

THE COPY/SOUTH DOSSIER

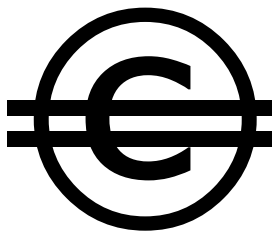
**Issues in the economics, politics, and
ideology of copyright in the global South**

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SOME INITIAL WORDS...

This dossier is addressed to readers who want to learn more about the global role of copyright and, in particular, its largely negative role in the global South. In the 190 or so pages of text that follow, we in the Copy/South Research Group, who have researched and debated these issues over the past 12 months, have tried to critically analyse and assess a wide range of copyright-related issues that impact on the daily lives (and future lives) of those who live in the global South.

Perhaps the easiest way to explain the aims and objectives of the Copy/South Dossier is to state what they are **not**... and to whom it is **not** addressed. This dossier is **not** a policy brief directed mainly at experts in copyright law or specialists in development economics. It does not contain page after numbing page of dry and often abstract formulations about the legal, social, political, and economic aspects of the increasingly contested topic of copyright. Yes, this dossier certainly does discuss a wide range of policy questions because copyright is a very political question and existing approaches to knowledge and access can certainly be changed. But it does so in a manner which, we hope, will bring these questions 'alive', show the direct human stakes of the many debates, and make the issues accessible to those who want to go beyond the platitudes, half-truths, and serious distortions that often plague discussions of this topic.

Nor is the dossier primarily addressed to policy makers (such as bureaucrats at the World Intellectual Property Organisation in Geneva), or to executives of large multinational corporations (the Rupert Murdoch's and Bill Gates' of this world) or to those who are working, often with huge financial resources, to uphold and perpetuate the current global and domestic copyright regimes. These people, their companies, and their organisations are fully aware of many of the comments and criticisms made in this dossier, admittedly often put forward previously and currently in a more partial and tentative way. Some of the same criticisms included here were made, for example, in the 1960's by then newly-independent countries in the South during a period labelled the 'international crisis of copyright'. Others were voiced in 2004 and 2005 as part of the 'development agenda' being led by 13 governments from the South. But those promoting the current copyright system have not listened or acted. (In fact, since the 1995 signing of the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹ they have made these intellectual property regimes even more restrictive and even more impenetrable barriers to knowledge access). Instead, the main intended audience is information 'activists', those working at the copyright 'coal face', such as librarians and teachers, anti-globalisation activists, cultural workers, such as writers and musicians, and NGOs. We particularly encourage all of you to join in the debate

To be clear, this document is **not** a manifesto. When you start reading this publication you will appreciate, almost from page one, that there is **not** a single point

¹ For a definition of important intellectual property-related organisations, laws, and concepts, see the Glossary found in Part Six at the end of this dossier.

of view being expressed. This is deliberate. Instead of providing a check list or recipe book for reform or attempting to give all of the answers to some very difficult questions, it is intended to open up – and re-open in some cases – an often-ignored debate and to pose what we think are some of the more pressing questions for further research and action. For example, we think it more important to figure out ways that illiterate people can read their first book – something that current copyright laws often restrict (though they are certainly not the only barrier) – than how to protect e-books. We are asking, as well, if the purpose of copyright law is to provide copyright protection to cake recipes, as has recently been tried in Italy.² And for us, cultural diversity is far more important than the promotion of an increasingly globalised (and copyright-protected) single culture. The emphasis in this dossier is more on critique and expose rather than on solutions, though we also examine some alternatives and reforms in Section Five. This is, as the dictionary defines the word ‘dossier’, a “collection or bundle of papers giving detailed information about a particular... subject.” And while we hope that all of the more than 50 articles included here are provocative and well-researched, they are *not* the final word on our still much under-researched subject: copyright in countries of the global South, a term we prefer to the more commonly-used phrase ‘developing countries.’ (We prefer it because, many countries in the South in Asia, Africa, and South America are not actually developing and we reject the notion that travelling along the same development path previously travelled by ‘developed countries’ is the only way forward for more than three-quarters of the world’s population).

Two points require clarification. Most studies on copyright focus primarily on the situation in the United States, Europe, and other rich countries. By focusing primarily on conditions in the South, we do **not** mean to imply that many of the conditions and problems we highlight are unique to the South; many of the same conditions also prevail in rich Northern (Western) countries. Yet, there are some particular problems in the South and some problems that bite with particular ferocity here. And if Southern manifestations ---and possible solutions – are not specifically highlighted, they are often forgotten about entirely or passed over in a sentence or two. It is often assumed, wrongly, that the access situation in Boston or Berlin or Brisbane is the same as that being faced in Bogotá or Beirut or Bangalore, let alone in their rural hinterlands. Second, we also recognise that ‘the South’ is **not** a homogenous area either and again, we do not intend to imply that the copyright situation across the three continents and the more than 150 countries of the global South is similar.

As you start to read this text, you may ask: how did the Copy/South dossier come into being? A first and draft version was prepared for a four-day intensive workshop held in August 2005 at the University of Kent in the United Kingdom and organised by the Copy/South Research Group. Of the 22 people who attended this ‘by invitation only’ session, more than 15 were from countries of the South. (See the list of those attending below). At this lively and informative session, the draft dossier was subjected to some sharp criticisms; numerous suggestions for improvement were made, and additional articles and research angles proposed. A second version was circulated internally in January 2006. Further changes were made and this third version is the public version. It is a work of North/South collaboration, a product of the sharing of knowledge.

² Barbara McMahon, ‘Italians protect panettone by ‘copyrighting’ the recipe’, *The Guardian* (London), 6 December 6, 2005.

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You will notice that the authors and editors of the various sections, articles, and introductions are not specifically identified. Again this is intentional as the dossier is the work of many people who have pooled their knowledge and differing experiences. And it should be emphasised that **every person listed above does not necessarily agree with or endorse all of the contents of the entire dossier.**

We wish to thank the following organisations for their financial support of the Copy/South Research Group: 1) The Open Society Institute, Budapest, Hungary; 2) HIVOS, The Hague, The Netherlands; 3) The Research Fund of Kent Law School, Canterbury, Kent UK.

If you wish to contact the C/S group for any reason – for example, to make criticisms of the dossier, to give your own examples, to join in the future research effort – our e-mail address is: contact@copysouth.org

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THE COPY/SOUTH RESEARCH GROUP

May 2006

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It is available for free either as a printed booklet or as a CD.
Distribution is subject to availability. Provide your complete postal address, and please be patient as receipt will likely take at least one month.**

INTRODUCTION

To introduce the Copy/South project and this dossier, one must first introduce the concept of copyright. Copyright has a long history emerging from 18th century English law. Generally speaking, it is a legal regime that provides a limited form of monopoly protection for written and creative works fixed in a tangible (material) form. The owner of the copyright is given the *exclusive* or *sole* right to do a number of things with that work such as the following: a) to make copies of the work, for example, by photocopying it, b) to perform the work, such as a play, c) to translate the work into another language, d) to display it publicly, such as using a photograph in a magazine. And to break these property-like restrictions is copyright infringement. While originally focused upon written work, copyright has been extended and expanded over the years to include maps, artwork, music, phonographic records (and later audio tapes and now CDs), photographs, and, most recently, computer software and data bases. Copyright protects the specific expression of an idea, not the idea itself, and the law – in some, though not all, countries – allows limited ‘fair use’ or ‘fair dealing’ by users of works in which the copyright is owned or held by others. Today, the law protects (and restricts) a copyrighted work for the life of the author plus fifty years in some countries *or* plus seventy years in others – notably in Europe and the United States where most copyrighted works are produced – *or* even longer in a few countries. It is relatively rare, however, for an author to retain rights to creative works; usually these rights are transferred (the legal word is ‘assigned’) to a publisher or record producer in exchange for publication, royalties or a flat fee. (In the case of employees who create copyrighted works, their employer owns the copyright in most cases.) The 1960’s UK rock group The Beatles did not, for example, own copyright in the songs they wrote, performed, and recorded.

