

THE COPY/SOUTH DOSSIER

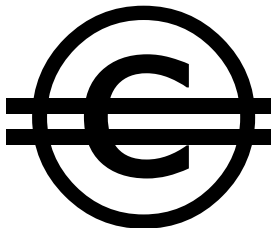
**Issues in the economics, politics, and
ideology of copyright in the global South**

Edited by
Alan Story
Colin Darch
and Debora Halbert

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SOME INITIAL WORDS...

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

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

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

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

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

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

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

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

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

The editors of this dossier are: Alan Story (United Kingdom), Colin Darch (South Africa), and Debora Halbert (United States).

Those who have contributed to this dossier (most of whom attended the C/S workshop) are: Adam Mannan (United Kingdom), Akalemwa Ngenda (Zambia), Beatriz Busaniche (Argentina), Denise Nicholson (South Africa), Federico Heinz (Argentina), Jennifer de Beer (South Africa), Norah Mugambi (Kenya), Joost Smiers (The Netherlands), José Antonio Torres Reyes (Mexico), Juan Publico Triana Cordoví (Cuba), Lawrence Liang (India), Maud Stephan (Lebanon), Roberto Verzola (The Philippines), Ronaldo Lemos (Brazil), Shishir Kumar Jha (India), Zapopan Martin Muela-Meza (Mexico), Carlos Affonso Pereira de Souza (Brazil), Papa Toumané Ndiaye (Senegal), Majid Yar (United Kingdom), Teresa Hackett (Ireland), Colin Darch, Debora Halbert and Alan Story. Special thanks to graphic artists Ulrike Brueckner and Sebastian Luctgert of Germany for their contributions to the online and printed version of this dossier. And particular thanks to William Abrams of the United States who undertook the important job of creating an index for the dossier.

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

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

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

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THE COPY/SOUTH RESEARCH GROUP

May 2006

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

1.2 How privatisation and monopolisation discourage creativity and invention

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

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

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

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

The impact at the level of the individual creator

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The impact on the international division of labour

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

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

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

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

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

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

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

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

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

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

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

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

Current IP laws as a threat to free speech

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

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

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

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

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

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

The threat to scholarly communication and scientific method

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

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

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

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

²⁵ *Ibid.*

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

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

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

The threat to the creative process

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

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

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

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

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

1.4 Monopoly ownership and its consequences for artistic expression

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

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

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

The market as the primary determinant of worth and value

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

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

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

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

Cultural diversity

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

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

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

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

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

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

³⁰ Ibid.

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

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

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

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

The copying of previously successful formulae

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

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

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

³³ Crosby, *The way the music died*.

³⁴ *Ibid.*

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

The power of marketing and promotion

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

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

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

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

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

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

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

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

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

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

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

Musicians in Senegal and their earnings

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

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

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

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

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

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

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

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

41

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

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

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

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

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

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

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

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

The role of the big media corporations

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1 Introduction

The world capitalist system is presently entering a phase, the earliest features of which had begun to emerge already in the late 1970s, “characterised by the elevation of information and its associated technology into the first division of key resources and commodities. Information is a new form of capital.”⁴⁹ In this new epoch, information and knowledge are no longer available from what John Frow has termed the former “interlocking ensemble of open ‘library’ systems with minimal entry requirements” but are rather “managed within a system of private ownership where access is regulated by the payment of rent.”⁵⁰

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

There is an often-cited maxim in the development literature to the effect that if you give poor people some fish, you feed them for a day, but if you teach them how to fish, you feed them for a lifetime.⁵¹ However, in our times, the epoch of extended copyright terms and the patenting of life forms and business methods, a caveat becomes necessary: you feed them for a lifetime, provided they can afford to pay licence fees for what is likely to be a patented fishing technology.

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

⁴⁹ G. Locksley, ‘Information technology and capitalist development’ *Capital and Class* no.27 (1986), p.91, quoted by J. Frow, ‘Information as gift and commodity’ *New Left Review* no.219 (1996), p.89.

⁵⁰ Frow, *Information*, p.89.

⁵¹ Apparently a Chinese proverb sometimes attributed to Kung Fu-tse (Confucius).

Round of GATT in 1994. The truth is, all IP rights are trade-related, and so all forms of content are under threat. Indeed, 'the US government has made the rigorous enforcement of intellectual property rights a top priority of its foreign policy' as it attempts to use such international organizations as the WTO and WIPO to impose harmonization of local IP rules to US standards.⁵² It is able to pursue this agenda because in the era of globalization, international capital is pretty much 'free to pursue profit wherever it wishes and on whatever terms it can impose.'⁵³ If these international forums fail to reach agreement because of resistance by developing countries in defence of their own interests, then typically the United States resorts to negotiating a series of bilateral free trade agreements (FTA's) which incorporate the key elements of TRIPS or TRIPS+, such as extended copyright terms, anti-circumvention measures and so on.

There are, nevertheless, contradictions. How well are the Northern, and especially the US content industries actually doing? In the long term, the confident predictions are that they will be the dominant components of the global economy of the immediate future, as we have seen earlier. However, there have also been many wild claims of losses, mostly attributed to insufficiently ferocious administration of IP legislation – certainly not, in their view, to any problems with their ability to adapt to new environments or technology. It is undoubtedly true that the music recording industry (which despite the rhetoric is not the same thing as the music industry) has been experiencing a downturn, with a fall in 2002 of 7.2 percent in global sales of recordings. From this, analysts have extrapolated hypothetical 'lost sales' worth US\$4.7 billion by 2008, and have attributed this mainly to Internet file-sharing and other forms of 'piracy'.⁵⁴ The problem is, as Stan Liebowitz and others have convincingly shown, that it is impossible to quantify the exact relationship between unauthorized copying and hypothetical purchasing behaviour by the copier, either in the case of file sharing or of cheap Chinese or Mexican 'pirate' versions of CDs or videos. It is quite possible that the music recording industry would be in a slump in any case.⁵⁵

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

⁵² Kristin Dawkins, 'Intellectual property rights and the privatization of life,' Foreign Policy in Focus vol.4, no.4 (January 1999).

⁵³ Leys, op. cit., p.vi.

⁵⁴ Dan Milmo, 'Piracy costs will double in five years,' The Guardian, 23 September 2003, available at <http://www.guardian.co.uk/print/0,3858,4759205-111163,00.html> [24 September 2003].

⁵⁵ Stan Liebowitz, 'Policing pirates in the networked age,' Policy Analysis no.438, 15 May 2002, especially p.11 ff. Available at <http://www.cato.org/pubs/pas/pa438.pdf> [24 September 2003].

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

With a certain amount of ingenuity, it is possible to answer, at least indicatively, the question of whether there is a net flow of capital from the global periphery to the centre in goods and services related to copyright (e.g. licensing fees, royalties). In addition, we know that there is a general trade imbalance between the North and the South, aside from debt-related capital flows. There is little reason to suppose that things would be different in such an important area as the IP industries, especially when we consider the importance that the US especially attributes to concluding TRIPS agreements, bi-laterally if necessary, with its trading partners. In fact, commentators and analysts from Daniel Bell in the 1970s, through Manuel Castells in the 1990s, to such current popularisers as John Howkins have all agreed that “the creative economy will be the dominant economic form in the twenty-first century.”⁵⁶

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

The world trade in cultural goods

In 2000, an official report by the United Nations Educational, Scientific and Cultural Organization (UNESCO) referred to a “crippling lack of basic quantitative and qualitative indicators” regarding the relationship between culture and development. The authors of the same report attempted to quantify the worldwide trade in cultural goods, with the caveat that the real value of such goods often far exceeds their “declared value at customs.” Thus, one print of a movie may have a particular value *as an artefact*, but its earning capacity when shown in a country’s cinemas may be exponentially greater. The UNESCO data show that the capacity to export cultural goods of many small and developing countries “appear[s] to have shrunk” over the period of the 1980s and 1990s, and Copy South has no reason to suppose that this trend has been reversed. Indeed, the same UNESCO report goes on to point out that “the flows of trade in cultural goods are unbalanced, heavily weighted in one direction with few producers and many buyers. There are great structural disparities both within and between the various regional trading blocks.”⁵⁷

⁵⁶ See e.g. Daniel Bell, *The coming of post-industrial society: a venture in social forecasting* (New York: Basic Books, 1973); Manuel Castells, *The information age: economy, society and culture* (Oxford: Blackwell, 1996-1998), 3 vols.

⁵⁷ Phillip Ramsdale, *International flows of selected cultural goods, 1980-1998* (Paris: UNESCO, 2000), p.v. Cultural goods are defined by UNESCO’s Framework for Cultural

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

The United States remains the main producer and the main consumer of cultural goods, as the UNESCO report emphasises. In another report entitled *Copyright industries in the US economy*, Stephen Siwek has attempted to quantify the importance of this sector according to three main indicators: value added to GDP, share of national employment, and lastly foreign sales.⁵⁸

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

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

Source: Siwek, p.3-4

In fact, from as early as the 1990s, the value of the export to the rest of the world of US copyright products (which include books, but are mainly entertainment commodities such as films, music and television programs) exceeded the total for clothes, chemicals, cars, computers and aeroplanes combined. In 1997, the value of all such products was \$414 billion, according to one popular account.⁵⁹ The core copyright industries extend to “all industries that create copyright or related works as their primary product: advertising, computer software, design, photography, film, video, performing arts, music (publishing, recording and performing), publishing, radio and TV, and video games.”⁶⁰ This list does not even begin to cover the economic value of patents and trademarks, which is considerable.

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

⁵⁸ Stephen E. Siwek, *Copyright industries in the US economy: the 2002 report* (Economists Incorporated for IIPA, 2002).

⁵⁹ Howkins, loc. cit.

⁶⁰ Howkins, op. cit., p.xii-xiii.

Using data from 'anti-piracy' sources

In order to make the political argument for the expansion and extension of intellectual property rights, and for their increasingly severe enforcement, the copyright industries themselves frequently try to show how 'piracy' and other activities have damaged their interests, and by implication, the interests of the countries whose economies they serve. Thus, unsubstantiated figures for losses due to piracy come to be bandied about in newspaper reports and gradually acquire a probably unwarranted authenticity. The problem is, as research by Stan Liebowitz and others has shown, that there is no logically coherent way of demonstrating the relationship between a specific number of, say, illegal music downloads from the Internet, and actual lost sales of specific CD recordings.⁶¹

Nevertheless, the data produced by such sources as the Recording Industry Association of America (RIAA), the Motion Picture Association of America (MPAA), and the International Intellectual Property Alliance (IIPA) is useful if only because it reinforces our sense of the claims that are being made on poor countries by Northern rights-holders. Indeed, such claims apparently have a significant degree of government backing: the US International Trade Commission apparently believes that 'because of an inadequate level of protection, many potential markets are unavailable to US manufacturers due to the proliferation of commercial piracy.'⁶² Indeed, the same source continues by stating that "the United States and other industrialized countries continue to urge many developing countries to live up to their new obligations by implementing the necessary legislation and enforcement mechanisms with respect to protecting intellectual property."⁶³ One source puts the 2002 losses to 'piracy' in the Middle East

Chomsky on the Capital Outflow

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

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

⁶¹ See for example, Liebowitz, Policing pirates in the networked age (Washington DC: Cato Institute, 2002), especially p.11-14; and his Will MP3 downloads annihilate the record industry? The evidence so far (unpublished paper, June 2003).

⁶² Christopher Johnson and Daniel J. Walworth, Protecting US intellectual property rights and the challenges of digital piracy (Washington DC: US International Trade Commission, March 2003), p.1 (US International Trade Commission. Office of Industries. Working Paper no. ID-05).

