

SECTION 6 – CONCLUDING THE DOSSIER ... AND LOOKING AHEAD

6.1 Some closing words

We hope that you have found the Copy/South dossier a productive – and provocative – reading experience. As stated in the opening sections, we do *not* think we have provided all of the answers to some very complicated questions. Nor have we even asked all of the most important questions. And these brief words of closing do *not* attempt to sum up all that has been included in the dossier or try to draw tightly-formulated, programmatic conclusions about the precise way ahead. Instead, we mostly ask further questions and suggest some further areas of research.

More than 70 years ago, the American legal scholar Felix Cohen pointed out how certain legal words and concepts had clouded our thinking about the reasons why we have particular laws and, in particular, what their social purposes were supposed to be. Such words, such as 'property rights' and 'fair value', had become what Cohen called magic "solving words" which, when used to try to resolve social issues, often simply became "transcendental nonsense."¹ The word 'copyright' has taken on the same status today. As soon as they are evoked in conversation, the word and the concept 'copyright' suddenly become some kind of purported or logical explanation – in other words, magic "solving words" – as to why certain things in the world cannot happen ... and why other things do. Why should nursing sisters and public health professionals in South Africa be required to pay royalty fees to publishers so that they can distribute printed materials to students and patients about how to avoid HIV/AIDS? In the face of this shocking pandemic, why should the circulation of such truly life-saving information be restricted? The answer: copyright laws dictate they must pay royalty charges to a collecting society and, in any event, without copyright, no one would have an incentive to write and produce such materials. Or why cannot the tens of millions of visually impaired persons across the South – more than ten million in India alone – change the format of a book or magazine so that they, as well as sighted persons, can read it? The answer: taking such a step is called 'reproducing the work' in copyright legalese and this is 'a right' that only the copyright holder can exercise. Or why is a country such as Mexico allowed to extend the term of copyright to the life of the author, plus 100 years ... meaning a song written today by a 20 year old composer would still be an item of exclusive private property in the year 2166? The answer, reply copyright's supporters, is that Article 7(6) of the Berne Convention of 1886, (now part of the TRIPS Agreement of 1994) sets no maximum on the term or duration of copyright and the Berne Convention is an international treaty that is basically 'unamendable' because all of its 160 odd signatory countries members must unanimously agree before any changes can be made.

¹ Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach', 35 Columbia Law Review 809, (1935), p. 820.

We in the Copy/South group say these answers are simply “nonsense”, transcendentally and otherwise. And there is a great deal of other related nonsense that is being said today about copyright that needs to be examined, remembering at the same time that copyright is a ‘created’ legal category which is of rather recent historical lineage, involves the state establishing a limited monopoly ‘right’ usually owned by a large corporations (a fact seldom mentioned by so-called ‘free marketers’ who say they believe in keeping the state out of the marketplace) and was simply absent from most parts of the South, where more than three/quarters of the world’s population lives, until very recently ... and still has foothold only in some urban areas and leading commercial sectors. In other words, copyright is not something natural or universal like the sun coming up. On this point, we would be the first to admit that looking at a range of access and cultural issues in the South through the lens of copyright has its own limitations and believe that future research needs to be more inter-disciplinary.

On the economic front and the question of the supposed benefits of establishing ‘mature’ copyright regimes in the South, we are reminded of how the now ‘reformed’ American consultant John Perkins describes the job he did for several decades on behalf of US corporations in the South: formulate unattainable economic plans (or “visions”) and plot the way to a “glorious future” for countries such as the kingdom of Saudi Arabia. In his current best-selling book, *Confessions of an Economic Hit Man*, Perkins writes how he approached the planning of new utilities, such as new electrical generating plants:

I always kept in mind the true objectives: maximizing payouts to U.S. firms and making Saudi Arabia increasingly dependent on the United States. It did not take me long to realize how closely the two went together; almost all of the newly developed projects would require continual upgrading and servicing and they were so highly technical as to assure the companies that originally developed them would have to maintain and modernise them.²