While originating in 18th century European law, copyright law has become international in scope. Yet, in many ways, copyright has always been an international issue. When copyright owners (as distinct from authors) in the 18th and 19th centuries were demanding protection for their work, the threat to copyright control often came from booksellers publishing cheap editions for a foreign market or importing cheap editions from abroad to compete in the domestic market. It is now conventional wisdom to acknowledge that the United States was one of the worst copyright ‘pirates’ in the 19th century when it was a developing country. (The US government refused to extend copyright protection to foreign works, thereby creating a domestic market in cheap reprints of popular titles.) The creation and adoption of the European-‘inspired’ Berne Convention in 1886, which remains the leading international copyright agreement, further illustrates the importance of international protection of copyright from the 19th century forward.

It is also conventional wisdom that the ‘information age’ has fundamentally transformed the scope and intensity of international copyright battles. While the history of copyright is the history of copyright expansion, computer technology has radically altered the balance between copyright owners and knowledge users. *First*, the ease with which digital material can be copied and distributed through ‘pirate’

channels has increased dramatically. *Second*, and perhaps more importantly, everyday consumers and users of copyrighted works are now defined as ‘pirates’ and ‘thieves’ as they go about sharing information, music, entertainment, and other materials found on the Internet. (It does need to be emphasised, however, that many parts of the global South – and many who live here – are not ‘plugged into’ the Internet as they lack computers, reliable phone lines, and electrical connectivity.) These two trends help highlight the stark differences between a culture of sharing and a culture of monopolisation and privatisation. As long-time Philippines activist Roberto Verzola explained at the Copy/South workshop (mentioned above in ‘Some initial words...’) there are two main competing value systems in the world and, in the current era, “the value system of monopolisation, corporatisation, and privatisation is being imposed on what I think is a better system, a system of sharing.” As the economy continues to globalise and as we become further dependent upon computer technology and need information exchange ever more urgently, copyright and its assumptions have moved from a marginal place in economic and development theory to a relatively central place.

The fact that copyright owners, represented by the software, music, movie, and publishing industries, have been lobbying for stricter copyright control is not new. But the past few decades have been marked by a remarkable expansion of copyright laws. Perhaps the most significant victories for these copyright owners was the successful negotiation and establishment of the Agreement on Trade-Related Aspects of Intellectual Property Agreement (TRIPS), which all countries seeking to become part of the World Trade Organization were and are required to sign. When TRIPS was negotiated and came into force in 1995, it did so with considerable resistance from the global South, led by India and Brazil. From the start, it was clear to many that the TRIPS Agreement would primarily benefit already developed Northern countries far more than those in the global South. It is the multinationals of the North who *already* own the overwhelming percentage of global intellectual property rights (copyright, patents, trade marks and other types); the creation, expansion, and stricter enforcement of property rights, including intellectual property rights, overwhelmingly benefits those *already* owning property. Moreover, given that intellectual property rights extend far into the future – for example, some copyright works created in 2006 will still be under copyright in 2106 and will still be bringing in revenue – agreements such as TRIPS serve to reinforce patterns of wealth and inequality that will, if we do not create a counter movement, be a burden on the backs of several future generations, including those in the South.

Ten years have passed since TRIPS became reality. Copyright has only increased in importance over the past ten years and the pressure to enact and enforce laws as tough as or tougher than the United States continues to mount. In fact, the US was not satisfied with the level of protection in the TRIPS agreement and has continued bilateral negotiations with many countries on all other continents to create what has come to be called ‘TRIPS plus’ treaties. The more common name for such treaties is ‘free trade agreements’; they follow a hypocritical (and contradictory) agenda of purporting to promote ‘freer trade’ in monopolised goods such as patented pharmaceuticals and Hollywood blockbusters. We ask, “how much ‘free trade’ in Nigerian or Cuban or Chinese films occurs within the US or Europe?” So it will be argued here that TRIPS and its component parts, such as the Berne Convention, have simply reproduced the types of economic inequalities associated with the earliest stages of colonialism and imperialism.

This dossier seeks to provide backing to the argument that copyright laws imposed upon the global South have had, and will continue to have, a negative impact. The document is designed to provide an introductory and broad analysis of the issues associated with copyright for the global South. It also seeks to highlight some of the controversies surrounding copyright law. As mentioned in the preface, the global South does not have a monolithic approach to copyright. What we seek to do in the following pages is provide a critical assessment of copyright and its impact on the global South, keeping the issues of both access to knowledge and the protection of local cultures and cultural diversity at the forefront.

The dossier is divided into five main sections, which we called 'research propositions' when we began this research in 2004. The first section/ proposition looks generally at the impact of copyright on culture and seeks to highlight the unstated assumptions behind the copyright paradigm or model. The argument in this section is that the privatisation of culture through copyright is not beneficial. Rather, such privatisation fundamentally transforms our relationship to culture and centralises its ownership in the hands of corporate powers, often not even associated with the local culture. We address issues related to privatisation, the threat of 'proprertisation' to the creative process, and the role of corporate culture in the ownership of copyrights.

The second section looks at the political economy of copyright and examines the issue from an economic perspective. Here, we argue that the global South is not the economic beneficiary of international copyright laws. Rather, the countries where more than three quarters of the world's population resides are expected to join, without complaint or criticism, a global economy which, on the one hand, offers increased protection to Northern-owned copyrights in the global South and hence greater South-North revenue flows, while, on the other hand, continues to siphon 'marketable' materials from the global South for the profit of corporations in the global North. In other words, a very unequal exchange. Specifically, we look at examples of capital flow through collecting societies, the role of free trade agreements, and the economic effects, in practice, of the concept 'national treatment.'

The third section looks specifically at the impact of the copyright system, as a western construction, on the public domain and on many long-standing cultural practices and forms across the South. In recent years, the concept of the public domain has received theoretical attention and has taken on new meaning in a world suffering from increased privatisation. This section develops an argument regarding the benefits of the public domain, especially in the context of regions and countries such as the Arab world, Indonesia, or the Indian sub-continent where important cultural forms such as music and story-telling have very different traditions from those existing in France or Germany. Of specific interest here are the questions of so-called copyright 'piracy' and the relationship between the public domain and what is called 'traditional knowledge' and the ways in which copyright issues impact on indigenous communities.

The fourth section seeks to develop the argument that the barriers created by copyright are damaging to access to knowledge by the global South. While the global North remains intent upon protecting what it sees as its 'private property', those in the global South continue to seek access to basic knowledge in order to improve the

conditions of those living in poverty and sub-standard conditions. This section investigates barriers established to limit access to knowledge by a range of people in a range of situations: students, teachers, the visually impaired, the illiterate, the general public, in libraries, in universities, on the Internet, on their computers. And we also ask the question: precisely what 'knowledge' should be available?

The final section of the dossier looks to the resistance that is emerging against copyright. Resistance to copyright by the global South was an integral part of the TRIPS negotiations. Despite this resistance, the global South was unsuccessful in substantially changing TRIPS. However, in the ten years since TRIPS was signed, the issues and contradictions of copyright (and patents, which are not the subject of this dossier) have taken on a higher profile and people throughout the global South (and the global North) have begun to actively resist the imposition of strong copyright laws as well as begin to reconfigure the law – and appropriate it for their own purposes.