⁶³ Johnson and Walworth, p.1.

and Africa at US\$211 million for films, US\$160.5 million for recorded music, US\$371.5 million for business software, and US\$150 million for 'pirated' books.⁶⁴

To get a better sense of these claims, and of the kind of pressure that accompanies them, we can examine the case of South Africa's alleged failure to enforce Northern standards of IP protection. In its 2002 Special 301 Report, the IIPA claimed that the "total estimated losses due to piracy of US copyrighted works in South Africa rose to \$124.6 million in 2001."⁶⁵ These losses, according to the claims of the IIPA, even "cost [South Africa] jobs, tax revenues, and the possibility of developing its creative community." In 2003, this same organization recommended that "South Africa should be placed on the Priority Watch List", owing to a sharp increase in levels of 'audiovisual piracy', referring specifically to imports of motion picture DVDs. IIPA also alleged that there was 'corruption [...] within South African Customs.'⁶⁶

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

2.3 From TRIPS to TRAP: Free Trade Agreements and copyright

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

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

⁶⁴ IIPA, IIPA 2004 special 301 recommendations, IIPA 2002-2003 estimated trade losses due to copyright piracy, in millions of U. S. dollars, and 2002-2003 estimated levels of copyright piracy.

Middle East and Africa (IIPA, 2003).

⁶⁵ IIPA, 2002 special 301 report, [South Africa], p.552.

⁶⁶ IIPA, 2003 special 301 report, [South Africa], p.271.

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

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

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

The US has always had a surplus in its trade in IP products with the rest of the world, an advantage that it has tried to sustain quite ruthlessly. For instance, the US received a total of US\$36.5 billion on its intellectual property exports in 1999, while paying out only US\$13.3 billion to other countries. No other country in the world even comes close to a surplus on IP products of more than \$23 billion.⁶⁷ Many other Northern countries, such as Germany, France, and Canada actually have sizeable IP deficits; these countries may perhaps be hoping that their IP fortunes will reverse in the future. 'The copyright industries', specifically, 'are responsible for some 5% of the GDP of the United States', and 'they gather in more international revenues than automobiles and auto parts, more than aircraft, more than agriculture.'⁶⁸ The IP industries in general and the copyright industries in particular are therefore of tremendous importance to the well-being of the economies of the North, and exercise significant domestic influence.

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

⁶⁷ Story, Alan (2002), 'Copyright: TRIPS and International Educational Agenda', in Drahos, P, and Mayne, R, (ed.) *Global intellectual property rights: knowledge, access and development* (Palgrave Macmillan), p. 131.

⁶⁸ See Jack Valenti (2002), *A clear present and future danger*, 2002; Open Democracy, www.opendemocracy.net/debates/issue-8-40.jsp, accessed 9 March 2004.

in those commodities.⁶⁹ However, why should it necessarily follow that the same policies must therefore hold true for the rest of the world, the Southern part? Must copyright standards for the rest of the world necessarily mimic those of the North, or should the South decide appropriately what its domestic needs are using the vehicle of free trade agreements? What is actually happening is that important policies adopted in one part of the world are increasingly becoming a de-facto standard for the rest; and this – with far reaching implications – is being achieved in three specific ways.

To exercise global influence, the first and the most durable tactic of Northern copyright and other knowledge-based industries is to make regular and significant contributions to campaign financing, so that ‘appropriate’ candidates are elected to the US Congress or other legislature. Essentially, in this way, large corporate organizations can capture the regulatory structure of their national governments. The US media, entertainment, pharmaceutical, bio-technological, and telecommunications industries are among the most generous contributors to the campaign coffers of US elected officials. The drug industry contributed a total of \$230 million to financing campaigns in the 1999-2000 US elections cycle. The communications industry ranked fourth in generosity, with \$133 million. The health industry ranked seventh with \$96 million among industry contributors.⁷⁰ Once elected, such officials may be expected to respond rather amiably to the most oblique requests for national or international policy favours: indeed, the requests may not even have to be spelled out.

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

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

⁶⁹ Pharmaceutical companies are organised into the International Federation of Pharmaceutical Manufacturers and Associations [IFPMA], the entertainment industry into the Recording Industry Association of America and The Motion Pictures Association of America, and software enterprises into the Business Software Alliance.

⁷⁰ Centre for Responsive Politics, 2004.

called 'piracy') became a rather convenient argument for copyright industries to ratchet up the demands for more protective policies. 'Piracy' or theft of intellectual property in developing countries, it is claimed repeatedly without fail, leads to considerable loss by the owners and producers of intellectual property from the developed world. The International Trade Commission claims that foreign 'piracy' of United States IP costs the country approximately \$40 to \$60 billion per year.⁷¹ It must be noted that the domestic copyright industries of United States and western European countries were during the nineteenth century pirating products with considerable enthusiasm, something that was quite deliberately overlooked by their governments.⁷²

Free Trade Agreements

In what appears as yet to be the most breathtaking method to impose US copyright policy on the rest of the Southern world, the US is now putting great emphasis on free trade agreements. The pace for increasing the volume and intensity of global trade on intellectual property through the WTO is apparently slowing down due to internal differences between member countries. This has led to an increase in the number of bilateral and pluri-lateral (more than two) preferential agreements; at the same time, the world share of such non-multilateral (i.e. unilateral) and preferential trade has been steadily increasing over the last 10 years.⁷³ These agreements, involving two or more countries, could be regionally specific, as say within Asia, or geographically divergent, as say between Singapore and the United States. They are also referred to as regional trade agreements if geographically proximate or more generally as free trade agreements [FTA] as the idea is to free cross-border trade from the encumbrances of tariff duties or restrictive rules.

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

1. countries across the world, including those traditionally reliant on multilateral trade liberalization, are increasingly making FTAs the centre of their trade policy;
2. FTAs are in many cases establishing trade regimes that go beyond the scope of multilateral trade agreements;
3. preference is being given on reciprocal trade agreements between developing and developed countries.⁷⁴

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

⁷¹ Johnson, C., 'Global copyright protection and the challenge of digital piracy', 2003; USITC Report 3640, <ftp.usitc.gov/pub/reports/ittr/PUB3640.PDF> - Retrieved on July 10, 2004.

⁷² Ben-Atar, Doron, *Trade Secrets: Intellectual Piracy and the Origins of American Industrial Power* (New Haven, Conn. USA: Yale University Press, 2004).

⁷³ Crawford, Jo-Ann and Fiorentino, Roberto V., 'The changing landscape of Regional Trade Agreements, Discussion Paper No. 8, WTO, Geneva, 2005.

⁷⁴ *Ibid.*

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

The FTAs are clearly seen as opportunities by countries like the United States to raise and harmonise IP standards worldwide. Facing opposition in multilateral forums like the WTO, the US is opting instead for the free trade path to achieve its ends. The approach is basically to use a US-oriented IP template and impose its preferred standards on others through these FTAs. The IP issues in each FTA are negotiated according to the template set by the last agreement, with the same provisions included in each, regardless of whether they address some 'problem' in the negotiating partner country.⁷⁵ For example, the free trade agreement between the US and Jordan requires the latter country to change its domestic patent statutes so as to allow business method patents; only the most naïve could conclude that this change was made at the request of the Jordanians or that Jordanian-based companies will be the main beneficiaries of such a controversial type of patent.

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

The DMCA and its worldwide implications⁷⁶

The DMCA is an overly restrictive copyright law produced in response to World Intellectual Property Organization's (WIPOs) passage of the Copyright treaty signed in 1996 by nearly one hundred and sixty countries. All signatory countries of the copyright treaty are expected to legislate such acts within their national jurisdictions. The 1998 US DMCA is a good example of a legislation many US copyright-oriented industries seek to impose on the rest of the world. The terms of DMCA go well beyond the general recommendations made by WIPO. Having failed to persuade nations worldwide to adopt US-style copyright regulations via the WIPO Copyright Treaty, the US government has included many stringent requirements of DMCA along with others in its Free Trade Agreements (FTAs) with Jordan, Singapore, Chile, Morocco, Australia, CAFTA, Bahrain and Oman. It is now seeking to include similar provisions in its current multilateral free trade negotiations with 33 countries in the Americas⁷⁷; such negotiations, it should be noted, are not going well in the rapidly changing political climate across this continent.

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

⁷⁵ Weatherall, Kimberlee, 'Locked in: Australia gets bad intellectual property deal', Policy, Vol. 20, No. 4, Summer 2004-05.

⁷⁶ For more on this topic, see Section 4.8

⁷⁷ See FTAA & Bilateral FTA Resources: www.eff.org/IP/FTAA/ [accessed December 04, 2005]

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

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

DMCA can also be used to create potential censorship by permitting copyright owners to force internet service providers (ISP) to remove any material from the Internet and the World Wide Web if the copyright owner believes the material to be infringing in nature.⁷⁸ This clearly has consequences for the political freedoms that the Internet gives people around the world. The copyright owners can enforce removal of 'adverse' material by simply sending the ISP a written legal notice stating, in good faith, that the material is infringing. If the ISP fails to quickly remove access to such alleged infringing material, the provider itself can be held liable for any infringement that might be found. It is quite evident that most ISPs will rather err on the side of removing the claimed 'infringing' material rather than challenge the copyright owner with its platoon of well-heeled lawyers.

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

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

⁷⁸ See US supreme court judgment on: MGM Studios Ltd. ET AL Versus Grokster Ltd. ET AL, June 2005. http://fairuse.stanford.edu/MGM_v_Grokster.pdf [retrieved on December 10, 2005]

half single-spaced, typed pages. It defines in most circumstances terms what technological measures are, what acts relating to them are proscribed, what exceptions may be provided, and even when and how new exceptions can be created, and what criteria we can apply in creating them.⁷⁹ The Central American Free Trade Act (CAFTA) calls for civil and criminal penalties to punish anyone who 'circumvents' copy-protection technology or 'provides' such tools to anyone else. Like the DMCA, it would cover everything from DeCSS (a tool which removes copy-protection from DVDs) to products that do the same for e-books.⁸⁰

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

Extension of copyright terms through FTAs⁸¹

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

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

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

⁷⁹ Kimberlee, op cit.

⁸⁰ McCullagh, Declan, Copyright lobbyists strike again, August 1, 2005, http://news.com.com/2010-1071_3-5811025.html [retrieved December 04, 2005].

⁸¹ For more on this topic, see Section 4.2

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

Conclusion

The protective muscle of US copyright industries are altering the information landscape through free trade policy intervention over copyright term, the scope and basic character of encrypted software, and the anti-circumvention technologies. All former protections envisaged under most copyright laws are currently under even graver threat with the shift to the digital domain. Stallman suggests that copyright's role has now been completely reversed. It was set up to let authors restrict publishers and for the sake of the general public. Digital technology has transformed it into a system to let publishers restrict the public in the name of the authors.⁸²

Developed western countries have literally resorted to blocking or knocking away the development of IP strategies of developing countries, strategies that were once themselves used by the former in moving up the developmental ladder.⁸³ The blocking of initiatives generally happens through the developed world's considerable control over international institutions and the promise of access to developed markets in return for more stringent IP policies negotiated through FTAs.