Is copyright expansion any different than expanding electrical power stations? The determined effort by both the United States and the European Union to ensnare the global South into the web of international copyright relations is not, *it cannot be said too often*, an effort by them to either promote internal economic growth in the South or, for example, to build markets for the music of Indian musicians in Boston or Berlin...or certainly for anyone other than a few ‘stars’ working for multi-national recording companies. On economic issues, we consider that the analysis done for Section 2 of this dossier is only a small start on these and other pressing questions. We would appreciate more assistance in developing our thinking. We understand that an economic agency in Brazil has just begun to generate economic studies on North/South intellectual property trade flows and we await their results with interest. As well, more work on the economic benefits of implementing free computer software in the South is needed. This is a technology that will not require “continuing upgrading” as with the Microsoft ethos.

On the question of access to educational materials, which is also closely related to financial questions and is another focus of this dossier, we note that one of the eight

² John Perkins, *Confessions of an Economic Hit Man* (London: Ebery Press, 2005) p.87

Millennium Development Goals established at the United Nations Millennium Summit in September 2000 is to achieve universal primary school education for all girls and boys by the year 2015. It is hard to disagree with the recent speech delivered in Mozambique by the United Kingdom's Chancellor Gordon Brown when he said that "it is one of the world's greatest scandals that today ... two-thirds of Africa's children never complete a primary education ... (and are) denied one of the most basic rights of all, the right to an education."³ Yet children and young people going to school at all levels, including university, require good reading and library materials. And they will also need to be both affordable and plentiful, which raises the copyright question. When newly-independent countries of the South asked in the 1960's that educational materials be exempted from copyright so that they could attain wider levels of primary education in their initial phase of nation building, it was the powerful British book publishing industry which was the most vocal – and ultimately successful – opponent of what was called "heresy" at the time. And what of the next decade in the South? Will work on this goal of universal primary education be an occasion for an added 'feeding frenzy' by publishers, international (including British) and domestic? One hesitates to believe that Gordon Brown, likely Britain's next Prime Minister, will rein them in or ensure that education comes before corporate profits. (A recent article by the noted African economist Samir Amin on the Millennium Development Goals has exposed what is behind such millennium goals and criticises the turn to privatisation and neo-liberal ideology; it is an article that deserves attention.⁴). Ways of writing and producing school texts and educational materials outside copyright's strictures deserve more analysis, including the spreading of best practice. The questionable pricing and distribution practices of European and North American publishers also require much more empirical study than we have been able to undertake here; as one publisher recently remarked, "intellectual property lies at the heart of the publishing industry."

On the question of cultural production, a third focus of the dossier, many questions require further discussion. Still, we do believe we have made a start here in looking at a few of the critical issues. In most parts of the South, the notion of individual 'stars', of individual appropriation, and of copyrighting creative work was still an alien concept until very recently; in many places, it still is. Is this changing and how quickly? If only a mere handful of musicians and artists can make a living in the North from a system that is centred on copyright, can the mass of artists from the South expect to be treated any differently? What are the pros and cons of Creative Commons' licences; is the analysis contained in the dossier too critical? And although we are said to live in an increasingly globalised world, rich countries of the global North certainly need more exposure to Southern understandings. As commentator Martin Jacques wrote recently in a British newspaper:

... globalisation has brought with it a new kind of western hubris... (and the view) that western values and arrangements should be those of the world; that they are of universal application and merit. At the heart of globalisation is a new kind of intolerance in the west towards other cultures, traditions and

³ Will Woodward, 'Chancellor pledges record UK aid package,' The Guardian (London), 10 April 2006.

⁴ Samir Amin, 'The Millennium Development Goals: A Critique from the South', Monthly Review, March 2006 <http://www.monthlyreview.org/0306amin.htm>

*values, less brutal than in the era of colonialism, but more comprehensive and totalitarian.*⁵

Let the discussion and debate continue ... and move to a new level. Do not hesitate to contact the Copy/South Research Group by e-mail at contact@copysouth.org with your thoughts, criticisms and ideas.

⁵ Martin Jacques, 'We are globalised, but have no real intimacy with the rest of the world', *The Guardian* (London), 17 April 2006.

