'Sweden Jurisdiction Report: Sinking the Pirates' (*World IP Review*) <<https://www.worldipreview.com/contributed-article/sweden-jurisdiction-report-sinking-the-pirates>> accessed 9 September 2020.

5.3 Criminalising Piracy

Unfortunately, pirates sometimes remain confident of securing their release from anti-piracy agents whenever arrested.⁶⁸ A couple of cases have been prosecuted, and we explore how these have served as deterrents to piracy (or not).

There have been twenty-five recorded piracy cases in Nigeria since the Nigerian Copyright Commission (NCC) was established.⁶⁹ Most of the cases prosecuted concerned literary piracy, software piracy and sound recording piracy.⁷⁰ However, is criminalisation a viable solution to piracy? It may be part of an overall strategy but not a solution in itself. Therefore, it has been argued that harsher penalties may not be the solution. Instead, the problem may be solved by adjusting business models. In her study on piracy in the music publishing industry, Towse opined that copyright law is ineffective in controlling piracy. She argued that sometimes a paradigm shift might not necessarily come out of a change in copyright law; instead, entrepreneurs need to simply follow the 'money'. In other words, prosperity in the industry does not flow from legal regulation but a shift in business models.⁷¹

In the United States, criminal copyright has dramatically increased since its introduction in 1897.⁷² While only wilful and for-profit unlawful performance was considered a misdemeanour offence in 1897, 'mass piracy' of all types of copyrighted works (including aiding or abetting) was made a felony offence in 1992. In 1997 the for-profit requirement⁷³ was extensively loosened. With the digital criminalisation phase, Haber argues that the

⁶⁸ Oludayo (n 27).

⁶⁹ The Commission was established under section 34 of the Copyright Act, Cap C28, Law of the Federation of Nigeria, 2004.

⁷⁰ The most recent recorded case was July 1, 2020 at The Federal High Court, Uyo, in a suit with charge No. FHC/UY/53C/15, The presiding judge, Justice F. O. Riman, convicted one Mr. Chinonso Ugochukwu and sentenced him to two years imprisonment on a two-count charge of selling infringing books, including Bibles, in which copyright subsists and for being in possession of infringing books other than for private or domestic use in violation of sections 20(2) (a) and 20 (2) (c) of the Copyright Act, 2004. He accused was sentenced to one year imprisonment on each of the two counts with the option of fine.

⁷¹ See Ruth Towse, 'Economics of Music Publishing: Copyright and the Market' (2017) 41 Journal of Cultural Economics 403.

⁷² Eldar Haber, *Criminal Copyright* (Cambridge University Press 2018) 75.

⁷³ For-profit infringement requirement means that in accessing actual damages and profits— 'The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.' See Section 17 U.S. Code 504. For-profit infringement by an individual began in 1909 and carried a maximum of \$1000, and one-year imprisonment. By 1992, there was a significant increase in penalties. Criminal sanctions for such offense was \$250,000. It was calculated as twice the gains from the offence, and five-year imprisonment for a first offense or ten-year imprisonment for second or subsequent offences.

criminalisation of copyright law is likely to continue in the years to come.⁷⁴ He opines that a similar trend in the criminalisation of the US experience exists in the UK, which saw a rapid expansion of criminal copyright legislation; however, enforcement was patchy.⁷⁵

This observation is a truism as it applies to Nigeria, where there is an evident gap between legislation and enforcement. In Nigeria, section 20 provides for criminal liability of copyright, and section 22 relates to offences by bodies corporate. Notwithstanding these sections on the criminalisation of piracy, most cases do not make it to court. This is not unconnected with the complexity of some stakeholders who benefit from the acts of piracy, thus making fighting piracy a herculean task.⁷⁶ For example, Tade claimed that, in the course of his research, he discovered that there was:

Penetration of the security outfits saddled with the task of arresting pirates. A pirate told me that he has an informant who gives him information about planned actions by the law-enforcement agents. This includes warning them when there are plans to raid their shops. Another pirate disclosed that they 'bribe their way through' whenever they were arrested. Pirates remain confident of securing their release from anti-piracy agents whenever arrested.⁷⁷

Similarly, in his study on piracy in Alaba market (Nigeria), Tade discovered that registered retailers mixed up the sale of legitimate copies with infringing copies, which they have most times produced themselves.⁷⁸

