

SECTION 2 – THE ECONOMICS OF GLOBAL COPYRIGHT: THE NET CAPITAL FLOW FROM THE GLOBAL PERIPHERY TO THE CENTRE

2.1 Introduction

The world capitalist system is presently entering a phase, the earliest features of which had begun to emerge already in the late 1970s, “characterised by the elevation of information and its associated technology into the first division of key resources and commodities. Information is a new form of capital.”¹ In this new epoch, information and knowledge are no longer available from what John Frow has termed the former “interlocking ensemble of open ‘library’ systems with minimal entry requirements” but are rather “managed within a system of private ownership where access is regulated by the payment of rent.”²

Since poor countries need access to patented information for technology transfer, and to copyrighted information for education and cultural production, the IP system that was locked into place after the conclusion of the 1994 Uruguay round of the now superseded General Agreement on Tariffs and Trade (GATT), can be seen as an attempt to freeze the international division of labour. Poor countries hold few patents and produce little local knowledge. They are net importers of ‘information capital’ on a massive scale, and the purpose of the emerging world IP regime is therefore to ensure that the net exporters – the countries of the industrialised North – continue to extend control over that capital through the exercise of monopoly rents, and thus to prevent any potentially competitive accumulation.

There is an often-cited maxim in the development literature to the effect that if you give poor people some fish, you feed them for a day, but if you teach them how to fish, you feed them for a lifetime.³ However, in our times, the epoch of extended copyright terms and the patenting of life forms and business methods, a caveat becomes necessary: you feed them for a lifetime, provided they can afford to pay licence fees for what is likely to be a patented fishing technology.

To cite a concrete example, US industries, including the entertainment industry, appear to be doing extremely well, and it is logical that they should wish to secure their own profitability. But they have also succeeded in harnessing the US government and its foreign policy in the service of an expanding and aggressive assertion of the corporate ‘right’ to patent or copyright any idea that might be commercially exploited, up to and including plants, animals and other life forms. The US has consistently sought to strengthen the global agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), introduced at the end of the Uruguay

¹ G. Locksley, ‘Information technology and capitalist development’ *Capital and Class* no.27 (1986), p.91, quoted by J. Frow, ‘Information as gift and commodity’ *New Left Review* no.219 (1996), p.89.

² Frow, *Information*, p.89.

³ Apparently a Chinese proverb sometimes attributed to Kung Fu-tse (Confucius).

Round of GATT in 1994. The truth is, all IP rights are trade-related, and so all forms of content are under threat. Indeed, 'the US government has made the rigorous enforcement of intellectual property rights a top priority of its foreign policy' as it attempts to use such international organizations as the WTO and WIPO to impose harmonization of local IP rules to US standards.⁴ It is able to pursue this agenda because in the era of globalization, international capital is pretty much 'free to pursue profit wherever it wishes and on whatever terms it can impose.'⁵ If these international forums fail to reach agreement because of resistance by developing countries in defence of their own interests, then typically the United States resorts to negotiating a series of bilateral free trade agreements (FTA's) which incorporate the key elements of TRIPS or TRIPS+, such as extended copyright terms, anti-circumvention measures and so on.

There are, nevertheless, contradictions. How well are the Northern, and especially the US content industries actually doing? In the long term, the confident predictions are that they will be the dominant components of the global economy of the immediate future, as we have seen earlier. However, there have also been many wild claims of losses, mostly attributed to insufficiently ferocious administration of IP legislation – certainly not, in their view, to any problems with their ability to adapt to new environments or technology. It is undoubtedly true that the music recording industry (which despite the rhetoric is not the same thing as the music industry) has been experiencing a downturn, with a fall in 2002 of 7.2 percent in global sales of recordings. From this, analysts have extrapolated hypothetical 'lost sales' worth US\$4.7 billion by 2008, and have attributed this mainly to Internet file-sharing and other forms of 'piracy'.⁶ The problem is, as Stan Liebowitz and others have convincingly shown, that it is impossible to quantify the exact relationship between unauthorized copying and hypothetical purchasing behaviour by the copier, either in the case of file sharing or of cheap Chinese or Mexican 'pirate' versions of CDs or videos. It is quite possible that the music recording industry would be in a slump in any case.⁷

Although it is hard both to collect and to interpret consistent data about capital flows associated with the trade in intellectual property, Copy South believes that it is highly likely that, at present, 'there is a net flow of capital from the global periphery to the centre in the form of IP licence fees and royalty payments'. It is clear that this proposition is *broadly* defensible. Such a flow would be entirely consistent with the negative balance of trade and payments between the periphery and the centre in other commodities. What we want to do, however, is to see if it is possible to quantify this in specific cases, such as the role played by the RRO's, in those countries that have them.

⁴ Kristin Dawkins, 'Intellectual property rights and the privatization of life,' *Foreign Policy in Focus* vol.4, no.4 (January 1999).

⁵ Leys, *op. cit.*, p.vi.

⁶ Dan Milmo, 'Piracy costs will double in five years,' *The Guardian*, 23 September 2003, available at <http://www.guardian.co.uk/print/0,3858,4759205-111163,00.html> [24 September 2003].

⁷ Stan Liebowitz, 'Policing pirates in the networked age,' *Policy Analysis* no.438, 15 May 2002, especially p.11 ff. Available at <http://www.cato.org/pubs/pas/pa438.pdf> [24 September 2003].

2.2 Calculating copyright-related capital flows from the global periphery to the centre

With a certain amount of ingenuity, it is possible to answer, at least indicatively, the question of whether there is a net flow of capital from the global periphery to the centre in goods and services related to copyright (e.g. licensing fees, royalties). In addition, we know that there is a general trade imbalance between the North and the South, aside from debt-related capital flows. There is little reason to suppose that things would be different in such an important area as the IP industries, especially when we consider the importance that the US especially attributes to concluding TRIPS agreements, bi-laterally if necessary, with its trading partners. In fact, commentators and analysts from Daniel Bell in the 1970s, through Manuel Castells in the 1990s, to such current popularisers as John Howkins have all agreed that “the creative economy will be the dominant economic form in the twenty-first century.”⁸

Figures are available for the world trade in cultural goods, and the organised ‘anti-piracy’ movement also makes quantified claims of losses because of illegal (or at least unauthorised) copying of intellectual property. Such losses, while they may well be exaggerated, indicate that rights-holders believe, probably with good reason, that there is a large market for cultural goods at a global level. Problems arise, however, in trying to disaggregate this data, or to break it down into discrete categories. It is clear to us that case studies of such outflows from specific countries, or for particular sectors, if feasible, would be extremely useful in making the point that the global IP system costs poor countries much more than it benefits them, at least in trade terms. This section is therefore divided into two sub-sections, one on the world trade in cultural goods, very broadly defined, and one on possible uses in this debate of the so-called ‘anti-piracy’ statistics.