6.2 Glossary of fifty copyright terms, phrases, and copyright-related organisations which are used in the Copy/South Dossier

Note to readers: Most capitalised words in the definitions below are defined elsewhere in this Glossary.

	Term	Definition
1)	Author	The person (or persons) by whom the Work is created. It is a generic word in copyright law that includes the composer of a musical work, the artist who draws or sculpts, and the writer of a computer software program. The author is sometimes the initial owner of copyright, but work created by an employee is, for example, usually owned by her/his employer. Copyright is capable of being transferred. See Transfer of Copyright
2)	Adaptation	The modification of a Work to create another work, for example, adapting a novel to make a motion picture or the modification of a work to make it suitable for different conditions of exploitation or the translation of a Work from one language into another language.
3)	Assignment of Copyright	One of two ways to conclude a Transfer of Copyright. This is the permanent allocation/ grant of some or all Economic Rights to a Work. Thus, if all rights are assigned, the person to whom the rights were so assigned becomes the owner of the copyright.
4)	Berne Convention	Properly titled the Berne Convention for the Protection of Literary and Artistic Works. It was adopted in 1886 as an agreement to protect the rights of all Authors who are nationals of countries that are party to the convention. (The word "authors" has been interpreted to include owners of copyrighted Works, such as publishers.) The current version of the convention is the Paris Act of 1971. The Berne Convention is also included as a part of the TRIPS Agreement; see Article 9. The convention is administered by the World Intellectual Property Organization (WIPO).
5)	Copyright	The right granted by law providing the owner the exclusive rights over a Work to reproduce it, to prepare derivative works from it (e.g. Adaptations, translations), to distribute it, to perform it publicly (e.g. a play), and to display it publicly. Copyright applies to so-called "original" material such as books, articles, drawings, photographs, musical compositions, recordings, films, and computer programs. Copyright does not protect an abstract idea; it protects only the concrete expression of an idea.
6)	Copyright Notice	A notice which is placed on a work to inform others that the work is protected by copyright. This is usually prescribed as follows: © <name of author> <year of publication> It is not, however, a requirement in most countries.
7)	Creative Commons	Creative Commons is a non-profit organisation that offers a "flexible range of protections and freedoms" for authors and artists. It builds on the "all rights reserved" notion of traditional copyright to create a voluntary "some rights

- reserved" copyright.
- 8) **DRM** Acronym for Digital Rights Management. This is an umbrella phrase referring to "technology systems facilitating the trusted and dynamic management of rights in any kind of digital information, throughout its life cycle, irrespective of how and where the digital information is distributed." This includes any of several technical methods used to handle the description, layering, analysis, valuation, trading and monitoring of the rights held over a digital work in order to protect files from unauthorised use, as well as the management of the financial transaction processing. Digital rights management systems are also referred to as electronic rights management systems (ERMS), rights management information systems (RMIs) and copyright management systems (CMS).
 - 9) **Duration/Period of Copyright** The period or duration of copyright begins from the moment when the work has been created, or, expressed in a tangible form. The period of duration continues until a lengthy period of time that is determined by the death of the author and does not depend on whether the author owns the copyright. The Berne Convention establishes a minimum of 50 years of copyright duration after the death of the author. But this is only a minimum and the period in different countries varies from 50 years to 100 years after the death of the author owing to various free trade agreements and other changes in national legislation. Other types of copyright works, such as films, broadcasts and applied art works, may have different duration periods and may instead be based on the year that the work was first produced.
 - 10) **Economic rights** The right of the owner of Copyright to prevent others from making copies of her/his works, including the right to authorise distribution, rental or hiring of copies of the work, and even importation of the work. Also protected are the right to translate and adapt a work, the rights of public performance, broadcasting and communication of the work to the public. These rights can be transferred to other parties.
 - 11) **Exhaustion of Rights** Also referred to as Principle of First Sale. This refers to a situation where copyright holders' rights over a certain work are exhausted upon the first sale or transfer of ownership of a particular copy of the work, which means that the owner of that copy is free to dispose of that copy without seeking the original copyright owner's further permission.
 - 12) **Fair use/Fair Dealing or Fair Practice** This is a limitation to the Economic rights granted under copyright laws and permits certain acts to be carried out without the authorisation of the copyright owner. These generally include the use of certain limited portions of such works for: private and research study purposes; performance, copies or lending for educational purposes; criticism and news reporting; incidental inclusion; copies and lending by librarians; acts for the purposes of royal commissions, statutory enquiries, judicial proceedings and parliamentary purposes; recording of broadcasts for the purposes of listening to or viewing at a more convenient time (this is known as time shifting); producing a back up copy for personal use of a computer program or; playing a sound recording for a non-profit making organisation, club, or