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

2.4 Reprographic collecting societies and their projected growth in the South

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

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

⁸² Stallman, R., *Let's share*, 2004; Open Democracy, www.opendemocracy.net/debates/article-8-40-26.jsp [retrieved March 09, 2004]

⁸³ Ha-Joon Chang, *Kicking away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002)

and Kopiken in Kenya (IFRRO website). One of the key functions of national RROs is to ensure the collection and transmission of copyright fees to foreign right holders and, to facilitate such distributions, national RROs are members of the International Federation of Reproduction Rights Organisations (IFRRO).⁸⁴ A number of bodies, in addition to the IFRRO and individual RROs in the developed world, are encouraging the further spread of the RRO system and philosophy, including to least developed countries.

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

The DALRO record in South Africa

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

What these figures reveal is that distributions from SA reprographic users to foreign holders were more than 2.5 times higher than the total distributions made to South African right holders by DALRO.⁸⁵ As is well known, South Africa is a much richer country than any other in Africa and has a significantly larger and more robust publishing and education sector (the latter being where many authors work.) But even here, as the above figures show, the RRO system leads to a highly unequal balance of payments to the advantage of richer countries and reinforces existing patterns of dependency. If a fully functioning and active RRO were to be established in any other African county, especially a least developed country, the financial inequality would be even greater; such an African RRO would primarily – if not exclusively---become a royalty collector for foreign publishers and authors headquartered in rich countries.

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

⁸⁴ The website of the IFRRO is: <http://www.ifrro.org/>

⁸⁵ Here is the math (slightly rounded): 73,000 – 20,000 = 53,000; 137/53 = 2.5.

publishing and publishing export sector. For example, the UK's CLA received a total of £3.6 million from non-British RROs in 1998-1999; in that same year, the CLA distributed £3.5 million to non-British right holders. In the 1999-2000 financial year, the US Copyright Clearance Center, which represents 9600 US publishers and tens of thousands of authors, collected US\$79 million and distributed an estimated US\$57 million to its own national right holders.⁸⁶ The conclusion: the publishing and copyright picture in a country such as Senegal or Zimbabwe bears no relationship whatsoever to that existing in the UK, the US, or even South Africa. The RRO model simply does not fit in less developed countries; it is an artificial transplant from a qualitatively different publishing climate. In fact, there is so little enthusiasm for the RRO model in other parts of Africa that Kenya's Kopiken or Zimbabwe's Zimcopy, the two other African RROs and both established in 1995, did not make a single financial reprographic collection during their last financial year according to documents published on their websites.⁸⁷

If the above analysis is not sufficient reason to reject the idea of exporting the RRO model to least developed countries of Africa (or elsewhere in the South), the experience with the RRO model in developed countries should provide further warning. The so-called 'blanket licences' that RROs usually offer to users do not include such key educational requirements as the distribution of non-profit student course packs - extra royalties are added for such materials - and the users, such as schools and universities, bear most of the expensive transaction costs of administering such schemes.⁸⁸ Devoting already scarce educational resources within poor countries to the administration of such schemes on behalf of foreign right holders simply does not make economic sense; such schemes have extremely high transaction costs.

Table: RRO Activity in the Developing World

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

⁸⁶ Interestingly, the posted CCC's documents do not state how much was distributed to non-US right holders.

⁸⁷ Repeated attempts to contact both organisation and discuss their operations were unsuccessful.

⁸⁸ Alan Story, 'The Heck with HECA: a critical analysis of the UK's Higher Education Copying Accord', in K. Brunstein and P.P. Sint, eds. *Information property, intellectual property and the new technologies* (Austrian Computer Society, Vienna, 2002). As a result of the 13 December 2001 decision of UK Copyright Tribunal, the CLA will now be required to include the provision of course packs within the blanket licence it offers to British universities and colleges. See more in this dossier, see section 4.6.

Denise Nicholson's extensive writings on the situation in South Africa⁸⁹ further expose the severe access problems such schemes create, especially for poorer students; the problems that illiterate persons face because of the RRO model (and restrictive copyright legislation) should also be noted. Finally, as textbooks make up approximately 90 per cent of book publishing in Africa and as such texts are relatively inexpensive, wide-scale photocopying and distributing of infringing copies of African-produced textbooks is not a serious problem today. It would be difficult to reproduce photocopied texts more cheaply than the original; "it costs more to photocopy books than buy books", said Ghanaian publisher Richard Crabbe in a 2001 interview. As Crabbe also noted, his Ghanaian-based company depresses its prices further to a break-even basis for export to some of the poorest African countries. So the creation of a national RRO would not significantly increase the royalty revenues paid to African-based publishers for the photocopying (or other reproductions) of their own publications.

Exporting the RRO model to the South

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

At the same time, there is a growing and co-ordinated PR campaign by international collective management organisations to propound the benefits of their services and systems; one example is the slick 2004 pamphlet, 'From artist to audience', jointly produced by the IFRRO, the International Confederation of Societies of Authors and Composers (CISAC) and WIPO.⁹⁰ What is particularly significant is the emphasis this pamphlet puts on the benefits of collective management systems for countries of the South; of the 13 countries featured in 'From artist to audience', seven are located in the South (Nigeria, Malawi, South Africa, Senegal, Singapore, Jamaica, and Mexico). In this pamphlet, Nigeria's REPRONIG, which has yet to make a single distribution,

⁸⁹ Available in Story, CIPR study, pg. 81.

⁹⁰ Available at : http://www.ifrro.org/papers/booklet_wipo_cisac_ifrro.pdf

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

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

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

Creating ‘copyright cops’

RROs are primarily a creation of the photocopying era and constitute what one commentator calls ‘a ‘mass use’ (as opposed to a market use e.g. the direct purchase of a book) of copyrighted works.’⁹¹ As this use is virtually *sub rosa*, it is “difficult for rights-holders to know where to start defending their interests.”⁹² There still is a significant amount of unauthorised use in the South and the IFRRO, as well as organisations such as WIPO, are putting forward three messages that will rely heavily on representatives of users and those tasked within organisations of the South to police copyright (a.k.a. ‘copyright cops’).

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

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

⁹¹ Paul Edward Geller, ‘Reprography and other processes of mass use,’ 30 Journal of the Copyright Society USA, 21, 1990.

⁹² Ibid.

Collective management and Collecting Societies for music and sound recordings

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

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

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

Complying formally with the TRIPS Agreement imposes enormous costs on developing countries. Not only do they have to set up industrial property registries that many of them did not have before, but they also have to comply with the extensive enforcement obligations of the agreement (articles 41–61), which include border measures (articles 51–60) and criminal sanctions to combat piracy and counterfeiting (article 61). The high economic cost of compliance is, of course, compounded by the fact that these countries are net importers of intellectual property. In hard currency terms, then, compliance with the TRIPS Agreement brings about an outflow of foreign currency from developing countries.⁹³

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

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

⁹³ Coenraad J. Visser, ‘Making intellectual property laws work for traditional knowledge’ in J. Michael Finger and Philip Schuler (eds.), *Poor people’s knowledge: promoting intellectual property in developing countries* (Washington DC: World Bank, 2004), p.208, emphasis added.

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

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

[although] royalties and license fees are the most direct measure available of international earnings on patents, trademarks, copyrights, and trade secrets [... they] are imperfect measures of the value of technology exchange. Within a multinational firm, the fees charged a subsidiary may depend on international tax structures. Furthermore, optimal pricing of information is a complex problem, and receipts of license fees and investment income may be poor indicators of the economic value of intellectual assets.⁹⁴

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

Maskus has published selected data from the IMF's balance of payments statistics to quantify the flow of royalties and fees in selected cases. However, he points out that "many countries do not compile reliable and comprehensive data on such flows"⁹⁵ and so this kind of analysis is difficult. However, most of Maskus' analysis focuses on the effect that a strong national patent regime has on foreign direct investment in developing countries, rather than on copyright issues per se; his interest is mainly in questions of technology transfer. As he points out, 'intellectual property protection has taken on increasing importance to multinational enterprises.'⁹⁶

⁹⁴ Maskus, 'The role of intellectual property rights in encouraging foreign direct investment and technology transfer' in Carsten Fink and Keith E. Maskus (ed.), *Intellectual property and development: lessons from recent economic research* (Washington DC: World Bank, 2005), p.45.

⁹⁵ Ibid. p.43.

⁹⁶ Ibid. p. 62.

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

What is national treatment?⁹⁷

"The principle of national treatment," according to a leading international copyright lawyer, "has proved itself as the fundamental principle of copyright and neighbouring rights conventions for nearly a century."⁹⁸ A recent WTO dispute panel took a similar view as to the centrality of the notion of national treatment for international copyright relations.⁹⁹ First proclaimed at an 1878 authors' conference that preceded the Berne Convention (the leading international copyright treaty) of 1886, the concept of national treatment became a key feature not only of Berne itself, but also of subsequent international intellectual property treaties and agreements, such as the TRIPS Agreement.¹⁰⁰

Sometimes labelled the principle of assimilation, national treatment means "the complete assimilation [for copyright purposes] of foreigners to nationals"¹⁰¹ and has been defined as "a rule of non-discrimination, promising foreign creators who come within [a] treaty's protection that they will enjoy the same treatment for their creations in the protecting country as the protecting country gives to its own nationals."¹⁰²

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

⁹⁷ This article draws heavily upon Alan Story, 'Burn Berne: Why the Leading International Copyright Convention Must be Repealed,' 40 *University of Houston Law Review*, 763 (2003).

⁹⁸ Stephen M. Stewart, *International Copyright and Neighbouring Rights* (2d ed. 1989), p.42 (emphasis added). Other commentators have discussed the 'pervasiveness' of the principle of national treatment in Berne, as evidenced by the fact that there are only three exceptions to national treatment in Berne), stated that 'border-preserving rule of national treatment remains the cornerstone of Berne and its successor agreements' and concluded that national treatment provides 'the basis' of Berne, as well as of the Paris Convention which deals with patents and trade marks.

⁹⁹ See WTO Appellate Body Report on United States – Section 211 Omnibus Appropriations Act of 1998, §240–242, WTO Doc. WT/DS176/AB/R (Jan. 2, 2002).

¹⁰⁰ Article 3, TRIPS Agreement (stating that member nations shall treat each other equally 'with regard to the protection of intellectual property').

¹⁰¹ Stephen P. Ladas, *The International Protection of Literary and Artistic Property*, Vol. 1 (1938) p. 365.

¹⁰² Paul Goldstein, *International Copyright: Principles, Law and Practice* (Oxford: Oxford University Press, 2001), p. 72.

or B – must have the same duration of copyright in Y (for example, life of the author plus 50 years, or plus 70 years (e.g. in the US or the European Union) or plus 100 years (e.g. which Mexico has recently done under US pressure).¹⁰³

As for the philosophical or political justification, national treatment is viewed as being “in accord with the ideal of international law that all men [sic] are equal before the law, regardless of whether they are nationals or foreigners.”¹⁰⁴ So, on one level, the concept of ‘national treatment’ appears to be promoting the laudatory values of equality and non-discrimination, especially against non-nationals. However as the US Supreme Court concluded in another context, “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”¹⁰⁵ In one 1966 International Court of Justice case, a judge recognised that if a valid case can be established for what is called ‘differential treatment’, a court must necessarily, as a matter of justice, take steps to act on this difference; as Judge Tanaka wrote: “To treat unequal matters differently according to their inequality is not only permitted but required.”¹⁰⁶ Berne Convention jurisprudence, however, rejects this approach. As a result, here is what the concept of ‘national treatment’ means, in practice, for all countries of the South: for the country of Tanzania, for example, all cultural goods (fiction, films, etc.) which are produced either domestically, regionally (say within East Africa) or in any country covered by the Berne Convention (e.g. USA, UK, Japan) must all be treated alike for copyright purposes, no matter how different are the conditions in which they are produced, the importance of the works, the national priorities set for their use, etc.¹⁰⁷

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

¹⁰³ Note: On the question of duration, the EU does NOT actually follow this practice; it does discriminate against countries that do not have the same high standard of life of the author, plus 70 years, but this is an issue beyond the scope of this section.