Regarding the few criminal cases that eventually made it to the law courts, offenders are often treated with sympathy, and the low fines or imprisonment sentences imposed when the accused is found guilty sometimes makes a mockery of the entire process. In the case of *Nigerian Copyright Commission v. Emordi Henry Chukwuma*,⁷⁹ in delivering his judgment, Honorable Justice A.R. Mohammed stated:

The convict has not wasted the time of the court in pleading guilty. It is clear that the convict *did not even know that his activities were criminal in the eyes of the law*.⁸⁰ From his plea for leniency, the convict appears to be a pensioner who was last paid his pension entitlement in 2010, that was three years ago. With a family

⁷⁴ Haber (n 72) p 76.

⁷⁵ Haber (n 72) pp 77–78.

⁷⁶ Tade (n 27) has stated that, in Nollywood, while the marketing bosses are sometimes major financiers of films in the Nigerian film industry they are also seeking to gain from the piracy of those films.

⁷⁷ Oludayo Tade, 'The Who and How of Pirates Threatening the Nollywood Film Industry' (*The Conversation*) <<http://theconversation.com/the-who-and-how-of-pirates-threatening-the-nollywood-film-industry-56952>> accessed 27 March 2020.

⁷⁸ Oludayo Tade, 'The Who and How of Pirates Threatening the Nollywood Film Industry; They Rob It of \$2 Billion a Year!' (*The Mail & Guardian*) <[https://mg.co.za/search/O. Tade, 'The who and how of pirates threatening the Nollywood film industry; they rob it of \\$2 billion a year!'](https://mg.co.za/search/O.Tade,%20The%20who%20and%20how%20of%20pirates%20threatening%20the%20Nollywood%20film%20industry;%20they%20rob%20it%20of%20$2%20billion%20a%20year!/)> accessed 9 June 2021.

⁷⁹ Ibid.

⁸⁰ Emphasis mine.

to cater for, and a regular pension not forthcoming, it is not strange that the convict would definitely look for any means of survival. It is even gratifying that the convict was not forced to venture into hard crimes like robbery, 419 scam, or even becoming a ready courier in the hands of drug barons.

Moreover, in this case, the finding of the judge is similar to many other prosecutions where it was found that the infringers were ignorant of the law.⁸¹

Section 20(1)(a) of the Nigerian Copyright Act states that on conviction, an accused shall be fined an amount not exceeding N1,000 (£1.70) for *every copy* deemed to be in contravention of the section. Even if the maximum fine is meted out, it is still considered a relatively insignificant amount. In *Chukwuma*, the accused was only ordered to pay a total of N10,000 (£17) in lieu of imprisonment, a considerably lenient sentence. Similarly, in *Nigerian Copyright Commission v. Joseph Daomi*,⁸² and *Nigerian Copyright Commission v. Stanley Nwankwo*,⁸³ the accused were arrested and charged with the breach of section 20(2) (a) and (c), respectively, for the illegal distribution of a broadcast signal and the possession of pirated copies of local and foreign movies and music in DVD and CD formats with the intention of selling them. Daomi was sentenced to 14 days imprisonment or a N20,000 (£35) fine. Nwankwo was sentenced to six months imprisonment or a N50,400 (£90) fine. Both opted to pay the fine.

In *Nigerian Copyright Commission v. CVL Technologies Ltd*,⁸⁴ the accused, a registered optical disc plant company, were found guilty on a three-count charge of making for sale 350 infringing copies of various sound recordings and cinematograph films, as well as being in possession of plates, master tapes, stampers, machine, equipment or contrivances for the purpose of piracy. The accused pleaded guilty to all charges. The court imposed a fine of N114,000 (£203). This again highlights how lightly the accused in criminal cases are let off. In a multi-billion naira piracy business, they will readily plead guilty and pay the fines imposed when caught.

There has been a general call for the imposition of much stiffer sentences for criminal copyright infringement.⁸⁵ Some believe that the imposition of harsher sentences will act as a deterrent to others. Compared to Nigeria, harsher punishments exist in other parts of the world. For example, in the US, in the state of Michigan, the offence of taping movies in the

⁸¹ In this particular case it is unclear why the judge came to the conclusion that the crime must be fault-based, rather than adopting a strict liability approach. The judge stated further that: 'In law, the essence of sentencing is *not to punish but to reform and rehabilitate*. It is enough if a convict feels remorseful for his actions. From *his demeanour, the present convict has shown remorse for his action* (emphasis mine.) That means, the convict is entitled to leniency of the Court. I hereby sentence the convict to pay the fine of N10,000 in lieu of imprisonment or one month imprisonment.'