- society. Note that the scope of these exclusions varies in every jurisdiction.
- 13) **General Agreement on Tariffs and Trade 1947 (GATT 1947)** This agreement was formed as part of the 1947 Havana Charter that would have created the International Trade Organization (ITO) as a sister institution to the World Bank and the IMF. However the failure of the United States to ratify the 1947 Havana Charter caused the ITO to be still-born. Pending the creation of a new international institution that would administer it, GATT 1947 was, instead, adopted and applied by countries on a provisional basis for fifty years from 1947 to 1994 through so-called "Protocols of Provisional Accession." The text of GATT 1947 as it stood on 15 April 1994 was absorbed in toto directly into the text of the GATT 1994, such that any references to specific provisions in GATT 1947 would indicate provisions found in the text of GATT 1947.
 - 14) **General Agreement on Tariffs and Trade 1994 (GATT 1994)** This is the Uruguay Round agreement annexed to the WTO Agreement that serves as the successor to GATT 1947. GATT 1994 covers: (i) the text of GATT 1947; (ii) various legal instruments created by GATT 1947 member countries that entered into force under the GATT 1947 before the entry into force on 1 January 1995 of the WTO Agreement; (iii) various "understandings" agreed upon by countries during the Uruguay Round with respect to the interpretation of various provisions in the GATT 1947; and (iv) the Marrakesh Protocol to GATT 1994.
 - 15) **Infringement (of Copyright)** The unauthorised use of works protected under copyright and a use that is not permitted by Fair Dealing/Fair Use provisions; it does not matter whether such unauthorised use was deliberate or non deliberate. This constitutes a criminal offence in an increasing number of jurisdictions with varying penalties such as imprisonment, fines, and confiscation of the offending material.
 - 16) **Intellectual Property Rights (IPRs)** This is a collective term referring to all those intellectual property rights that can be granted by the State for the exclusive exploitation of intellectual creations. One approach divides IPRs into two categories: those rights relating to industrial property (patents, industrial designs and models, marks, and geographical appellations), and those relating to literary and artistic property (copyright).
 - 17) **IFRRO** Properly known as The International Federation of Reproduction Rights Organisations, this consortium links together all RROs as well as national and international associations of rightsholders. IFRRO works to encourage the formation of RROs worldwide, to facilitate formal and informal agreements between its members, and to increase public and institutional support for copyright.
 - 18) **Literary work** Work consisting of text such as novels, poems, song lyrics without music, catalogues reports, tables as well as translations of such works. It also includes computer programs.
 - 19) **Licensing of copyright** One of two ways to conclude a Transfer of Copyright. Refers to the authorisation to exercise some or all Economic Rights e.g. the copying of a work, for a specific period of time and for a specific purpose; the owner still retains ownership of the rights. A licence is usually obtained by paying a fee to the