We believe that a focus on the global South has been too long ignored in discussions of copyright; this dossier seeks to remedy this situation. The argument made by developed countries is that copyright is supposedly good for their economies so it must be good for everyone in the world. However, a 'one-size fits all' approach is detrimental to many. It is important to recognize that many countries in the global South face poverty so severe that copyright protection is (or should be) far from an important item on their political agendas. Rather, literacy and education, poverty reduction, access to clean water and affordable food, and a variety of other needs are all more important than protecting the TRIPS-established property rights of foreign companies. At the same time, the dossier seeks to remain sensitive to the differences between countries in the global South, where some countries have fundamentally different priorities than others. For example, while Argentina has a wonderfully vibrant free software movement seeking to extend access to information technology via free software, most people in Kenya do not even have access to a phone and Internet access is well beyond range. Or, as several participants at the Copy/South workshop from Brazil noted, the technology revolution in Brazil will not be based upon computers (desktops or laptops), but on cell phones where everything from text messages to MP3s are exchanged. This leapfrogging of technological services is in stark contrast to the situation on the ground in Zambia where almost 2/3 of the state's budget is funded by foreign sources. Thus, the similarities as well as the differences between the many countries from the global South must be recognized.

Ultimately, this dossier seeks to provide an avenue into the serious discussions that must be held regarding copyright and development at the global level. We consistently look at copyright as a western idea being imposed on the global South. However, it is also time to look at the innovation coming from the global South as a model for transforming all cultures. Furthermore, it is time to develop deeper and stronger connections between activists in the global North interested in critiquing copyright laws and those in the global South seeking the same goals. The Copy/South project and this dossier are part of what we hope will become a larger and more complex network of actors. We cannot promise and do not deliver a unified theory or single solution. Rather, what we seek to do is place a light on the global South and the problems copyright has wrought in order to not simply critique the system, but also to open the doors towards a transformation of the system at a global level.

SECTION 1 – THE GLOBAL INTELLECTUAL PROPERTY SYSTEM IS PRIVATISING HUMANITY’S COMMON CULTURAL HERITAGE

1.1 Introduction

Much of the dominant discourse around intellectual property (IP) – whether legal or sociological – starts from some largely unexamined assumptions. These are first that both the concept and the system are ‘good things’ socially and juridically, second that there is no alternative, and third that the system has worked well and continues to work well in pretty much the same way regardless of the specifics of time and place – in other words, through history and all over the world. There is, however, also a venerable and well-developed tradition of critical thinking about intellectual property – especially copyright and patents – which argues that as a system for rewarding creators it is inefficient, as an economic mechanism it amounts to a restraint on free trade, and over time it has increasingly placed more and more control over recorded human knowledge in fewer and fewer corporate hands. This is the dissident intellectual tradition from which the Copy/South project has emerged, and it is one that is increasingly gathering support across the political spectrum.

The Copy/South Project believes that, contrary to the tenor of the dominant copyright and IP discourse, it can quite easily and convincingly be shown that the global IP system, and specifically copyright, tends through privatisation to concentrate control of humanity’s common cultural heritage in the hands of a shrinking number of private owners, and that this tendency has a demonstrably negative effect on the well-being of the majority of the world’s poor people, most of whom live in the global South.

This was the first proposition that the Copy/South Project began to investigate. We believe that the tendency to privatisation – the workings of which we will describe in this section – is pernicious for several reasons. We intend to focus on two main areas of creative discourse, both of them fundamental to social and economic development. These are cultural diversity and access to teaching and educational materials (including scholarly communication). It is intuitively clear that private control of either content or the channels of communication through which content is delivered, in either of these areas, is likely to result in short-term market forces becoming determinant in deciding what is preserved, taught, delivered or developed, and what is discarded, dumped or abandoned. This is a problem for several of the reasons discussed in the following sections.

The Enlightenment copyright discourse that dates back to the eighteenth century Statute of Anne in the United Kingdom and to the United States Constitution implicitly proposes an idealised balance between the rights-holders’ limited-term monopoly and the public benefit of unhindered access to the scientific record and the products of cultural traditions. But to accept this idealism at face value is to ignore two key problems. First, most rights are now and have always been held, not by the

creators themselves, but by vendors in the form of publishers and later media corporations.³ Second, as the sale of educational and cultural content has increasingly shifted from the delivery of physical objects – books, records, pictures – to the provision of access to digital objects, two contradictory tendencies have emerged. It has become technologically possible for the vendor to restrict and monitor the uses made of the digital object, while at the same time it has become technologically possible for the user – assuming, of course, that she has Internet access – to reproduce it immediately, infinitely and at close to zero cost. The battle between these two tendencies is the battle that we see being fought out in courtrooms today over peer-to-peer networks, term extensions, software and business method patents, and the like.

There is little doubt that the protection of intellectual property rights in the era of digital content is being strengthened, increasingly placing control of content in private hands. Copyright and patent law has expanded in various ways: by term extension, by the patenting of living organisms and business methods, and by the criminalisation of violations. Protection itself has become more complex and multi-layered: on top of ordinary intellectual property rights such as copyright, we now typically find access to databases governed by strict contracts, together with various database management systems which provide additional *technological protection* for content, and which are themselves protected in turn, in the United States, for example, by *anti-circumvention measures* that can effectively act as a threat to free speech and even to scientific method, which depends on full disclosure. Meanwhile, long-standing problems such as the shortage of books in most libraries across the South remain unsolved and are even getting worse, as we explain later in the dossier.

How has this situation arisen? In 1973, in the aftermath of the oil price shock, the US Senate's Committee on Foreign Relations held sessions to try to identify other possible vulnerabilities in the US economy, apart from oil dependency. The committee – 'sharp cookies' all – warned that 'information and communications' represented a strategic resource as far as the US were concerned, and that policies needed to be put into place to protect them as soon as possible. Shortly afterwards, President Gerald Ford appointed a Task Force on National Information Policy, a body that famously warned that "property concepts have been central to [...] social and economic activity in our society, but [...] were formulated to deal with tangibles, primarily land and chattels. When information, ways of dealing with information, or information products are treated as property, issues arise which differ from those resulting from the application of property theories to tangible matter."⁴

In other words, IP protection needed to be tougher, and it needed to be imposed everywhere in the world in the same way. In the bipolar world of the 1970s this was a tough proposition, but after the collapse of the socialist bloc and the advent of a world dominated by US economic interests, we have seen rapid progress towards such an IP regime. The process reached its nadir in the world trade negotiations known as the Uruguay Round of the General Agreement on Tariffs and Trade

³ C. Darch, 'Digital divide or unequal exchange? How the northern intellectual property rights regime threatens the south' *International Journal of Legal Information* vol.32 (2004), p.494.

⁴ Quoted in John Howkins, *The creative economy: how people make money from ideas* (Harmondsworth: Penguin, 2002), p.74.

(GATT), which were concluded in 1994, and ushered in the age of the World Trade Organisation (WTO), the Agreement on Trade-Related Intellectual Property (TRIPS), and most recently, bi-lateral trade agreements pushing vigorously for TRIPS+, that is, even stricter protection of intellectual property than is envisaged in the TRIPS agreement itself. The North Americans are of course, right in one important sense. There is little doubt that the so-called 'creative economy' or copyright industries constitute an extremely important sector of the current global economic system. One popular source claimed as long ago as 1999 that the value of the global creative economy was then US\$2.2 trillion, growing at around five percent a year, and representing 7.3 percent of the world's GNP of US\$30.2 trillion.

