

SECTION 3 – PRIVATISING THE PUBLIC DOMAIN AND IMPOSING WESTERN/NORTHERN ASSUMPTIONS ABOUT CULTURAL PRODUCTION

3.1 Introduction

“The West has consistently sought to impose intellectual property laws on developing countries and indigenous populations with no notion of intellectual property as conceived in the West.”¹

The first two sections of the dossier have examined privatisation issues more generally as well as the global economics for the South of copyright and its accompanying ideology. In this section we turn our attention to questions centred on cultural production and the commonly-held assumption, championed by organisations such as World Intellectual Property Organisation, that – to put it most directly – *a community, a country, or a region cannot have significant cultural production without a strict copyright regime.... and indeed, the stricter the regime, the better and more diverse will be the levels of cultural production*, whether in music or art or any of the other myriad forms of cultural production.

This is certainly a widespread assumption. For example, the well-known US legal academic Larry Lessig begins one of his books, *The Future of Ideas*, with a brief anecdotal discussion of the work of a US documentary film director Davis Guggenheim. Lessig mentions “the ordinary and reasonable” role that the copyright system plays in the production of films and then, as one of his *operating premises*, writes that “without such a system we would not have anything close to the creativity that directors such as Guggenheim have produced.”² But as another academic commentator states in the quotation above, copyright is far from a universal phenomenon and imposing Western conceptions of copyright has a long history across the global South. Many ‘missionaries’ have uncritically accepted, spread, and reinforced the view that awarding copyright to creators is the necessary incentive – as well as the best incentive – required for the creation of cultural forms. This section attempts to challenge this view which, among other things, is a Western (or Eurocentric) conceit based on a narrow ‘centre-of-the-world’ mentality; it denies the many cultural forms in the South which have been created for centuries in the South without any concern as to whether such works were or were not protected by copyright laws.

Section Three begins with a brief explanation of the values infusing copyright regimes, such as individualism and the presumption that all cultural goods should be conceived, first and foremost, as mere marketable products. This section then provides a number of examples from across the South, including Asia, the Arab world, Africa, and among indigenous peoples, where traditional copyright

¹ Daniel Burkitt, ‘Copyright culture-The History and Cultural Specificity of the Western Model of Copyright’, 2001 Intellectual Property Quarterly, 186.

² Lawrence Lessig, *The Future of Ideas* (Vintage Books: New York, 2002), p. 3.

conceptions have certainly *not* been the incentive for the rich cultural production that exists. We then examine the question of so-called copyright 'piracy' and the quickening pace in which the public domain is itself being 'pirated' and privatised. The section continues by raising questions such as why we should doubt that copyright laws, which have served cultural workers, such as musicians, in the rich developed countries so poorly, will be of great assistance to the majority of musicians and other artists from the South. Other than a few 'stars' and a few multinational recording companies, who will benefit? Section Three concludes with a detailed look at how WIPO, the United Nation's richest agency, is relentlessly working to export the copyright system and its values to the global South.

3.2 The basic values and ideology of copyright

As a system, copyright is far more than a set of complicated domestic legal rules or the words contained in various international agreements and conventions. And it is also much more than a mere economic calculus used by the owners of copyrighted materials to accumulate wealth (or, sometimes by authors and artists, as a way of protecting and getting payment for their labour.) Rather, copyright represents one possible answer – and there are many alternative answers – to a wide range of questions: how do cultural, artistic, and literary objects get produced? By whom? For what reasons? And for whose benefit? Copyright thus represents a wide-ranging value system and it encompasses a set of philosophical justifications as to why this Western-based system should continue both to exist and to expand in its global reach and power.

The initial article in this section of the dossier examines what we are calling 'the values and ideology of copyright', namely, individualism, commodification, reward, and consumerism.³ In the case of countries of the South, they are values which are daily being transplanted and implanted by rich countries of the North to justify the overturning of long-standing and alternative approaches to cultural production that are discussed in later articles throughout this section.

Individualism

Individualism extols as valuable the creative effort of an individual⁴ and the protection of intellectual property, in this instance copyright, is seen as constituting a basic right of the individual.⁵ The justification for this approach is often sought from John Locke's theory of natural law positing that a person's effort or labour gives rise to an individual property interest.⁶ Locke's theory has helped shape individualism as

³ This is a brief and 'popular' treatment of what are a number of complicated philosophical and political questions. For further reading, see some of the articles available on the open access Kent Law School Intellectual Property Resource Pages at:

<https://www.kent.ac.uk/law/undergraduate/modules/ip/resources/Opening.htm>

⁴ M. A. Hamilton, 'The Trips Agreement: Imperialistic, Outdated, and Overprotective', in A .D. Moore (ed.), *Intellectual Property: Moral Legal and International Dilemmas* (Lanham, M.D.: Rowman & Littlefield, 1997), p. 243.

⁵ *Ibid.*, p. 258.

⁶ J. Locke, *The Second Treatise of Government*, edited by Thomas P. Peardon (Indianapolis: Bobs-Merrill, 1952), sec. 26–7, 44 [1690]; H. C. Hansen, 'International Copyright: An Orthodox Analysis' in, A .D. Moore (ed), *Intellectual Property: Moral Legal and International Dilemmas* (Lanham, Maryland, USA: Rowman & Littlefield, 1997), p. 267.

it is known today by annexing rights to personage, the result of which is to invoke ownership. The property right in the copyrighted work is said to arise out of the direct relationship between an individual and the creation. Indeed, copyright doctrine states that a song or a poem acquires legal protection only if it is the work of an identifiable author. Joint authors, but also identifiable, or an anonymous author may suffice in some circumstances, but authorship of some type is a pre-requisite. Moreover, it is not coincidental that the first article of the Berne Convention states that its sole purpose is “the protection of the rights of authors in their literary and artistic works.” Copyright is considered as having no wider social purpose or common goal, such as education or cultural diversity, and there is supposedly no other source of creativity except that of the individual author.

In France and in some other countries of Europe, copyright has an additional purpose, again a highly individualised one: the protection of the *droit moral* or the author’s moral/ personal right. Here what is at stake is not property or money or financial considerations which are the single-minded focus of the Anglo-American copyright system. Instead, what is being protected is the individual author’s personality. Derived from the writings of the continental European philosophers Hegel and Kant, this ‘personality theory’ or justification for copyright argues that all creative works produced embody (or personify) the spirit (or mind) of the individual creator. In fact, this theory argues that there is indivisibility’ between the works created and the person who created them. As a result, an ‘injury’ to creative works, for example, an unauthorised use or infringement, is considered an ‘injury’ as well to the individual creator’s personality; they are seen as a synonymous ‘injury’.

It is little wonder then that the rights and prerogatives of the individual author are, at least in theory, accorded such a central place in copyright law and ideology.

Commodification

Why are songs composed, books written, or photographs taken? There are at least two reasons, among others. One rationale is that such works express the creative urges and aspirations of individuals and of wider societies. They are produced to communicate thoughts, to solve problems, to teach others, to express ideas and feelings and emotions. Collectively, they are part of the common heritage and culture of groups, of communities, and of nations. A competing view or rationale is that songs and books and photographs are commodities produced for the purpose of exchanging them for something; they are property, albeit intangible property, created primarily for trade and for commerce.

The need for copyright laws is intimately linked with this second rationale, a process commonly known as ‘commodification’. The further linking of the production and use of creative expressions, such as books, with the mechanisms of world trade, was the underlying purpose behind the 1994 Agreement on *Trade-Related Intellectual Property* (italics added), popularly called the ‘TRIPS Agreement.’ As such, TRIPS represents the latest (and highest) stage in the commodification of the production and use of songs, books, photographs and a myriad of other literary, artistic and cultural objects that are copyrighted, both domestically and globally.

At first glance, individualism, the first copyright value explained above, and commodification may appear to be in conflict with one another. But in capitalist terms, the two perfectly compliment each other. Here is how the process works:

Commodification consists in the dissociation of goods from their producers in order to facilitate the passage of these goods into the stream of commerce. As a result, the creator of the product need not be the owner or distributor of that product. And so while the 'personality' of the individual is disassociated from the intellectual goods she or he has created, what happens, at the same time, is that the 'propertising' of ownership rights occurs under the *initial* (but usually not subsequent) control of a single individual; this process transforms a literary or artistic work into a commodity which can then be amortised in the marketplace by maximising distribution and hence, profits.⁷ In short, personality is converted into capital. Or to explain the process more fully, we need to appreciate that when intellectual property-based goods pass through the domestic and increasingly global channels of commercial production and distribution, they are stripped of the *persona* with which they were individualised when they were made. They are retailed merely as capital goods and usually as the property of some corporate or other commercial entity; they are not under the control of a single individual.

"Intellectual property laws with their epicentres in Washington, New York, Brussels, and Geneva travel like invisible tsunamis to developing countries. There they turn the national innovation systems of those countries into so much dust."

Peter Drahos, *Cities of Planning and Cities of Non-planning: Geography of Intellectual Property,* World Information- IP City Edition, November 2005.

Reward

As items of commerce, copyrighted goods can be exchanged for profit. But why are they created in the first place? The standard argument pro-copyright commentators provide is that, without the financial reward or incentives provided by copyright, such works would not have been created. In the same vein, establishing a lengthened duration for copyrighted works is seen as giving creators an increased incentive to produce works; as a consequence, they will supposedly create more and better works. So incentive as reward is a third integral tenet of the copyright scheme. (What is ignored, we note in passing, is that many of the greatest works of literature and art were – and are being – created without any reference to copyright incentives; one thinks of the many plays by the English dramatist William Shakespeare or dazzling Yoruba art from Nigeria.)

The result of this 'reward the creator' orientation is that society is held to be monetarily obliged to authors, composers, and artists. And this process is said to be linked with the quality of the products we can purchase and use for a price. To be rewarded, products originating from individual creators must supposedly be singled out on the basis of their quality; this is done by granting the owners proprietary rights over them.⁸ Ideally, unless the product can be said to be creative, it cannot

⁷ Akalemwa Ngenda, 'The Nature of the International Intellectual Property System: Universal Norms and Values or Western Chauvinism?', *Information & Communications Technology Law*, Vol 14. 2005, pp. 59-79.

⁸ Hamilton, *op cit.*, p. 245.

attract such reward. This operation has become the measure of appreciation and recognition in the eyes of copyright law, *vis. a vis.*, remuneration.

Consumerism

After visiting a book store or a music CD shop in a large North American or European city at Christmas time and seeing their overflowing shelves, one can certainly ask: do we really need 25 crime novels by the same author or 25 more CDs from the same band? Meanwhile, many valuable books we actually do need are no longer in print or are far too expensive... and certainly too expensive for the budgets of most people and most libraries in the South. Meanwhile, a great deal of good music that does not make it into the bland mainstream pop charts cannot be found. But making greater profits in the marketplace, not fulfilling human needs, is what dictates the marketing of copyrighted commodities. Twinned with this is another requirement: more and more and more and ever more books must be produced, marketed and sold.

At the same time, it is a common feature of consumer culture that the impetus for purchasing goods is more often than not largely motivated by reasons and purposes other than function or utility. As one commentator explains, "consumer culture is a particular form of material culture that... emerged in Euro-American societies during the second half of the twentieth century", continuing that "consumption is always a cultural as well as an economic process."⁹ Consumers can largely be distinguished from mere buyers in that the former chiefly buy "to sustain their sense of psychological well-being" or "to signal status."¹⁰ Copyright protection of the most promoted, the most fashionable, and the most 'talked about' song or movie or crime novel entrenches these values and consequently leaves consumers susceptible to be influenced through the market by those whose purpose it is to control and maximise profits.