- rightsholder.
- 20) **Marrakech Agreement/
WTO Agreement** This is the main framework treaty creating the World Trade Organisation and to which is annexed the various other Uruguay Round agreements. It entered into force on 1 January 1995. Currently, 146 countries have ratified or acceded to the Marrakech Agreement.
 - 21) **Moral Rights** Concerned with the protection of the reputation of the Author and are independent of Economic rights. In particular, they refer to the Right of Attribution (or Paternity), the Right of Integrity, and the right of association. These rights are often, though not always, extinguished on the death of the author.
 - 22) **Most Favoured Nation
(MFN)** This is one of two cornerstone principles underlying the GATT 1994, and the TRIPS Agreement which requires that members of those treaties do not give any one member preferred treatment in terms of market access for goods and services or even treatment of Intellectual Property emerging from the different member states. This is reflected in Article I of GATT 1994 and Article 4 of the TRIPS Agreement.
 - 23) **Musical work** Work that consists of music plus lyrics or music only.
 - 24) **National Treatment
(NT)** This is one of two cornerstone principles underlying the GATT that requires a member state to treat domestic and imported goods, services, service suppliers, investments, and IPRs equally or in the same way. This is reflected in Article III of GATT 1994, and in Article 3 of the TRIPS Agreement.
 - 25) **Neighbouring Rights** See Performers and producers rights.
 - 26) **Open Source Software** The Open Source Initiative has defined open source software as software whose licence generally allows for free redistribution of the program and its source code. It also permits the creation and distribution of derivative works and modifications. In so doing, the licence must not discriminate against any persons, fields, technology, products or other software.
 - 28) **Performers and
Producers Rights** A term used to indicate rights of performers and sound recording producers to be remunerated when their performances and sound recordings are performed publicly or broadcast. Also referred to as "neighbouring rights".
 - 29) **Piracy** The term coined to describe the deliberate infringement of copyright on a private or commercial scale, i.e. unauthorised copying.
 - 30) **Principle of First Sale** See Exhaustion of Rights
 - 31) **Public domain** This comprises the body of knowledge and innovation in relation to which no person can establish or maintain proprietary interests. It is considered to be part of the common cultural and intellectual heritage of mankind. Proprietary works can revert to the public domain where the copyright (or patent) has been waived, or the copyright (or patent) period has lapsed and can be used without authorisation or permission of the rightsholder. In some jurisdictions such as Argentina, copyrighted works do not revert to the public domain on expiry of the protection period, but revert to the state that granted these rights.
 - 32) **Reprographic Rights
Organizations (RROs)** RROs are "collecting societies" which, acting as agents of rightsholders, licence the reproduction of copyright-protected material. RROs derive their authority from contracts with national copyright holders and/or from

- legislation. RROs licences typically grant authorisations to copy a portion of a publication, in limited numbers of copies, for the internal use of institutional users such as university libraries. In order to collect fees and convey authorisations internationally, RROs enter into bilateral agreements with each other; such agreements are based upon the principle of National Treatment.
- 33) **Requirements for Copyright** In most jurisdictions, to qualify for copyright protection a work must be “original” (meaning originating from an identifiable author or authors), exhibit a degree of labour, skill or judgment, and be fixated in a tangible form.
- 36) **Right of Attribution (Paternity)** The Moral Right of the author of a Work to be credited as the author of that work.
- 35) **Right of Integrity** The Moral Right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work which would be prejudicial to the author's honour or reputation.
- 36) **RIAA** Properly referred to as the Recording Industry Association of America, the RIAA is the trade group that represents the U.S. recording industry. Its members constitute among the largest record companies in the world who create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.
- 37) **Section 301 action** Section 301 of the U.S. Omnibus Trade Act of 1988 is the principal U.S. statute for addressing alleged foreign unfair practices affecting U.S. exports of goods or services. This particular section of the Act gives the U.S. Trade Representative (USTR) discretion to unilaterally enforce sanctions in response to what the U.S. government considers are unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict U.S. commerce.
- 38) **Special and differential treatment (S&D)** This refers to the principle that would provide developing countries with special privileges vis-à-vis compliance with WTO or TRIPS obligations in view of their different or lower state of economic development. This usually takes the form of exemptions from some WTO rules or else in the form of special trade rights (such as longer transition periods).
- 39) **Technical Protection Measures (TPM)** Refers to technological methods intended to promote the authorized use of digital works. This is accomplished by controlling access to, copying, distribution, performance, or display of such works. Examples of TPM's are passwords and cryptography technologies.
- 40) **Transfer of Copyright** See Licensing of Copyright and Assignment of Copyright above.
- 41) **Translation** This generally means the expression of a Work in a language other than that of the original version. Only the copyright owner can authorise a translation to be made and published.
- 42) **TRIPS Agreement** Properly referred to as The Agreement on Trade-Related Aspects of Intellectual Property Rights, the TRIPS Agreement is a Uruguay Round agreement annexed to the WTO Agreement. It came into force in 1996 and is the most comprehensive multilateral agreement on intellectual property. It sets compulsory minimum standards for intellectual property protection which countries that join the World Trade Organisation must conform to. Under the terms of this agreement, all WTO member-countries must re-write