⁸² 55 NIPJD [FHC. 2012] MKD/CR/38.

⁸³ 55 NIPJD [FHC. 2012] ABJ/CR/14/2011.

⁸⁴ 55 NIPJD [FHC. 2012] L/268C/2009.

⁸⁵ See Phau, Teah and Liang (n 58) 656. Where they advocate for harsher punishments for pirates. And suggested that antipiracy agencies should be more aggressive in catching all illegal downloaders by tracking their IP addresses from the internet provider used.

theatre carries the following penalties: a fine of \$10,000 and one year in jail for the first offence; \$20,000 fine and two years in jail for the second offence and \$40,000 fine and four years in jail for the third offence. In the UK, in 2017, the UK government passed the Digital Economy Act, which introduced tougher sentences for online copyright infringement. The maximum penalty for illegally streaming copyrighted content is 10 years in prison, an increase from the previous maximum of two years. If convicted, it can carry as much as five years imprisonment with a £5,000 fine depending on the illegal activity. London's Police Intellectual Property Crime Unit (PIPCU) and the Federation Against Copyright Theft (FACT) employ substantial resources in identifying those who develop tools or create online platforms to enable piracy. Commenting on the sentencing to two years imprisonment of a man convicted of selling illegal streaming devices, Assistant Chief Constable Pete O'Doherty, national policing lead for IP Crime, in the UK, said: 'The severity of the sentence handed down, in this case, underlines the seriousness of this crime and should act as a warning to anyone involved in online piracy – both those facilitating the activity and those watching at home'.⁸⁶

Although it is debatable whether long prison sentences deter criminals in situations like this, if meted out in addition to huge fines, which should focus on account of all profits received from the alleged infringement should be imposed for such crimes, it will probably serve as a deterrent that may prevent acts of piracy. Again, as pointed out by Harber, even when there are heavy criminal penalties, the success of criminal copyright will depend on enforcement and not solely on legislation.⁸⁷ The Nigerian government has to be deliberate about the enforcement of any amendment to the legislation.

6. Impact of Piracy at Different Levels in the Film Industry in Nigeria

6.1 Impact of Piracy on DVD Sales

It is generally agreed that piracy causes substantial losses in both DVD rentals and purchases. Worldwide, DVD's popularity has waned in favour of online streaming.⁸⁸ In her paper, Ezepeue opines that the DVD medium may be displaced entirely in the near future by internet distribution modes.⁸⁹ In Nigeria, although there is a decline in this mode of distribution, there is still a market for DVDs. Generally, it has been suggested, drawing on

⁸⁶ 'Two-Year Prison Sentence for Man Convicted of Selling Illegal Streaming Devices' (*FACT*, 10 September 2020) <<https://www.fact-uk.org.uk/two-year-prison-sentence-for-man-convicted-of-selling-illegal-streaming-devices/>> accessed 22 June 2021. He added: 'The sums involve also underline just how much harm online piracy causes to the creative economy, which supports millions of jobs in this country.'

⁸⁷ Haber (n 72) p 79.

⁸⁸ Day (n 23) p 817.

⁸⁹ Ezinne M Ezepeue, 'The New Nollywood: Professionalization or Gentrification of Cultural Industry' (2020) 10 *SAGE Open* 1, 6.

data-driven research,⁹⁰ that creators and stakeholders in the industry can dramatically reduce the market impact of pirates in several ways. For example, they can offer consumers what they want at a different price point. This is one sure way of dealing with the impact of piracy on DVD sales.⁹¹ The competition is with 'free' products. They, therefore, have to find an equilibrium appropriate for consumers while at the same time aiming for a meaningful profit margin. Nigerian stakeholders must therefore offer consumers something that approaches the price plus the added value of owning an authentic copy. The price differential has to be such that the risk of buying an illegal copy will be unattractive.