¹⁰⁴ Stewart, *op cit.* at p. 38.

¹⁰⁵ *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

¹⁰⁶ *South West Africa* (Dissenting Opinion Tanaka), Second Phase, Judgement. ICJ Reports (1966) 6, at p. 306. As Judge Tanaka explained on pp. 303-304: “The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.”

¹⁰⁷ There is an exception that may be used in certain special cases, the so-called Berne Convention ‘three-step test’, but it is of extremely limited use by countries of the South and beyond the scope of this section. See Section 4.12

treatment may encourage formal equality, but *reproduce substantive inequality*.¹⁰⁸ Indeed, it is the private intellectual property rights of the richest nations and richest rights holders that are one of the leading sources of the current inequality between rich and poor nations. It is in the very act of upholding and enforcing these private property rights that these inequalities are deepened.

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

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

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

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

¹⁰⁸ Speaking about the conditions existing in Paris in 1894, Anatole France wrote, in his well-known phrase, that it is “the majestic equality of the laws, which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” Anatole France, *The Red Lily* 95 (Winifred Stephens trans., 1930) (suggesting that if ‘unalikes’ face equally enforced laws, enforcing laws that go to the very nature of their ‘unalikeness’ or difference result not in equality but substantive inequality).

and produce far more economically valuable works. Indeed, this is why the US put pressure on Mexico during recent free trade talks to extend its copyright duration.¹⁰⁹

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

¹⁰⁹ For more on duration of copyright, see Section 4.2.

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.”¹¹⁰

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.”¹¹¹ 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

¹¹⁰ Daniel Burkitt, ‘Copyright culture-The History and Cultural Specificity of the Western Model of Copyright’, 2001 *Intellectual Property Quarterly*, 186.

¹¹¹ Lawrence Lessig, *The Future of Ideas* (Vintage Books: New York, 2002), p. 3.

world, Africa, and among indigenous peoples, where traditional copyright 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.¹¹² 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 individual¹¹³ and the protection of intellectual property, in this instance copyright, is seen as constituting a basic right of the individual.¹¹⁴ 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.¹¹⁵ Locke's theory has helped shape

¹¹² 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>

¹¹³ 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.

¹¹⁴ *Ibid.*, p. 258.

¹¹⁵ 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

individualism as 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.

Analysis’ in, A .D. Moore (ed), *Intellectual Property: Moral Legal and International Dilemmas* (Lanham, Maryland, USA: Rowman & Littlefield, 1997), p. 267.

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.¹¹⁶ 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.¹¹⁷ Ideally, unless the product can be said to be creative, it cannot

¹¹⁶ 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.

¹¹⁷ 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."¹¹⁸ 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."¹¹⁹ 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."¹²⁰

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

¹¹⁸ Celia Lury, *Consumer Culture* (Cambridge: Polity Press, 1996), p. 1 and p. 51.

¹¹⁹ See S. L. Winter, 'What Makes Modernity Late?' (2005) *International Journal of Law in Context*, 1(1) 61–80.

¹²⁰ 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 Peshawar¹²¹

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.¹²² 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*¹²³ 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.

¹²¹ 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.

¹²² The indigenous people of Northwest Pakistan and parts of Afghanistan.

¹²³ 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.'¹²⁴ 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.¹²⁵

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. ¹²⁶

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

¹²⁴ 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>>.

¹²⁵ A Yanyuwa man from the Gulf of Carpentaria, Mussolini Harvey, describing the link between body painting and the Dreaming.

¹²⁶ 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*.¹²⁷

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."¹²⁸

"[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."¹²⁹ 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?"¹³⁰

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."¹³¹ The title of a book by William P.

¹²⁷ Bouziane Daoudi and Hadj Miliani, *L'aventure du raï: musique et société* (Paris: Éditions du Seuil, 1996), p.126-9

¹²⁸ Ibid.

¹²⁹ 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.

¹³⁰ Ibid.

¹³¹ 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.'*¹³²

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 Confucius¹³³ 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"¹³⁴ 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.¹³⁵

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."¹³⁶

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."¹³⁷ 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."¹³⁸

¹³² Stanford, Ca. USA: Stanford University Press, 1995.

¹³³ The Analects of Confucius. Translated by A. Waley (New York: Macmillan, 1938).

¹³⁴ Daniel Burkitt, 'Copyright culture- The History and Cultural Specificity of the Western Model of Copyright', 2001 *Intellectual Property Quarterly*, 177.

¹³⁵ Ibid.

¹³⁶ Wineburg, p. 26.

¹³⁷ *International Herald Tribune*, 10/11 February 1996.

¹³⁸ 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.¹³⁹ 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."¹⁴⁰ 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:

¹³⁹ Simon Butt, 'Intellectual Property in Indonesia: A Problematic Legal Transplant', 24 *European Intellectual Property Review* 2002, 429, p. 434.

¹⁴⁰ *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.”¹⁴¹ 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.¹⁴² 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)

¹⁴¹ 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.

¹⁴² 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.¹⁴³

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: ¹⁴⁴

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

¹⁴³ 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.

¹⁴⁴ 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...”¹⁴⁵

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.¹⁴⁶

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

¹⁴⁵ Riley, op cit. 177-178.

¹⁴⁶ 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.¹⁴⁷

However, innovation is on-going in the South, especially in areas covered by copyright, the subject of this dossier.¹⁴⁸ 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.¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹

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.¹⁵² 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

¹⁴⁷ 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.

¹⁴⁸ While patent-related claims are also important, they are not the focus of this dossier.

¹⁴⁹ 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.

¹⁵⁰ Lakshmi Sarma, 'Biopiracy: Twentieth Century Imperialism in the Form of International Agreements', *Temple International & Comparative Law Journal*, 13, Spring 1999, p. 109.

¹⁵¹ 'The Simmering Debate on Intellectual Property in South Africa,' *The African Times*, Vol. 15, September 30, 2002, p. 19.

¹⁵² 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."¹⁵³ 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.

¹⁵³ 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.¹⁵⁴ 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

¹⁵⁴ 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."¹⁵⁵ 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

¹⁵⁵ Toni Morrison, *Beloved* (London: Cahto 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."¹⁵⁶ 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 backgrounder 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'

¹⁵⁶ 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."¹⁵⁷ 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."¹⁵⁸ 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.¹⁵⁹ 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

¹⁵⁷ Lawrence Liang, Atrayee Mazmdar and Mayur Suresh, 'Copyright/Copyleft: Myths About Copyright', Infochangeindia.org, 1 February, 2005.
<http://www.countercurrents.org/hr-suresh010205.htm>

¹⁵⁸ Ibid.

¹⁵⁹ 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?"¹⁶⁰

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 Window's 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.

¹⁶⁰ 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 £100¹⁶¹; 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

¹⁶¹ 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

Backgrounder on WIPO¹⁶²

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.

¹⁶² 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."¹⁶³ 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.¹⁶⁴ 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.'¹⁶⁵ In a section entitled 'The Role of WIPO in Developing National Programs for Bahrain', the proposal states:

¹⁶³ Peter Drahos with John Braithwaite,

<http://www.thecornerhouse.org.uk/item.shtml?x=85821#fn038ref>

¹⁶⁴ See Drahos and Braithwaite, *Information Feudalism*, Chapter 7 'Agendas and Agenda-Setters: The Multilateral Game.'

¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ 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."¹⁶⁸ 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.¹⁶⁹

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

¹⁶⁶ See for example, K. Idris, *Intellectual Property: A Power Tool for Economic Growth* (Geneva: World Intellectual Property Organisation, 2003).

¹⁶⁷ 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.

¹⁶⁸ See 'Striking a Balance: The Patent System and Access to Drugs and Health Care', WIPO Publication No. 491(E), Geneva.

¹⁶⁹ *Ibid.*

justify its treatment and conceptualisation of them as mere commodities in the global marketplace.¹⁷⁰

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.¹⁷¹ 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

¹⁷⁰ The concepts of ‘commodification’ and ‘reward’ were explained earlier in Section 3.

¹⁷¹ 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."¹⁷²

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."¹⁷³

¹⁷² <http://www.wipo.int/wilma/pressinfo-en/200502/msg00004.html>

¹⁷³ 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.¹⁷⁴ 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, 2005.¹⁷⁵ 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

¹⁷⁴ For a brief critique of the 'Nashville in Africa' project, see Story, CIPR Study, pp. 12-13.

¹⁷⁵ <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.'*¹⁷⁶

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.*¹⁷⁷

¹⁷⁶ Online Forum on Intellectual Property in the Information Society, Theme Four
http://www.wipo.int/roller/comments/ipisforum/Weblog/theme_four_what_is_the

¹⁷⁷ 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,¹⁷⁸ 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.¹⁷⁹ 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.

¹⁷⁸ 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.

¹⁷⁹ 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

SECTION 4 – SERIOUS AND DAMAGING BARRIERS TO THE USE OF COPYRIGHTED MATERIALS IN COUNTRIES OF THE SOUTH

4.1 Introduction

Section Four, the longest section of the dossier, examines how copyright laws, their presumptions, and the fine print of domestic copyright statutes and international conventions block access to and use of all types of copyrighted works by those who live in the South.

The issue has been framed essentially under three themes:

- the barriers that have been and are being created to access in the South to educational materials, technical information and ‘knowledge’ **created in the North;**
- the barriers that are created within the South (though often not by the South but due instead to the provisions of international copyright conventions) to access to ‘knowledge’ and technical information **created in the South;**
- the cultural, social, and political consequences of the essentially one-way flow of copyrighted works such as books and movies **from the North to users in the South.**

Greater access to ‘knowledge’ and technical information created in the North

This was a key focus for the demands of newly-independent countries in the South during the 1950’s and 1960’s in the period labelled ‘the international crisis of copyright’, an era discussed in Section Five of the dossier. Fifty years later and given the continuing uneven global development and the fact that an overwhelming percentage of copyright works of all types are still produced in the North, this particular ‘flow’ – or, more accurately, lack of flow – remains an ongoing point of conflict and hardship. In this section, we look at how copyright acts as an access barrier in a variety of locations and programmes and for tens of millions of people across the South: in libraries, on distance learning courses, on the Internet and in the use of computers themselves, in the translation of copyrighted texts into other languages, for students, teachers and university researchers, for the visually impaired, and for the public generally. We commence this section with an article on the duration of copyright.

Access barriers to ‘knowledge’ and technical information in the South

With the recent expansion of copyright systems in the South and with the increased production of works in some – though not all – such countries, this aspect of the access question is primarily an internal or domestic (or, in some cases, regional) matter for the countries of the South. This section of the dossier only addresses this

aspect of the access issue in a few isolated spots; it is one issue that deserves much fuller discussion and documentation with practical domestic examples from the South. The wider embrace of the ideology of copyright across the South, a goal that the World Intellectual Property Organisation is working hard to achieve (as we explained in Section 3.9), will also lead to the barricading of more works behind locked and privatised copyright doors.