In the following sections we hope to show, not only that the process of privatisation in pursuit of ways to protect this extremely valuable economic sector is real and harmful, but that it is in direct contradiction to the *tendency of technological change to continue to accelerate*. As the conservative weekly *The Economist* recently editorialised, "Copyright was originally intended to encourage publication by granting publishers a temporary monopoly on works so they could earn a return on their investment. But the internet and new digital technologies *have made the publication and distribution of works much easier and cheaper*. Publishers should therefore need fewer, not more, property rights to protect their investment. Technology has tipped the balance in favour of the public domain." Astonishingly, the editorial continues by recommending "a drastic reduction of copyright back to its original terms – 14 years, renewable once. This should provide media firms plenty of chance to earn profits, and consumers plenty of opportunity to rip, mix, [and] burn their back catalogues without breaking the law."⁵

1.2 How privatisation and monopolisation discourage creativity and invention

If it is true, as we have argued, that the global IP regime as presently constituted shows a tendency to privatisation and monopolisation of content and channels of communication, then the next question must be what impact – if any – does this have on creativity and invention? The question can be analysed at two levels, namely the impact of the IP system on knowledge production at the *individual level*, and its impact, especially in the post-1994 phase of global capitalist development already identified, on the *international division of labour*. To put it another way: is it possible for the countries of the South (more commonly called 'developing countries') to realise their potential so long as rich countries control access to information capital?

The idea that copyright and patent protection function to encourage creative endeavours has its roots in the eighteenth century Enlightenment, and was made quite explicit from the very beginning of modern copyright. It can be convincingly argued that this discourse was as much an ideological falsification then, in the eighteenth century, as it clearly is now in the twenty-first. Indeed, Brendan Scott has contended that copyright was *always* designed to benefit publishers and distributors

⁵ Editorial, *The Economist*, 30 June 2005.

rather than authors.⁶ If this is so, and if it can be shown creators' motivations are complex and varied, then the argument that strong IP rights encourage innovation falls away. The question that remains is: do they have the inverse effect?

The impact at the level of the individual creator

Much intellectual property theory rests on a largely unexamined assumption, that without a direct economic incentive, inventors will cease to invent, actors and singers will fall silent, writers will put down their pens, and creativity in general will decline catastrophically. Thus, the extensive scholarly and polemical literature on intellectual property and copyright usually appears to assume that the individual creative impulse is inherently acquisitive. In this view, creators are motivated largely by the prospect that they will have a monopoly right to exploit their work economically in the marketplace, under the protective umbrella of copyright law. It is this prospect that 'calls forth' new works on a continuing basis.⁷ In the absence of copyright protection, or if copyright protection is allowed to weaken, the argument goes, these creators will produce less or even nothing, and society's interest in innovation and invention will be harmed. Conversely, any strengthening of intellectual property protection either by term extension or by increasing the force of intellectual property legislation will benefit society by enhancing the motivation of creators, and hence the general levels of qualitative and quantitative production of creative works.

This hypothesis that creative acts are uniformly economic acts is problematic for several different reasons, as we hope to demonstrate. First, it assumes an (in fact unproven) economic motivation for all acts of creation, and then presupposes a uniformly significant correlation between economic incentive on the one hand and innovation and creativity on the other. Second, it conflates the motivations and interests of individual creators in widely different circumstances with those of vendors.⁸ Third, it fails to distinguish, by ignoring the importance of moral rights, between the interests of *various categories of creators* in intellectual property protection.⁹

Although many commentators have recognised that there is a problem of incentive, few have spelled out its full implications for the way copyright protection actually functions in society. The fundamental premise is that copyright protection performs a useful social function by encouraging the creators of works to write, assemble or

⁶ Brendan Scott, 'Copyright in a frictionless world: toward a rhetoric of responsibility' *First Monday* vol.6, no. 9 (September 2001), available http://firstmonday.org/issues/issue6_9/scott/index.html

⁷ The metaphor of 'calling forth' is borrowed from Wendy J. Gordon, 'Authors, publishers and public goods: trading gold for dross,' *Loyola of Los Angeles Law Review* v.36 (Fall 2002), *passim*.

⁸ The word 'creator' is used to indicate writers, songwriters, performing musicians, computer programmers, inventors, filmmakers and others who produce the content of copyrightable or patentable works. The word 'vendor' is used to indicate publishers, database owners, recording companies and other types of corporation that typically exist to distribute content for profit. Both these categories can be referred to as 'rights holders' but it is central to the argument that they hold sharply distinguishable kinds of interest in their rights.

⁹ A full-time professional writer of fiction, for example, has different interests in different aspects of copyright protection than a journalist, or than an academic producing a scholarly article in a journal.

compose cultural and scientific works. It does this first by recognising their so-called 'moral rights' to decide how and when to publish (if at all), to publicly assert their authorship, and to protect the integrity of their creations. It does it second by providing a statutory framework in which such works can be put to economic use. The profit motive, in this view, is what drives most creative activity: writers write and singers sing to make money. Unsurprisingly, representatives of the modern US entertainment industries strongly and openly endorse this stance; Jack Valenti, former head of the Motion Picture Association of America, is, for instance, on record as claiming that 'copyright protects not just the financial interest of people who create artistic or intellectual property, but the very existence of creative work.'¹⁰

Two questions arise. First, is it true that the primary motivation for creative work amongst writers and artists is financial gain? It is intuitively clear that while some creators may be motivated by the prospect of riches, the probability of these being in significant amounts is about equivalent to their chances of winning the lottery. Second, even conceding that some financial motivation may exist, is the present IP regime the best way of protecting the creator's interests?

Over forty years ago, the economist Robert Hurt dismissed the idea that authors are uniformly motivated to write "in the expectation of monopoly profits", pointing to a wide range of other intentions, such as "the propagation of partisan ideas; notions of altruism [...]; desire for recognition; and enhancement of one's reputation."¹¹ Obviously there are many more possibilities. Hurt was also able to show that in the nineteenth century, even without the benefit of copyright protection, British authors and their publishers were able to turn a profit in the United States book market for solid and conventional economic reasons.¹²

But does copyright protection have other advantages for creators; does it stimulate their creativity in other ways? The answer is probably no; there is a surprisingly venerable tradition of serious criticism by economists of intellectual property protection as a stimulus to innovation.¹³ In 1958 the economist Fritz Machlup wrote in a report to the US Congress that the patent system represented a victory for the lawyers over the economists. Machlup was not alone in believing that the copyright and patent systems are in fact "a form of protectionism [... an] interference with a free market."¹⁴ This critical tradition continues to the present day. In a recent and widely reported paper published by the Federal Reserve Bank of Minneapolis, Boldrin and Levine argue that the copyright and patent systems reinforce monopoly control, keep prices high and actually *smother* future innovation.¹⁵ As Dean Baker, also an

¹⁰ Jack Valenti, 'There's no free Hollywood,' New York Times, 21 June 2000, emphasis added. Available at http://www.eff.org/IP/Video/20000621_valenti_oped.html [16 September 2003].

¹¹ Robert M. Hurt (and Robert M. Schuchman), 'The economic rationale of copyright,' American Economic Review vol.56, no.1-2 (March 1966), p.425-426.

¹² Hurt and Schuchman, op. cit., p.421-432.

¹³ However, the modern reformist writings on IP of lawyers and non-economists such as e.g. Lawrence Lessig, Pamela Samuelson, Jessica Littman, James Boyle, or Siva Vaidhyanathan make little use of the inefficiency argument.

¹⁴ Dean Baker (Center for Economic and Policy Research, Washington DC), e-mail to Colin Darch, 8 January 2003.

¹⁵ 'Perfectly competitive innovation,' Federal Reserve Bank of Minneapolis, Research Dept. Staff Report no.303, March 2002, available at

economist has pointed out, “calling patents intellectual property ‘rights’ does not change their logical status as a form of protectionism.”¹⁶

In fact, and counter-intuitively, it is widely recognised that in certain circumstances “reward can have adverse effects on intrinsic motivation and objective task performance.”¹⁷ This has been a commonplace of research in such disciplines as social psychology and behavioural economics since at least the mid-1960s. Results have suggested that the functioning and impact of incentives is much more complex than most copyright commentators appear to suppose.¹⁸ Zajonc, for example, researched ways in which the presence of an audience impacted on performance, and regretted in the 1960s that social facilitation, that is to say the impact of peoples’ behaviour on the behaviour of others, was a “nearly completely abandoned area of research.”¹⁹ This is clearly an area which requires serious further investigation if we are to question the basic assumptions of the dominant IP discourse.