In the current era, the link between consumerism and copyright is becoming ever firmer; as media theorist Herbert Schiller explains, "cultural production, in its basic forms and relations," is becoming "increasingly indistinguishable from production in general."¹¹

3.3 The differing traditions of cultural creation in the South

One of the central assumptions of Western copyright law and ideology is that the creation of stories or songs or artistic works requires a single author who conjures up works of literature or music or art through a stroke of individual genius. Such works are unique and original, it is claimed, and this approach to creativity, it is further claimed, is a universal one. First and foremost, such works must be commodities that are owned and produced for sale in the national and international marketplace. Hence, the need for a global copyright regime to

⁹ Celia Lury, *Consumer Culture* (Cambridge: Polity Press, 1996), p. 1 and p. 51.

¹⁰ See S. L. Winter, 'What Makes Modernity Late?' (2005) *International Journal of Law in Context*, 1(1) 61–80.

¹¹ Herbert I. Schiller, *Living in the Number One Country: Reflections from a Critic of American Empire* (New York: Seven Stories Press, 2000), p. 62.

protect authors and their individual copyrights because well, 'that's the way it's done in the West.'

Yet all across the global South there are many radically different traditions of creativity. Some stretch back many centuries. Others are widespread across entire regions, while others are more localised. Here are some examples, put together in no particular order and in rather eclectic fashion, which give a few artistic 'snapshots' rather than providing a comprehensive picture. More examples are found in the following two articles on Arab culture and the traditional knowledge of indigenous people.

The story teller of Peshawar¹²

The chattering comes to an intuitive halt; the room becomes motionless and an eerie silence envelops the air. Khan Baba steps in, unaided even in his old age, he is the embodiment of a proud Pathan.¹³ A pristine white beard flows from a face, wrinkled through age and physical hardship; his eyes though are a testament to his blazing spirit. A word is yet to be spoken; Khan Baba instead relies on his eyes to relay warmth. The bustling market seems to have sensed the occasion, the buses and the rickshaws seem no longer to be there. Khan Baba finally greets his audience, orders some tea and gets into an inane conversation with those around him; a veteran of the art, he teases the anxious audience. Finally he begins; it is going to be a story of passion and love, war and death, with a smile he adds 'about all the good things in life'.

This is the story of a story-teller, Khan Baba, who belongs to a dying breed of men, anxious to hold on to the last remnants of their heritage...storytelling. They ply their trade in the *Qissa-Kahani*¹⁴ Bazaar, in Peshawar, Pakistan which is located on the border with Afghanistan and which has, for centuries, served as the bridge between Central Asia, Persia, and India. It is in Peshawar that traders and travellers, men of science and men of war, travelling through the Khyber Pass and the Silk Route have stopped and relayed their stories for hundreds of years in tea shops dotted around the Bazaar. These tea shops are a relic to a bygone era, but even today they serve as an ancient repository of stories and memoirs. Khan Baba recalls the story of his grandfather who would die fighting the British in a bid to retain the 'smallest piece of land' in the whole region. This story of valour will probably never be written, not that Khan Baba would mind such a thing. He simply chooses not to care. To him a story can never simply be read, it must be listened to and then passed on through the generations. When it comes to these stories, there is no concept of ownership or of uniqueness; there is however a concept of sharing one's experiences and of imparting knowledge; for these stories are considered to be the collective wisdom of the Pathans. The story tellers consider themselves to be guardians of an ancient tradition, and by recalling the stories of their lives, and the lives of their forefathers, they keep their history alive.

¹² This is a personal account of a trip to Peshawar undertaken in August 2004 by a university student Ali Khan. Thanks to Ali for his contributions to this section (and others) of this particular article.

¹³ The indigenous people of Northwest Pakistan and parts of Afghanistan.

¹⁴ This literally translates into 'story and tale'.

Australian aborigines

Many different cultures and civilisations strongly believe that knowledge is something to be shared amongst all people and should not be confined to those who can afford to gain knowledge. The Australian Aborigines, for example, have no Western concept of originality. In aboriginal culture, art is not defined by originality, no matter how distinct it may be, but by the correct representation of ancestral traditions, known as 'the Dreaming.'¹⁵ The stories which constitute the Dreaming carry the truth from the past together with the code of Law, which operates in the present. The Dreaming consists of the natural world, especially the land or county to which a person belongs, and hence it is the person who belongs to the Dreaming and not the dreaming to the person.

In our ceremonies we wear marks on our bodies, they come from the dreaming too, we carry the design that the Dreamings gave to us. When we wear that Dreaming mark we are carrying the country, we are keeping the Dreaming held up, we are keeping the country and the Dreaming alive.¹⁶

The Masai warriors of East Africa

The philosophy of a collective pooling of knowledge through storytelling is shared by the Masai warriors of the African savannah. The Masai, like the Pathans do not seek to commodify knowledge and profit from its ownership. Rather, it is much more important that their stories are remembered and survive, even when they do not. This concept of authorship has evolved over thousands of years and has become an important vestige of Masai heritage.

It is only the story that can continue beyond the war and the warrior. It is the story that outlives the sound of war-drums and the exploits of brave fighters. It is the story that saves our progeny from blundering like blind beggars into the spikes of the cactus fence. The story is our escort; without it, we are blind. Does the blind man own his escort? No, neither do we the story; rather it is the story that owns us and directs us.¹⁷

Algerian raï music

The artist and the inventor often proceed from the work of predecessors. A good example of this type of artistic continuity is Algerian raï music. (Other examples are traditional and popular music cultures such as calypso, samba, and rap from Latin America and the Caribbean.) In writing about raï music, Bouziane Daoudi and Hadj Miliani emphasise "that the same theme may know as many variations as there are performers." The base is shared knowledge, which refers less to a repertoire of

¹⁵ The Dreaming tells of the journey and the actions of Ancestral Beings who created the natural world. The Dreaming is infinite and links the past with the present to determine the future. <<http://indigenoustralia.frogandtoad.com.au/story.html>>.

¹⁶ A Yanyuwa man from the Gulf of Carpentaria, Mussolini Harvey, describing the link between body painting and the Dreaming.

¹⁷ Chinua Achebe, *Anthills of the Savannah* (New York: Anchor Books/Doubleday, 1988)

existing 'texts' but more to a whole of social signs, such as *el mérioula*, *el mehna*, *el minoun*, and *e'har*.¹⁸

Raï has no true 'author' in the Western copyright sense of the term of 'authorship'. Until some years ago and before it entered the Western market, the singers 'borrowed' songs or choruses from each other. The public added words spontaneously to a song. Theft, pillage, and plagiarism of texts do not exist as far as these singers, known as the *chebs* and the *chebete*, are concerned. It is a form of music that depends heavily on influences from the immediate circumstances, period, place, or audience. Bouziane Daoudi and Hadj Miliani describe the raï as a "continuum of a strongly perturbed social imagination."¹⁹

"[t]he range of Western beliefs that define intellectual and cultural property laws... are not universal values that express the full range of human possibility, but particular, interested fictions emergent from a history of colonialism that has disempowered many of the world's peoples."

Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham, North Carolina, US: Duke University Press, 1998) p. 247

African music

Even when copyrights are applied in many non-Western cultures, it soon becomes clear that the ideology sustaining the system does not work when you consider the complexity of the creative process. In the Western world, there exists a sharp division between the composer and the performer in the case of music. This is not so, however, in African music, which according to John Collins, is usually associated with many more aspects than only the music. Thus, in this case, "royalty-accruing components...should, in the name of creative equity, be divided into four: the lyrics, the melody, the rhythm and the dance-step with the melody further divided into various contrapuntal or cross melodies and the polyrhythm into its multiple sub-rhythms."²⁰ However, this is not all: "in African performing arts the audiences often have a creative role too, as they chant, clap and perform dance-dialogues with the musicians." Obviously all of these elements change for every performance and, as a result, every performance is changed. It is clear that the individual allocation of copyrights cannot work. After all, "how does one measure the degree (and value) of 'originality' in a continually *reworked* piece of music?"²¹

The literature of China and Japan

Asian countries such as China and Japan both have long literary traditions in which copyright played no part. As one US intellectual property lawyer put it, "in Asian cultures, inventions are freely disclosed, copying is a high form of flattery, and the individual is subservient to the community."²² The title of a book by William P.

¹⁸ Bouziane Daoudi and Hadj Miliani, *L'aventure du raï: musique et société* (Paris: Éditions du Seuil, 1996), p.126-9

¹⁹ Ibid.

²⁰ John Collins, 'The problem of oral copyright: the case of Ghana', in Simon Frith (ed.) *Music and Copyright* (Edinburgh: Edinburgh University Press, 1993) p. 149-50.

²¹ Ibid.

²² Arthur Wineburg, *Jurisprudence in Asia: Enforcing Intellectual Property Rights*, 5 *University of Baltimore Intellectual Property Law Journal*, 1997, p. 25.

Alford captures the same sense: *'To Steal a Book is an Elegant Offence: Intellectual Property Law in Chinese Civilization.'*²³

Here, for example, is one view of the traditional Chinese approach. Since all artists are considered in Confucian philosophy to be a special breed within humanity, the ideals of originality must surely be universal. Are we then to say that someone who muses that *"I transmit rather than create; I believe in, and love, the ancients"* is not worthy of being an artist? This is a saying of Confucius²⁴ and it would be hard to deny that he was a creative genius or his work not worthy of being an original 'literary work'.

In traditional Chinese literature citing the ancients is the "very method of universal speech"²⁵ and the reproduction and copying of already existing work never had the same 'dark connotations' as it had in Europe or the United States. The same is true in Chinese painting and calligraphy. The artistic process was viewed as a spiritual one and the commodification of knowledge is a notion that is simply unacceptable in the Chinese tradition.²⁶

Another commentator explains that "inventing a product or authoring a work of art, is an accomplishment of the family and the community, and is expected to be shared. Advancing, learning, and creating works are in the public domain, and are not considered objects privately owned by persons. Asians traditionally learn by copying the wisdom of their elders and ancestors. Making money by writing a book is not considered an honourable endeavour for a learned person."²⁷

The idea of paid copyrights is also foreign to Japanese culture. Japan had to change its copyright law in 1996 under pressure from the US. The *International Herald Tribune* reported at the time that, "current Japanese copyright law does not protect foreign recordings made before 1971, meaning that Western record companies, by their estimates, are losing millions of dollars a year in royalties from the copying of tunes that are still highly popular." The headline of the article on this matter in the *International Herald Tribune* read: "US take music-piracy charge against Japan to WTO."²⁸ This is curious: a cultural difference (that is, a different opinion about how long rights should hold) has been interpreted as 'piracy'.

Tôru Mitsui explains that the basic conception of copyright has become familiar in Japan mainly through newspaper coverage of copyright issues concerning records, tapes, and computer programs. "But still the Japanese people do not take well to copyright, or more properly, to the idea of the individual right. Generally speaking, to claim one's right is regarded as dishonourable or undignified, especially when the right involves money."²⁹

²³ Stanford, Ca. USA: Stanford University Press, 1995.

²⁴ The Analects of Confucius. Translated by A. Waley (New York: Macmillan, 1938).

²⁵ Daniel Burkitt, 'Copyright culture- The History and Cultural Specificity of the Western Model of Copyright', 2001 *Intellectual Property Quarterly*, 177.

²⁶ Ibid.

²⁷ Wineburg, p. 26.

²⁸ *International Herald Tribune*, 10/11 February 1996.