The cultural, social and political consequences of the one-way flow of copyrighted works from the North to the South¹⁸⁰

Up to this point in the introduction, we have put quotation marks around the word 'knowledge'. We have done so for good reason as we think it is fallacious to assume that, on the one hand, the rich countries of the North are the source of all the important knowledge in the world and that, on the other hand, the countries of the South are interested only in being passive receptacles of this knowledge. Western chauvinism and a sense of superiority on this issue of knowledge and its use are strongly entrenched. Yet, this is a complex issue that is addressed only briefly at the end of Section 4 of the dossier; it also requires further discussion, debate, and documentation (which we have only begun in Copy/South). One question that needs to be examined is this: Should the South endorse the notion of an unrestricted 'free flow' within the global marketplace of copyrighted works and cease to worry about the wider social and political consequences of what is sometimes called 'cultural imperialism'? This, we suggest, is a dangerous course of action to take, especially after reading excerpts (found in Section 4.13) from the writings and speeches of those in the United States who encourage this particular form of knowledge transfer.

The role of copyright

Obviously copyright laws and the global copyright system are *not* the only barrier – or even, in some cases, the most important barrier – to access. In fact, in some poorer parts of the South, *copyright is almost a non-existent issue* as traditional hard copy texts, such as books, are not available and computer use and Internet access is non-existent ... or available only to a tiny elite. So income levels are one determining factor for access. The level of state financial support for schools and libraries is another, though copyright laws certainly add to the costs of providing instructional materials and the purchasing of books for libraries. Other access barriers are primarily economic and technical, whether the shortage of photocopiers or the shortage of computers and telephones and other telecommunications linkages that are taken for granted in many parts of the North. In such circumstances, copyright restrictions add an additional obstruction, an obstruction, we should add, that is seldom discussed in policy studies about the South and its way forward. This section of the dossier is one attempt to try to overcome this important omission.

¹⁸⁰ For a discussion of this topic from the viewpoint of moral philosophy, see Johannes J. Britz and Peter J. Lor, 'A moral reflection on the information flow from North to South: an African perspective' Libri vol.53 (2003): 160-173.

4.2 Extending copyright terms extends privatisation

Copyright law can create some very puzzling scenarios, indeed some downright absurd ones for accessing protected works. Consider the following hypothetical situation related to the extension of the term of copyright:

A Spanish literature teacher in Chile, let's call him Juan, needs to provide each of his 15 students with a copy of a short book (40 pages) of poems for use on his course. The book was written by a poet, let's call her Maria, and published in Spain in 1935. Maria's book is out of print and so it cannot be purchased anywhere, including in Chile or Spain. Juan does, however, have a copy in his personal library and wants to use his own edition to make the photocopies. Maria died 56 years ago in 1950 and before she died, she transferred her ownership of copyright in the poems (known as assigning copyright) to a Spanish publishing company because, at the time, she needed money to pay off some bills. (There are very few rich poets.)

You might think that there would not be a problem *in 2006* for Juan to photocopy an out-of-print, 1935 book and pass it out to his students for their reading and studying purposes. In fact, there is. If he goes ahead and photocopies this book of poems and passes it on to his students, Juan is liable to face a civil action (a private legal action initiated by the Spanish company) for copyright infringement; in some countries, he might also face a criminal prosecution. Why? For infringement purposes, it does not matter that the book is out of print. Nor that Juan owns a copy in his personal library. Nor does it matter that Maria is dead and, in any event, that she had assigned the copyright to a company before she died (...or that Juan did not know about the copyright assignment and that he could not track down this Spanish company to ask permission to copy the book even if he had known about the assignment.) And finally, nor does it matter that the reason Juan was doing the copying was for a non-profit educational purpose; there are no such blanket exemptions available in copyright law.

What *does matter* is that Chile has recently extended the term of copyright *from* a term or period of the life of author (that is, from the date the author dies), plus 50 years *to* a term of life of the author, plus 70 years. Because Spain, where the book was published, and Chile, where it is to be used, are both members of the 1886 Berne Convention for the Protection of Literary and Artistic Works,¹⁸¹ copyright in this 1935 book of poems will not expire in Chile and in Spain until 70 years after the year Maria died (1950), which is 2020. And while Juan and the university in Chile that employs him is not likely to actually face a civil action (the courts would grind to a halt if every infringement was prosecuted and many of us unintentionally infringe copyright regularly or must do so because there are no other alternative and sensible way to access and distribute materials), the fact remains that copyright term extension is creating an increasingly precarious situation for those who wish to use works legally protected by copyright. Numbers of countries in the South have, in the past five years, made the situation even worse, often as a result of growing pressures

¹⁸¹ See Section Six, Glossary.

from the United States and, to a lesser extent, from the European Union. As a South African educational copyright expert has stated, “copyright term extension threatens to make criminals out of hundreds of teachers and librarians who simply want to provide materials for their students.”

The legal basics of the copyright term issue

Here are the legal basics of the copyright term question:

Under the provisions of Article 7(1) of the Berne Convention, the term of copyright protection “shall be the life of the author and fifty years after his [or her] death.” This means that every country which is a member of the Berne Union must provide copyright protection for the works (e.g. poems, novels, music, photographs) produced not only within its own country, but also in all other members of the Berne Union for this same period; there are 160 members of the Berne Union (as of November 2005). However, further along in Article 7, it states that member countries “may grant a term of protection in excess of those provided by the preceding paragraphs.” There is no wording in Berne that establishes what the maximum allowable term is and so, for example, any country could legally establish a term of life of the author, plus 500 years, or longer.

Especially in recent years, copyright owners (who, in most cases, are *not* the actual creators of the works in question) have been pushing for longer and longer copyright terms. Any actual creators/authors directly affected would have died decades ago. Jack Valenti of the US, president of the Motion Picture Association of America from 1966 to 2004, once suggested infamously that the term should be “forever less one day.” These ‘copyright industries’, as they call themselves, want to delay for as long as possible the date by which materials must go into the public domain and hence when they can be freely available for all to use without restrictions.

Many criticisms have been made about the 1998 extension of copyright in the United States under the provisions of the Sonny Bono Copyright Term Extension Act¹⁸². This section of the dossier examines the extension of copyright term across the global South and its effects across three-quarters of the globe.

As stated above, numbers of countries in the South have jumped aboard the ‘extend copyright term’ train. Although the situation is changing on almost a monthly basis and is somewhat complicated¹⁸³, it has been reported that in Morocco, Madagascar, Ghana, Mozambique, Nigeria, Chile, Costa Rica, Ecuador, Paraguay, Nicaragua, Peru and Singapore, the term has been increased to life of the author, plus 70 years. In July 2003, Mexico increased its term to life, plus 100 years, which appears to give this country the longest term of any country on the globe. (Cote d’Ivoire is second, at lifetime of the author, plus 99 years.) Other countries, such as the Dominican Republic and El Salvador appear poised to also change to lifetime, plus 70 years. (Usually all such extensions apply to both existing, created under previous legislation, and new works to be created in the future.) Relentless pressure is being exerted on other countries, such as South Africa, to also increase its term to life, plus

¹⁸² For one example, see the excellent website ‘Opposing Copyright Extension’ at: <http://homepages.law.asu.edu/%7Edkarjala/OpposingCopyrightExtension/>

¹⁸³ For further details, see <http://onlinebooks.library.upenn.edu/okbooks.html>

70 years. There, as elsewhere, the pressure is usually coming as a key clause in new and proposed free trade agreements between various countries and the United States.¹⁸⁴

Yet, there has also been resistance and opposition to such US pressures to extend the term of copyright. In October 2002, the government of Taiwan, for example, rebuffed US pressures to extend its term to life, plus 70 years, during Taiwan-US intellectual property negotiations. Outside the offices of the Board of Foreign Trade in Taipei, a large group of university students protested against the US pressure, shouting “knowledge cannot be monopolised.”

Multi-nationals are the main beneficiaries of term extension

Who benefits from such increased monopolisation and privatisation of knowledge when countries in the South cave in to US pressures? The main beneficiaries now – as they will be also in coming years – are large multi-national corporations located in the United States and Europe; they are, by a wide margin, the richest rightsholders in copyrighted works and have the deepest (and widest) ‘warehouses’ of already copyrighted works. Only the most naive person would believe, for example, that the US put pressure on Mexico to increase its copyright term to the lifetime of the author, plus 100 years, because the US government wanted the songs and stories and artwork of Mexican composers or novelists or artists to gain extra years of copyright protection within Mexico. Instead, the aim was to gain an additional 20 or 40 or more years of revenue *for US-owned works used in Mexico by Mexicans*.

The main consequence of extending the term of copyright – in both the South and the North – is that fewer and fewer works will enter the public domain and will do so at later and later dates; until such works enter the public domain, they will have the potential to earn more money for their owners, who again, are seldom the original creators. And in exchange for what supposed benefits? First decisively exposed as a self-serving fiction more than 160 years ago¹⁸⁵, the main rationale for term extension is the assumption that authors and composers and artists will write more and better works and spend longer at their desks *today in 2006* because they want to provide greater financial rewards not only for their children and their grandchildren (both of whom may be unborn and hence may only be *possible benefactors* in the future *if and only if the original author retains copyright*) but also for their great grandchildren and great-great grandchildren who *may be alive in the year 2131*. (The example assumes that the author is now aged 25 and dies when he or she is 80 and that the work is still a saleable commodity in 2131.) Little wonder then that Macaulay, who exposed this fiction so many years ago, labelled copyright “a tax on readers....”¹⁸⁶

Two further economic realities are often forgotten as well. *First*, the economics of copyright means that, while the first copy of a CD or software may require a significant initial investment by the producer (but often also by the actual creator), the cost of all additional copies produced, such as those available and sold during the period of additional copyright term, are very cheap. They can be stamped out on

¹⁸⁴ For background on current Free Trade Agreements, see Section 2.4 of the dossier.

¹⁸⁵ T. B. Macaulay, Speech to the British House of Commons, 5 February 1841. Available at: <http://www.kuro5hin.org/?op=displaystory;sid=2002/4/25/1345/03329>

¹⁸⁶ Ibid.

presses for mere pennies per copy. In other words, copyright term extension creates what can only be called 'pure windfall profits' for copyright owners of existing copyright works. *Second*, adding an additional 20 or 50 or more years of copyright term adds – indeed ensures if the product remains marketable – additional generations of revenue streams for such corporations. For users and consumers in the South, these additional streams add additional generations of costs and, ultimately, debts. At a time when many countries in the South are trying to reduce their debt burdens, increasing the term of copyright means that they are literally mortgaging their financial futures; instead, they should be considering how they can provide more and better materials to their citizens at cheaper prices today and in coming years.

Estimating the costs of term extension

Few reliable economic studies have yet been able to estimate how much copyright term extension will cost individual countries in the South; admittedly it is a difficult calculation to make. One study from Australia, which has also recently increased its term from life, plus 50 years, to life plus 70 years, is instructive for far less developed countries. According to Australian National University economics professor Philippa Dee, Australia's extension of copyright, which was part of its free trade agreement with the US, will cost Australia up to AU\$88 million a year and AU\$700 million in the future.¹⁸⁷ And is there really an incentive for authors and composers? A total of 17 leading US economists, including five Nobel Prize winners, told the US Congress in 2002 that adding 20 more years of copyright term in the United States would create no significant incentive for the creation of new works in that country. How would an additional 20 years create an incentive for authors in Peru or Singapore? And how can there be an incentive created by the retrospective extension of the copyright term, that is, adding an additional 20 or more years to works written or composed by persons who have long since died? "Dead men do not write poetry," as one commentator put it. Nor does our dead Maria.