US researchers Boldrin and Levine believe that copyright, patents, and similar government-granted rights serve *only* to reinforce monopoly control, with its attendant damage of inefficiently high prices, low quantities, and stifled future innovation. In *Perfectly competitive innovation*, a report published by the Federal Reserve Bank of Minneapolis, they argue that economic theory shows that perfectly competitive markets are entirely capable of rewarding (and thereby stimulating) innovation, making copyrights and patents superfluous and wasteful.

The impact on the international division of labour

It is sometimes argued that the highly developed system of protection for IP is in itself likely to stimulate innovation and thus development in poor countries, presumably since most developed countries in fact have such systems. This may, of course, simply be an example of the *post hoc, propter hoc* fallacy at work, but there is nonetheless an extensive literature on the supposed positive causal relationship between IP protection and socio-economic development.

In this vein, a major report by the United Nations Conference on Trade and Development (UNCTAD) on the relationship between IP rights and development was published in 2003. This text asserted that “innovation is heavily dependent on

<http://minneapolisfed.org/research/sr/sr303.pdf> [23 September 2003]. For a useful summary of reactions, both positive and critical, see Douglas Clement, ‘Creation myths: does innovation require intellectual property rights?’ Reason Online, March 2003, available at <http://www.reason.com/0303/fe.dc.creation.shtml> [21 February 2003].

¹⁶ Dean Baker, Vaccine buying pools: is more protectionism the best route? Paper for conference Making New Technologies Work for Human Development, Tarrytown, NY, USA, 26 May 2001

http://www.cepr.net/publications/vaccine_2001_05.htm

¹⁷ John C. McCullers, ‘Issues in learning and motivation’, in: M. R. Lepper and D. Greene (eds.), *The hidden costs of reward* (Hillsdale, NJ: Erlbaum, 1978), p.5.

¹⁸ K. W. Spence, *Behavior theory and conditioning*, (New Haven: Yale University Press, 1956); K. O. McGraw, ‘The detrimental effects of reward on performance: a literature review and a prediction model’, in: M. R. Lepper and D. Greene (eds.), *The hidden costs of reward: new perspectives on the psychology of human motivation* (Hillsdale NJ: Lawrence Erlbaum Associates, 1978), p.33-60.

¹⁹ Robert B. Zajonc, ‘Social facilitation,’ *Science*, vol. 149, no. 16 (July 1965), p.269-274;

IPRs”, while conceding that “the exclusionary aspects of strong IPRs can increase costs of follow-on innovation and imitation.’ UNCTAD therefore came down in favour of ‘a balanced approach [...] with particular features of the system varying according to the level of economic development.”²⁰

However, this has not yet happened. As Ruth Gana bluntly asserts, “it is quite clear that one of the central motivations behind the TRIPS agreement was to target enforceability of foreign intellectual property rights in developing countries. As such, the global model of intellectual property protection imposed by the agreement is not a reflection of the need to encourage creativity or to promote the public welfare. Rather, the chief aim of the agreement is to secure from these countries and societies the full monopoly benefits that western intellectual property laws offer.”²¹ In other words, the purpose of imposing a globally harmonized IP system is fundamentally to shore up the existing international division of labour, and has little to do with the encouragement of innovation in developing countries.

1.3 Why this tendency is against the interests of creators and society in general

It is at least possible that a consensus is beginning to emerge across a range of political opinions from right to left, to the effect that the balance of IP protection has shifted too far in favour of commercial rights holders. In an earlier section, we quoted the British establishment weekly *The Economist*, describing present copyright law as “worse than anachronistic in the digital age.” However, a case can be made that the tendency to privatization is pernicious for several *utilitarian* reasons, and that copyright repeal or reform is necessary because present trends present *specific threats* to values and activities that are essential or important to general social well-being *in the North* as well as in the South. In this section we shall focus on three of these threats – to free speech, to scientific method, and to the creative process – but we are aware that there may well be others.

Current IP laws as a threat to free speech

As the copyright lobby – in other words, advocates of wider, longer and more vigorous IP protection for content – has extended its influence over law-makers, especially in the United States, it has succeeded in pushing for the criminalisation of acts that were previously not criminal, and has also succeeded in imposing a general *discourse of criminality* on the debate. It is true that the term ‘piracy’ has long been used to describe the production of unauthorized copies of literary works for sale without payment of royalties to the creators. However, it seems that the near-hysterical equation of *any kind of unauthorized copying* with ‘theft’, the presentation of such activities as constituting a threat to creativity itself (rather than primarily to corporate profits), and the almost vindictive pursuit of young consumers through the

²⁰ UNCTAD, Intellectual property rights and sustainable development (Geneva: International Centre for Trade and Sustainable Development [ICTSD], August 2003), p.65

²¹ Ruth L. Gana, ‘Has creativity died in the Third World? Some implications of the internationalization of intellectual property’ *Denver Journal of International Law and Policy* vol.24 (Fall 1995), p.141.

courts for offences such as downloading music files, have created a new and intimidating environment.

Whether this in itself constitutes a threat to free speech, it is of course too early to say. The holding of unpopular opinions, is, tautologically, unpopular. But there are some indications that voices may already have been silenced. In April 2001, for example, several computer scientists from Princeton and Rice universities in the United States withdrew a technical paper from a conference, under threat of action by a company that had challenged them to try to remove a digital marker from a music recording. The scientists had done this, but subsequently received a letter from the Secure Digital Music Initiative Foundation stating that “any disclosure of information gained from participating in the public challenge would be outside the scope of activities permitted by the agreement and could subject you and your research team to actions under the Digital Millennium Copyright Act.” This was described by another scientist as “pure and simple intimidation.”²² Current US law forbids the discussion of methods used to circumvent technological protection of content, and according to the Electronic Frontier Foundation (EFF) has had ‘a chilling effect’ on free speech. As a result, says the EFF, some “online service providers and bulletin board operators have begun to censor discussions of copy-protection systems, programmers have removed computer security programs from their websites, and students, scientists and security experts have stopped publishing details of their research on existing security protocols. Foreign scientists are also increasingly uneasy about travelling to the United States out of fear of possible DMCA liability, and certain technical conferences have begun to relocate overseas.”²³

More recently, according to newspaper reports in the United Kingdom, a man was allegedly fired from his job because he expressed ‘inappropriate’ opinions on copyright issues on a television show.²⁴ The man, Alex Hanff, is in dispute with the MPAA over a now-defunct website, and was interviewed about this on a BBC news programme. The next day he was told that he might have jeopardised his employing company’s chances of securing government contracts, and was fired. The company stated that Hanff had “declared that he is opposed to copyright and intellectual property laws. Since much of our business is based around the protection of our copyright and intellectual property, we consider our dismissal of Mr Hanff entirely justified and appropriate.”²⁵

The threat to scholarly communication and scientific method

Scholarly communication – in other words, access to the entire scientific record – depends in part on what is effectively a global network of libraries sharing the burden of acquisition of the estimated 70,000 or so academic journals that are published around the world. Academic libraries share these resources primarily through a system of inter-library loans. If a researcher requires an article from a journal that is not in library A’s collections, staff members contact library B, which does subscribe, and get a photocopy of the article, which the researcher can keep.

²² John Markoff, ‘Scientists drop plan to present music-copying study’, *New York Times* (27 April 2001).

²³ EFF, *Unintended consequences: three years under the DMCA, v.1.0* (May 3, 2002), p.2.

²⁴ Owen Gibson, ‘File-share defender fired over TV show’, *The Guardian* (4 July 2005).