²⁹ Tôru Mitsui, 'Copyright and music in Japan', in Simon Frith (ed.), *Music and copyright* (Edinburgh: Edinburgh University Press, 1993), p.141-142.

Indonesia and its culture

Across rural parts of Indonesia (where most Indonesians live), the governing laws are known as '*adat*' or customary law. Most such laws in the fourth most populous country in the world do not make a distinction between tangible property, such as land, and intangible property, such as that which might exist elsewhere in a book or song, and *adat* law "does not accommodate intellectual property law" and, for example, does not recognise the sale of intangible goods.³⁰ As a result, attempts to enforce copyright laws and their accompanying ideology are likely to fail in crafts such as batik; traditions of creativity are not the same in Indonesia as they are in Indiana. As one writer explains, " Indonesian traditional communities often create for reasons which preclude commercialisation. Some see their work as a symbol of dedication to art itself or a national treasure...Many local creators are happy to allow their works to be imitated and duplicated without their consent and are proud...if their works are copied, often because they believe that they have assisted the community in some way."³¹ For example, a singer of traditional Indonesian music was very happy when his music was copied en masse in 1997 and was reported not to be interested in launching a copyright infringement action.

3.4 Culture and creativity in the Arab countries

Because of its non-material (or intangible) character, the concept of intellectual property is a new and foreign one to most cultures across the globe. Intellectual property emerged with the development of industries that heavily depended on innovation; ideas were made more valuable than the materials that were used for disseminating and reproducing them. The concept of intellectual property is also closely related to the concept of individuality and capitalist-based societies that cherish individualism were responsible for introducing and adopting it. But traditional societies kept regarding it -and many still do – as a very strange and foreign concept.

Islam, for instance, emerged in a merchant society, where the concept of property was the basis of economic activity. Obviously, at this time, a merchant society was concerned with material property and the necessity of respecting this type of property has been stated in the Koran. By contrast, the concept of intellectual property is today subject to debate among Muslims because it contradicts community interests. As in other traditional societies, individual interests are secondary to those of the wider community. Such societies commonly consider knowledge as something that cannot be the private property of an individual and, moreover, that no one can or should prevent others from benefiting from knowledge.

Although intellectual property considers cultural production as solely an individual achievement, traditional forms of artistic expressions, such as those occurring in the Arab world, do not fit into this scheme. Here are a few examples:

³⁰ Simon Butt, 'Intellectual Property in Indonesia: A Problematic Legal Transplant', 24 *European Intellectual Property Review* 2002, 429, p. 434.

³¹ *Ibid.* p. 434.

- a) Lebanese folk poetry, known as Zajal, is performed in a public challenge between two groups of poets who improvise short poems satirising each other; each group bases its inspiration on a sentence presented by the opposing group. In this traditional competition, the creation involved is a collective process developed through dialogue.
- b) Traditional Arabic music, especially that which uses the 'Oud' (a kind of lute), is mainly based on improvisation during a live performance and is very similar to a conversation between two or more persons. Music is performed by a 'takht', a small group of musicians capable of improvisation on one theme. Each musician builds on what the last person played; the musicians wander, move away, and then come back to the main theme.
- c) In solo singing performances, a dynamic interaction arises between the singer and his or her public. A kind of musical listening emotion, called 'Tarab', creates a very special atmosphere which inspires the singer; this environment seems to be the main determinant of the success of the performance.

There are additional contradictions. Intellectual property is based on a clear definition of authorship, particularly individual authorship, and draws on, indeed establishes, a division of labour between creators (composers, performers, authors, etc.). This distinction is not, however, an adequate one for the actual process of creation involved in many forms of expression.

"Developed countries underestimate the degree to which local institutions, traditional ideas and social values will resist a wholesale acceptance and application of the philosophy of intellectual property rights...."

Ruth Gana, 'Prospects for Developing Countries Under the TRIPs Agreement', 1999, 29 Vanderbilt Journal of Transnational Law, 774.

Creative works are produced by finding inspiration in previous works and by borrowing various phrases and expressions from them. In such cases, the Western conception of authorship is not an accurate or applicable one. During improvisation, Arab musicians recall musical phrases from a common heritage, found either in the public or private domain. Putting limitations and restrictions on this kind of inspiration by the privatisation of this heritage could lead to sterilizing the creative process.

Modern forms of expression began and flourished in Arab countries by borrowing from Western productions. Theatre, for example, was not part of the Arab tradition and began in Arab countries by translating and adapting French and English plays. Many Egyptian movies were inspired or directly adapted from American films of the 1940s and 50s. Caricature developed in Arabic newspapers by borrowing figures and scenes from one another or sometimes from Western newspapers. These borrowings were integrated in the Arab culture, thereby helping it to renew itself.

Some works are considered by a society as a common heritage, even though their creator is still alive. For the Palestinians who have lost their country, poems are the main expression of their national identity; the poems of Mahmoud Darwiche, for instance, played a major role in the construction of a national consciousness. His poems constitute a common heritage and are told by nearly everybody at any occasion. Many composers put his poems into their musical works without even

asking for the consent of the poet who, in turn, never asked them for any royalties. To make such claims would be considered rather unethical. When the poems of Mahmoud Darwiche are put into music and sung by Marcel Khalifah or any other great Arab musician, this process results in increased popularity for both the poet and the composer. The personal benefits are shared by both the composer and the poet and this seems to be enough to motivate them to further creativity. Furthermore, if the primary motivation for creation is the diffusion of a message, the objective is far better achieved without imposing intellectual property rights and restrictions.

Copyright is *not* a pre-condition of creativity

In fact, we can say that copyright law is not a necessary pre-condition for creative works to be made. Nor are Western conceptions transferable because the context is very different. In the Arab tradition since the pre-Islamic period, poetry was usually subject to public competitions and performances without any financial incentives available. In the contemporary period, publishers in the Arab book industry often omit to pay royalties to authors whose works they have published. In order to avoid paying 10% to 12% of the proceeds which are due to the author, the publisher does not declare the actual number of reprints that have been made. Although writers often complain justifiably about the dishonesty of publishers, this does not discourage them from writing and editing. Even a famous writer like Nagib Mahfouz needs to have a regular job and a salary; he cannot live from the proceeds of his work, although many of his books have been turned into very successful films. Even though royalties paid to authors are small when compared to other kinds of royalties, especially those available from translation work, intellectuals prefer writing their own works rather than translating works written by other authors. In other words, they prefer seeking 'fame' instead of monetary rewards.

Meanwhile in the music sector, it is impossible to stop widespread 'piracy'. Some Lebanese musicians put their recordings on the market at a very low price so that they can be certain that the musical quality of the recording remains acceptable. Yet even this practice does not succeed in restraining the market for illegal copies. The operation of the music industry reveals in other ways how the copyright system is simply not working in Arab countries. Because the Arabic music market is monopolised by a small number of producers, the majority of creative musicians and composers produce their work at their own expense and on their own initiative. They alone are the ones who bear any financial risks. Once the work is completed and recorded, they then sign a contract with a distributor to sell their recordings. As a result of this arrangement, the distributor gets all the benefits and has exclusive control over the number of copies reproduced and sold. In fact, it would be foolhardy for Arab composers and musicians to rely on the sales of their CDs as a way to make a decent income. Instead, they can only count on the income which is gained from public performances of their works.

The establishment of a branch of the Societe des Auteurs, Compositeurs et Editeurs de Musique (SACEM) in Beirut, the heart of musical life for the Arab market, has not improved the economic situation of musicians. Since it was impossible to collect royalties every time music was played, SACEM decided that it made more sense to charge television and radio stations and restaurants a fixed amount of money each year for the right to broadcast and play recorded music. Yet, despite this system, only

two of the eight television stations and only a few radio stations actually pay royalties due to SACEM; restaurants, which play music to attract Arab tourists, never pay their royalties. Thus, after subtracting SACEM administrative expenses and dividing the money between composers, authors and musicians, the artists get very little of what they are supposed to get and certainly not even enough to cover the expenses for registering a single new song.

Restricting artistic expression

Additionally, the copyright system restricts the communication of intellectual works and artistic expressions within the Arab world. Examine what happens in the Arab publishing market where translations are rare. A recent Human Development Report published by the United Nations Development Programme states that only 330 titles are translated per year for the entire Arab market. Arab publishers say that royalties they are required to pay to Western publishers are far too high in comparison to the price of an Arab book.

There are other problems and contradictions. In 2003, the famous Lebanese composer Gabriel Yared was hired to create the musical score for the motion picture 'Troy'. However after Warner Bros., the American movie studio, rejected his musical score, the company refused to allow Mr. Yared to finish mixing and producing his score; as a result, the score is not available for purchase by the general public.

Training and learning in other cultural fields are also hampered by copyright restrictions, once again linked with financial constraints. Students in the Lebanese audiovisual schools cannot afford to pay royalties for the use of audiovisual archives needed for their graduating projects.

We can conclude then that existing intellectual property regimes, and copyright in particular, reinforces the market power of cultural products owned and packaged by large corporations and, in the process, seriously damages creativity and diversity in production in the Arab world. The large Arab-owned corporations which dominate the musical market here can afford to challenge piracy, to pay royalties to Western entertainment conglomerates, and to hire performers at very high prices. The Lebanese musical sector, by contrast, simply cannot compete and, as a result, three large Arab corporations have a stranglehold over musical production. In fact, due to the widespread pirating that is now occurring, producers often refuse to produce a work unless they can be assured that 100,000 copies will be sold within weeks of it first appearing on the market (in other words, before the illegal copies invade the market). This system kills all the artistic creation to the sole benefit of very popular and mass music.

These corporations have monopolized all the stages of production, from creation, to distribution and to broadcasting. They produce video-clips, own TV channels, organise shows, finance stars, recruit programs, and create a vertically-integrated chain that it is very difficult for 'outsiders' to break into. At the same time, these large media corporations create and shape the tastes of the audience by imposing American style and out-of- context products, leading artists to have unrealistic dreams – unrealistic except for a very few – of individual success. They have power to impose their terms and conditions on the artists and to eliminate whoever they do not want. They also corrupt artists with extraordinary and disproportionate amounts

of money. There are no limits or controls on these enterprises and no requirement to protect creative diversity. The market is flooded by uniform and generally bland cultural products, usually at the expense of non-commercial artworks.

3.5 Traditional/indigenous knowledge and copyright: a complex issue.

Introduction

There are significant problems facing groups who seek to protect traditional knowledge in the contemporary information age. Thomas Greaves notes that “[t]he very cultural heritage that gives Indigenous peoples their identity, now far more than in the past, is under real or potential assault from those who would gather it up, strip away its honoured meanings, convert it to a product, and sell it. Each time that happens the cultural heritage itself dies a little, and with it its people.”³² While, as we will discuss later, it is not always outsiders who are attempting to commodify knowledge, in many cases, the appropriation of knowledge and culture is perceived by those trying to adhere to a traditional way of life as a new form of cultural genocide.

The United Nations declared 1993 the International Year for the World’s Indigenous People, giving indigenous peoples throughout the world a forum in which to raise concerns.³³ Indigenous voices raise concerns regarding the way culture is appropriated and the chasm between protecting culture and the commodification brought on by intellectual property rights. As Greaves points out,

Indigenous societies are seeking much more often to protect knowledge that identifies sacred lands and cemeteries, that locates sources of ceremonial and craft supplies, that draws on oral tradition and archaeological evidence to build a case for land claims, that preserves spiritual wisdom and ceremonies,

The Lies and Thefts Just Never End
*They came for our land, for what grew
or could be grown on it, for the resources in it,
and for our clean air and pure water.
They stole these things from us, and in the taking
they also stole our free ways
and the best of our leaders, killed
in battle or assassinated. And now, after all that,
they’ve come for the very last of our possessions;
now they want our pride, our history,
our spiritual traditions.
They want to rewrite and remake these things,
to claim them for themselves.
The lies and thefts just never end.*

Margo Thunderbird, Native American writer (1988)
quoted in Ward Churchill, *From a Native Son:
Selected Essays in Indigenism, 1985-1995* (Boston:
South End Press, 1996)

³² Thomas Greaves, *Tribal Rights*, in Stephen B. Brush and Doreen Stabinsky, (eds.) *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights*, (Washington D.C.: Island Press, 1996), p. 25.