6.2 Legal Streaming Services and Piracy

Here the focus will be on accessing unlawful content online against paid-for services. Unfortunately, illegal downloading, file sharing and illicit streaming are so common in Nigeria that many consider it the norm and socially acceptable behaviour. In a bid to further boost copyright regulation and anti-piracy, the NCC recently reintroduced the hologram scheme.⁹² The Commission partnered with the Motion Pictures Practitioners Association of Nigeria (MOPPAN) and promised to collaborate with the National Film and Video Censors Board (NFVCB) and all relevant stakeholders to ensure that the reintroduction of the hologram stamps is realised. It is hoped this will strengthen the Commission's enforcement drive by aiding the identification of genuine copyright works.⁹³ The National President of MOPPAN, Dr Safari, identified some of the main challenges undermining the growth of the movie industry to include piracy and unauthorised content upload on social media platforms.⁹⁴

The streaming mode of distribution in the film industry was welcomed by many, and it was predominantly aimed at stamping out piracy which was available principally through sales of DVDs. Generally, streaming platforms were initially thought to dilute to a great extent the effect of piracy. The Internet provides copyright holders with new sales and

⁹⁰ Carnegie Mellon University, 'The Impact of Piracy on Sales & Creativity - Initiative for Digital Entertainment Analytics - Carnegie Mellon University' <<https://www.cmu.edu/entertainment-analytics/impact-of-piracy-on-sales-and-creativity/index.html>> accessed 6 November 2020.

⁹¹ Day (n 23) p 800. Where he opines that the best strategy for a right holder to fight piracy is to reduce the good's price. See further at p.805, where he gives the example of Netflix as stated its CEO David Wells who stated: 'Netflix's prices subscriptions are based upon a region's level of piracy: the more piracy a region has, the cheaper the service is.' He was of the opinion that firms are aware of the manner in which pirates target anticompertitive industries; thus companies like Netflix and Microsoft attempt to deter piracy by offering more competitively priced products from their launch.

⁹² As part of its fight against the scourge of piracy in the film industry, the National Film and Video Censors Board introduced a special hologram stamp to be affixed on all original copied of DVDs approved for sale and circulation in Nigeria.

⁹³ 'NCC Partners MOPPAN, to Reintroduce Hologram Stamps' (*The Guardian Nigeria News - Nigeria and World News*, 28 October 2020) <<https://guardian.ng/arts-2/ncc-partners-moppan-to-reintroduce-hologram-stamps/>> accessed 5 November 2020.

⁹⁴ 'NCC Partners MOPPAN, to Reintroduce Hologram Stamps' (n 93). See also <https://copyright.gov.ng/ncc-partners-moppan-set-to-reintroduce-hologram-stamps/> accessed 5 November 2020.

promotional channels for their content. In their paper, Smith and Telang opined that it is generally more difficult to pirate films when compared with music piracy. At the time of writing, they found that Internet movie piracy was difficult and of generally low quality, and the Internet had an overall strong positive impact on media sales.⁹⁵

Nhan et al. acknowledge that the high usage of legal streaming services has greatly reduced movie piracy; they consider how the existence of relatively low-cost legal streaming services such as Netflix and Amazon Prime Video might impact unauthorised streaming services. Focussing on the university sector, they studied whether students in private universities behaved differently from their counterparts in public universities. They found that even with low subscription fees, students in both private and public universities still engage in illegal streaming of pirated movies. That is, the availability of legal streaming sites like Netflix did not necessarily mean that the students paid for the services. Netflix, for instance, allows account sharing and students do often share account usage with their friends or use the accounts of their parents.

The authors noted that legal streaming services and pirating are not mutually exclusive.⁹⁶ Students usually supplement *legal* streaming services with *illegal* services for several reasons, including the availability of a variety of content not offered by legal streaming services and the demand for current movies during theatrical runs. Other reasons that students gave for engaging in pirating activity included cost, with some stating, that it was 'free', and the ease and convenience of piracy. An interesting finding from this study was that 'students sampled from the expensive private university pirated significantly more than the public university',⁹⁷ contrary to the presumption that students from the private universities, who are presumably from more affluent homes and with access to more disposable income, would pirate less.