²⁵ *Ibid.*

This is frequently done free of charge, as there is a principle of reciprocity at work, but in theory the researcher may have to cover the copying costs.

Journal publishers typically charge higher subscription rates to libraries than to individuals, precisely in order to recover what they see as lost sales from this kind of activity, which is, of course, perfectly legal under the fair dealing or fair use exemptions. Stan Liebowitz has termed this differential subscription charging “indirect appropriability.”²⁶ However, with the advent of multi-layered protection of digital content, libraries that subscribe to electronic journals through access to a database sometimes find that they are forbidden by the terms of the access contract from sharing electronic or paper copies of articles with other institutions. The researcher then has no other resort than desist, or to turn to a commercial document delivery service to obtain a copy, perhaps at a transaction cost of US\$8.00 or more. This is an active disincentive to enquiry, especially in poor countries where research funds are spread thin and \$8 represents a significant chunk of change.

At another level, if the system of IP protection effectively closes off parts of the scientific record, not through censorship or formal barriers, but by making access unaffordable, it can be argued that the requirement of full disclosure is not being met.

The threat to the creative process

In an interview published on Slashdot in May 2002, author Siva Vaidhyanathan graphically described how the uncritical application of IP rights through litigation had stifled an emerging musical form:

in the early 1990s I noticed [that rap] music was changing [...] the underlying body of samples were getting thinner, more predictable, more obvious, less playful. I had heard that there had been some copyright conflicts in 1990 and 1991. So I suspected that lawsuits had chilled playful and transgressive sampling. I was right. The courts had stolen the soul. And rap music is poorer for it. We used to get fresh, exciting, walls of sound that were a language unto themselves. By the mid-1990s, all we got were jeep beats and heavy bass.²⁷

Vaidhyanathan argues that the US Digital Millennium Copyright Act replaced copyright as “a fluid, open, democratic set of protocols under which you use what you need and face the consequences, with a cold ‘technocratic regime’ “.

²⁶ Liebowitz, ‘Copying and indirect appropriability: photocopying of journals’, *Journal of Political Economy* vol.93, no.5 (October 1985), p.945-957.

²⁷ Siva Vaidhyanathan on copyrights and wrongs, available <http://interviews.slashdot.org/article.pl?sid=02/05/15/166220> [24 May 2002].

1.4 Monopoly ownership and its consequences for artistic expression

The tendency towards the privatisation and monopolisation of our common cultural and scientific heritage may in fact not discourage creativity and invention *in itself*, since, as we have already argued, the motivations for creativity and invention are many and varied. Thus creators will likely continue to create, inventors to invent and performers to perform, so long as the financial investment required for those activities is relatively modest.

However, this does not mean that the tendency towards concentrated privatisation can be seen as a neutral or even benevolent form for the social organization of cultural and scientific production. In fact, as Herbert Schiller has pointed out, private ownership in and of itself plays a key *ideological* role in the process of global domination by Western media conglomerates, for which privatisation is an essential characteristic of an under-defined freedom: “the main constituent of a free press, it was unqualifiedly asserted, is that it is privately owned. Without private ownership of a newspaper, radio or television station, or other medium [...] there is no freedom of the press.”²⁸

Indeed, the process of privatisation in fact produces a series of problems. *First*, success in the market becomes the primary determinant of worth as well as value, and the market can easily be manipulated. *Second*, cultural diversity suffers, especially if the number of media conglomerates is constantly shrinking, since there is little profit in specialist or minority tastes. *Third*, the business strategy of searching for block-busters – cultural products such as movies or hit records that are consumed around the world in the same way – leads ineluctably to the copying of previously successful formulae. *Fourth*, truly creative work can only succeed commercially by pure chance, since the less formulaic it is, the less likely it will be that it will attract serious marketing or promotion.

The market as the primary determinant of worth and value

In a strictly commercial view of culture, if the investment needed for creating an artistic work is high, then it is only feasible to raise the necessary funds if distribution is guaranteed, since otherwise no return is possible. In this situation artists are confronted by definition with the problem that the channels of distribution and promotion are effectively locked, open only for the happy few, the limited number of lowest-common-denominator artists who are selected by the owners of the communication media on the basis of past successes or likely future successes.

As David Crosby observed in an interview in March 2004, “when it all started, record companies – and there were many of them, and this was a good thing – were run by people who loved records. Now record companies are run by lawyers and accountants. [...] The people who run record companies now wouldn’t know a song

²⁸ Herbert I. Schiller, *Mass communications and the American empire* (Boulder, Colorado: Westview, 1992), 2nd ed., p.23.

if it flew up their nose and died.”²⁹ Nowadays, record companies and small independent publishers have been taken over by large media corporations – in Crosby’s words “big fish eat little fish.” Inevitably, the link between the creator and the real decision-makers in the company is weakened or even disappears altogether: “the bigger a company gets, the less it gives a damn about you.”³⁰

Cultural diversity

The concentration of the financial and economic control of IP rights in the hands of an ever smaller number of private owners is not in the interest of artists for various reasons. For one thing, they miss the opportunity to communicate with diverse audiences to stimulate creativity. In addition, artists whose opportunities are restricted to a limited range of outlets miss out on other, unpredictable sources of income.

For society in general, it is a catastrophe when artistic diversity – concretely and actually created and performed – does not in fact reach a range of different social groups, so that they can choose what they enjoy. The media corporations effectively dictate what huge masses of people should see, watch, hear and enjoy. It is difficult for most people, who are ill informed about the existing and varied artistic landscape in their own societies, to escape the restricted offerings of the cultural conglomerates. For example, in a recent open letter to the recording industry published on the Internet, Glenn McDonald wrote of “a French band I had to go to France to discover, and wasn’t that supposed to be the kind of thing I’m paying you for? While you were watching people vying on TV to be the next disposable idol, I was wondering what the rest of the world sounds like. Half the time it doesn’t sound all that different, sadly, because they’re probably watching those same miserable shows, but sometimes the small differences are enough to make me happy [...] your greed isn’t even loyal to itself, so how can you hope for loyalty from anybody else?”³¹

Corporations are thus in a position to decide what is and what is not an artistic creation. They select a tiny fraction of actual artistic production, and market it as the only work of interest, hampering cultural exchange and cross-fertilization, and preventing audiences from forming their own ideas or selecting works of art according to their personal tastes or circumstances. The conglomerates, of course, also control the channels of communication, possible interpretations of works, and the limited range of public discourse.

All this impedes the democratic exchange not only of ideas and opinions, but also of sentiments, kinds of pleasure, or expressions of sadness. It is a characteristic of democracy that many voices can be heard, and many opinions expressed. The public domain in a democratic society is the mental and physical space in which the exchange of ideas and an open debate around all sorts of questions can take place without interference. The arts are critical to democratic debate and to the process of

²⁹ The way the music died: interview with David Crosby. Frontline, PBS, 4 March 2004. Posted at

<http://www.pbs.org/wgbh/pages/frontline/shows/music/interviews/crosby.html>

³⁰ Ibid.

³¹ Glenn McDonald, ‘The war against silence’. No.503: ‘Warnings and promises’. 2 June 2005. Available <http://www.furia.com/twas/twas0503.html>

responding emotionally and in other ways to life's questions. A diversity of forms of expression and channels of communication is needed. People's opinions are formed *inter alia* by the books they read, the music they hear, the films they watch and the images they see – and not always at the rational level. The arts include all forms of entertainment and design and touch our hidden emotions and drives, our perceptions and hopes, our desires and our very selves.

Artistic creations from different parts of the world can have an important impact on groups of people within a particular society at a given moment in history. Nevertheless, it is important that a substantial part of artistic communication reflects, without being nostalgic, what is going on in any given community, including the virtual communities formed by the Internet. It would be a serious loss if none of the sentiments expressed in the arts was related to the *specific* conflicts, the desire for conviviality, the way people enjoy themselves, the specific kinds of humour or aesthetic that are found in a *particular* society.