The world trade in cultural goods

In 2000, an official report by the United Nations Educational, Scientific and Cultural Organization (UNESCO) referred to a “crippling lack of basic quantitative and qualitative indicators” regarding the relationship between culture and development. The authors of the same report attempted to quantify the worldwide trade in cultural goods, with the caveat that the real value of such goods often far exceeds their “declared value at customs.” Thus, one print of a movie may have a particular value *as an artefact*, but its earning capacity when shown in a country’s cinemas may be exponentially greater. The UNESCO data show that the capacity to export cultural goods of many small and developing countries “appear[s] to have shrunk” over the period of the 1980s and 1990s, and Copy South has no reason to suppose that this trend has been reversed. Indeed, the same UNESCO report goes on to point out that “the flows of trade in cultural goods are unbalanced, heavily weighted in one direction with few producers and many buyers. There are great structural disparities both within and between the various regional trading blocks.”⁹

⁸ See e.g. Daniel Bell, *The coming of post-industrial society: a venture in social forecasting* (New York: Basic Books, 1973); Manuel Castells, *The information age: economy, society and culture* (Oxford: Blackwell, 1996-1998), 3 vols.

⁹ Phillip Ramsdale, *International flows of selected cultural goods, 1980-1998* (Paris: UNESCO, 2000), p.v. Cultural goods are defined by UNESCO’s Framework for Cultural Statistics (FCS)

Several key points emerge. First, this is a rapidly growing sector. Measured in dollars, world imports of cultural goods have nearly quintupled over the past quarter century, from a value of US\$47.8 billion in 1980 to US\$213.7 billion in 1998. However, as an overall *proportion* of world trade, cultural goods have remained steady, increasing only from 2.5 to 2.8 percent. Second, and most significantly, developing countries accounted for 87 percent of all cultural goods imports in 1980, and for 78 percent in 1998. The value of these imports leapt from US\$5.5 billion in 1980 to a staggering US\$57 billion in 1998, a tenfold increase.

The United States remains the main producer and the main consumer of cultural goods, as the UNESCO report emphasises. In another report entitled *Copyright industries in the US economy*, Stephen Siwek has attempted to quantify the importance of this sector according to three main indicators: value added to GDP, share of national employment, and lastly foreign sales.¹⁰

If we examine the value of US exports of such categories of cultural goods as recorded CDs and tapes, films and television programmes, computer software, and printed materials (books, newspapers and magazines), it is clear that this is an extremely important sector for the well-being of the US economy.

	1991	2001
Software	US\$19.65 billion	US\$60.74 billion
Films	US\$7.02 billion	US\$14.69 billion
Records and Tapes	n/a	US\$9.51 billion
Printed materials	n/a	n/a
Total	US\$36.19 billion	US\$88.97 billion

Source: Siwek, p.3-4

In fact, from as early as the 1990s, the value of the export to the rest of the world of US copyright products (which include books, but are mainly entertainment commodities such as films, music and television programs) exceeded the total for clothes, chemicals, cars, computers and aeroplanes combined. In 1997, the value of all such products was \$414 billion, according to one popular account.¹¹ The core copyright industries extend to “all industries that create copyright or related works as their primary product: advertising, computer software, design, photography, film, video, performing arts, music (publishing, recording and performing), publishing, radio and TV, and video games.”¹² This list does not even begin to cover the economic value of patents and trademarks, which is considerable.

as including printed matter and literature (FCS 1); music (FCS 2); visual arts (FCS 4); cinema and photography (FCS 5); radio and television (FCS 6); and games and sporting goods (FCS 8).

¹⁰ Stephen E. Siwek, *Copyright industries in the US economy: the 2002 report* (Economists Incorporated for IIPA, 2002).

¹¹ Howkins, loc. cit.

¹² Howkins, op. cit., p.xii-xiii.

Using data from 'anti-piracy' sources

In order to make the political argument for the expansion and extension of intellectual property rights, and for their increasingly severe enforcement, the copyright industries themselves frequently try to show how 'piracy' and other activities have damaged their interests, and by implication, the interests of the countries whose economies they serve. Thus, unsubstantiated figures for losses due to piracy come to be bandied about in newspaper reports and gradually acquire a probably unwarranted authenticity. The problem is, as research by Stan Liebowitz and others has shown, that there is no logically coherent way of demonstrating the relationship between a specific number of, say, illegal music downloads from the Internet, and actual lost sales of specific CD recordings.¹³

Nevertheless, the data produced by such sources as the Recording Industry Association of America (RIAA), the Motion Picture Association of America (MPAA), and the International Intellectual Property Alliance (IIPA) is useful if only because it reinforces our sense of the claims that are being made on poor countries by Northern rights-holders. Indeed, such claims apparently have a significant degree of government backing: the US International Trade Commission apparently believes that 'because of an inadequate level of protection, many potential markets are unavailable to US manufacturers due to the proliferation of commercial piracy.'¹⁴ Indeed, the same source continues by stating

that "the United States and other industrialized countries continue to urge many developing countries to live up to their new obligations by implementing the necessary legislation and enforcement mechanisms with respect to protecting intellectual property."¹⁵ One source puts the 2002 losses to 'piracy' in the Middle East

Chomsky on the Capital Outflow

Noam Chomsky may not be far from the truth when he observes that American companies stand to gain \$61 billion a year from the Third World on intellectual property rights, 'at a cost to the South that will dwarf the huge current flow of debt services from South to North.'¹ This is a calculation from the beginning of the nineteen nineties. Ten years later, in 2003, this amount of money will be considerably higher, certainly also when other Western rights holding companies would be included in the calculation. A portion of this sum concerns (besides patents and trade marks) copyrights on cultural 'products'. Which part this is, however, is difficult to calculate due to enormous differences in commercial statistics between countries. One may assume that the money poor countries must pay for copyrights is increasing, partly because Southern and Eastern countries feel pressure from the West to fight piracy. This places a drain on the already scarce resources of their police forces. Moreover, transnational cultural conglomerates penetrate those countries more effectively with their entertainment and other cultural products. Consequently, those countries must transfer the scarce hard currency they have to Western and Japanese cultural industries.

Source: Noam Chomsky, 'Notes on NAFTA', in Kristin Dawkins 1993, NAFTA. The New Rules of Corporate Conquest (Westfield, NJ: Open Magazine Pamphlet Series, 1993) p.3.

¹³ See for example, Liebowitz, Policing pirates in the networked age (Washington DC: Cato Institute, 2002), especially p.11-14; and his Will MP3 downloads annihilate the record industry? The evidence so far (unpublished paper, June 2003).

¹⁴ Christopher Johnson and Daniel J. Walworth, Protecting US intellectual property rights and the challenges of digital piracy (Washington DC: US International Trade Commission, March 2003), p.1 (US International Trade Commission. Office of Industries. Working Paper no. ID-05).

¹⁵ Johnson and Walworth, p.1.

and Africa at US\$211 million for films, US\$160.5 million for recorded music, US\$371.5 million for business software, and US\$150 million for 'pirated' books.¹⁶

To get a better sense of these claims, and of the kind of pressure that accompanies them, we can examine the case of South Africa's alleged failure to enforce Northern standards of IP protection. In its 2002 Special 301 Report, the IIPA claimed that the "total estimated losses due to piracy of US copyrighted works in South Africa rose to \$124.6 million in 2001."¹⁷ These losses, according to the claims of the IIPA, even "cost [South Africa] jobs, tax revenues, and the possibility of developing its creative community." In 2003, this same organization recommended that "South Africa should be placed on the Priority Watch List", owing to a sharp increase in levels of 'audiovisual piracy', referring specifically to imports of motion picture DVDs. IIPA also alleged that there was 'corruption [...] within South African Customs.'¹⁸

As far as the education sector was concerned, according to IIPA, book publishers suffered from 'piracy' including unauthorized photocopying of complete textbooks and other materials on university campuses, to a value of US\$14 million, an apparent drop over previous years that can be explained by exchange rate variations. However, the wealthier educational institutions have been forced to become 'more copyright-conscious' and in the case of the four institutions in Cape Town have appointed a joint copyright officer to deal with copyright permissions for copies of learning materials. So, although the data is not complete or totally reliable, we can draw a broad picture of the continuing capital flows in copyright-protected goods from the South to the North.