And who loses is becoming clearer every day. Let us assume poet Maria also wrote a best-selling book of poems used as a school text in Chile and with average annual sales in that country of 2,000 copies. And let us assume that the wholesale cost of that book is US\$10.00 = Chilean Pesos 5,160.00. Chile's decision to increase the copyright term by 20 years means, in the case of Maria's book, that from 2000 to 2020, the additional cost to Chileans or Chilean educational authorities will be 2,000 copies X \$US10.00 X 20 years = \$US400, 000.00 (or Chilean Pesos 206,481.00). Not surprisingly, such books can seldom be afforded.

We can fairly conclude that copyright term extension is another barrier to access. Why the year that an author died, in this case 1950, should determine the term of copyright is a question which is seldom considered; such a determining factor makes even less sense when the author does not even own copyright in the work. And fifty years of copyright protection after an author dies is already a very long period of time. Let's not forget that the first copyright law, Britain's Statute of Anne of 1709, was drafted at a time when books and papers circulated at a far slower pace than

¹⁸⁷ 'Big FTA stough brewing on copyright', 30 June 2004, [Bilaterals.org.](http://www.bilaterals.org/), at http://www.bilaterals.org/article.php3?id_article=737

today. This statute awarded a term of 14 years *after publication* in most cases. In 2006, how can a 70 year term – or longer as in Mexico – *after an author dies* be justified?

4.3 Distance learners kept from study materials: experiences from Kenya

“Someni vijana, muongeze pia bidii, mwisho wa kusoma mtapata kazi nzuri sana”

The chorus of this song, broadcast on a back-to-school radio show, resonates in every Kenyan child’s ears during every school term. Translated, the chorus urges all of Kenya’s young people to read so that, at the end of the day, they will be able to get a good job. And the benefits of having a good education outlined in that simple song are reflected in the economic disparity between those who are educated and those who are not. As a recent World Bank-funded study done in Kenya concluded, those households with parents who were educated are less likely to suffer poverty than those with no education at all.¹⁸⁸

Unfortunately in Kenya and in many other African countries south of the Sahara, this gap continues to grow as few are able to afford the high costs of education and donor-dependant government budgets are no longer able to fund primary, let alone secondary and tertiary, education. Hence it is not an exaggeration to say that there is a crisis in higher education in Sub Saharan Africa. This diverse region suffers from a myriad of educational problems including the inability to accommodate the volume and variety of student demand, inflexible teaching methods that cannot accommodate a diverse student body, a lack of educational quality and, more devastatingly for both students and the government, the rising cost of education that is not sufficiently relevant to the labour market. This has resulted in a massive brain drain from the continent, but the option to travel abroad and study is a preserve of the rich.

A number of African countries including Kenya have responded to this crisis by “liberalising”, that is, commercialising, their education sector and permitting private institutions to set up tertiary institutions in their countries. While these have attempted to fill a gap, many see them as taking advantage of a desperate situation: the quality of education offered is questionable in some instances. Nevertheless, these institutions have been unable to plug the hole, especially as the majority of these privately operated institutions tend to offer humanities-based courses rather than technically-based programmes. The former are administratively cheaper to offer in comparison to the cost of putting up a medical school with necessary equipment or an engineering department that would be expensive to establish and maintain without any government financial support.

On paper, distance education presents itself as a feasible alternative for Sub Saharan Africa. It promises to solve many of the problems faced by government, such as the

¹⁸⁸ Muriithi Muriuki 'The Great Divide: Kenya's Richest And Poorest Areas' at http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=60611

inability to construct teaching facilities and accommodation for an ever-increasing student body or to pay for a larger number of teachers and lecturers. Distance learning would seem to allow for the provision of more affordable education to larger numbers of students and to reach those far from city hubs. In reality, however, many countries in this region have assigned distance education a low priority as evidenced, for example, by the lack of a national policy on distance learning in Kenya.

Delivering distance learning in Africa

Private enterprises have, instead, taken the lead in the provision of distance learning in this region; they use the following delivery models:

- Distance learning via electronic means, as is done via African Virtual University (AVU), which is a World Bank initiative running in Kenya, Zimbabwe, Uganda, Ghana, Ethiopia and Tanzania. It is aimed at filling in the gaps caused by the inadequate provision of technology-based courses.
- Distance learning through 'affiliate' colleges. Over the past ten years or so, there has been a significant upsurge in the number of colleges offering degrees and diplomas from national and foreign institutions in the developing world. This is often preferred as it is cheaper than studying abroad.
- Distance learning through correspondence. This remains the oldest and, for institutions, the cheapest form of distance learning. It involves the least amount of physical resources and has successfully been used by the University of South Africa (UNISA) and Strathmore University in Kenya.

Yet, according to a study done by the Association for the Development of Education in Africa¹⁸⁹, there are fewer than 150 distance education providers operating across Sub Saharan Africa today and governments have not warmed up to the concept as expected. So why has this concept borne so little fruit in Sub Saharan Africa? The most common reason given is that the cost of distance education is more expensive than conventional education and thus its survival rate is diminished. One example is the Radio Language Arts Programme in Kenya which closed when US Agency for International Development (USAID) funds were no longer available. More recently, students in one program at the Africa Virtual University-Kenyatta University have been required to purchase textbooks worth USD 800, and even when substitutes were compiled at USD 100¹⁹⁰, this cost still remained too dear for the majority in Sub Saharan Africa who live below the poverty line.

At the same time, a seldom mentioned reason for the high contributory costs of distance education is the high costs associated with the operation of copyright laws; they create a thicket of access problems. Distance education requires that teaching materials are often copied and distributed to students. Instructors and course designers often use copyrighted materials to design courses and teach and learners often must consult copyright materials for their learning requirements. For delivery

¹⁸⁹ ADEA Working Group on Distance Learning and Open Learning 'Distance Education And Open Learning In Sub-Saharan Africa' at http://www.adeanet.org/publications/docs/open_learning_1.pdf

¹⁹⁰ Pauline Ngimwa's e-mail response of 8 December 2005 to question on the effect of copyright laws on Distance Learning.

purposes, most of these teaching materials are copied and distributed to students who are usually remotely located. In Kenya and elsewhere, copyright laws give rights owners the exclusive or sole right to copy and distribute their works. Because of this, copyright owners, who are usually publishers, are able to charge arbitrary prices for access, backed up by the added threat that any unauthorised use of their works will be illegal in most national jurisdictions worldwide and that breaches can be prosecuted. As digitisation catches up with education, more and more materials are now being locked away behind subscription based databases which, when coupled with digital rights management systems¹⁹¹, make them all the more difficult to access.

Existing laws do not facilitate distance learning

This expensive and restrictive system does not augur well for developing countries that are largely importers of copyrighted material. Philip G. Altbach contends that the specific needs of these countries will vary. In some cases, access to scientific journals and books at subsidized prices for a limited period would help greatly.¹⁹² In other cases, local publishers with limited markets need easy and inexpensive access to foreign books in order to translate them into a local language. What is certain is that copyright has served as a barrier to the development of distance learning in the countries of the South. Whereas distance learning students expect to receive the same access to materials as their counterparts in the 'normal' stream of learning, the copyright holder expects to make profits from the sale of his work or from licences and royalties. Unfortunately because "*copyright laws were not structured to facilitate distance learning*",¹⁹³ this conflict of interest between the expectations of the key players in the distance learning equation has persisted and the interests of the developing countries with weaker bargaining powers continue to be ignored.

Tyrants and autocrats have always understood that literacy, learning, books and newspapers are potentially dangerous. They can put independent and even rebellious ideas into the heads of their subjects.

Carl Sagan, The Demon-Haunted World: Science as a Candle in the Dark. 1997 p. 362

One particular problem facing distance learning students is their inability to actually access many required books, journals, and other like materials. The cost of textbooks and other material has become so high in Kenya and elsewhere in the region that the sparse numbers of public libraries with meagre state funding are not able to properly provide access to books and materials. For any distance-learning programme, this absence spells disaster: the usual expectation is that correspondence students should be able to at least access books in their local public libraries. And even where the student can access a local library, it is rare that public or even private libraries hold copies of relevant books or indeed hold enough copies of essential texts and materials. In the past, it appears that this was not as much of a problem as it is today; one book was simply duplicated for distribution to many readers. (For example as a

¹⁹¹ See Section 6, Glossary.

¹⁹² Philip G. Altbach, 'The Subtle Inequalities Of Copyright', Bellagio Publishing Network at http://www.bc.edu/bc_org/avp/soe/cihe/publications/pub_pdf/copyright.pdf

¹⁹³ Laura N. Gassaway, 'Impasse: Distance Learning and Copyright' at <http://moritzlaw.osu.edu/lawjournal/gasaway.htm> (last visited 17 Apr 2005)

student, one text book used for the Jurisprudence and Social Foundations of Law modules was available at the University of Nairobi's Faculty of Law Library both in the original and in the duplicated form.) However, the increased protectionism ushered in by the TRIPS Agreement means that these libraries can no longer afford to do that and thus there is a chronic shortage of books and materials for students. With neither access to journals nor online materials available on university campuses, this means that the distance learning student has to choose between attending lectures in order to get information or forfeiting certain subjects in which the needed materials are too costly; in the end, this defeats the purpose of having a distance education programme.

In the absence of the use of course packs, it is up to the student to supplement his/her own reading or research with whatever materials can be afforded. For many students, the prices of materials and books are too dear and many turn to photocopying the books at a fraction of the cost.¹⁹⁴ However as international pressure mounts for the stiffer enforcement of intellectual property rules, many students will not be able to do this in the near future...or do so legally. Researching for and obtaining material via the Internet is also an expensive affair as not only does it involve commuting to and from the towns that provide the service, but also includes the cost of using Internet facilities at cyber cafes, usually charged by the minute. This is a further hindrance to many students.

Because of the significant fees and expenses incurred by students on distance learning courses, institutions that provide distance learning programmes are often faced with the burden of obtaining and providing teaching materials, reference books, and even access to revision papers. Most of these are obtained from western countries and is therefore a costly affair. Not only do they have to make regular 'affiliation' payments, they must meet other criteria such as provision of library facilities, reprographic facilities, and access to 'relevant IT/Computers' in order to obtain and retain accreditation status as outlined by the Association of Business Executives. Such criteria refuse to acknowledge the widespread poverty in many parts of the South or even the fact that a mere 8% of the rural population in many developing countries are served by electrification.¹⁹⁵ As a result, many in rural areas are denied access to even a narrow range of educational material and courses.

Producing course packs

Where an institution is able to produce its own course packs, as does the Strathmore University, then the issue of copyright is no longer straightforward. Often, course packs will include articles, tables, photographs, newspaper clippings, extracts from books, music, etc. that are taken from other sources. The problem is indeed far from simple for distance learners. The 'fair use' exemption to copyright, as found in S.26 (1) of the *Kenya Copyright Act*, which permits only the copying of two short passages of a work, is simply derisory. In addition, this 'fair use' provision is only applicable

¹⁹⁴ The photocopying charge in Nairobi- Kenya for example ranges from Kshs1.50 (USD 0.02) to Kshs. 3 (USD 0.04) per A4 Sheet. (Exchange rate obtained using Universal Currency Converter at <http://www.xe.com/ucc/convert.cgi>)

¹⁹⁵ Daniel M. Kammen 'Household Power in a New Light: Policy Lessons, and Questions, for Photovoltaic Technology in Africa' *Tiempo: Global Warming and the Third World Issue* No. 20 (1996), p. 1 - 8 at <http://ist-socrates.berkeley.edu/~rael/tiempo.html>

to institutions registered under the Education Act. This effectively prevents the use of such materials in community learning centres without the payment of royalties or licence fees. These fees are unfortunately passed on to the locals, making it more expensive for those in rural areas where such community centres play a pivotal role in adult education and vocational training.