Moreover, it is important that within any society a *diversity of forms* of artistic expression is created and distributed by diverse artists and creators. People are different; and what is more human than hoping to find forms of theatre, music, visual arts, literature or film that express adequately one's own confusions, feelings of delight or aesthetic tastes?³²

The copying of previously successful formulae

The business plan of the media corporations boils down to the search for a blockbuster, a summer hit, a bestseller. Their almost complete inability to predict what will become popular in this way is clearly a major impediment to their success. The strategy is to keep on churning out the records and the movies until one catches fire. Ironically, as Crosby says "every once in a while, there's an aberration, a crack in the pavement. Somebody [...] will have a hit [...] that's] just so good, that it slides in between all of the meaningless, tasteless, cardboard cut-out crap."³³

Crosby continues: "We spent time with a lot of people [...] and they'll all say, 'I've just found the new Norah Jones. I've got the new Norah Jones. You know, she sounds just like the new Norah Jones.' See, that's the wrong thing. *They're out there looking for a clone of whatever's at the top.*"³⁴ Other singers and musicians agree: "in times past, an A&R man [...] would help an artist to find songs, perhaps put them with specific musicians and arrangers. The role was creative and at its best, led to relationships which fostered the performer's growth, over time. If a company had a great success with something, other people would look for someone to equal that success, sure, but they wouldn't be looking for something identical, because what was appreciated was difference. If you couldn't hear an artist's sound as distinctive, who would want it?"³⁵

³² Joost Smiers, *Arts under pressure: promoting cultural diversity in the age of globalization* (London: Zed Books, 2003), p.vii.

³³ Crosby, *The way the music died*.

³⁴ *Ibid.*

³⁵ Barb Jungr, 'Why are pop singers so samey and sexless?', *Spiked-Online*, 27 June 2005. Available <http://www.spiked-online.com/Printable/0000000CAC21.htm>

The power of marketing and promotion

The consolidation of power in the media conglomerates, through control over both content and channels of distribution, permits global marketing and promotion. A company with the capacity continuously to manufacture its cultural products in large quantities and to distribute them effectively to many parts of the world, is in a position to persuade huge numbers of people that what is on offer is something they want. It has the expertise to transform all those single products into 'not-to-be-missed experiences'. It can upgrade its international operations to a privileged position by expanding horizontally and tapping emerging markets worldwide, by forging vertical alliances at all levels and in all branches of the cultural market, and attracting the necessary investment capital.

This is the power to decide who will be a client, a viewer or a listener; but it is also power that extends to moments before this. It is the power to select a few artists and reject the rest; and to give those who are selected massive distribution and promotion. These key decisions limit and, more often than not, effectively create, the field of cultural options that many people experience as the only ones. In order to want something else, a person needs a well-developed imagination and a conviction that cultural life can offer more than what is currently and seemingly unavoidably on offer on a mass scale.

The decisive question thus becomes: who has access to the communication channels of the planet, both digital and material? Who has access to the emotions of large numbers of people and to their disposable income? The question of evaluating the content, ethical standards and quality of what the cultural industries offer is secondary to the major issue of control by this oligopoly. Corporations exercise control to steer creativity in certain directions, select particular artists, set up the means of seduction, prepare a favourable reception, and manufacture a range of experiences around a prioritised singer, writer, dancer, director, designer and his or her products and the broad range of gadgets inextricably surrounding their work.³⁶

1.5 Average artists and conglomerates cannot benefit from the same copyright system

We have already pointed to the need to question the uncritical acceptance of an Enlightenment discourse that permeates discussions on copyright, to the effect that the real purpose of the IP system is *to encourage creativity and innovation*. The Copy/South project strongly believes that more research is needed on the problem of the motivation of creators and innovators and on differentiation of reward, as well as on the question of who really benefits from the system (or to put it more crudely, *follow the money*).

It would be naïve to believe that an intellectual property rights system that is disproportionately influenced by the real interests of a handful of giant international media corporations (see below) is *also* designed to ensure that struggling researchers, writers and artists can work free from money worries. It is clear that the system of

³⁶ Smiers, Arts under pressure, p.28-29.

rewards is determined by what is effectively a winner-takes-all search for a smash hit recording or a block-buster movie, in which the value of diversity or of minority-taste markets are secondary considerations. Thus we can understand, for example, the US movie industry's propensity to make second, third or even fourth sequels to successful films, which have come to be regarded as franchises, and are accompanied by the marketing of hugely profitable toy lines and other branded product

The history of the relations between artists and recording companies, writers and publishers, and film-makers, actors and studios is replete with examples of exploitative contracts, bad faith, and bitter legal struggles for control of the estates of deceased artists whose works have turned out to be money-spinners. This has especially been the case when the creators have been from developing countries, or, in the case of the United States, when they have been members of disempowered communities, such as African-Americans. There are thus two aspects to this question, namely the relationship of the individual creator to the corporate rights holders

within the system, and second, the way in which an undifferentiated Western system itself impacts *on cultures with differing ideas of the nature of authorship and of text*.

In fact, royalties and other earnings from intellectual property rights constitute only a fraction of the income of most active professional artists, even in such markets as the United States, while in the developing world, they are almost certainly completely insignificant. A recent survey of US jazz musicians showed that just only a little over half of them had earned their major income in the previous year from musical

Musicians in Senegal and their earnings

Here are some statistics on the situation of musicians in Senegal in the year 2000:

- 'Eighty percent of musicians in Senegal are unemployed or underemployed.' One study estimates that US\$600.00 is the average annual income for a musician in Senegal, though this figure is not substantiated and appears to be inflated.
- In Senegal, African musicians who have international sales constitute 'perhaps a dozen of the country's estimated 30,000 musicians.'
- 'The pressing need for short-term income often leads to musicians giving up their rights rather than licensing or some other sort of business/legal arrangement that would provide longer-term income.'

The general approach of the World Bank and the World Intellectual Property Organisation is, essentially, to suggest the further inter-meshing of African musicians into the global copyright net. Though citing "the vision" of Nashville, Tennessee, USA as a model so that "African countries would create their own Nashvilles" even intellectual property 'fundamentalists' are forced to admit that the results are likely to be modest. 'The idea (for Senegal) is to build an industry for the 30,000 low-income musicians, recognizing that the measure of success would be a modest increase of earnings for each of them. One would hope that in this supportive artistic and business environment a few more of the 30,000 will make it big time,' conclude the authors of The Africa Music Project. And the message that intellectual property is central and necessary is one that is continually reinforced. The first element of their purported musicians' dream is strengthening IPRs, including their policing, and the goal of archiving/conserving of Senegal's musical patrimony is 'both to maintain music from generation to generation [obviously a laudable goal] and to reinforce the IPR system.'