³³ Michael Blakeney, ‘Global Intellectual Property Rights: Boundaries of Access and Enforcement: Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources,’ *Fordham Intellectual Property Media & Entertainment Law Journal*, 12, Spring, 2002, pp. 762-763.

and that accords respect for physical things and insights that should not be treated simply as grist for personal enrichment in the game of capitalism.³⁴

It is within this context that a discussion of intellectual property and indigenous knowledge must take place. The issues at stake are important both culturally and politically. While there is no single answer, it is the general opinion of the Copy/South group that copyright is *not* an appropriate form of protection for traditional artistic and cultural production. However, as the following example illustrates, some sort of protection is necessary.

Traditional music as the supposed 'Heritage of Mankind'

Back in 1996, a German rock group named Enigma had a hit near the top of the international pop charts for more than six months. 'Return to Innocence' sold more than five million copies world-wide, put the term 'world-beat' on the musical map, and even was featured as background music for advertisements promoting the 1996 Olympic Games in Atlanta. 'Return to Innocence', however, was NOT Enigma's original work and the background to this musical rip-off reveals a serious limitation of copyright for countries of the South, especially for indigenous groups.

Briefly, here is what happened:³⁵

A group of more than 30 indigenous singers from Taiwan was invited by the French Ministry of Culture to perform Taiwanese tribal songs at concerts across Europe. The French Ministry recorded the concerts and issued a CD which the German music magnate Michael Cretu (a.k.a. 'Enigma') heard and liked very much. He decided to use significant sections on his own musical recordings: to accomplish this, Cretu purchased the rights to this music from the French Ministry. When recorded by Enigma, this music was called Enigma's 'Return to Innocence'. As for the Taiwanese folk singers, they received neither recognition nor financial compensation; in fact, they were not even told about any of these dealings.

Under current copyright doctrine, what the French Ministry and Enigma did was perfectly legal, if morally abhorrent. Under 'classic' copyright theory (and the practice of the Berne Convention and TRIPS), a work cannot be protected unless it is original, fixated (i.e. written down) and created by individual (or perhaps by joint) authors. In the case of this Taiwanese musical work, it was not 'original' (in the Western copyright sense of the word), it was not written down as it arose from an oral story-telling tradition, and it was the product of a communal indigenous culture, and not as the 'romantic author' conception behind copyright theory suggests, the creation of a individual starving composer (or author) living in a garret. As Angela

³⁴ Greaves, op. cit., pp. 28-29. The effort to protect a broad range of rights over traditional culture is evident. See: Laurie Anne Whitt, Mere Roberts, Waerete Norman, and Vicki Grieves, 'Belonging to the Land: Indigenous Knowledge Systems and the Natural World', Oklahoma City University Law Review, 26, Summer 2001, pp. 701-743; Russell L. Barsh, 'Grounded Visions: Native American Conceptions of Landscapes and Ceremony', St. Thomas Law Review, 13, 127-154 Fall 2000, p. 127.

³⁵ For further details, see Angela Riley, 'Recovering Collectivity: Groups Rights to Intellectual Property in Indigenous Communities', 18 Cardozo Arts and Entertainment Law Journal 2000, 175.

Riley comments, “indigenous works fail to fulfil individualistic notions of property rights that underlie the structure of Western law...”³⁶

While the Taiwanese singers were ultimately credited for their contributions to ‘Return to Innocence,’ for them nothing like innocence was gained. The intent of the original tour of Taiwanese singers was to highlight a dying traditional culture and the fact this music was appropriated and commodified by western singers highlights the problems emerging around the issue of traditional knowledge.

Until recently, traditional knowledge was seen as a ‘raw material’ within the intellectual property system – part of the ‘common heritage of mankind.’ Traditional knowledge remained outside intellectual property laws because the commonly accepted property rights of patent and/or copyright did not seem to apply. Instead of thinking about the possibility that Indigenous groups might have alternative property models governing their knowledge, many simply assumed the knowledge shared with them by Indigenous groups was free for the taking. While attitudes are changing as a result of the growing resistance by Indigenous groups, there is still a sentiment that unless it can be defined as intellectual property then it is open for exploitation.

There are a series of important questions to consider. First what constitutes traditional knowledge? Who should ‘own’ this knowledge? How should it be protected if copyright and patent law is not utilized? We must also ask ourselves whether we should use the language of property to respond to a problem caused by extending property boundaries, or are there other ways? Furthermore, are we making a mistake by using a romantic idea of the community? These questions and others are important when framing the issue of traditional knowledge.³⁷

Avoiding essentialist approaches

As we discuss traditional knowledge, it is also important to avoid essentialist claims regarding the relationship of traditional knowledge to the North. (That is, we must *not* use an analysis that assumes all issues and all claims can be fitted into neat and fixed boxes or categories.) Generally speaking, the issue of traditional knowledge is framed as one where rich countries appropriate the knowledge of poor countries, which certainly takes place as the ‘Return to Innocence’ example above illustrates. However, focusing exclusively on ‘biopiracy,’ where rich countries appropriate the wealth of the poor, allows us to disregard the fact that there is a larger debate over the commodification of knowledge taking place within indigenous communities themselves; they are not of a single mind about what should be done. Appropriation of traditional knowledge also takes place among traditional communities as one sector of the population chooses to commodify something that others seek to retain as uncommodified.

Furthermore, we should avoid the essentialist view that there is no innovation going on in the South. When one speaks of traditional knowledge in the global South, the

³⁶ Riley, op cit. 177-178.

³⁷ Michael Brown provides a thoughtful analysis of the dilemmas surrounding the issue of intellectual property and traditional knowledge. See: Michael F. Brown, *Who Owns Native Culture?* (Cambridge and London: Harvard University Press, 2003)

underlying assumption tends to be that innovation happened thousands of years ago with cultures remaining in a sort of stasis since that time. Rosemary Coombe offers a description of this common assumption:

According to Fitzpatrick, it is one of modernity's myths that others live in worlds of static, uniform, and closed systems of meaning, whereas 'we' (a European, literate, and propertied male 'we' in many cases) occupy a world of progress, differentiation, and openness. This 'white mythology' assumes that the West has law, order, rule, and reflective reason, whereas others have only violence, chaos, arbitrary tradition (mindless habit), or coercive despotism to govern social life.³⁸

However, innovation is on-going in the South, especially in areas covered by copyright, the subject of this dossier.³⁹ Innovators in the global South may have a different relationship with copyright and the underlying values associated with intellectual property which obscures from view much of the innovation taking place because it has not yet been appropriated into the commodity structure of intellectual property.⁴⁰

One must also be aware that the politics of indigenous communities is complex and it is not necessarily the case that governments within the global South speak for the indigenous communities within their borders. Furthermore, indigenous cultures exist throughout the developed world and are largely ignored in the debate over copyright happening in these countries. The complexity of sovereignty questions makes it difficult to know who speaks for traditional communities. Commodifying traditional knowledge can, for example, be used as a vehicle for bringing revenue into a country.⁴¹ States in the global South may seek to appropriate traditional knowledge to support their own economic goals and it must remain clear that states do not always speak for the indigenous communities within their borders. For example, organizations like African Renaissance tend to focus on how to best exploit African traditional knowledge and avoid bio-piracy.⁴²

The lack of clarity at the state level may be one reason the World Intellectual Property Organisation (WIPO) has become one focal point for discussion of traditional knowledge issues.⁴³ WIPO has provided a forum for indigenous communities to come together and speak to each other outside the 'official' positions of their nation-states. While discussions in WIPO are still framed by property

³⁸ Rosemary Coombe, 'Contingent Articulations: A Critical Cultural Studies of Law,' in Austin Sarat and Thomas R. Kearns, (eds.), *Law in the Domains of Culture* (Ann Arbor, Michigan, USA: University of Michigan Press, 1998), pp. 25-26.

³⁹ While patent-related claims are also important, they are not the focus of this dossier.

⁴⁰ Akalemwa Ngenda, 'The Nature of the International Intellectual Property System: Universal Norms and Values or Western Chauvinism?' *Information & Communications Technology Law*, Vol 14, 2005, p. 59-79.

⁴¹ Lakshmi Sarma, 'Biopiracy: Twentieth Century Imperialism in the Form of International Agreements', *Temple International & Comparative Law Journal*, 13, Spring 1999, p. 109.

⁴² 'The Simmering Debate on Intellectual Property in South Africa,' *The African Times*, Vol. 15, September 30, 2002, p. 19.

⁴³ Rosemary J. Coombe, 'Sixth Annual Tribal Sovereignty Symposium: The Recognition of Indigenous Peoples and Community Traditional Knowledge in International Law,' *St. Thomas Law Review*, 14, Winter 2001, pp. 275-276

considerations, bypassing the nation-state and allowing for indigenous communities to speak directly to each other has provided these groups with an opportunity to articulate their concerns with the concept of intellectual property and seek measures to protect what is called 'traditional knowledge' from appropriation as public domain knowledge.

Four possible strategies being considered

A tension exists in the global South regarding the use of intellectual property to protect goods. This tension suggests that there is no common answer as to how the global South views traditional knowledge or how it should be used or protected. The following are all strategies, or possible strategies, used by the global South to protect what they see as their traditional knowledge.

First, indigenous communities may appropriate the language of intellectual property. During the recent World Summit on the Information Society (WSIS), for example, people from indigenous communities were asking for more protection because their intellectual property was being appropriated. Thus, indigenous groups adopted the language of their enemies in an effort to solidify their own forms of protection. However, as one participant at the Copy/South workshop in August 2005 noted, many of these traditional representatives were paid by western governments to push for a stronger intellectual property agenda.

However, in many cases it is too late to resist the commodification of knowledge since many indigenous peoples have already seen their culture and science appropriated. Thus, a *second* strategy could be developed to deal with these issues. In this case, agreements must be reached regarding how knowledge is used and profits will be shared. It is important to distinguish between outsiders appropriating knowledge as part of what they perceive to be the 'public domain' and insiders using knowledge to further innovation within the context of the culture. Intellectual property laws can be helpful in creating a barrier to outside intervention while attempting to protect a common good on the inside. It is possible to appropriate the idea of copyright to create what David Bollier calls "property on the outside, commons on the inside."⁴⁴ The idea behind Bollier's statement is that one can utilize the language of property rights to protect a commons from the exploitation of commercial forces. Otherwise, while those within a commons may feel free to share their knowledge, they are easily exploitable by commercial interests who seek to colonize aspects of the commons.

However, translating traditional knowledge into property rights even while trying to critique a system of property rights has its own problems and, moreover, using the language of intellectual property to critique a form of commercialising knowledge will *not* lead to the best possible future. Whether the property right is individual or collective, the nature of commodifying cultural content will lead to the same problems of exploitation and the decline of what many cultures still hold to be sacred.

⁴⁴ David Bollier, *Silent Theft: The Private Plunder of our Common Wealth*, (New York: Routledge, 2003), p. 179.