2.3 From TRIPS to TRAP: Free Trade Agreements and copyright

"He who receives an idea from me, receives instruction himself, without lessening mine; as he who lights his taper at mine, receives light without darkening me." Thomas Jefferson

The birth and subsequent exploitation of the Agreement on Trade-Related Intellectual Property Rights 1994 (TRIPS) is a fascinating story of how intellectual property- oriented industries of the Northern part of the world have sought – and have largely obtained – worldwide IP dominance. The recipe works in the following manner. First, build a strong global intellectual property alliance of large organizations from US, Europe and Japan. Next, bring the alliance to a slow boil by getting them to lobby their respective national trade representatives to introduce intellectual property as a trade related issue in world trade talks such as the General Agreement on Tariffs and Trade (GATT), the precursor to the World Trade Organisation (WTO). If some southern countries find the hastily cooked broth unpalatable at first, add sprinkles of a few concessionary ingredients. Cajole and

¹⁶ IIPA, IIPA 2004 special 301 recommendations, IIPA 2002-2003 estimated trade losses due to copyright piracy, in millions of U. S. dollars, and 2002-2003 estimated levels of copyright piracy.

Middle East and Africa (IIPA, 2003).

¹⁷ IIPA, 2002 special 301 report, [South Africa], p.552.

¹⁸ IIPA, 2003 special 301 report, [South Africa], p.271.

even threaten them with severe consequences until they finally submit to trying the new dish. Keep adding spicy new toppings to the recipe every few years to avoid blandness. The best thing about this simple recipe is that the unsuspecting southern nation-states buy in to the promise that the latest offering is good for their own long-term health. In fact, without this 'à la carte IP menu', it is claimed that the Southerners would suffer from terrible under-nourishment of creativity and intellect.

The above metaphor may be strained, but it captures the essence of unfolding events as they have gathered momentum in global intellectual property-oriented policy-making over the last two decades. What this section of our dossier explores are the *causes* of this urgent impulse towards change in IP policy. How have such ideas spread, at the cost of other options? Why is there a danger of actual creative deprivation for many southern as well as northern citizens after dining from such a limited and limiting IP menu?

First, why do we need an IP – or more specifically a copyright – policy cooked up in Northern countries, to be digested largely by the Southern hemisphere? As Northern countries, particularly the United States, have moved from a manufacturing base to a services base and thence to a knowledge base for their economies, it has become crucial to create new sources of revenue. Governments can better shield such new revenue streams if the technologies and content that constitute the knowledge base – such as proprietary software or entertainment products – are more ruthlessly protected with a comprehensive and *globally enforced* IP regime; in fact, such protection helps the copyright industries of the North to realize higher monopoly profits.

The US has always had a surplus in its trade in IP products with the rest of the world, an advantage that it has tried to sustain quite ruthlessly. For instance, the US received a total of US\$36.5 billion on its intellectual property exports in 1999, while paying out only US\$13.3 billion to other countries. No other country in the world even comes close to a surplus on IP products of more than \$23 billion.¹⁹ Many other Northern countries, such as Germany, France, and Canada actually have sizeable IP deficits; these countries may perhaps be hoping that their IP fortunes will reverse in the future. 'The copyright industries', specifically, 'are responsible for some 5% of the GDP of the United States', and 'they gather in more international revenues than automobiles and auto parts, more than aircraft, more than agriculture.'²⁰ The IP industries in general and the copyright industries in particular are therefore of tremendous importance to the well-being of the economies of the North, and exercise significant domestic influence.

It is evident that Northern countries, dependent on such knowledge industries as the media, entertainment, pharmaceuticals, biotechnology, telecommunications or software, feel an urgent financial impulse to achieve strategic global trade dominance

¹⁹ Story, Alan (2002), 'Copyright: TRIPS and International Educational Agenda', in Drahos, P, and Mayne, R, (ed.) *Global intellectual property rights: knowledge, access and development* (Palgrave Macmillan), p. 131.

²⁰ See Jack Valenti (2002), *A clear present and future danger*, 2002; Open Democracy, www.opendemocracy.net/debates/issue-8-40.jsp, accessed 9 March 2004.

in those commodities.²¹ However, why should it necessarily follow that the same policies must therefore hold true for the rest of the world, the Southern part? Must copyright standards for the rest of the world necessarily mimic those of the North, or should the South decide appropriately what its domestic needs are using the vehicle of free trade agreements? What is actually happening is that important policies adopted in one part of the world are increasingly becoming a de-facto standard for the rest; and this – with far reaching implications – is being achieved in three specific ways.

To exercise global influence, the first and the most durable tactic of Northern copyright and other knowledge-based industries is to make regular and significant contributions to campaign financing, so that ‘appropriate’ candidates are elected to the US Congress or other legislature. Essentially, in this way, large corporate organizations can capture the regulatory structure of their national governments. The US media, entertainment, pharmaceutical, bio-technological, and telecommunications industries are among the most generous contributors to the campaign coffers of US elected officials. The drug industry contributed a total of \$230 million to financing campaigns in the 1999-2000 US elections cycle. The communications industry ranked fourth in generosity, with \$133 million. The health industry ranked seventh with \$96 million among industry contributors.²² Once elected, such officials may be expected to respond rather amiably to the most oblique requests for national or international policy favours: indeed, the requests may not even have to be spelled out.

Second, once in place, the regulatory capture of Northern governments including European ones became a decisive force in shifting global priorities at crucial trade venues such as GATT or the WTO. The successful introduction of TRIPS during the 8th GATT round between 1986 and 1994 was a masterly stroke in re-ordering global IP priorities. In one swift move, intellectual property rights were transformed from an obscure national concern of a handful of governments, into a global trade-related issue. Once TRIPS fell within the WTO’s ambit, threats and even sanctions could be and were imposed by Northern nations against countries without ‘adequate’ IP protection policies. This was a sweeping victory. The inclusion of TRIPS within the WTO framework in 1995 went a long way towards realigning and harmonising the intellectual property rights of most of the 152 WTO member states towards US standards. All member countries, particularly those in the South, could now be compelled to abide by the restrictive terms of TRIPS, and all within a strict time frame.

Third, the introduction of TRIPS was merely the beginning of a grand new strategy of seeking ever higher levels of harmonization of the copyright laws of the Southern countries with those existing in the US and Europe. The new weapon in the US trade arsenal was the skilful use of free trade agreements for achieving such ends; they are agreements which are quite unlike multilateral institutional mechanisms. The easy reproduction of copyrighted products worldwide, both digital and non-digital, (also

²¹ Pharmaceutical companies are organised into the International Federation of Pharmaceutical Manufacturers and Associations [IFPMA], the entertainment industry into the Recording Industry Association of America and The Motion Pictures Association of America, and software enterprises into the Business Software Alliance.