Sources: Frank J. Penna et al., 'The Africa Music Project' in: *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington DC: World Bank and Oxford University Press, 2004); and Alan Story, 'Intellectual Property Rights, the Internet, and Copyright', *Commission on Intellectual Property Rights Study Paper no.5*, (January 2002), available at: http://www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf

activity of any kind, let alone from the royalties from their intellectual property.³⁷ Indeed, around two-thirds earned only around US\$7,000 a year from music. In these circumstances, it is hard to accept the sincerity of the media corporations when they claim to be representing the interests of struggling creators. In any case, as Ruth Towse has cogently pointed out “royalty payments to all but the top artists are typically small and firms in the creative industries are typically large, making for a very unequal bargaining situation.”³⁸

This inequality has often resulted in creators being cheated by the system while they were alive, and in their descendants, commonly not creators themselves, fighting bitterly over the estate after they are dead. For instance, a court case was recently heard in London about the IP rights to songs featured in the popular film and CD of the Cuban *Buena Vista Social Club*. The composers had been fobbed off with “contracts [...] so cunningly contrived as to allow the publishers to get away with paying the composers practically nothing [...] at most, a few pesos and maybe a drink of rum.”³⁹

Similarly, the South African Solomon Linda, author of *Wimoweh*, was a Zulu musician who wrote a song “that earned untold millions for white men but died so poor that his widow couldn’t afford a stone for his grave.”⁴⁰ The song has been a major hit several times, most recently when it featured in the Disney cartoon *The Lion King*, and is estimated to have earned, in fact, about US\$15 million. But as Rian Malan has pointed out,

That Solomon Linda got almost none of it was probably inevitable. He was a black man in white-ruled South Africa, but his American peers fared little better. Robert Johnson’s contribution to the blues went largely unrewarded. Leadbelly lost half of his publishing to his white ‘patrons.’ DJ Alan Freed refused to play Chuck Berry’s ‘Maybelline’ until he was given a songwriter’s cut. Led Zeppelin’s ‘Whole Lotta Love’ was nicked off Willie Dixon. All musicians were minnows in the pop-music food chain, but blacks were most vulnerable, and Solomon Linda, an illiterate tribesman from a wild valley where lions roamed, was totally defenceless against sophisticated predators.⁴¹

There are numerous examples of ferocious struggles around disputed intellectual property rights in the form of creators’ estates. The Jimi Hendrix estate, for instance, valued at about US\$80 million, remains the subject of litigation in what one report has described as ‘a long and bitter family feud’ even though the singer and guitarist

³⁷ See Joan Jeffri, ‘Changing the beat: a study of the working life of jazz musicians’, (San Francisco: National Endowment for the Arts, 2003).

³⁸ Ruth Towse, Copyright and creativity in the cultural industries (Rotterdam: Erasmus University, 14 June 2001, unpublished paper).

³⁹ David Ward, ‘Writers of Buena Vista hits were paid with a few pesos and rum, court hears’, *The Guardian* (UK), 11 May 2005).

⁴⁰ Rian Malan, ‘Where does the lion sleep tonight?’ *Rolling Stone* [date unknown, probably August-September 2002]. Available from <http://www.3rdear.com/forum/mbube2.html> [11 January 2003].

⁴¹ *Ibid.* In 2006 and after a long legal battle, some type of financial settlement of this dispute was announced, although no figures were released.

died intestate as long ago as 1970.⁴² In an even more arcane dispute, the Walt Disney Company is locked in billion-dollar litigation over marketing rights to Winnie the Pooh products with an elderly woman, Shirley Slesinger Lasswell who is not even related to A. A. Milne, but whose husband allegedly bought the rights in 1930. It should be clear that whatever result these contestations in fact have, it is much more likely to be the enrichment of lawyers than the 'encouragement of learned men to compose and write useful books.'

The failure to question the globalisation of what are in fact culturally specific ideas of ownership, creativity and community is also a problem. Some commentators have argued that in the process of spreading Western intellectual property law concepts, many non-Western peoples have been compelled to 'make their claims using categories that are antithetical to their needs and foreign to their aspirations.'⁴³ This is an especially noticeable characteristic of much of the debate around IPRs and indigenous knowledge or traditional knowledge which is discussed in Section 3.5. But this is not necessarily a one-way street. In a fascinating study of the appropriation of an Algerian Berber musical style, Jane Goodman has shown that the encounter of non-Western societies with an imposed Western intellectual property regime is not always simply linear and destructive. She argues that the Kabyle people are producing "a markedly different understanding of the relationship between authorship and the public domain. Instead of being conceptualized as a neutral arena where unauthored and unowned materials are freely available to all, the notion of the public domain in [this] discourse is being evoked to constitute entirely new conceptions of authorship – conceptions that are not opposed to the public domain but emerge from it."⁴⁴

The role of the big media corporations

Today there are far fewer small, independent publishing houses, recording companies and film-makers than there used to be; even academic journals, which until the 1960s were primarily produced and distributed by scholarly societies and associations, are now mostly published by large commercial enterprises. This process of consolidation and privatization of what was an extremely diverse field into half-a-dozen giant media corporations has been described as the 'brutal decline' of trade and academic publishing. Takeovers by multinational corporations have effectively destroyed excellent publishing houses both in Europe and in North America. The need to publish books, make records, or produce films that will quickly make large profits drives these giant corporations. In publishing, their business plan consists essentially of gambling on celebrity names – former presidents or aging rock stars – who are paid huge advances to produce best-sellers. Naturally, such an environment

⁴² Brian Alexander, 'Judge settles long family feud over Jimi Hendrix's estate', New York Times (25 September 2004).

⁴³ Rosemary J. Coombe, *The cultural life of intellectual properties: authorship, appropriation, and the law* (Durham NC: Duke University Press, 1998), p.241.

⁴⁴ Jane E. Goodman, 'Stealing our heritage?' *Women's folksongs, copyright law, and the public domain in Algeria* Africa Today vol.49, no.1 (2002), p.88

marginalizes alternative voices, which are unlikely to be profitable, and may also be critical of the way the system is working.⁴⁵

When we speak of half-a-dozen media giants, this is almost literally the number of corporations that do in fact control global cultural and scholarly production, and which are among the most vociferous and influential voices calling for tighter IP laws and better enforcement of their criminal provisions. In 2002, the main players consisted of six big groups – AOL Time Warner, Vivendi, Viacom, News Corporation, Disney and Bertelsmann – and one hybrid, Sony.⁴⁶ These giant companies are not nimble – they are slow to adapt to new technology for example, and if they fail to produce the required annual blockbusters, as might have been the case for the Hollywood film industry in mid-2005, they have no way to respond.⁴⁷

If market forces really determined the fate of the media conglomerates, then we could be moderately confident that either they would have to adapt to the demands of the public, or they would break up. However, the media corporations spend large amounts of money and commit significant resources to making sure that the rules and the playing field are designed in such a way as to favour their continued survival and profitability. In a report published in 2000 by the Center for Public Integrity in Washington DC, it was shown that, *inter alia*, the conglomerates spent US\$75 million on campaign contributions between 1993 and 2000. In the four years since 1996, they spent US\$111 million on lobbying in Congress; there were 284 registered media lobbyists in 1999; and the media companies have taken 118 members of Congress and staff on 315 trips since 1997, at a cost of US\$455,000.

Perhaps one of the best known examples of the way corporations are able to exert direct influence on the law-makers occurred in 1998, when the Walt Disney film company – whose copyright on the presumably still-profitable Mickey Mouse cartoon character was to expire in 2003 – successfully lobbied the US Congress for a copyright term law. Since the company had made campaign donations of over US\$6 million the year before, they received a sympathetic hearing, and the act was duly signed into law, effectively extending copyright protection forward another twenty years after the author's death, from fifty to seventy years.⁴⁸ Subsequent court challenges to this law were unsuccessful.

⁴⁵ See especially the detailed account of the process in the field of publishing in André Schiffrin's *The business of books: how international conglomerates took over publishing and changed the way we read* (London: Verso, 2000).

⁴⁶ See *The Economist* (25 May 2002). For earlier and similar reports, see also *New Internationalist* no.333 (April 2001),

⁴⁷ See 'Hollywood crisis as summer hits dry up' *The Guardian* [London] (27 June 2005).

⁴⁸ Some works get protection for up to 95 years. In the extensive secondary literature, for a useful summary account, see Chris Sprigman, 'The mouse that ate the public domain: Disney, the Copyright Term Extension Act, and *Eldred v. Ashcroft*' *Findlaw's Legal Commentary*, Tuesday 5 March 2002, available at http://writ.findlaw.com/commentary/20020305_sprigman.html.