Indigenous people argue that it is their cultural heritage and therefore they have the right to prevent monopolization by outside forces. Prohibiting access to knowledge and the free exchange of culture by creating new types of monopolies is certainly one strategy, but the larger problem is the ability to exclude others. Using the same tools and language as the status quo to exclude others does not solve the problem of barriers to knowledge.

On the other hand, 'the heritage of mankind' language is used to appropriate traditional knowledge for commercial exploitation leaving many feeling exploited. However, responding by monopolizing what was otherwise knowledge existing outside of property rights simply reproduces the problem. Claims rejecting the idea of intellectual property as yet another form of exploitation have been made by some seeking to protect the importance of traditional knowledge.⁴⁵ Another solution is necessary.

If we agree that the problem with intellectual property is that it excludes people, then the goal is to *avoid* reproducing this type of exclusion. The solution we seek is protection from being excluded. Extending the concept of property rights to group rights does *not* make the underlying concepts of property any better. The value that should be endorsed consistently across all forms of knowledge is that of non-commodified sharing. It is pernicious to put exchange value over use value and the copyright system puts exchange value over all other values.

We must avoid, therefore, what one Copy/South contributor aptly pointed to as the problem of 'King Midas'. For King Midas, everything he touched turned to gold and this reflects the problem of commodification. When everything is privatized (including money, life, and values), it turns otherwise non-quantifiable things into commodities. This value system is being imposed on other societies. Unfortunately, these other societies very often have their own value system that is more human and ecologically compatible, but they lose this culture and way of thinking because they adapt to the copyright system. Even discussing preserving traditional knowledge through a system of 'group rights' or 'collective property' is problematic because it introduces 'rights' and the commodification of culture into areas that may as of yet remain uncommodified.

A *third* strategy that could be taken by those interested in protecting traditional knowledge is to follow the observations offered here and avoid commodification altogether. Protection of traditional knowledge has emerged as a problem because copyright law is used to appropriate a previously uncommodified knowledge into the commodity structure. Resisting commodification altogether is a legitimate strategy; works of traditional knowledge, both scientific and cultural, should not be treated as commodities and thus should remain outside the profit structure. This

⁴⁵ Victoria Tauli-Corpuz, 'Biotechnology and Indigenous Peoples,' in Brian Tokar, (ed), Redesigning Life: The Worldwide Challenge to Genetic Engineering, (New York and London: Zed Books, 2001), p. 253. Tauli-Corpuz who works in the Philippines with the Indigenous Peoples' International Centre for Policy Research and Education argues that the views of Indigenous peoples on the issue of intellectual property are substantively different from other groups. Because Indigenous groups have long been marginalized by market-based economic systems it is difficult for many to believe that a system like intellectual property rights will be of use.

strategy fits with the way many indigenous peoples articulate their relationship to traditional knowledge and culture: as sacred and not for sale.

Finally, a *fourth* important strategy is to recognize that the model of mutual aid often associated with the culture and science of traditional knowledge *should be the model for the rest of the world*. Instead of seeking to wrap traditional knowledge into the package of western intellectual property laws, we should be actively trying to deconstruct and break apart the western notion of authorship, ownership in a fixed medium, or any medium at all. The model of traditional knowledge is that music, medicine, art, religion and science can be locally protected (and traditional knowledge is not without its property regimes, they are just very different ones); but proprietary values associated with contemporary intellectual property laws should be deconstructed. Instead of putting traditional knowledge into a western property model, we should begin putting western property into the traditional knowledge model, that is, a model which emphasises mutual aid and cultural sharing over commodification.

3.6 The criminalisation of copying in the South and the 'piracy' question

Introduction

The word 'piracy' is at the top of the agenda of many Western governments. In June 2005, for example, the European Communities circulated a 'Communication on the Enforcement of Intellectual Property Rights' (IP/C/W/448) that emphasised "the worrying evolution of counterfeiting and piracy worldwide." A March 2006 follow-up document fretted that enforcement measures provided under the terms of the TRIPS Agreement were not having the desired results and needed to be improved through increased surveillance efforts by Interpol, customs authorities, and other agencies. Curbing 'piracy' is rising up the agenda of some non-Western countries as well; in the latter case, their concerns are focusing on the 'piracy' of the work of Western stars and sometimes the 'piracy' is of the work of popular local artists. What are we to make of the so-called 'pirating' of copyrighted products?

Before we get into the question, however, one initial matter needs to be cleared up. Is 'piracy' the correct word to use to define this phenomenon? If not, why are the words 'piracy' and 'pirates' being used so widely by Western governments, large media corporations, the media itself, and others? To answer the second question first, we would do well to remember the words of noted African-American author Toni Morrison: "...definitions belong...to the definers-not the defined."⁴⁶ Calling people who use copyrighted works without the permission of their owners 'pirates' is a crude, but often effective, rhetorical device to cast such people as simply the contemporary version of the robbers and thieves who raided ships at sea in the days of sail and made off with chests of gold and other booty. Indeed, today's digital pirates are now often mentioned in the same breath as those other contemporary 'bad guys': terrorists. One media sociologist has shown how, in the pre- and post-9/11 era, the activities of the terrorists, counterfeiters, and intellectual property

⁴⁶ Toni Morrison, *Beloved* (London: Cahtto Windus, 1987), p. 190.

'pirates' were (and are) regularly linked together in police statements. Sociologist Nitin Govil gives numerous examples of such *unproven* claims, including: a) New York City's Joint Terrorism Taskforce claimed "that profits from counterfeit T-shirt sales – sold in the very shadows of the twin towers – helped fund the 1993 bombing of the World Trade Centre"; b) "British detectives claim that "Pakistani DVDs account for 40% of anti-piracy confiscations in the UK and that profits from pirated versions of *Love, Actually*, and *Master and Commander* funnel back to the coffers of Pakistan-based Al Qaeda operatives. "⁴⁷ Using the very language of 'piracy' conjures images of sea-faring, blood-thirsty brigands, who terrorise the innocent and are devoid of moral scruples... and links them to their supposed cousins who shoot down civilian airliners today. As for the answer to the first question, any serious student of copyright law knows copyright 'piracy' does not involve theft or any type of stealing; it is, at worst, unauthorised borrowing because the owner gets to keep the original work. In other words, 'pirating' a CD has *far different consequences* than stealing a car.

This article begins with a background on the criminalisation of copying, explains how the stakes are often quite different in the South, and then looks at some wider ramifications, including critical cultural implications, of copyright 'piracy.'

The criminalisation of copying

The criminalisation of copying and the war on 'piracy' will be familiar to many people in Western countries. Breaches of copyright were once matters largely handled by specialists and lawyers, and of little interest to us in the wider public. However, in recent years we've seen a relentless shift in which copying has been demonized, and become targeted with ever tougher criminal penalties. Well-known instances include the pursuit of those who use peer-to-peer (P2P) online file sharing networks such as Gnutella and Napster (when it was first established). We have been treated to the sight of corporate legal machines and police raiding parties let loose upon teenagers who choose to share their favourite music or video games with their like-minded peers and friends. This criminalisation process has been helped along by a slew of legislative measures against copyright 'violation' introduced by national governments and through international treaties and agreements, such as the Agreement on Trade-Related Intellectual Property (TRIPS) and the Council of Europe Convention on Cybercrime.

This criminalisation process has also taken shape through the appearance of a bewildering array of private bodies and interest groups, created by copyright-holding corporations, who have taken it upon themselves to act as both self-appointed police and 'moral educators'. They have unleashed a rhetorical onslaught aimed at curtailing copying by instilling fear and guilt: parents are told that their children need to be watched, in case they turn into hardened criminals in the privacy of their bedrooms; copiers are dubbed 'thieves', and consumers of copied material are accused of helping fund terrorism and organised crime.

Copyright holding corporations and their apologists will probably respond that the kinds of criminalisation noted above are an unfortunate necessity, and will 'merely'

⁴⁷ Nitin Govil, 'War in the Age of Pirate Reproduction', *Sarai Reader* 4, 2004, p.380
http://www.sarai.net/journal/04_pdf/50nitin.pdf

restrict consumers' access to leisure and entertainment if they are unwilling and unable to pay for it. From this viewpoint, limiting access to *Grand Theft Auto* video games or the latest *Coldplay* album hardly impinges upon individuals' fundamental rights or entitlements. The position around copying and criminalisation in the South, however, is often very different.

Consider one area in which the criminalisation process has gathered pace over the past few years, that of academic and educational publishing. Organisations such as the American Association of Publishers (AAP), proudly advertise their successes in staging armed raids against 'copy shops' in developing countries where textbooks and other materials are reproduced. Such raids have occurred in countries such as India, Malaysia, Pakistan, the Philippines, Taiwan and Brazil. For example, they report with satisfaction that "the owner of Chamunda Photocopy Center was arrested on the 5th of April, 2004 in Mumbai, and authorities seized 500 copies of medical books from the establishment." The AAP also recently wrote en masse to the Presidents of hundreds of South Korean and Malaysian universities, 'urging' them to stop on-campus copying of textbooks and other educational materials, and including in their missive the reminder that 'commercial copyright violations' can result in prison sentences of up to five years.

Such custodial sentences have also become increasingly commonplace as legal institutions in developing countries are exposed to

massive political pressures and their governments are threatened with trade sanctions and other penalties if they fail to uphold the copyrights of Western businesses. (Things are obviously not moving fast or hard enough for the AAP, who lament that "even in cases of conviction, the fines are too low and prison sentences are almost nonexistent".) The onslaught of criminalisation is justified by claims that copying is "irreparably damaging the development and preservation of our literary talents and heritage." Setting aside the question of who, precisely, is meant by 'our', we should note what is either repressed or denied by those who promote these 'anti-piracy' measures. According to the AAP's figures, the 'top ten' countries for monetary losses to book piracy include Pakistan, India, the Philippines, Mexico, Indonesia and Thailand.

This should come as no surprise, since one important thing they share in common is, quite simply, that all these countries are poor and struggling to attain economic and social development. They do so under conditions of gross inequality in trade relations with the advanced industrial world. The struggle for development and the lifting of large populations out of poverty has to be driven by investment in education and training. Lack of access to educational materials places a block on such

"If it is a sin for the poor to steal from the rich, it must be a much bigger sin for the rich to steal from the poor. Don't rich countries pirate poor countries' best scientists, engineers, doctors, nurses and programmers? When global corporations come to operate in the Philippines, don't they pirate the best people from local firms? If it is bad for poor countries like ours to pirate the intellectual property of rich countries, isn't it a lot worse for rich countries like the US to pirate our intellectuals?"

In fact, we are benign enough to take only a copy, leaving the original behind; rich countries are so greedy that they take away the originals, leaving nothing behind."

Roberto Verzola, 'Pegging the World's Biggest', 12 Earth Island Journal 41, 1997.

countries' ability to educate and train their populations, with the consequence of blighting the life chances of millions. Without medical texts it is impossible to train doctors and nurses who can provide health care in parts of the world where disease and ill-health often reach epidemic proportions; without access to scientific journals and books, they cannot train a generation of engineers who could design and build networks of clean water, sanitation, safe housing, affordable and sustainable transportation, and so on.

In short, what is lost to individuals and nations through the criminalisation of copying is nothing less than access to the means for living a safe, healthy and dignified life. It is worth remembering that the 'right to education' is upheld by Article 26 of the U.N.'s Universal Declaration on Human Rights. To deny access to the means of education through the criminalisation of copying is tantamount to denying this right, and the rights and benefits that flow from it, to all peoples of the South.