²² Centre for Responsive Politics, 2004.

called 'piracy') became a rather convenient argument for copyright industries to ratchet up the demands for more protective policies. 'Piracy' or theft of intellectual property in developing countries, it is claimed repeatedly without fail, leads to considerable loss by the owners and producers of intellectual property from the developed world. The International Trade Commission claims that foreign 'piracy' of United States IP costs the country approximately \$40 to \$60 billion per year.²³ It must be noted that the domestic copyright industries of United States and western European countries were during the nineteenth century pirating products with considerable enthusiasm, something that was quite deliberately overlooked by their governments.²⁴

Free Trade Agreements

In what appears as yet to be the most breathtaking method to impose US copyright policy on the rest of the Southern world, the US is now putting great emphasis on free trade agreements. The pace for increasing the volume and intensity of global trade on intellectual property through the WTO is apparently slowing down due to internal differences between member countries. This has led to an increase in the number of bilateral and pluri-lateral (more than two) preferential agreements; at the same time, the world share of such non-multilateral (i.e. unilateral) and preferential trade has been steadily increasing over the last 10 years.²⁵ These agreements, involving two or more countries, could be regionally specific, as say within Asia, or geographically divergent, as say between Singapore and the United States. They are also referred to as regional trade agreements if geographically proximate or more generally as free trade agreements [FTA] as the idea is to free cross-border trade from the encumbrances of tariff duties or restrictive rules.

The total number of free trade agreements in force in 2005 was 170 and another 90 were in the pipeline. FTA activities have recently intensified all over the world. Just how intense is revealed by the fact that all but one member of WTO, namely Mongolia, is engaged in some form of trade agreement or another. It is expected that by 2008 the number of FTAs in existence may be close to 300. There are broadly three trends apparent in these trade agreements:

1. countries across the world, including those traditionally reliant on multilateral trade liberalization, are increasingly making FTAs the centre of their trade policy;
2. FTAs are in many cases establishing trade regimes that go beyond the scope of multilateral trade agreements;
3. preference is being given on reciprocal trade agreements between developing and developed countries.²⁶

So if sluggish growth of WTO is not delivering the desired trade results, then many Southern countries, ever anxious to increase their exports, are keen to take advantage

²³ Johnson, C., 'Global copyright protection and the challenge of digital piracy', 2003; USITC Report 3640, <ftp.usitc.gov/pub/reports/ittr/PUB3640.PDF> – Retrieved on July 10, 2004.

²⁴ Ben-Atar, Doron, *Trade Secrets: Intellectual Piracy and the Origins of American Industrial Power* (New Haven, Conn. USA: Yale University Press, 2004).

²⁵ Crawford, Jo-Ann and Fiorentino, Roberto V., 'The changing landscape of Regional Trade Agreements, Discussion Paper No. 8, WTO, Geneva, 2005.

²⁶ Ibid.

of preferential treatment of their Northern counterparts. There is also the matter of not being thought as being 'left behind' in the competitive race for limited Northern markets. In the bargain, however, the Southern states are conceding a lot more than they presently realize.

The FTAs are clearly seen as opportunities by countries like the United States to raise and harmonise IP standards worldwide. Facing opposition in multilateral forums like the WTO, the US is opting instead for the free trade path to achieve its ends. The approach is basically to use a US-oriented IP template and impose its preferred standards on others through these FTAs. The IP issues in each FTA are negotiated according to the template set by the last agreement, with the same provisions included in each, regardless of whether they address some 'problem' in the negotiating partner country.²⁷ For example, the free trade agreement between the US and Jordan requires the latter country to change its domestic patent statutes so as to allow business method patents; only the most naïve could conclude that this change was made at the request of the Jordanians or that Jordanian-based companies will be the main beneficiaries of such a controversial type of patent.

Now let's examine two specific elements of copyright related free trade agreements. These features cut right across many preferential agreements between the United States and other countries. The first is with respect to the introduction of the relatively new Digital Millennium Copyright Act (DMCA) and the second is the extension of the copyright term to life of the author plus 70 years.

The DMCA and its worldwide implications²⁸

The DMCA is an overly restrictive copyright law produced in response to World Intellectual Property Organization's (WIPOs) passage of the Copyright treaty signed in 1996 by nearly one hundred and sixty countries. All signatory countries of the copyright treaty are expected to legislate such acts within their national jurisdictions. The 1998 US DMCA is a good example of a legislation many US copyright-oriented industries seek to impose on the rest of the world. The terms of DMCA go well beyond the general recommendations made by WIPO. Having failed to persuade nations worldwide to adopt US-style copyright regulations via the WIPO Copyright Treaty, the US government has included many stringent requirements of DMCA along with others in its Free Trade Agreements (FTAs) with Jordan, Singapore, Chile, Morocco, Australia, CAFTA, Bahrain and Oman. It is now seeking to include similar provisions in its current multilateral free trade negotiations with 33 countries in the Americas²⁹; such negotiations, it should be noted, are not going well in the rapidly changing political climate across this continent.

The DMCA can prevent any copying or access to works, even copying that would be completely excused under copyright law as a 'fair use' or 'fair dealing'. DMCA is unbalanced as it basically provides considerable power to the copyright content provider at the cost of the consumers' access to information, especially with reference

²⁷ Weatherall, Kimberlee, 'Locked in: Australia gets bad intellectual property deal', Policy, Vol. 20, No. 4, Summer 2004-05.

²⁸ For more on this topic, see Section 4.8

²⁹ See FTAA & Bilateral FTA Resources: www.eff.org/IP/FTAA/ [accessed December 04, 2005]

to their 'fair use' rights. The owners can now legally put a technological lock around a work in order to control unauthorized access, or copying, or performance or display of the work. In such a case, it is illegal to both circumvent that technological lock, for example those that exist with 'copy protected' CDs, or to supply any product, service or technology that is designed to help anyone else circumvent that lock. Any person 'privately' engaged in the development or distribution of circumvention technology for digital media, which should be allowed under copyright's 'fair use' doctrine, is at risk, however, of being held criminally or civilly liable. Further, digital or internet enabled access can be even more tightly restricted with embedded software codes and shrink-wrap and click-wrap licensing agreements.

Millions of copy-protected discs are already in circulation worldwide. One cannot use such copy-protected discs on MP3 players, although making an MP3 copy of a CD for personal use is still deemed as 'fair use'. The greater irony is that, unlike the earlier generation videotaping machines which allowed users to 'time shift' or copy content for later viewing (e.g. on their VCR), a company that distributes tools to 'repair' such unusable CDs – and hence restoring to consumers their 'fair use' rights – will run the risk of lawsuits under DMCA's ban on circumvention tools and technologies.

DMCA can also be used to create potential censorship by permitting copyright owners to force internet service providers (ISP) to remove any material from the Internet and the World Wide Web if the copyright owner believes the material to be infringing in nature.³⁰ This clearly has consequences for the political freedoms that the Internet gives people around the world. The copyright owners can enforce removal of 'adverse' material by simply sending the ISP a written legal notice stating, in good faith, that the material is infringing. If the ISP fails to quickly remove access to such alleged infringing material, the provider itself can be held liable for any infringement that might be found. It is quite evident that most ISPs will rather err on the side of removing the claimed 'infringing' material rather than challenge the copyright owner with its platoon of well-heeled lawyers.

The Digital Copyright Act can thus begin to mediate access to cyberspace for people living in other countries. The Internet is a medium that is easily accessible from an increasing number of parts of an increasingly wired world. At the same time, it should be remembered that a high density of information traffic originates from the United States. The English language continues to dominate the Internet with approximately 78% of all web sites and 96% of e-commerce web sites.