In Nigeria, stakeholders argue that *some* revenue is better than *no* revenue, though streaming has become a vital competitor with lawful and unlawful use. One drawback of the struggle against piracy is online platforms' high subscription fees levied. Related to this is the steep internet costs/high cost of data that enables streaming.⁹⁸ Phau et al. have suggested that marketers and policymakers can combat piracy on streaming platforms by providing a cheaper alternative on the Internet.⁹⁹ However, connectivity problems in Nigeria sometimes hinder the smooth operation of this method of distribution. In addition

⁹⁵ Michael D Smith and Rahul Telang, 'Piracy or Promotion? The Impact of Broadband Internet Penetration on DVD Sales' (2010) 22 *Information Economics and Policy* 289. Where they find that when compared with music piracy, it is generally more difficult to pirate films. Internet movie piracy was difficult and of generally low quality and that, in the Internet has an overall strong positive impact on media sales.

⁹⁶ Nhan, Bowen and Bartula (n 21) p 4.

⁹⁷ Nhan, Bowen and Bartula (n 21) p 6.

⁹⁸ See Oguamanam, 'Nollywood Phenomenon' (n 60) 542.

⁹⁹ Phau, Teah and Liang (n 58) p. 656.

to internet streaming, many in Nigeria have at least one or two pirated movies on their smartphones, which they share via phone-to-phone file transfer apps.¹⁰⁰

The impact of the pandemic has worsened an already bad situation.¹⁰¹ Piracy thrives in scarcity. Directors Mildred Okwo and Imoh Umoren and actress-producer Kemi Lala Akindoju explain the pandemic's impact on the industry, stating that COVID-19 saw many productions brought to a halt.¹⁰² With limited content in circulation, television stations were forced to repeat content across channels.¹⁰³

Recently, the dominant streaming company Netflix announced its presence in the country. It detailed plans to increase its investment in Nigeria's film industry, including plans to commission original content by partnering with local creatives and investing in the space; it hopes to grow its subscriber base to five million by 2025.¹⁰⁴ Stakeholders in the industry have welcomed this development. It will increase visibility and viewership; also, Netflix gives Nigerian filmmakers a strategy to combat the adverse impact of piracy in Nigeria.¹⁰⁵ Indeed online releases have been said to be the future of Nollywood as it is elsewhere.¹⁰⁶ For example, the African streaming platform IROKOTv¹⁰⁷ has been using streaming to distribute Nollywood content while staying out of the reach of pirates.

However, while these developments are welcome, stakeholders have concerns that Nollywood filmmakers and stakeholders may not be conversant with the ownership rights

¹⁰⁰ Maggie Fick, 'The Netflix of Africa Doesn't Need Hollywood to Win - Bloomberg' (31 July 2016) <<https://www.bloomberg.com/news/features/2016-02-22/the-netflix-of-africa-doesn-t-need-hollywood-to-win>> accessed 26 August 2020.

¹⁰¹ 'How Nollywood Is Coping with Covid-19' *BBC News* <<https://www.bbc.com/news/av/world-africa-53197579>> accessed 25 August 2020.

¹⁰² *Ibid.*

¹⁰³ 'How COVID-19 Has Affected Nigeria's Film Industry' (*The Guardian Nigeria News - Nigeria and World News*, 24 May 2020) <<https://guardian.ng/art/how-covid-19-has-affected-nigerias-film-industry/>> accessed 26 August 2020.

¹⁰⁴ 'Netflix Opens Office in Nigeria to Invest in Original Contents' (*Afrikan Heroes*, 27 February 2020) <<https://afrikanheroes.com/2020/02/27/netflix-opens-office-in-nigeria-to-invest-in-original-contents/>> accessed 26 August 2020.

¹⁰⁵ Samuel Andrews, 'Netflix Naija: Creative Freedom in Nigeria's Emerging Digital Space?' (*The Conversation*) <<http://theconversation.com/netflix-naija-creative-freedom-in-nigerias-emerging-digital-space-133252>> accessed 23 October 2020.

¹⁰⁶ 'Nigeria's Nollywood Gets Creative in Response to Covid-19' (*France 24*, 4 June 2020) <<https://www.france24.com/en/20200604-nollywood-innovates-in-response-to-covid-19>> accessed 26 August 2020.

¹⁰⁷ IROKOTv originally started out as YouTube Company is a web platform that provides paid-for Nigerian films on demand. It was the first company to put Nollywood content online legally. In 2011, it moved to its own platform, iROKOTv.com and began licensing and developing its own content. It is one of Africa's mainstream online movie streaming websites, giving instant access to over 5,000 Nollywood film titles.