The wider ramifications of the 'piracy' issue in the South

Some of the many other issues related to copyright 'piracy' include:

1. One starting point when looking at the 'piracy' issue is to underscore the fact that it is the very act of 'pirating' Western-produced cultural products which makes these Western cultural products immensely more popular and available in many poorer countries than they otherwise would be. There are people who claim that such 'piracy' pushes aside, for instance, locally-made music from public attention and makes such music seem less important in the eyes of several layers of the population.

Is this an unexpected form of cultural imperialism? Perhaps this sounds exaggerated, but let's see what actually happens. In China, for instance, huge shipments of 'remaindered' CDs of the five big global record companies illegally enter the market. This import, called in Chinese *dakos*, has two remarkable characteristics. First, the market becomes rather quickly inundated with these illegal imports. It is unlikely that record companies have immediately 'remaindered' best-selling stars who would otherwise be bringing in large revenues for them. Second, at the edge of the CDs a notch has been cut. The idea behind this notching is to make them unusable, but this is only the case for a little bit of music on the CD. If there are merely remainders, would it not be more effective to cut them in several pieces? One might start to think that cultural industries have a vested interest in promoting their artists in parts of the world where people do not have the money to purchase 'legitimate' versions at 'normal' prices. Moreover, all that is 'forbidden' – in this case, buying 'pirated' CDs – is considered by many as making them more desirable. Unproven allegations suggest some that record companies may themselves distribute both legal CDs and so called cheap 'pirated' copies of the work of their own artists. Of course, not all 'piracy' originates from the big record companies. There are many entrepreneurs, as well as politicians, who make big profits out of something that is considered illegal by the law.

At the same time, we need to realise that there cannot be 'piracy' in societies where the individual appropriation in the form of copyright does not exist. Why

not? Everybody in the community has the self-evident right to use and adapt all works from the past and present creatively. If individual ownership has no currency, then there cannot be theft either. Therefore, in most non-Western cultures 'piracy' was an unknown phenomenon, at least until recently. Many cultures have been characterised by their ongoing processes of creative adaptation; otherwise those cultures would not exist.

2. The economics of copyright 'piracy', as well as who actually gets hurt and loses out, are often portrayed in misleading ways. In the first place, while the ideology of copyright suggests that it is a system designed to protect individual authors (the so-called individual struggling 'romantic author') most copyrighted cultural commodities are, in fact, owned under law by the employers of the people who create these works. (Or, alternatively, the copyright is acquired by corporations through contracts that are often one-sided as a result of unequal bargaining power...as many musicians have learned to their sorrow.) As one recent article concludes, "[I]t is abundantly clear that in the current era of industrial production of cultural commodities, copyrighted works are more often than not created by unromantic authors sitting in their cubicles creating for a large corporation like Microsoft."⁴⁸ In other words, most financial losses due to piracy do *not* result in losses by individual authors, but by corporations such as Microsoft. This same article goes on to explain how decisions are made about what books or CDs are 'pirated' and asks how sympathetic we should be towards those who may suffer not losses, but less profits than they expect to receive. "Clearly pirates respond only to a market demand, and not every book is pirated. There is a particular popularity or price limit that has to be achieved before it enters into the piracy circuit. Presumably, if a book has achieved a certain status that leads to it being pirated, its author is no longer poor and struggling. Thus, the sight of Madonna appearing in TV ads condemning piracy because it deprives her of her livelihood is not terribly convincing as images of her many villas and islands flash into one's mind."⁴⁹ As for Microsoft and its losses due to unauthorised copying of computer software, Bill Gates is the richest person on the globe.
3. We should also be suspicious of the accuracy of statistical claims as to the total losses resulting from 'piracy.' To continue with the example of software, powerful global organisations such as the Business Software Alliance, which represents a number of large multinational software firms, claim they have accurate and detailed profiles on country-by-country rates of software piracy...and hence of the losses they have suffered.⁵⁰ But such calculations start from the assumption that a consumer purchasing an illegal copy of software would necessarily purchase a legal version of the same software if 'pirated' software was not available as an alternative. Using the case of India, critics have pointed out the fallacy of such an assumption. They ask: "while we know that most computers in India have an illegal copy of Microsoft XP and Microsoft Office, can we assume that every user would be willing to pay an additional

⁴⁸ Lawrence Liang, Atrayee Mazmdar and Mayur Suresh, 'Copyright/Copyleft: Myths About Copyright', Infochangeindia.org, 1 February, 2005. <http://www.countercurrents.org/hr-suresh010205.htm>

⁴⁹ Ibid.

⁵⁰ The website of the BSA is <http://www.bsa.org/>

Rs23,000 for these two programmes alone, especially in the light of a free alternative in the form of Linux? Is it not likely that most users would not go in for the Microsoft software were it not for the fact that pirated software is available for free?"⁵¹

4. Without glamorising 'piracy' or arguing that it represents a conscious resistance to copyright laws and the values which they represent, we do need to recognise that so-called 'pirates', including commercial pirates, play a positive role in many parts of the South. They enable the distribution of low-cost technology, information and entertainment to millions of people who could not otherwise access or afford it. Moreover, many of these so-called 'pirates' participate in this informal information economy as a means of earning a livelihood. And look at the context: when many counties of the South have been subjected to centuries of economic exploitation by colonial masters, when millions of slaves were transported in slave galleys from Africa to pick sugar cane and tobacco (and with many dying en route), and with the rich biological resources of the South subjected today to a growing plunder known as 'biopiracy', we could first start *not* by condemning copyright 'piracy', but by asking why, in the so-called 'information age', Microsoft's Windows XP is being offered for sale in Beijing's Hailong Market at a cost of US\$ 245.00 (with logo and shrink-wrap)...and its copy can be purchased in an unmarked CD in the same market for a mere US\$ 5.50? Could it be that the officially packaged version is being sold at a price that bears no relationship whatsoever to the cost of producing it? And if the answer is yes, might this be one reason why Bill Gates is the richest person on the globe?

'(o)ne might say that one nation's
'piracy' is another man's [sic]
'technology transfer.'

*Peter Jaszi, A Garland of
Reflections on Three International
Copyright Topics, 8 Cardozo Arts &
Entertainment Law Journal 47, 63
(1989).*

3.7 The privatisation of common culture proceeds in the South, at a quickening pace.

It is happening more and more in recent years in non-Western societies that local artists privately appropriate an artistic idea or a melody or a cultural development originating from a collective tradition and then start to use it for their own individual commercial interests. They pretend – to others and perhaps even to themselves- that they are using 'my own idea' or 'my own song.' This pretence starts the process of excluding others from the use of these cultural resources and, in this transformation, the concept of copyright gets introduced rather quickly. Yet, the existence of this phenomenon should not be a reason for amazement. The commonly-held supposition that copyright can ---and does – support artists to make a decent living does not stop at the borders of the Western world. One may wonder what kind of tensions this transformation causes in local communities. In any case, once the private appropriation of cultural resources has started and is accompanied by the introduction of the notion of copyright, societies and their cultural lives are never the same as before.

⁵¹ Liang et al., *ibid.*

What has been described here in a nutshell covers the huge social transformations that have been taking place all over the world for the past few decades but, in the last years, have been going at a faster and faster pace. Although few seem to appreciate the impact, radical changes of cultures are at stake. The processes may appear to be automatic and self-evident happenings and hence not demand specific attention and analysis. We do know that the owners of copyright and those merchandising these cultural 'products' become the ultimate winners. It is *not* certain, however, that everybody is content with those transformations. What tensions does this bring about in different parts of the non-Western world? Are there counter movements that argue that the public cultural domain should not be hollowed out and swallowed up? What are their arguments? Where do they think a new balance should be found between the commons in the cultural field and the right of artists to make a living from their work? Hence, there is an almost wide-open research agenda.

Let's consider a typical situation. A local record company produces cassettes or CD's of the work of local artists. (In a larger country, this record company may also be active in the same region.) The distribution of this music and accompanying videos is local (or regional) as well. Let's assume as well that the system of copyright does not yet exist in this locale / region or it is very patchy. What are the kind of usual agreements between artists and producers that can be found in different societies? Are there any agreements at all? Does the production of a cassette deliver an income to artists or does it mainly generate publicity that may lead to live performances? What are the optimal conditions that make artists, as well as producers and distributors, content? And what happens when an artist feels that he or she has been treated improperly? Would a well regulated system of copyrights give him or her a stronger position? When does the claim arise that another artist must refrain from using, for instance, a certain melody? There are many questions then to answer.

Reasons for doubting copyright

From a Western perspective, one might be inclined to think that the introduction of intellectual property rights – and copyright in particular – would be of real assistance to artists. There are, however, several reasons for doubt. First, the state where the artist resides must be strong enough to provide legitimacy to collecting societies and to support their practical operations with an effective system of sanctions. This is not the case everywhere and certainly not in Lebanon as was explained earlier in Section Three. (Nor is it the case that the financial 'irregularities' and outright corruption which permeate some of these collecting societies are being properly investigated by governments in the South.) Second, there is an idea prevalent in the Western world that who is the creator (or who is the performer) of a musical composition is something that can be easily indicated and identified; such identification is a key building block for the present copyright system. In most cultures in the South, however, such a distinction does not exist at all. Third, most artists in the Western world do not profit from the existence of a copyright system; only a tiny minority get a substantial income from this rights system. (For example, a survey conducted in 2000 into the amount of income in royalties received by the 30,000 members of the UK Performing Rights Society is revealing: 200 members received more than GB £100,000, 700 members received more than GB£25,000, 1,500 received more than GB£10,000, 2,300 received more than GB£5,000 and a total of 16,000 members

received under £100⁵²; for comparison purposes, the average annual income of all British residents in 2000 was about GB£15,000.) Why would this be different in parts of the world where this system was recently introduced? Fourth, the present practice of copyrights aggressively privatises complete fields of creativity and knowledge development. This is highly disadvantageous for artists' future processes of creating and performing music.

Considering all of these facts, one may wonder whether artists would not be better off if they negotiated directly with producers and distributors and, as well, joined unions to make general agreements for the entire industry. Are there examples of best practices that indicate how a satisfying balance can be reached between the needs of artists and the public interest, while avoiding the introduction of the copyright system that, apparently, has more disadvantages than advantages?

More and more artists from non-Western countries are getting contracts with one of the big five globally-dominant record companies or with their sub-labels. If the work they record is distributed only in their own local or regional market, more or less the same questions will be on the table as those concerning the relation between local artists and locally operating record companies.

By-passing the 'star' system

The contract that changes an artist from a non-Western country into a 'star' with a global distribution system will not differ much from the contract his or her counterpart in the Western world has signed; this system incorporates all of the problems and objections that are inherent in the 'star' system. (It must be noted, however, that the negotiating power of an artist from Africa, Asia, Latin America or from one of the Arab countries is far weaker than it is for an artist from a Western country.) What is similar, as well, is that the prospective 'star' must obey all the procedures that govern anyone under contract with a multi-national record company: the music will be polished endlessly; the only purpose of concerts and tours is to promote a new CD; and all that is spontaneous should disappear behind the horizon. However, this process may affect the artistic work of a non-Western artist even more than it may affect a European or North American star. For these latter stars, his or her rhythm and tonality will stay more or less the same as it was in the local pub where they sang or played originally. It will be polished a little bit more; one may like this, or one may not. But compare this with the sound of the music produced by a non-Western musician. To sell and be popular, his or her music must encapsulate the proper blend of the 'exotic' with a sound that can be tuned in by the 'Western' ear – or what a producer thinks the 'Western' ear will like. So the change in performance and presentation may indeed be quite fundamental and, in the end, the musician may become quite cut-off and even alienated from his or her own cultural roots.