The lengths to which the free trade agreements are going to achieve their objective are quite astounding. Even the language of TRIPS comes across, by comparison, as permitting somewhat more flexibility. For example, Article 11 of the WIPO Copyright Treaty merely requires parties to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors." The equivalent provision in the Australian Free Trade Agreement, however, explains this point in inordinate details for two and a

³⁰ See US supreme court judgment on: MGM Studios Ltd. ET AL Versus Grokster Ltd. ET AL, June 2005. http://fairuse.stanford.edu/MGM_v_Grokster.pdf [retrieved on December 10, 2005]

half single-spaced, typed pages. It defines in most circumstances terms what technological measures are, what acts relating to them are proscribed, what exceptions may be provided, and even when and how new exceptions can be created, and what criteria we can apply in creating them.³¹ The Central American Free Trade Act (CAFTA) calls for civil and criminal penalties to punish anyone who 'circumvents' copy-protection technology or 'provides' such tools to anyone else. Like the DMCA, it would cover everything from DeCSS (a tool which removes copy-protection from DVDs) to products that do the same for e-books.³²

Future copyright policy will, in all likelihood, be drafted with the US looking over the shoulder of its trade partners. The ever powerful US lobby groups will clearly oppose, directly and through their trade representatives, any implementations they consider less than optimal from their point of view.

Extension of copyright terms through FTAs³³

The other example within free trade agreements to be highlighted here is the clearly inexplicable extension of the copyright term to life of the author plus 70 years. All FTAs involving US have this clause as a requirement. It is a direct replication of the US Sonny Bono Copyright Act of 1998 which extended the copyright hold for an additional 20 years, to a total of 70 years after the death of an author. It was made possible largely due to the intense lobbying of the Walt Disney Corporation (US Sonny Bono Copyright Act, 1998) since the character Mickey Mouse was about to come into the public domain.

It is almost impossible to find in the copyright literature any precise analysis of just how the extension of the copyright term to life of the author + 70 years (or even 50 years according to the Berne Convention, one part of TRIPS) is related to any acceptable economic logic. Do such long years of protection actually provide additional time for the content owners to recover their marketing or financial expenses and, if so, can one actually provide some calculation of the expected returns for each of the next 50-70 years in a row? Quite clearly not. The extensions appear more like ploys for preventing copyrighted artefacts from coming back quickly enough into the public domain.

The standardisation of the copyright term and scope, which incorporates a basic minimum level of protection as well as preventing the exclusion of certain copyright expressions, is a result of the Berne Convention that all TRIPS/WTO members must also sign up to claim their due eligibility. This clearly has huge implications for most Southern countries which need greater access to cheap and abundant information for their national development. If copyrighted products take longer and longer to reach the public domain, then inexpensive access to knowledge will be denied to a whole generation of people. It is important to recognize that a nation's copyright policy is a pivotal source determining the forms of control that can be exercised over access to published information. The vibrancy of the public domain is under clear threat from

³¹ Kimberlee, op cit.

³² McCullagh, Declan, Copyright lobbyists strike again, August 1, 2005, http://news.com.com/2010-1071_3-5811025.html [retrieved December 04, 2005].

³³ For more on this topic, see Section 4.2

new forms of copyright protection envisaged by powerful copyright oriented industries of the United States.

Conclusion

The protective muscle of US copyright industries are altering the information landscape through free trade policy intervention over copyright term, the scope and basic character of encrypted software, and the anti-circumvention technologies. All former protections envisaged under most copyright laws are currently under even graver threat with the shift to the digital domain. Stallman suggests that copyright's role has now been completely reversed. It was set up to let authors restrict publishers and for the sake of the general public. Digital technology has transformed it into a system to let publishers restrict the public in the name of the authors.³⁴

Developed western countries have literally resorted to blocking or knocking away the development of IP strategies of developing countries, strategies that were once themselves used by the former in moving up the developmental ladder.³⁵ The blocking of initiatives generally happens through the developed world's considerable control over international institutions and the promise of access to developed markets in return for more stringent IP policies negotiated through FTAs.

Can developing countries that are 'lower down' on the ladder of technological growth take advantage of other, more open, paradigms of knowledge distribution? The struggle for the future shape of important aspects of copyright policy is being addressed principally through the contrived elements of the FTAs. So while copyright is being strengthened, the need for a corresponding 'copyduty' to sustain the importance of the public domain is being gradually weakened. It is clear that if the public domain is not constantly replenished, there is considerable danger of it becoming unfertile – and hence not able to inspire new generations of copyrighted work – and becoming 'off limits' to those who need to use its riches.

2.4 Reprographic collecting societies and their projected growth in the South

The main purpose of a reproduction rights organisation (RRO) is to collect copyright royalty fees from users on behalf of right holders, both publishers and authors. Such fees are mostly generated through licensing schemes between RROs and user groups; educational institutions are the predominant licensees and the principle source of revenue for RROs. Hence RROs deserve particular attention in any assessment of copyright and educational issues in the South.

In 2001, there were a total of 33 RRO national organisations, mainly in the developed world. Three RROs existed at that time in Africa: the Dramatic, Artistic and Literary Rights Organisation (Pty) Limited (DALRO) in South Africa, Zimcopy in Zimbabwe,

³⁴ Stallman, R., Let's share, 2004; Open Democracy, www.opendemocracy.net/debates/article-8-40-26.jsp [retrieved March 09, 2004]

³⁵ Ha-Joon Chang, *Kicking away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002)

and Kopiken in Kenya (IFRRO website). One of the key functions of national RROs is to ensure the collection and transmission of copyright fees to foreign right holders and, to facilitate such distributions, national RROs are members of the International Federation of Reproduction Rights Organisations (IFRRO).³⁶ A number of bodies, in addition to the IFRRO and individual RROs in the developed world, are encouraging the further spread of the RRO system and philosophy, including to least developed countries.

For example, at its centenary meeting in April 1996 in Barcelona, Spain, the 25th Congress of the International Publishers Association passed a resolution calling for the creation of RROs in every country of the world. WIPO copyright education programmes in poorer countries and various World Bank reports also encourage, in the context of improving or building copyright administrative systems and enforcement regimes, the establishment of national RROs within these countries. The question is: in the current copyright and publishing conjuncture, should the RRO model be exported to Africa (and the South generally)?

The DALRO record in South Africa

The experience of the South African RRO, DALRO, is instructive. According to the latest available (2001) financial data posted on the DALRO website, DALRO distributed to national (i.e. South African) rights holders a total of €73,545.89 in reprographic (essentially photocopying) royalty fees during its 1999 financial year. By contrast, DALRO distributed a total of €136,523.07 to foreign RROs (and hence to foreign right holders) in 1999. The main source of DALRO revenues was the educational sector, particularly universities and technikons. During the same period, DALRO received a total of €19,802.62 from other (i.e. non-South African) RROs for the reprographic copying done in these countries (and presumably for distribution to SA rights holders; this is split between publishers and authors; the percentage split is unknown, though certainly the UK's Copyright Licensing Association distribution percentages greatly favour publishers over authors).