As a result, institutions are then forced to rely on either material already in the public domain or seek permission from the copyright holder to reproduce the work for such purposes. Such permissions can take months to process and as the duration of copyright lasts for 50 years or 70 years (or longer) after the death of the author¹⁹⁶, many of the works in which copyright has reverted to the public domain may not be relevant in today's world. The state of science, for example, is rather different today than it was in the 1950s.

One alternative is being tried, though still on a small scale. Steve Foerster of the Free Curricula Centre (FCC) states that it may be more effective in the short run to refurbish old texts and write new ones than to try and overcome what he calls "the Intellectual Property lobbying juggernaut." This is the rationale behind FCC's move to attempt to write and provide free textbooks to those in the developing world.¹⁹⁷

Copyright laws also serve to hinder the assimilation of knowledge by local communities by granting monopoly rights of translation to the copyright holder.¹⁹⁸ Lecturers and institutions could find themselves facing law suits if they attempted to translate such works. And with over 40 tribes in Kenya alone, all with different dialects,¹⁹⁹ the translation costs of books can run into the millions of dollars, especially because for each dialect, a separate licence must be obtained. Thus the only book widely translated remains the Bible. For this reason, education in developing countries is seen as synonymous with learning the languages of the countries of the West, for it is the only means to obtain material, both in the online and offline worlds.

Even though limited, the use of online programmes for distance learning as done by the AVU also faces several copyright hurdles. Putting materials in digital formats involves using multimedia technology to develop and deliver the coursework and assessments. And this means that broadcasting issues and licensing use of software also comes into play. According to Pauline Ngimwa²⁰⁰, initially the University tried to broker education programs from outside Africa which were to be delivered to its students. This approach, however, was soon abandoned as this mode of delivery proved very expensive; there was a high cost of clearance licences for such activities and broadcasting, distribution, and copying were among other restraints. This has now forced the AVU to look to their partner institutions to develop and provide their own materials. Again, this raises the question of ownership of the content. Observers

¹⁹⁶ For more on the duration of copyright, see Section 4.2.

¹⁹⁷ The group's website is <http://www.freecurricula.org/>

¹⁹⁸ For more on translation and copyright, see Section 4.11

¹⁹⁹ See more on Kenya's language distribution at <http://www.kenyalogy.com/eng/info/pobla4.html>

²⁰⁰ Pauline Ngimwa, 'Copyright And Open Distance And E-Learning (ODEL): The AVU Experience', presented at the African Copyright Forum: An International Conference, 28th - 30th November 2005 Kampala, Uganda

fear that private institutions, which as noted above provide most of the distance education programmes in Sub Saharan Africa, will prefer to keep ownership rights to themselves and make profits from that material. Again, valuable knowledge for students would be retained behind the closed gates of copyright-induced pricing.

As has been illustrated above, the use of distance learning has been hampered because of the operation of increasingly restrictive copyright laws. As it stands, any calls to end poverty in these countries will not be fruitful if the inhabitants do not have the knowledge on how to best use the resources available to them. Copyright laws then work contrary to their supposed purpose – to stimulate creativity – by keeping that knowledge the property of a select few, and causing a waste of resources in ‘reinventing’ the wheel. Perhaps when the necessity of encouraging distance learning is grasped by the leaders in the countries of the South, we may see a significant push towards its development.

4.4 How copyright hinders librarians in providing services to library users

Copyright and intellectual property protection impinges in different ways on the practices of librarians as **individual professionals**, on libraries as **institutions of various kinds** (public, commercial, and academic), on the professional organizations of library workers, and to some extent on ‘librarianship’ as an idealised amalgamation of all of the above. This is almost always in respect of patrimonial or economic rights, and usually has little or nothing to do with moral rights, either in law or principle. To the extent that such protection limits or inhibits them from providing service to users, some librarians, especially in countries of the South, have begun to express a not fully articulated uneasiness with the way that the copyright regime appears to favour the commercial interests of publishers over a hypothetical ‘right to knowledge’. In this section of the dossier we will examine the hidden assumption that library collections harm publishing, the idea that librarians have a moral duty to police copyright compliance among users, the impact on libraries of multiple layers of protection for digital content, and whether the librarian’s first duty is to the library user.

Libraries and Public Lending Right

At least some publishers and booksellers have always believed that the ‘free’ availability of their books in libraries constitutes a threat to their commercial interests, and is likely to harm sales. Logically enough, those who hold this belief are willing to use copyright law and any other available mechanisms (*see below*) to protect their perceived interests and to recover what they see as lost revenue, even if this could mean that libraries might not function as well as they would otherwise do. Two centuries ago, when the first ‘circulating libraries’ (the precursors of today’s public libraries) were established, the London

Knowledge is not a commodity, and can never be one. Knowledge is the distillation of human endeavour and it is the most profound collective good that there is...Education must embrace the intellectual, cultural, political and social development of individuals, institutions, and nations. This ‘public good’ agenda should not be held hostage to the vagaries of the market.

Alec Erwin (former South African Minister of Trade and Industry), *ANC Today*, Vol. 3, no. 41, 17-23 October 2003.

bookseller James Lackington (1746-1815) argued against this perspective, writing that:

When circulating libraries were first opened, the booksellers were much alarmed, and their rapid increase, added to their fears, had led them to think that the sale of books would be much diminished by such libraries.

However, Lackington continued, the availability of books in the circulating libraries actually had the opposite effect:

[...] experience has proved that the sale of books, so far from being diminished by [libraries], has been greatly promoted, as from those repositories many thousand families have been cheaply supplied with books, by which the taste of reading has become much more general, and thousands of books are purchased every year by such as have first borrowed them at those libraries, and after reading, approving of them, become purchasers.²⁰¹

It is unclear whether Lackington's optimistic conclusion was supported by any empirical evidence at the time, but it is certain that in the two hundred years since he wrote, publishers, booksellers and librarians have existed in uneasy symbiosis, at least as far as intellectual property rights are concerned. This is primarily because their interests sometimes clash: publishers and booksellers are in the business of selling as many books as possible in order to make a profit, while librarians are in the business of meeting the information needs of their users.

In fact, Lackington's argument has been ignored in modern practice, most especially and specifically by the introduction in many countries of Public Lending Right (PLR), which, admittedly, is aimed at helping authors rather than vendors.²⁰² It is hard to argue against the proposition that by introducing what is effectively a low level tax on the borrowing of books from libraries the state is able to redistribute some revenue to those authors whose books are actually read.²⁰³ Such a proposition appeals to most people's sense of natural justice. Whether the author in question is a best seller like J. K. Rowling or a struggling Grub Street hack has no bearing on the issue. Naturally enough, in those mainly developed countries where writers' organisations exist, such bodies are noisily in favour of PLR – it delivers cash to members and shows that the organisation has actually achieved something concrete in their interests.

The problem, however, is that the *principle* underlying PLR is both muddled and also has far-reaching implications. First, the unexamined assumption is that the existence of public libraries does in fact *actually harm* book sales. The counter argument, of course, is that without public (and other) libraries many published works would scarcely sell a single copy. Like the argument about music downloading through Napster, it is extraordinarily difficult to prove the first part of the case either way,

²⁰¹ Quoted in S. H. Steinberg, *Five hundred years of printing* (Harmondsworth: Penguin, 1961) p.260.

²⁰² For an excellent factual introduction to PLR, see the IFLA website at <http://www.ifla.org/III/clm/p1/PublicLendingRigh.htm>.

²⁰³ The PLR organisation in the United Kingdom actually publishes useful statistics on the popularity of various categories of books year by year.

since it rests on the extremely shaky supposition that a book borrowed (or a song downloaded) is equivalent in some linear way to a book not purchased (or a CD not bought).²⁰⁴

The second assumption underlying the PLR is that second or third or fourth readers of a book are *also* in some way depriving an author of sales (the first borrower is presumably covered by the fact that the library did pay for the copy), and that the author must therefore be compensated. This is as shaky a proposition as the other, and for the same reasons. Virtually any copy of any book ever bought that is worth reading has been read more than once, and by different people, within a family or among friends or colleagues, or by buyers of the copy second-hand. The suspicion is that if it were a practical proposition, some kind of tax would be introduced to cover this too, by analogy, and this suspicion is supported by experiments with formats for *digital* content that would allow access only a defined number of times (one viewing of a DVD, two readings of a text, three hearings of a musical piece: if you want to know what rights holders would *like* to do in the print environment, look to what they *are* doing in the digital one).

This matters, of course, because public libraries in practice support popular education in both a formal and an informal sense, and the more expensive they become to run, the more likely they are to introduce access charges or membership fees (as is already the case in Johannesburg, South Africa, for instance). At the very least, books that might otherwise have been acquired are not obtained. Thus, the poorest citizens, those who are arguably most in need of library services, are excluded or are less able to satisfy their information needs.

Do Librarians have a Moral Duty to Police Copyright?

Many librarians worry about copyright issues mainly because they are frightened that either their institutions, or they themselves as individuals, may be held responsible for copyright infringements by library users, by aggressive and well-funded RROs or publishers. This fear has virtually nothing to do with offences against so-called moral rights (plagiarism, forgery, unauthorised publication) and almost everything to do with offences against patrimonial rights (photocopying or scanning of content beyond the limits allowed by fair use, fair dealing or local custom). Historically, it is a phenomenon of the age of reprography: before the advent of publicly available user-operated dry photocopying in the mid-1970s, libraries had little to worry about. However, photocopiers were followed by computers and the Internet, and now high quality scanners link the worlds of print and digital content, so that any user smart enough to push a green button can make a complete copy of anything at all in some unsupervised corner of the library.

²⁰⁴ The economist Stan Liebowitz, for example, has shifted his position on this issue. Originally very sceptical of the idea that MP3 downloads harmed the recording industry, by 2003 he was less so, writing cautiously that 'MP3 downloading does *appear* to be causing harm. No other explanations that have been put forward *seem to be able to explain* the decline in sales that have occurred since 1999. Still, *it is not clear* that the harm will be fatal [to the industry].' See 'Will MP3 downloads annihilate the record industry? The evidence so far' (Dallas, June 2003), p.2, emphasis added. Available <http://www.utdallas.edu/~liebowitz/intprop/records.pdf>.

The librarians' concerns are reflected in official statements by professional associations, such as the following extract from an IFLA (International Federation of Library Associations) document published in August 2000:

Librarians and information professionals recognise, and are committed to support the needs of their patrons to gain access to copyright works and the information and ideas they contain. They also respect the needs of authors and copyright owners to obtain a fair economic return on their intellectual property. Effective access is essential in achieving copyright's objectives. IFLA supports balanced copyright law that promotes the advancement of society as a whole by giving strong and effective protection for the interests of rights-holders as well as reasonable access in order to encourage creativity, innovation, research, education and learning.

IFLA supports the effective enforcement of copyright and recognises that libraries have a crucial role to play in controlling as well as facilitating access to the increasing number of local and remote electronic information resources. Librarians and information professionals promote respect for copyright and actively defend copyright works against piracy, unfair use and unauthorised exploitation, in both the print and the digital environment. Libraries have long acknowledged that they have a role in informing and educating users about the importance of copyright law and in encouraging compliance.²⁰⁵

The second paragraph of this statement is especially interesting, since it represents a strong expression of what we might call the 'policing role' position for librarians with regard to copyright and intellectual property rights. Libraries and librarians are presented as *enforcers* and *controllers* on behalf of the vendors and publishers whose economic interests are supposedly in play, as active *defenders* of those interests, as *encouragers* of compliance. What is missing is any justification or argument as to why libraries and librarians should take on such a role, especially if the law is vague or silent, and especially if the role requires them to act against the interests of their clients. This is not to suggest for a moment that librarians should become active violators of the law, of course, and they should be well enough informed to be able to advise their users on what is permitted and what is not.