Despite this transformation, very little research has been done as to what happens to the music of non-Western artists once they come under the control of cultural conglomerates and their producers. This is not a nostalgic question. If musicologists

⁵² M. Kretschmer, 'Artists' Earnings and Copyright: A review of British and German music industry data in the context of digital technologies', *First Monday*, Vol. 10, No. 1, January 2005. www.firstmonday.org/issues/issue10_1

can investigate what kinds of influences have penetrated the work of, for instance, Bach, why are they absent when it concerns the major transformation processes that are taking place at the moment in music from the Arab world, Africa, Latin America or Asia as it is being adapted to – and transformed for – a global market? It should not be difficult to investigate those kinds of interventions. For instance, there are artists from the non-Western parts of the world that have two kinds of repertoire: one which they perform at home, and one which they present as a star on the world market. The comparison can be made quite easily. The research could be focused as well on what is current in the country or region of the artist him or herself, and how his or her work sounds and looks in the global context.

It is strange and regrettable that such forms of analysis are not what keep (ethno)-musicologists busy today.

3.8 Western cultural conglomerates and the global marketing of culture from the global South

In the ongoing process of globalisation, we see that Western cultural conglomerates (or their sub-labels) have started to use artistic material from non-Western cultures on a much greater scale than even a few years ago. One could suggest that this is a creative adaptation that should be stimulated and encouraged. Everybody should have the right to make even minor creative changes to a work as was tolerated and promoted in all cultures everywhere in the world. Does this mean that those forms of industrial creative adaptations do not have problematic aspects? The answer is no.

The main problem is that Western cultural conglomerates are exploiting cultural productions being derived from non-Western cultures while, at the same time, controlling cultural markets all over the world. They determine the character, the sphere, and the ambiances in which the work will be presented. As a result, there is seldom the normal kind of creative adaptation that takes place in an ongoing cycle of additions, changes, and cultural dynamics within a community. Here is how the current process can be characterised: after *we*, the giant cultural industries, get a firm grip on the work by owning its copyright, no creative adaptation will take place any longer, unless, *we*, cultural conglomerates, decide that it might or will happen, and moreover only under *our* conditions. Actually, this means that the cultural conglomerate alone decides what the work will be, now and in the future. This is completely opposite to the practice in all cultures that creative adaptations were the object of quarrels and enjoyment within a community and where nobody could say: this work and all its possible adaptations belongs to me forever. Another problem is that these cultural industries are *not*, by definition, respectful to the work they adapt.

By using the exclusionary powers granted by copyright, creative adaptation ends with the cultural conglomerates which have appropriated artistic material from non-Western countries. Copyright is the legal fence erected in the final phase of the creative adaptation. Moreover, the price of the works cultural industries have adapted and copyrighted is astronomical compared to what it costs them to take and distribute non-Western local cultures. The discrepancy between what they pay non-Western artists and what they receive in profits for their work is too great to be justifiable.

3.9 The role of the World Intellectual Property Organisation in spreading the copyright system and its narratives to countries of the South

Background on WIPO⁵³

The World Intellectual Property Organisation (WIPO) is a United Nations organisation based in Geneva. Established in 1970, it subsequently became the lead/specialised UN agency dealing with all intellectual property issues in 1974. WIPO traces its organisational roots to the *Bureaux Internationaux réunis pour la protection de la propriété intellectuelle* (BIRPI) which administered the two leading international IP agreements, the Paris and Berne Conventions, as well as other 'special' IP agreements. Most countries join WIPO through their membership in the Paris and Berne Unions. As of March 2006, WIPO had 183 members.

As for its finances, the proposed WIPO budget for 2006/07, as recommended for approval at the WIPO General Assembly in September 2005, was 531 million Swiss Francs (US\$416.71 million). Significantly, one of the few areas of recent budget increases has been the expansion of WIPO's programmes in countries of the South. Unlike other UN organisations, which receive most of their funding from the contribution of member countries, a very high percentage of WIPO's budget is derived from the services it provides and, in particular, from the filing and ongoing fees paid by patent holders who seek protection under the Patent Co-operation Treaty. In fact, a total of 80 per cent of WIPO's total budget is derived from PCT fees. As the total number of international applications for patents filed under the PCT has increased from less than 10,000 in 1985 to more than 100,000 in 2001, WIPO's revenues have also increased significantly in recent decades, especially since the enactment of the TRIPS Agreement in 1994. WIPO is the wealthiest UN organisation and appears likely to remain in that favoured position for the foreseeable future.

WIPO has two main objectives as set down in Article 3 of the WIPO Convention:

- to promote the protection of intellectual property throughout the world through the cooperation among States, and, where appropriate, in collaboration with any other international organisations; and
- to ensure administrative cooperation among the Unions.

⁵³ Parts of this text draw on earlier published sources, including Sisule F. Musungu and Graham Dutfield, 'Multi-lateral agreements and a TRIPS-plus world: The World Intellectual Property Organisation (WIPO)', Quaker United Nations Office, Geneva, 2003; this pamphlet contains a detailed exposition on the functioning and role of WIPO and is available at: http://www.iprsonline.org/ictsd/docs/WIPO_Musungu_Dutfield.pdf.; Peter Drahos with John Braithwaite, *Information Feudalism- Who Owns the Knowledge Economy?* (London: Earthscan, 2002.) (For a digital summary of this important book, see: <http://www.thecornerhouse.org.uk/item.shtml?x=85821#fn038ref>.; Alan Story, 'Study on Intellectual Property Rights, the Internet and Copyright', Study Paper 5, Commission on Intellectual Property Rights, London, 2002, which is available at: http://www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf

Despite its seemingly pre-eminent role in international intellectual property affairs and its stance as a strong proponent of what we might call 'intellectual property fundamentalism', WIPO has, at least since the early 1980's, been forced into a somewhat defensive stance, chiefly because it was considered *as not fundamentalist enough* by US and European IP multinational rightsholders. For example, in 1982, just as these corporations were launching their campaign for more expansive international property protection and stronger protection mechanisms, the president of the US drug giant Pfizer wrote an opinion piece in *The New York Times* entitled 'Stealing from the Mind'. In addition to charging that certain governments (especially in the South) were stealing US knowledge and inventions, the Pfizer article also criticised WIPO for "trying to grab high technology inventions for underdeveloped countries" and contemplating treaty revisions that would "confer international legitimacy on the abrogation of patents."⁵⁴ Why this initial broadside? Throughout the 1980s, the most powerful developed countries and their multinational corporations in the IP business had begun to view WIPO as a mere 'talking shop' and, in particular, as ineffective in the global enforcement of their IP rights. But far stronger attacks, which ultimately undermined WIPO's central role, were still to come.

Just as the US had sidelined UNESCO from any serious role in copyright policy in the early 1980's – an impotence that remains today – what Peter Drahos calls 'the Quad' (the US, the European Community and Japan, with a minor role played by Canada) decided that the main forum for intellectual property policy issues should become the General Agreement on Tariffs and Trade (GATT) rather than WIPO.⁵⁵ Drahos calls this manoeuvre 'forum shifting'. By the late 1980's when negotiations for a new intellectual property treaty linked to trade (later to become known as the TRIPS Agreement) took shape behind closed doors, WIPO started to take an increasingly diminished role in global IP policy. In fact, and over the objections of countries such as Brazil and India, it was the GATT (later to become the World Trade Organisation), that was the forum of choice for the drafting and passage of the TRIPS Agreement.

WIPO's role in spreading the copyright message to countries in the South

Since the mid-1990s, WIPO has re-grouped and works very actively in promoting the spread and cementing of intellectual property values and laws in the South. Indeed, the South has been a particular 'target area' in the ten years and this has been especially true since the signing of the TRIPS Agreement in 1994. Here, for example, is an excerpt from a proposal submitted in June 2005 by the Kingdom of Bahrain on 'The importance of intellectual property in social and economic development and national development programs.'⁵⁶ In a section entitled 'The Role of WIPO in Developing National Programs for Bahrain', the proposal states:

⁵⁴ Peter Drahos with John Braithwaite,
<http://www.thecornerhouse.org.uk/item.shtml?x=85821#fn038ref>

⁵⁵ See Drahos and Braithwaite, *Information Feudalism*, Chapter 7 'Agendas and Agenda-Setters: The Multilateral Game.'

⁵⁶ The document, dated 14 June 2005, was prepared for the Inter-sessional Intergovernmental meeting on a development agenda for WIPO, second session, Geneva, June 20 to 22, 2005. Available at: http://www.wipo.int/edocs/mdocs/mdocs/en/iim_2/iim_2_2.doc

WIPO works with developing countries, including Bahrain, in setting up national programs for social and economic development. Ongoing cooperation and coordination with the Arab Bureau in WIPO has produced tangible results, such as: modernizing national legislation on intellectual property; facilitating accession to WIPO-administered treaties, including the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT); supporting national awareness campaigns through national and regional seminars and meetings, raising awareness of the significance of intellectual property in an era of advanced technology and accelerated production, and their impact on economic growth and development; providing support for curricula development in national educational institutes and universities; and participating in the preparation of capacity-building programs for the judiciary and legislative authorities, to keep abreast of worldwide developments in the intellectual property field.

Similar WIPO activities are carried out in many other countries across the South.

WIPO and its supporters use a range of themes in telling their story. The main message in WIPO's evangelism is a fairly straightforward one: intellectual property protection is a necessary tool for development.⁵⁷ More specifically, intellectual property is viewed as the *indispensable ingredient* in the complex process of knowledge and wealth creation which, it is suggested, earlier led to the prosperity of developed countries. This is contrary to the evidence and to history.⁵⁸ The protect-in-order-to-create cliché is fervently advocated as a universal and global imperative. For example, WIPO insists that "[intellectual property] protection is an indispensable incentive to creative and inventive work."⁵⁹ It denigrates as 'myth' any contrary assertions that seek to draw upon the peculiarity of social and economic circumstances of developing countries in the formulation of intellectual property laws.⁶⁰

WIPO's approach strikes a cord with what is known in the United States as the 'bargain theory.' Under this rhetoric of reward as an incentive for creativity and inventiveness (the roots of which can be traced to the patent and copyright clause in Article 1 of the U.S. Federal Constitution), it is assumed that people can and will *only* come up with new inventions if there is a sufficiently large financial reward acting as an incentive for doing so. It is further argued that reducing incentives, such as shortening of the duration of patents or copyright, will produce an unfavourable atmosphere for invention and progress. WIPO advocacy is also highly commercial in its orientation. Knowledge and culture are referred to as 'intellectual capital' to

⁵⁷ See for example, K. Idris, *Intellectual Property: A Power Tool for Economic Growth* (Geneva: World Intellectual Property Organisation, 2003).

⁵⁸ See for example, Ha-Joon Chang, *Kicking away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002); 'Intellectual Property Rights and Economic Development – Historical Lessons and Emerging Issues', *Journal of Human Development*, July 2001.

⁵⁹ See 'Striking a Balance: The Patent System and Access to Drugs and Health Care', WIPO Publication No. 491(E), Geneva.

⁶⁰ *Ibid.*

justify its treatment and conceptualisation of them as mere commodities in the global marketplace.⁶¹

There are various other common WIPO themes. One is the link between both the transplanting and embracing of intellectual property values *and* nation-building (and modernisation.) For example, the document from Bahrain cited above begins with the statement: “The importance of intellectual property is reflected in everything around us and

“As an intergovernmental organization...WIPO embraced a culture of creating and expanding monopoly privileges, often without regard to consequences. The continuous expansion of these privileges and their enforcement mechanisms has led to grave social and economic costs, and has hampered and threatened other important systems of creativity and innovation.”