See also 'Nigeria's Film Industry Goes Global Online' <https://www.wipo.int/wipo_magazine/en/2017/05/article_0002.html> accessed 6 December 2018.

regime in the evolving digital copyright.¹⁰⁸ It has been suggested that stakeholders may be 'cheated' by streaming platforms and satellite distribution models the same way marketers did during the early stages of Nollywood.¹⁰⁹ Therefore Nollywood may not get full value for its rich creative resources when negotiating across licensing and other transactional platforms.

Finally, as with the graduated type responses, the Nigerian copyright amendment¹¹⁰ calls for both regulation of primary and secondary infringement as well as safe harbour immunities for ISPs. The proposed Bill grants ISPs immunity from third-party copyright infringement. A Nigerian ISP loses secure harbour protection if it has knowledge of the infringement activities, receives financial benefits from the infringing activities, and ignores takedown notice.¹¹¹ One wonders if this system will work in Nigeria, where it was not so successful in other jurisdictions. Rightsholders and the NCC may not have the resources to monitor and police infringing sites to detect illegal consumption. Therefore, this may not be the preferred approach to adopt.

6.3 Impact of Piracy on Box-office/Cinema Sales

In the UK currently, there are 843 cinemas¹¹² for a population of 66.5 million (or one cinema for every 79,000 people). The most recent Year Book on Cinemas in Nigeria¹¹³ reveals that there are currently only 68 cinemas in a country of 36 states plus one Federal Capital Territory (Abuja), for a population of over 211 million people (or one cinema for every 3.1 million people).¹¹⁴ It is evident that the number of cinemas in Nigeria cannot possibly service Nigeria's population. As such, cinema attendance is reserved for the upper and middle classes, with ticket prices too steep for the common man to afford readily. Pirates take advantage of this situation. Blockbuster movies shown in the cinemas are often

¹⁰⁸ Andrews (n 108). They appear to be content with whatever funds are made available from the streaming platforms compared with envisaged losses due to pirating activities, and a struggle to receive a return on their investments.

¹⁰⁹ See Haynes (n 6).

¹¹⁰ There is currently a Copyright Amendment Bill, before the National Assembly sponsored by the Nigerian Copyright Commission. See 'DRAFT_COPYRIGHT_BILL_NOVEMBER-2015.Pdf' <http://graduatedresponse.org/new/wp-content/uploads/2016/02/DRAFT_COPYRIGHT_BILL_NOVEMBER-2015.pdf> accessed 26 October 2018.

¹¹¹ See Samuel Samia Andrews, 'Reforming Copyright Law for a Developing Africa' (2018) 66 *Journal of the Copyright Society of the USA* 1, 36.

¹¹² 'Number of Cinemas in the UK' (*Statista*) <<https://www.statista.com/statistics/297391/number-of-cinemas-in-the-uk/>> accessed 12 August 2021.

¹¹³ Film One Entertainment, 'Nigeria Box Office Year Book | 2020' <<http://books.filmhouse.ng/books/dfz/#p=1>> accessed 27 July 2021. See also Sodas, 'Box Office 2020: Facts from Nigeria's Box Office You Should Know' (*Sodas 'N' Popcorn Blog*, 25 February 2021) <<https://sodasandpopcorn.ng/box-office-nollywood-nigeria-anglophone-west-africa/>> accessed 27 July 2021.

¹¹⁴ The current population stands at 211,318,729. 'Nigeria Population (2021) - Worldometer' <<https://www.worldometers.info/world-population/nigeria-population/>> accessed 21 June 2021.

pirated. The government do not help matters because they generally look the other way while these pirates go about the pirating business.¹¹⁵

6.3.1 Anti-piracy instruments used by Cinemas

In Nigeria, as a means of checking piracy, cinemas now employ the use of night vision recording equipment ('nighthawks') to detect and gather footage, for evidence, of cinemagoers who use recording equipment inside cinema theatres to record the films. Several issues arise from this, including whether Nigeria's privacy and data protection laws are relevant, whether the use of nighthawks is legal, whether they should be registered and regulated, for example, how long the data may be kept, and who may have access to the data.