their national laws to conform to international standards for the protection of patents, trade marks, copyrights, industrial designs, and trade secrets in order to reflect the minimum standards contained in the TRIPS Agreement. The minimum standards in TRIPS are set primarily with reference to the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention); TRIPS also makes the principles of National Treatment and Most Favoured Nation applicable to the protection, application, and use of IPRs.

- 43) TRIPS Plus (+) Agenda** This refers to the imposition of obligations by bilateral agreements (often in the form of Free Trade Agreements) that impose far higher requirements for the protection of IPRs than those encapsulated in the TRIPS Agreements. Such Free Trade Agreements, for example, have required some countries to extend the duration of copyright to 100 years after the death of the author compared to a world average of 50 years after the death of the author.
- 44) UNCTAD** Properly known as the United Nations Conference on Trade and Development. It was established in 1964, to promote the development-friendly integration of developing countries into the world economy.
- 45) Universal Copyright Convention (UCC)** The UCC was created in 1952 through the United Nations Educational Scientific Cultural Organisation (UNESCO) to provide an international multilateral copyright treaty that would serve as an alternative to the Berne Convention and thereby cater to those countries not willing to sign up to the Berne Convention, such as the United States. With the US joining the Berne Convention in 1989 and with the creation of the TRIPS Agreement, which incorporates Berne, the UCC today has significantly diminished importance.
- 46) Uruguay Round (UR)** This refers to the negotiations that took place under the auspices of GATT 1947. It was launched at Punta del Este, Uruguay, in 1986 and concluded at Marrakesh, Morocco, in April 1994. It resulted in the negotiation and conclusion of the Uruguay Round agreements such as the TRIPS Agreement and the creation of the World Trade Organisation.
- 47) Work(s)** All literary, dramatic, musical or artistic material protected by copyright laws, including but not limited to every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and similar materials; dramatic or dramatic-musical materials; choreographic materials/performances and entertainments; musical compositions with or without words; films and analogous cinematographic materials; drawings, paintings, architecture, sculpture, engraving and lithography; photographs; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. Also includes translations, adaptations, collections, and arrangements of music and other alterations of literary or artistic materials which are protected without prejudice to the copyright in the original material.

- 48) **World Intellectual Property Organization (WIPO)** With headquarters in Geneva Switzerland, WIPO is one of the 16 specialized agencies of the United Nations system of organizations. It administers 23 international treaties including the Berne Convention, the WIPO Copyright Treaty (WCT), and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations among others, dealing with different aspects of intellectual property protection. WIPO, which currently includes 183 nations as member states, was created in 1967 as “an international organization dedicated to promoting the use and protection of works of the human spirit.”
- 49) **World Intellectual Property Organization Copyright Treaty (WCT)** The WCT is an international treaty that was negotiated in 1996 primarily to protect rightsholders’ copyrights on the Internet. It introduced anti-circumvention provisions as well as requiring signatory countries to prohibit the alteration or deletion of electronic rights management information, which is information that identifies a work, its author, performer or owner, and the terms and conditions for its use.
- 50) **World Trade Organization (WTO)** Located in Geneva Switzerland, this is the international intergovernmental organization established as a result of the Marrakech Agreement. It came into being on 1 January 1995, and currently has 149 countries as members. It is tasked with overseeing the implementation of the various Uruguay Round agreements, including the TRIPS Agreement; it is a forum for trade negotiations; it handles trade disputes among member countries; it also monitors national trade policies and provides technical assistance and training primarily for developing countries.

For a fuller explanation of the above terms and other copyright-related terms and organisations, we recommend that you check with Wikipedia, the free encyclopaedia, at: http://en.wikipedia.org/wiki/Main_Page

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