Geneva Declaration on the Future of the World Intellectual Property Organization, October 2004.
(<http://www.cptech.org/ip/wipo/genevadeclaration.html>)

challenges old established ideas and concepts.” This modernisation theme continues: “creativity breaks the shackles of classical science and shows that experience and observation are the sound basis for modern scientific research” and the document attempts to link the embrace of copyright and its accompanying values with the global spread of cultures, such as that of the ancient Arab cultures. The enactment of copyright laws, the Bahrain proposal states, is “allowing for traditional knowledge and heritage to make significant contributions to the development of learning, progress, employment and transmission of works through modern communication and information technologies.” The message is obvious: opposing the spread of intellectual property values makes you a backward-looking element. And conversely, to embrace such values is to be a moderniser and a nation-builder.

A linked theme, pushed incessantly by WIPO, is the role of intellectual property as a way of encouraging inward investment to the South and of integrating the South into the global economy. In fact, additional foreign direct investment and transfer of technology are often suggested to be contingent upon adoption of intellectual property rights.⁶² New ‘elites’ and budding entrepreneurs in the South are a particular target for these messages.

WIPO’s ‘technical assistance’ programmes

As for the specific activities undertaken by WIPO, because of the prescriptive ‘inevitability’ motif by which the adoption of copyright is advocated, many of its programmes are classed as so-called ‘technical assistance’ to countries of the South. This is a euphemism for the organisation’s pretension that what it is doing is simply helping these countries to comply with their obligations under the TRIPS Agreement. WIPO offers, for example, intellectual property training to professionals and officials from Southern countries who are then expected, on return to their home countries, to teach in law schools or to work in IP national administration offices respectively. In the case of the former, ‘ever helpful’ WIPO may even offer to help in drawing up

⁶¹ The concepts of ‘commodification’ and ‘reward’ were explained earlier in Section 3.

⁶² E. Wolfard, ‘International Trade in Intellectual property: The Emerging GATT Regime,’ (1990) 49 University of Toronto Faculty of Law Review, 106, 118 (stating that “technology drives investment” and thus technology is “reluctant to flow where it is not protected.”). Journal of Transnational Law 243, p. 264.

course syllabi and provide WIPO-produced teaching materials. The supposedly value-neutral 'technical assistance' extends even further. It is not uncommon for WIPO to 'offer' countries 'assistance' by drawing up their own copyright legislation to be adopted and incorporated into national law. This is one of the main ways by which harmonisation is achieved; the legislation across certain regions, such as the Southern Africa Development Community (SADC) and The Common Market for Eastern and Southern Africa (COMESA) is conspicuously similar. In any event, this is not difficult to do since WIPO deals with governments both at regional as well as national level. In the same vein, 'sensitisation' / 'familiarisation' workshops and seminars, at which the virtues of copyright are preached, are a favourite past-time in this lavishly funded propaganda process. WIPO's target groups have traditionally included lawyers (paying audience), judges (paid and pampered audience), local musicians ('victims' of piracy) and government officials (who are usually up for an all-expenses paid trip to Switzerland.) In more recent times, traditional healers or traditional medicine practitioners have also been scrumptiously courted since the emergence of traditional knowledge as a prominent international topic in intellectual property circles.

"In traditional African societies, information and life skills have always been passed on from generation to generation, through oral traditions and folklore for the good of the whole society. With the new trade agreements being negotiated and drawn up under the Trade-Related aspects of Intellectual Property Rights (TRIPS), the World Trade Organisation (WTO), and the World Intellectual Property Rights Organisation (WIPO), African Societies are required to adopt copyright regimes that are contrary to the African understanding of information sharing."

Gertrude Kayaga Mulindwam, Chairperson – Organising Committee, African Copyright Forum Conference, Uganda, November 2005.

Here are some statistics on WIPO's formal pro-IP educational activities. A WIPO announcement in February 2005 noted that "since the launch of its General Course on Intellectual Property (DL 101), in 1999, some 33,000 participants from 180 countries have registered for the course. In 2003, an interactive learning management system was deployed by the Academy which provided on-line learning resources for participants and a live discussion forum. The Academy's tutorial faculty includes some 80 experienced IP teachers and experts from across the globe who tutor in seven languages [...] The course is available in 7 languages (Arabic, Chinese, English, French, Portuguese, Spanish, and Russian) and is free-of-charge."⁶³

An additional aspect of WIPO's 'technical assistance' programmes is the 'modernisation' of existing copyright administrative systems and the building of new ones in the South. WIPO also encourages the establishment of new national reprographic rights organisations (RROs) within these countries; as outlined in a previous section of this dossier, it has had some successes in this area. Another key area of WIPO activity, especially in the South, is 'standard setting' and, in particular the establishment of closed (as opposed to open) standards, meaning proprietary standards. Finally, WIPO is involved in the proposing, drafting and creating of a series of 'soft laws' involving copyright, that is, laws that are "technically non-binding norms, but which states nonetheless follow in practice or to which at least they subscribe" and "which overcome the drawbacks of [formal] treaty making."⁶⁴

⁶³ <http://www.wipo.int/wilma/pressinfo-en/200502/msg00004.html>

⁶⁴ Musungu and Dutfield, op cit.

All of these seemingly neutral law making activities are freighted with a clear political and ideological message about the supposedly indisputable virtues of copyright and its value system. .

One tactic regularly used by WIPO in the South is to focus on attempting

'Why should developing countries provide a very real right to protection for foreign works and inventions in their countries in return for the largely theoretical right of receiving that treatment in developed countries?'

Simon Butt, 'Intellectual Property in Indonesia: A problematic legal transplant,' 2002 European Intellectual Property Review, 431.

to win over one sector of the 'creative community'; musicians are a particularly favoured target group. The aim is to show the purported benefits of the copyright system for them and then to argue that this target group demonstrates how the whole South and its various nations can benefit. This is very similar to the approach used by the World Bank with its 'Nashville in Africa' sessions held in 2001 with groups of African musicians.⁶⁵ On the economic level, such projects (and their underlying message) are highly misleading. On the one hand, the actual number of musicians from the South who could benefit from closer integration into the world copyright system and its commodification/royalties approach – and how much they would benefit – is vastly inflated. (At the same time, the well-documented corruption and nepotism that envelops music collecting societies in the South is not mentioned or glossed over by WIPO). On the other hand, the question is never asked: even if a small number of creators, such as musicians, could – or would – actually benefit financially from a closer integration, how much would full compliance with the global copyright system cost the overwhelming majority of the population (and hence the nation) in higher consumer costs (e.g. for educational materials, software) and in copyright royalty fees to be sent, usually in scarce foreign currency, to rich industrialised countries and their media, music, publishing and other sectors of their 'copyright industries'? In short, key financial calculations are ignored.

WIPO's veneer of liberalism

WIPO maintains a veneer of liberalism and pretended consultation, transparency, and inclusiveness that hides its actual political and economic goals; indeed, this attitude becomes a form of 'repressive tolerance.' Take, for example, this promotional message announcing 'the Online Forum on Intellectual Property in the Information Society', hosted by the World Intellectual Property Organization (WIPO) from June 1 to 15, 2005.⁶⁶ It states that:

The WIPO Online Forum is designed to enable and encourage an open debate on issues related to intellectual property in the information society, and in light of the goals of the World Summit on the Information Society (WSIS). This presents a unique opportunity for all to engage in the emerging debate on intellectual property in our day. ...The WIPO Online Forum is open to participation by all interested persons – you are invited to join in online discussions over a period of two weeks from June 1, 2005. It is hoped that the Online Forum will further inform the discussions taking place during the

⁶⁵ For a brief critique of the 'Nashville in Africa' project, see Story, CIPR Study, pp. 12-13.

⁶⁶ <http://www.wipo.int/ipisforum/en/>

second phase of WSIS. The conclusions of the Online Forum will form part of WIPO's contribution to the WSIS Tunis Summit.'

WIPO documents reflect this purported liberalism. For example, WIPO's commentary for this online forum on the question "what is the impact of copyright law, both at international and national level, on education and research?" argues that

*copyright law gives authors the choice of how to structure their relationships with consumers—whether to reserve their rights against all uses, charge for some or all uses of content, or make their works available free of charge with or without restrictions upon future use.'*⁶⁷

But, in fact, copyright law is *not* a requirement for structuring such relationships. And, moreover, most authors and creators do *not* have such a choice; due to unequal bargaining power, for example between an individual musician and a multinational recording company, the musician is required—more accurately, coerced—to assign her/his copyright to the recording company.

We can conclude then that WIPO's 'liberalism' operates within a very controlled agenda that again 'forgets' some critical economic and political realities.

The WIPO Development Agenda

In the past 18 months, a central issue before WIPO has been the WIPO 'Development Agenda'; this agenda has obvious implications for copyright issues in the South. Here is a brief backgrounder from the Electronic Frontier Foundation that describes this moment and its current possibilities, albeit in rather inflated terms:

In October 2004, the World Intellectual Property Organization (WIPO) took the historic step of agreeing to consider the impact of its decisions on developing nations, including assessing the impact of intellectual property law and policy on technological innovation, access to knowledge, and even human health. What's at stake is much more significant than the harmony or disharmony of IP regulations. WIPO decisions affect everything from the availability and price of AIDS drugs, to the patterns of international development, to the communications architecture of the Internet.

*WIPO held a meeting in April to discuss Brazil and Argentina's Proposal to Establish a Development Agenda [PDF], which had been endorsed by hundreds of individuals and public-interest non-governmental organizations (NGOs), including EFF and the Consumer Project on Technology (CP Tech), through the Geneva Declaration on the Future of WIPO, and the subsequent thoughtful Elaboration on Issues Raised in the Development Agenda proposal from the 14 countries in the Group of Friends of Development. This is an extraordinary breakthrough. The Development Agenda gives WIPO the opportunity to move beyond the narrow view that any and all IP protection is beneficial, and choose instead to act strategically to spur economic growth, foster innovation, and help humanity.*⁶⁸

⁶⁷ Online Forum on Intellectual Property in the Information Society, Theme Four http://www.wipo.int/roller/comments/ipisforum/Weblog/theme_four_what_is_the

⁶⁸ http://www.eff.org/IP/WIPO/dev_agenda/

Acting on the purported liberalism of WIPO and the claim from some working in the 'access to knowledge' treaty group that WIPO can be 'taken over' by NGOs and allies,⁶⁹ a number of NGOs attended and spoke briefly at the WIPO Intersessional Intergovernmental Meetings held in Geneva in late June 2005. A sample of their submissions is one that was presented by the advocacy group, IP Justice.⁷⁰ But very little was accomplished. One report, dated 27 June 2005, concluded: "The second meeting on the WIPO Development Agenda is now finished, and the opponents of reform have made their strategy clear: tie-up the meeting in procedural posturing to forestall substantive debate on the real issues. Even as the Friends of Development tried to discuss unassailable reforms like an ethics code for WIPO, the proceedings kept getting sidetracked by countries that wanted to cut off debate."

As more and more activists are beginning to realise, the focus needs to become not on how to take over WIPO – an unlikely scenario indeed – or how to reform it, but rather on it how to abolish it and start building a new organisation from the ground up.

⁶⁹ This tactic/ possibility was suggested by a representative of the CP Tech group at an 'access to knowledge' conference in London in May 2005. For more on this group, see Section 5.7.

⁷⁰ IP Justice Policy Paper for the WIPO Development Agenda, 20-22 June 2005, Geneva Switzerland, available at:

http://www.ipjustice.org/WIPO/WIPO_DA_IP_Justice_Policy_Paper.shtml