The National Film and Video Censors Board Act¹¹⁶ regulates cinemas; however, the Act does not make provisions for regulating and managing information and data collected from viewers. The privacy of every citizen is guaranteed and protected under section 37 of the Constitution of the Federal Republic of Nigeria 1999.¹¹⁷ The enabling laws that regulate the collection and processing of personal data are the National Information Technology Development Agency Act 2007,¹¹⁸ the Nigeria Data Protection Regulation 2019 (NDPR),¹¹⁹ and the Nigeria Data Protection Regulation 2019: Implementation Framework (NDPRIF).¹²⁰

The NDPR prohibits collecting and processing personal data without a lawful basis.¹²¹ The legal basis for collection and processing of personal data under section 2.2 of the NDPR are: (a) Consent of the data subject; (b) Performance of a contract; (c) Legal obligation of the organisation; (d) Vital interest of the data subject; and (e) Public interest or exercise of official public mandate. Regarding the use of the nighthawks, the lawful basis that the cinema may utilise to collect personal data will be to obtain the consent of the data subject.

Based on the above provision of the NDPR, nighthawks could be lawfully deployed in Nigerian cinemas if the data subject grants consent for the collection and processing of his or her personal data. Since individuals are not targeted, the data subject is made aware

¹¹⁵ Tunde Ajaja, 'Government Drags Feet on Movie Piracy as Industry Loses Billions of Naira' (*Punch Newspapers*) <<https://punchng.com/government-drags-feet-on-movie-piracy-as-industry-loses-billions-of-naira/>> accessed 16 November 2020.

¹¹⁶ The National Film and Video Censors Board Act Cap N40 LFN 2004.

¹¹⁷ Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23 LFN 2004, ('the Constitution').

¹¹⁸ National Information Technology Development Agency Act 2007 (NITDA ACT).

¹¹⁹ Nigeria Data Protection Regulation 2019 (NDPR.) It is a regulation issued by the DG NITDA pursuant to section 6(a) and (c) of NITDA Act 2007.

¹²⁰ Nigeria Data Protection Regulation 2019: Implementation Framework (NDPRIF).

¹²¹ According to the NDPR, personal data includes any information relating to an identified or identifiable natural person ('Data Subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

that such activity will go on in the cinema, which may somehow involve the processing of his/her data for specific purposes – and stored and used for that particular purpose. In addition, section 2.5 of the NDPR stipulates that any medium through which Personal Data is being collected or processed shall display a conspicuous, simple, and straightforward privacy policy that the class of data subjects being targeted can understand.

Section 2.1 of the Implementation Framework provides exceptions to data privacy and protection under the NDPR, one of which is investigating criminal offences. Given that section 20 of the Copyright Act makes a person criminally liable for infringing the work of a copyright holder, the use of nighthawks to detect and gather footage to evidence unlawful activity would constitute activity permitted under the ‘investigation of criminal offences’ exception.

The data controller has the obligation under the NDPR to account for the data,¹²² and the data controller has a duty of care with respect to the data. However, where the data controller seeks to give third-party access, the data controller must ensure that it signs a third-party processing agreement. In addition, government agencies may also have access to the data based on statutory requirements. Where there is a criminal investigation, access would be granted to the relevant authority.¹²³ However, it is recommended that Nighthawks, deployed as part of an anti-piracy strategy, should be registered with the Nigerian Copyright Commission.

The cinema should obtain the consent of viewers before entering the cinema’s hall or put a Privacy Notice around the premises notifying viewers of the collection of such information. The Privacy Notice can also be displayed on the screen or at the back of the cinema tickets before every movie is commenced. Where the data collection and processing involves a minor, the management of the cinema needs to ensure that the consent of the legal representation or guardian is obtained.

If cinemas successfully put these anti-piracy checks in place, the impact of piracy on cinema attendance may be controlled. Undoubtedly, the new normal post-COVID-19 pandemic will significantly affect cinema attendance in the future.

7. Recommendations and Conclusion

We exist in a dynamic digital space. This is not a revolution, but a constant evolution, a continuous stream of changes. Entertainment lies at the nexus of technology and law. Nigeria is still transitioning from the analogue to the digital; pre-existing regulations in that space may no longer suit this shift to the digital.

One way to test the hypothesis that piracy is economically harmful to the film industry in Nigeria is by looking at studies that have been carried out on piracy. We do not have robust

¹²² See section 2.7 NDPR.

¹²³ See section 2.8 NDPR.

research focussing specifically on Nigeria that can be compared to, for example, the annual Tracker reports produced by the UK IPO. There is analytical evidence on the attitudes of Piracy in Nigeria, but it lacks reliable statistical data. Alternatively, we have some empirical evidence about piracy, but these are produced by the NCC and other parastatals who work for the government. But for many, this data serves a purpose rather than observing trends in an unbiased manner.