What these figures reveal is that distributions from SA reprographic users to foreign holders were more than 2.5 times higher than the total distributions made to South African right holders by DALRO.³⁷ As is well known, South Africa is a much richer country than any other in Africa and has a significantly larger and more robust publishing and education sector (the latter being where many authors work.) But even here, as the above figures show, the RRO system leads to a highly unequal balance of payments to the advantage of richer countries and reinforces existing patterns of dependency. If a fully functioning and active RRO were to be established in any other African county, especially a least developed country, the financial inequality would be even greater; such an African RRO would primarily – if not exclusively---become a royalty collector for foreign publishers and authors headquartered in rich countries.

At one level, for the establishment of a national RRO to make economic sense, that is, to facilitate some level of inter-jurisdictional equality in distributions, a country must, if it is required to pay significant royalty revenues, also have a significant

³⁶ The website of the IFRRO is: <http://www.ifrro.org/>

³⁷ Here is the math (slightly rounded): 73,000 – 20,000 = 53,000; 137/53 = 2.5.

publishing and publishing export sector. For example, the UK's CLA received a total of £3.6 million from non-British RROs in 1998-1999; in that same year, the CLA distributed £3.5 million to non-British right holders. In the 1999-2000 financial year, the US Copyright Clearance Center, which represents 9600 US publishers and tens of thousands of authors, collected US\$79 million and distributed an estimated US\$57 million to its own national right holders.³⁸ The conclusion: the publishing and copyright picture in a country such as Senegal or Zimbabwe bears no relationship whatsoever to that existing in the UK, the US, or even South Africa. The RRO model simply does not fit in less developed countries; it is an artificial transplant from a qualitatively different publishing climate. In fact, there is so little enthusiasm for the RRO model in other parts of Africa that Kenya's Kopiken or Zimbabwe's Zimcopy, the two other African RROs and both established in 1995, did not make a single financial reprographic collection during their last financial year according to documents published on their websites.³⁹

If the above analysis is not sufficient reason to reject the idea of exporting the RRO model to least developed countries of Africa (or elsewhere in the South), the experience with the RRO model in developed countries should provide further warning. The so-called 'blanket licences' that RROs usually offer to users do not include such key educational requirements as the distribution of non-profit student course packs – extra royalties are added for such materials – and the users, such as schools and universities, bear most of the expensive transaction costs of administering such schemes.⁴⁰ Devoting already scarce educational resources within poor countries to the administration of such schemes on behalf of foreign right holders simply does not make economic sense; such schemes have extremely high transaction costs.

Table: RRO Activity in the Developing World

Country	Name	Incorporated	1st collection	1st distribution
Argentina	CADRA	2002	none reported	None reported
Chile	SADEL	2003	none reported	None reported
Colombia	CEDER	2000	none reported	None reported
Jamaica	JAMCOPY	1998	2001	None reported
Kenya	KOPIKEN	1995	2000	None reported
Malawi	COSOMA	No information available		
Mexico	CEMPRO, SGC	1998	2002	2001 (small)
Nigeria	REPRONIG	2003 (operating)	none reported	None reported
Singapore	CLASS	1999	2002	None reported
Trinidad	TTRRO	1995	none reported	None reported
Uruguay	AUTOR	2004	none reported	None reported
Zimbabwe	ZIMCOPY	1995	none reported	None reported

³⁸ Interestingly, the posted CCC's documents do not state how much was distributed to non-US right holders.

³⁹ Repeated attempts to contact both organisation and discuss their operations were unsuccessful.

⁴⁰ Alan Story, 'The Heck with HECA: a critical analysis of the UK's Higher Education Copying Accord', in K. Brunstein and P.P. Sint, eds. *Information property, intellectual property and the new technologies* (Austrian Computer Society, Vienna, 2002). As a result of the 13 December 2001 decision of UK Copyright Tribunal, the CLA will now be required to include the provision of course packs within the blanket licence it offers to British universities and colleges. See more in this dossier, see section 4.6.

Denise Nicholson's extensive writings on the situation in South Africa⁴¹ further expose the severe access problems such schemes create, especially for poorer students; the problems that illiterate persons face because of the RRO model (and restrictive copyright legislation) should also be noted. Finally, as textbooks make up approximately 90 per cent of book publishing in Africa and as such texts are relatively inexpensive, wide-scale photocopying and distributing of infringing copies of African-produced textbooks is not a serious problem today. It would be difficult to reproduce photocopied texts more cheaply than the original; "it costs more to photocopy books than buy books", said Ghanaian publisher Richard Crabbe in a 2001 interview. As Crabbe also noted, his Ghanaian-based company depresses its prices further to a break-even basis for export to some of the poorest African countries. So the creation of a national RRO would not significantly increase the royalty revenues paid to African-based publishers for the photocopying (or other reproductions) of their own publications.

Exporting the RRO model to the South

Despite this, the IFRRO is rapidly acting on the 1996 International Publishers Association resolution, noted above, to create RROs in every country of the world; the main (almost exclusive) growth area in the intervening years has been in countries of the South. On the other hand, some of these national organisations still remain essentially 'shells', operated by a minimum number of personnel – perhaps only a single person – and with little public presence. Most have made few or no financial distributions and their financial records (at least those which are publicly available) do not permit any detailed assessment of their actual operations as is possible with more developed agencies such as South Africa's DALRO. Only one of the above new RROs has received any fees from RROs in another country; in its last completed financial year, CLASS (Singapore) received externally collected payments totalling €26.89. Still, WIPO is an active supporter of RROs and the organisational 'shells' that exist today could, in time, become more significant earners primarily for Northern rights holders. DALRO gives an example. In the case of DALRO, it made payments to other worldwide RROs (primarily for distribution to Northern publishers) of €404,573 in its last completed financial year, compared to €136,523.07 in 1999; this represents a nearly 300 per cent increase in less than 5 years. In its last completed financial year, DALRO received €25, 534.22 from other RROs, mostly, one assumes, for distributions to SA rights holders; this represents an increase of about €6, 000 over the same period. Conclusion: the disparity in the North/South revenue flow is increasing.

At the same time, there is a growing and co-ordinated PR campaign by international collective management organisations to propound the benefits of their services and systems; one example is the slick 2004 pamphlet, 'From artist to audience', jointly produced by the IFRRO, the International Confederation of Societies of Authors and Composers (CISAC) and WIPO.⁴² What is particularly significant is the emphasis this pamphlet puts on the benefits of collective management systems for countries of the South; of the 13 countries featured in 'From artist to audience', seven are located in the South (Nigeria, Malawi, South Africa, Senegal, Singapore, Jamaica, and Mexico). In this pamphlet, Nigeria's REPRONIG, which has yet to make a single distribution,

⁴¹ Available in Story, CIPR study, pg. 81.

⁴² Available at : http://www.ifrro.org/papers/booklet_wipo_cisac_ifrro.pdf

is given equal billing – in terms of space and layout – with the Copyright Clearance Center Inc. of the USA which collects millions of US dollars annually.

An impressionistic sense suggests that RROs currently have little presence in the collection of revenues in the South from Internet-based print revenues. It appears as if individual publishers collect such fees themselves through the use of technological protection measures (TRMs) in combination with digital rights management systems (DRMs).

At present, the revenues collected and distributed by RROs are far less than the revenues collected by various music-based collecting societies.

Creating ‘copyright cops’

RROs are primarily a creation of the photocopying era and constitute what one commentator calls ‘a ‘mass use’ (as opposed to a market use e.g. the direct purchase of a book) of copyrighted works.’⁴³ As this use is virtually *sub rosa*, it is “difficult for rights-holders to know where to start defending their interests.”⁴⁴ There still is a significant amount of unauthorised use in the South and the IFRRO, as well as organisations such as WIPO, are putting forward three messages that will rely heavily on representatives of users and those tasked within organisations of the South to police copyright (a.k.a. ‘copyright cops’).