The government must consider some of the studies reviewed on digital piracy and acknowledge, for instance, that university students are probably the most likely to be engaged in digital piracy and focus attention on how to change consumer behaviour amongst them. It has to consider blocking several illegal sites at a time, as this is likely to increase legal sales rather than prosecuting individuals who may be probably ignorant of the law. The government has to be aware of this problem and put the same into consideration when making policy statements on piracy.

There will be a variety of reasons to legislate on piracy, which may include the need to send a strong signal around the world to present Nigeria as a legitimate haven for filmmaking on the world stage. However, from the studies examined above, although new legislation appears to reduce piracy and increase legal sales, the effects are usually short-lived as pirates develop new technological workarounds. Undoubtedly, a blanket policy on piracy will not be the solution.

One solution as regards Business Models is accepting a percentage as *shrinkage*. Retail industries routinely accept a certain percentage of loss (through damage or theft) as standard. The creative industries, particularly the film industry, should consider adopting it as part of their Business Models as a potential solution or as part of a solution. The creative industries may do well to accept that a certain level of piracy is tolerable. One might think of shrinkage in this domain as the *pirates' share*.

It should, however, be pointed out that in contrast to the Western world, where pirated material is a negligible percentage, the reverse is true in the Global South.¹²⁴ It has been reported that in the film industry in Nigeria, the bulk of the material purchased is pirated.¹²⁵ This, therefore, is different from the '*moderate levels*' of piracy being a good thing as advocated above.¹²⁶ This considerable margin does not present a '*win-win-situation*' and only means that the creative industries in Nigeria will lose a massive amount of revenue if this is not adequately addressed.

It has been argued that if there was a real threat to prosecution and imposition of heavy criminal penalties, the scourge of piracy may be drastically reduced as it may serve as an effective deterrence to pirates. However, focusing *only* on criminalising piracy as is

¹²⁴ Global South is one of a family of terms, including 'Third World' that denote regions outside Europe and North America, mostly low-income and often politically and culturally marginalised. Nigeria is classified as a part of the Global South.

See also Nour Dados and Raewyn Connell, 'The Global South' (2012) 11 Contexts 12.

¹²⁵ Bamgbose (n 5).

¹²⁶ See Kim and others (n 37). See also Kim, Lahiri and Dey (n 37).

currently advocated by the government may not solve the problem of piracy. Moreso, in Nigeria, there is a negative attitude to litigation. Even in cases of apparent medical negligence,¹²⁷ the average Nigerian will choose not to litigate but rather '*leave it for God*', a common Nigerian phrase when one is encouraged to turn a blind eye to wrongdoing. So while the government may enact stiffer penalties for copyright infringement, criminalisation in the past was not very successful. Although the public must be made aware of the criminal implications of piracy, in the alternative, it is preferable to educate them on the adverse effects of patronising pirated works and how it contributes to the vicious cycle of poverty through unemployment and the ultimate loss of revenue for our government.

A change in attitudes is the best approach to dealing with Nigeria's problem of piracy. It is suggested that schemes that aim to educate rather than punish should be introduced. These lessons from the Nigerian experience may be applied in other jurisdictions as a more effective way of dealing with piracy.

The government, on its part, needs to insist on a deliberate policy and legal framework to best suit stakeholders in Nollywood. This can be achieved with good negotiation and lobbying by stakeholders. Currently, entertainers, already overwhelmed by doing business without any help from the government, are groaning under the imposition of new taxes by the government.¹²⁸ Government should support the industry backed by legislative tools like tax exemptions.

Until all these issues are adequately addressed, Nollywood will continue to grow but – at a cost.

¹²⁷ See Arinze Nwosu, 'The Horror of Wrong-Site Surgery Continues: Report of Two Cases in a Regional Trauma Centre in Nigeria' (2015) 9 Patient Safety in Surgery 6. A case that tells the story of the attitudes of Nigerians and the general aversion to litigation in the society.

¹²⁸ 'Entertainers Kick as Lagos Introduces New Tax for Videos, Songs – Punch Newspapers' <<https://punchng.com/entertainers-kick-as-lagos-introduces-new-tax-for-videos-songs/>> accessed 19 August 2020.