- respect copyright and support authors (with little mention of the main beneficiaries, publishers);
- it is your responsibility (not that of rights holders) to pay the steep transaction costs involved in copyright clearance;
- it is your duty to enforce copyright laws.

The RRO model has the potential to create significantly increased revenues for rights holders, without any increased expenditures. As mentioned above, it is users who bear the principal administration costs of such schemes. The expansion of this model to the South is an attempt to enmesh such countries into the copyright web of commodification of knowledge and will, in time, generate higher revenues, primarily for Northern rights holders. In the North, both the term of copyright protection and the fees paid by existing RRO licensees are based, at least rhetorically, on what is considered the appropriate level of incentive that is required for the production of creative works. If copyright policy makers in the North were consistent, the increased revenues paid by users in the South – for the use of the very same works produced in the North and distributed in the South at no cost to rights holders – would lead to a conclusion that the copyright term and RRO fees in the North should be reduced. It is not a development we should anticipate.

⁴³ Paul Edward Geller, ‘Reprography and other processes of mass use,’ 30 Journal of the Copyright Society USA, 21, 1990.

⁴⁴ Ibid.

Collective management and Collecting Societies for music and sound recordings

Such organisations are increasingly important on a global scale and in the South; although comparative data is not available, we can safely conclude that they generate significantly greater revenues than reprographic rights organisations (due to the widespread dissemination of music and the greater market base – print RROs primarily collect from educational institutions. In addition, many music-based cultural industries make collections directly as is discussed in Section 3 of the dossier.

2.5 How much of this capital flow is related to copyright?

Even analysts writing for publications sponsored by the World Bank, and thus likely to be defenders of the status quo, concede that the costs of running a national IP system according to international conventions, especially in the forms taken after the 1994 changes to trade rules, is enormously expensive for developing countries, and results in a net outflow of capital.

Complying formally with the TRIPS Agreement imposes enormous costs on developing countries. Not only do they have to set up industrial property registries that many of them did not have before, but they also have to comply with the extensive enforcement obligations of the agreement (articles 41–61), which include border measures (articles 51–60) and criminal sanctions to combat piracy and counterfeiting (article 61). The high economic cost of compliance is, of course, compounded by the fact that these countries are net importers of intellectual property. In hard currency terms, then, compliance with the TRIPS Agreement brings about an outflow of foreign currency from developing countries.⁴⁵

The question then becomes whether these ‘enormous costs’ are recouped later by some hypothetical future benefits in the form of innovation. But another key question is how the net capital outflow is constituted, since such information would allow us better to evaluate claims of future benefit. Clearly the operations of the RROs, discussed in the preceding section, offer us some indication of how one mechanism operates in a relatively small sector with regard to copyright-related payments.

In the case of the South African organisation, DALRO, the Dramatic, Artistic and Literary Rights Organisation (Pty) Ltd., we have quite detailed figures for the amounts collected and distributed, published on the IFFRO website (already mentioned above). From these figures we can see that a very significant proportion of the fees collected have been distributed abroad.

⁴⁵ Coenraad J. Visser, ‘Making intellectual property laws work for traditional knowledge’ in J. Michael Finger and Philip Schuler (eds.), *Poor people’s knowledge: promoting intellectual property in developing countries* (Washington DC: World Bank, 2004), p.208, emphasis added.

FY 2002-2003	Amount in Euros	Amount in Rand	Percentage
Domestic fees collected		R7,918,722.52	
Fees remitted from abroad	E25,534.22	R222,944.93	
Total income		R8,141,667.45	100 %
Domestic fees distributed in SA		R2,148,387.80	26.4 %
Domestic fees sent abroad	E404,573.02	R3,532,416.01	43.4 %
Total distribution		R5,680,803.81	
Administrative overheads		Not specified	

But these amounts are relatively small and specific mainly to the higher education sector. In order to answer the question usefully and comprehensively, we would need systematically to quantify several factors. First of all, we should be able to specify with some accuracy what the total capital outflow in payments for IP rights is, from a specific country or set of countries, and in a specified time series. Ideally, this should also be related to the total contribution of the 'creative economy' or the 'copyright industries' to that country's GDP over the same period, and would include payments attributable to licenses for foreign patents, trade marks, and other forms of intellectual property. There is in fact data available for such an exercise, but there are some serious drawbacks, as Keith E. Maskus has pointed out,

[although] royalties and license fees are the most direct measure available of international earnings on patents, trademarks, copyrights, and trade secrets [... they] are imperfect measures of the value of technology exchange. Within a multinational firm, the fees charged a subsidiary may depend on international tax structures. Furthermore, optimal pricing of information is a complex problem, and receipts of license fees and investment income may be poor indicators of the economic value of intellectual assets.⁴⁶

This is clearly true, especially with regard to copyrighted products. In a country such as South Africa, which has a functioning publishing sector, foreign books can be brought into the country in several ways, by direct import of an overseas edition, by importing sheets to be bound up into a local edition under a local imprint, or by resetting the book completely. In each case, a certain proportion of the capital outflow would need to be isolated from other expenses in order to attribute it to IP rights.

Maskus has published selected data from the IMF's balance of payments statistics to quantify the flow of royalties and fees in selected cases. However, he points out that "many countries do not compile reliable and comprehensive data on such flows"⁴⁷ and so this kind of analysis is difficult. However, most of Maskus' analysis focuses on the effect that a strong national patent regime has on foreign direct investment in developing countries, rather than on copyright issues per se; his interest is mainly in questions of technology transfer. As he points out, 'intellectual property protection has taken on increasing importance to multinational enterprises.'⁴⁸

⁴⁶ Maskus, 'The role of intellectual property rights in encouraging foreign direct investment and technology transfer' in Carsten Fink and Keith E. Maskus (ed.), *Intellectual property and development: lessons from recent economic research* (Washington DC: World Bank, 2005), p.45.

⁴⁷ Ibid. p.43.

⁴⁸ Ibid. p. 62.

2.6 How 'national treatment' increases the net outflow of capital from the South

What is national treatment?⁴⁹

"The principle of national treatment," according to a leading international copyright lawyer, "has proved itself as the fundamental principle of copyright and neighbouring rights conventions for nearly a century."⁵⁰ A recent WTO dispute panel took a similar view as to the centrality of the notion of national treatment for international copyright relations.⁵¹ First proclaimed at an 1878 authors' conference that preceded the Berne Convention (the leading international copyright treaty) of 1886, the concept of national treatment became a key feature not only of Berne itself, but also of subsequent international intellectual property treaties and agreements, such as the TRIPS Agreement.⁵²

Sometimes labelled the principle of assimilation, national treatment means "the complete assimilation [for copyright purposes] of foreigners to nationals"⁵³ and has been defined as "a rule of non-discrimination, promising foreign creators who come within [a] treaty's protection that they will enjoy the same treatment for their creations in the protecting country as the protecting country gives to its own nationals."⁵⁴

Reduced to its basics, national treatment means equal treatment or equal protection by the laws of copyright to works owned by nationals and non-nationals alike. Here is how it works in practice: Assuming that countries X and Y are members of the Berne Convention (and given that there were 160 members as of January 2006, including all the 'major' countries in the world, this is usually a safe assumption), if a resident or citizen A of country X produces a work in X that is also used in country Y, the work of A must be protected in Y on the same legal basis as the work of writer B (who is a resident/citizen of Y) in country Y. To use the same example and apply it to the question of copyright duration/term, all works in Y – whether produced by A

⁴⁹ This article draws heavily upon Alan Story, 'Burn Berne: Why the Leading International Copyright Convention Must be Repealed,' 40 *University of Houston Law Review*, 763 (2003).

⁵⁰ Stephen M. Stewart, *International Copyright and Neighbouring Rights* (2d ed. 1989), p.42 (emphasis added). Other commentators have discussed the 'pervasiveness' of the principle of national treatment in Berne, as evidenced by the fact that there are only three exceptions to national treatment in Berne), stated that 'border-preserving rule of national treatment remains the cornerstone of Berne and its successor agreements' and concluded that national treatment provides 'the basis' of Berne, as well as of the Paris Convention which deals with patents and trade marks.

⁵¹ See WTO Appellate Body Report on United States – Section 211 Omnibus Appropriations Act of 1998, §240–242, WTO Doc. WT/DS176/AB/R (Jan. 2, 2002).

⁵² Article 3, TRIPS Agreement (stating that member nations shall treat each other equally 'with regard to the protection of intellectual property').

⁵³ Stephen P. Ladas, *The International Protection of Literary and Artistic Property*, Vol. 1 (1938) p. 365.

⁵⁴ Paul Goldstein, *International Copyright: Principles, Law and Practice* (Oxford: Oxford University Press, 2001), p. 72.

or B – must have the same duration of copyright in Y (for example, life of the author plus 50 years, or plus 70 years (e.g. in the US or the European Union) or plus 100 years (e.g. which Mexico has recently done under US pressure).⁵⁵

As for the philosophical or political justification, national treatment is viewed as being “in accord with the ideal of international law that all men [sic] are equal before the law, regardless of whether they are nationals or foreigners.”⁵⁶ So, on one level, the concept of ‘national treatment’ appears to be promoting the laudatory values of equality and non-discrimination, especially against non-nationals. However as the US Supreme Court concluded in another context, “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”⁵⁷ In one 1966 International Court of Justice case, a judge recognised that if a valid case can be established for what is called ‘differential treatment’, a court must necessarily, as a matter of justice, take steps to act on this difference; as Judge Tanaka wrote: “To treat unequal matters differently according to their inequality is not only permitted but required.”⁵⁸ Berne Convention jurisprudence, however, rejects this approach. As a result, here is what the concept of ‘national treatment’ means, in practice, for all countries of the South: for the country of Tanzania, for example, all cultural goods (fiction, films, etc.) which are produced either domestically, regionally (say within East Africa) or in any country covered by the Berne Convention (e.g. USA, UK, Japan) must all be treated alike for copyright purposes, no matter how different are the conditions in which they are produced, the importance of the works, the national priorities set for their use, etc.⁵⁹

To conclude: What international copyright regimes attempt to do is reduce and homogenise all forms of cultural production to a single, one-dimensional property phenomenon, that is, to a capitalist commodity, and then proclaim the essential equality of all commodities in the global marketplace. All other aspects or characteristics of such production are neglected, indeed suppressed. From this we can draw two basic conclusions: *First*, it is incoherent to argue that countries of the South must, for copyright purposes, recognise within their own borders the formal legal equality of all cultural and artistic creations produced across the globe when, on so many other dimensions, there is extreme inequality and disparity in the conditions of production and use across the globe. *Second*, national treatment does not work in the interests of countries of the South, but rather reinforces the power of rich industrialised countries and their rights holders. Laws mandating national

⁵⁵ Note: On the question of duration, the EU does NOT actually follow this practice; it does discriminate against countries that do not have the same high standard of life of the author, plus 70 years, but this is an issue beyond the scope of this section.

⁵⁶ Stewart, op cit. at p. 38.

⁵⁷ *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

⁵⁸ *South West Africa* (Dissenting Opinion Tanaka), Second Phase, Judgement. ICJ Reports (1966) 6, at p. 306. As Judge Tanaka explained on pp. 303-304: “The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.”

⁵⁹ There is an exception that may be used in certain special cases, the so-called Berne Convention ‘three-step test’, but it is of extremely limited use by countries of the South and beyond the scope of this section. See Section 4.12

treatment may encourage formal equality, but *reproduce substantive inequality*.⁶⁰ Indeed, it is the private intellectual property rights of the richest nations and richest rights holders that are one of the leading sources of the current inequality between rich and poor nations. It is in the very act of upholding and enforcing these private property rights that these inequalities are deepened.

The economic effects of 'national treatment' on the South, especially with regard to capital flows

For copyright-protected cultural goods produced in rich industrialised countries (and this is where the majority of such goods are produced globally, as was detailed in Section 2.2) and used in the South, the 'national treatment' requirement ensures that, at least in terms of copyright, such works cannot be subjected to any tariff-like protection favouring or giving an advantage to domestically-produced goods. Thus, to take one example, the collection and flow of copyright royalty payments is unencumbered. Indeed, the 'national treatment' approach very much acts on a borderless, 'the whole world is one market', and pro-globalisation orientation. For example, a country in the South might decide that, to build up its own domestic cultural industries, it would need to give privileged treatment to domestically-produced goods. Or such a country might decide that translation of (or into) certain languages should get favoured treatment. Or such a country might decide that 'fair dealing/fair use' copyright provisions might operate differently for domestic vs. foreign works. Or, to give a final example, a country in the South might decide to have different policies re: payment to collecting societies for domestic copyrighted goods compared to foreign goods. 'National treatment' would, at least in theory, block any of these policy options for a country in the South. (However, as there is very little jurisprudence on such issues, it is difficult to say for certain how a WTO dispute settlement panel would rule on such issues.)

Conversely, cultural goods produced in the South and used in the North gain little from 'national treatment' in the North because there is – for a wide number of reasons – a relatively small market in the North for such goods. And if 'national treatment' is not followed for Southern-produced goods in the North, it is unlikely that Southern creators would know about such discriminatory treatment or have the resources to challenge it.

In the same vein, it needs to be appreciated that when a country such as Mexico raises its duration of copyright to life of the author, plus 100 years (this means that if a work is produced in 2005 and the author dies in 2055, copyright extends until 2155 – or 150 years after publication) and when it is required that Mexican and non-Mexican authors get equal protection, it will be *non-Mexican authors* that will be the main beneficiary of such protection. Why? Because they are so much more numerous

⁶⁰ Speaking about the conditions existing in Paris in 1894, Anatole France wrote, in his well-known phrase, that it is "the majestic equality of the laws, which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." Anatole France, *The Red Lily* 95 (Winifred Stephens trans., 1930) (suggesting that if 'unalikes' face equally enforced laws, enforcing laws that go to the very nature of their 'unalikeness' or difference result not in equality but substantive inequality).

and produce far more economically valuable works. Indeed, this is why the US put pressure on Mexico during recent free trade talks to extend its copyright duration.⁶¹

The overall result: cultural goods which are already more economically valuable and in demand (e.g. US soap operas in Latin America) will be the main beneficiaries of national treatment; the biggest producers of copyright-protected works have far more intellectual property to protect.

⁶¹ For more on duration of copyright, see Section 4.2.