We suggest, in fact, that the librarian's first duty is to satisfy the user's information needs (not necessarily the same as her information wants), and to do so within the law of the land. This does not imply, either directly or indirectly, *any* duty to defend the intellectual property rights of publishers or authors, who must look to their own interests in the matter. Indeed, in questions of fair use or fair dealing, it is clearly in the interests of users that librarians should advocate and 'actively defend' as broad an interpretation of what is permitted as possible, rather than the narrower one normally favoured around the world in different jurisdictions by corporate rights holders. In the scale of such affairs, the duty of 'librarianship' is clearly, in our view, to add weight to the side of the user to attain the famed 'fair balance' of copyright discourse between creators and consumers of information.

²⁰⁵ The IFLA Position on Copyright in the Digital Environment (August 2000), available at <http://www.ifla.org/III/clm/p1/pos-dig.htm> [accessed 6 February 2006].

Layers of protection of digital content

In libraries in those less developed countries with a modern ICT infrastructure, such as South Africa, Brazil or India, problems are increasingly arising from layers of intellectual property protection that are additional to copyright. These include the terms and conditions of the access contracts to the vendor's databases (commonly called licences), as well as technological devices in both software and hardware, and new laws that criminalise any kind of circumvention of such devices (anti-circumvention laws). This problem affects all libraries all over the world, but the point is that it impacts on developing countries disproportionately, since they probably do not have funds available to pay extra licence fees, and may not have the capacity to negotiate better licence terms or indeed to lobby for better copyright laws.

Access licences, like most contracts, can be assumed to mean exactly what they say, no more and no less. Thus, access to a database of newspaper articles or academic journals does not confer upon the library permission to perform the same set of practices that would be possible with a printed set of the newspaper or the academic journal. Interlibrary loan may not be possible, for instance, and the access to the back set may disappear if the current subscription is discontinued. Indeed, if the back set goes far enough back, some rules may still be imposed *even though the journal is in the public domain*, i.e. out of copyright. In addition, digital formats change rapidly, and long term duration remains a major concern. The extreme convenience of digital access for authorised users in the short term is thus offset by a series of difficulties to which the solutions are as yet far from clear.

Technological protection and anti-circumvention law add yet another layer of protection to content and make the provision of library services difficult. Each database behaves differently, requires the user to learn a different set of protocols for access, searching and downloading, and imposes a different set of rules on what behaviours are permitted or forbidden. Librarians are responding by building portals with federated searching across multiple databases, and simple URL resolvers to allow seamless downloading of full text content from searches which produce metadata result lists. Nevertheless, in some academic libraries, for example, outside researchers who traditionally have been welcome to use print collections on payment of a nominal fee, are now formally excluded from access to all digital resources, mainly because it is too complicated to work out who might have access to what under which conditions, from the range of licence contracts.

In sum, attempts to co-opt librarians and information workers in defence of existing copyright regimes should be resisted, at the very least because such a role has the potential to clash with their primary duty to their clients. Second, it is clear that copyright rules often prevent users from easily or conveniently obtaining what they want or need, in the form they want, especially in poorer countries. That said, authors in particular have a legitimate interest in protecting their patrimonial rights from exploitation by libraries as much as from exploitation by corporations. The trick, as always, is to find a way of doing things that allows for free access, while at the same time allowing authors to benefit from their creative efforts. It is hard to see how the present globalising copyright regime, given current trends, could support such a happy outcome even in theory.

How copyright makes libraries less efficient: some examples

a) Academic journals

Most academics publish articles and books in order to enhance their reputations, persuade their colleagues that their arguments are correct, and to increase their chances of promotion or of obtaining a better position elsewhere. It is unusual for an academic to receive any direct payment or royalties for an article, and the amounts earned from the majority of academic books are negligible – most are published at a loss or subsidised.

Traditionally, an academic publishing a journal article is aiming for the widest dissemination of her ideas possible, and access to the complete scientific record is widely regarded as being fundamental to scientific method. That is how the system of distributing off-prints developed, as well as inter-library loan. Most academics are therefore mainly interested in so-called ‘moral rights’ (being identified as the author, and not having the text altered), rather than in a revenue stream. Library networks and photocopy machines are fundamental in this process.

However, things are changing for the worse. Until the 1960s, academic journals were published mainly by learned societies. The takeover of academic journals by commercial publishers in the last half century has created a new and unsustainable model of scholarly communication. Commercial publishers charge high prices, and in the digital environment are able to do what they would like to do in the print environment, namely restrict the free transmission of information between individuals and institutions unless payments are made. This has an especially severe impact on libraries in developing countries, which cannot afford to pay \$8 or \$10 for a single article offprint.

Copyright and licence rules can thus increasingly be seen as preventing ‘learned men and women’ from writing ‘learned books’, as the scientific record is privatized rather than socialised.

b) Photocopying and short loan services

A related problem exists at undergraduate level in academic libraries in developing countries, where home-made course-packs are commonly assembled by local lecturers for use as textbooks in local courses. Alternatively, lecturers may place multiple copies of texts in library short loan or reserve departments for student use. In middle income developing countries such as South Africa, however, institutions are coming under increasing pressure from local RRO’s to sign up on ‘blanket licences’ for library-related photocopying activity, which are calculated at high pro rata rates and add significantly to the cost of higher education. Thus academic libraries end up paying fees for photocopies that, if they were made by individual students one by one, would certainly fall under the fair dealing or fair use exemptions that developed in the 1970s.

c) Libraries and the Internet

The Internet is a delivery mechanism for texts and information. Some documents are prepared and posted in formats such as the widely used proprietary Adobe PDF

format or the generic Postscript format, that are clearly intended for print-out. Others, in HTML, may be transitory for one reason or another, that is to say, there may be good reason to suppose that a particular Website may not be permanently available.

However, librarians have learned caution in these matters. It may be unclear whether an author or publisher who posts a PDF text does in fact intend to allow a library to print it out and add a paper copy to the collections, especially when the item is also available through the conventional book trade. Even 'ripping' and storing a Website that is about to disappear may in fact be illegal. Again, such activities cannot reasonably be argued to represent lost sales in most cases, especially in the developing world.

d) Access for the visually impaired²⁰⁶

Only five percent of visually impaired people in the developing world have access to Braille materials. This can be partly explained by the fact that Braille materials are expensive, but in many jurisdictions copyright legislation further increases the cost of the materials, since permission is needed to transcribe copyrighted content into the format. The rights holder may legally charge a fee, adding to the costs, and perhaps making it completely unaffordable. He or she may even simply refuse permission. A library – even a library for the visually impaired – may not legally undertake such transcriptions without permission and payment. Although the United States and the United Kingdom have enacted legislation to allow copies for the visually impaired to be made without obtaining the permission of a rights holder, this issue remains a major problem in many countries around the world.

Libraries and copyright restrictions in the South: evidence submitted by librarians

Here are some examples of how copyright laws impact on public and university libraries in the South. The state sector is generally much smaller and less well-funded in countries of the South than that which exists in the North and, as a result, the imposition of stricter copyright laws often have an even more chilling effect on the use of and access to books and other library materials. Book purchasing budgets are also comparatively more constrained than in the North and the increasingly high cost of books often bites even harder. (Copyright laws give publishers the ability to limit access to cheaper alternatives, such as photocopying books.) In other countries of the South, librarians sometimes act as "copyright cops" and, because of the precarious financial position of many such libraries, are excessively worried by potential copyright violations.

1) Negotiating a better deal

Subscriptions to e-journals often do not allow a subscriber to keep copies of the issue they have paid for; rather, it is the subscription itself that permits access to the archives. So when you stop your subscription, there is nothing to show for what was paid for. This creates a dependency on the provider for many years. As one librarian explains, "when a library subscribes to a print journal and the subscription is cancelled, the publisher does not drive up to the library and take away the back

²⁰⁶ For more on this topic, see also Section 4.10

issues in a big truck. This is effectively what happens when a subscription to an electronic journal expires.”

The vendor licences that many universities are required to use allow the subscriber to save copies of the article; for each additional copy, you have to make a separate extra payment. If more than one copy is required, two different payments have to be made, regardless of whether it is for the same article. These agreements prohibit even making a photocopy of an article that one has paid for.

Nevertheless, libraries can work together in consortia to negotiate better prices and access terms with publishers on a national, regional or sector basis. As a result, model licences have been adopted by many publishers. The organisation Electronic Information for Libraries (known eIFL.net) supports the development of library consortia in developing and transition countries to gain affordable access to electronic scholarly resources and research material. eIFL.net will negotiate licences with publishers on a multi-country basis to leverage highly discounted prices, alternative business models and fair terms for access and use.

The point about licences is that they *can* be negotiated. But isolated libraries in developing countries may lack both the confidence and the skill to undertake this tough process. The answer is probably two-fold: statutory compulsory licences and building strong library consortia.

2) Colombia

The Colombian Nobel laureate of literature, Gabriel García Márquez, has written a book entitled “*Memorias de mis putas tristes*” (Memories of my sad whores). The book is published by Random House, Colombia, which is the publishing division of the German multinational corporation Bertelsmann. On the title page of the book, the publisher has written that all rights are reserved and that not a single part of the book can be reproduced by any means. But Random House has gone much further and stated that the book should not be lent by any public institution, such as libraries, without the authorization of the author and without the payment of extra royalties to the copyright holder, that is, to Random House.

3) Uganda

The National Library of Uganda operates a service called the “Digital Book Mobile” that attempts to make books available in parts of rural Uganda where they are seldom found. Several years ago a visit was arranged for children attending the ‘displaced schools’ of Gulu, Uganda ; the 22 primary schools with more than 300 students are called ‘displaced schools’ because the children have been uprooted from their home villages as a result of civil war and relocated in Gulu. The two-day event was called “one of the rare occasions when children who in their existence share a common daily experience of uncertainty converged in one place to indulge in reading as a peaceful activity.”²⁰⁷

For the first time in their lives, hundreds of titles were made available for the children’s use; their teachers, who knew that most of the books were far too

²⁰⁷ Charles Batambuze, ‘Bringing books to the troubled north: Digital Bookmobile visits ‘displaced schools’ in Gulu.’ <http://www.anywherebooks.org/gulureport.php>

expensive for local schools to purchase, asked if it might be possible for some of them to be reproduced for use in the future in Gulu-area schools. (Reproduction of whole books is forbidden under copyright law, even if the books are to be used for non-profit educational purposes. A report on the Gulu event says that the “most favourite title for children in upper primary (to take home) was ‘Alice’s Adventures in Wonderland’ by Lewis Carroll.”²⁰⁸ It continues that “teachers showed very keen interest in African Writers series which unfortunately is still under copyright protection and so could not be reproduced or distributed electronically without permission.”

4) Francophone West Africa

One continuing colonial ‘relic’ in the countries of ‘French-speaking’ West Africa is that they still use a ‘droit d’auteur’ copyright system which privileges the so-called ‘moral rights’ of authors; this system significantly reduces what are called ‘fair dealing/fair use’ exemptions. It has been reported that photocopiers at a university library in one such country were being used for unauthorised copying and that when the university was having its annual inspection as a university, conducted by the ‘mother university’ in the United States, this fact was revealed. The African university was evidently told that this had to be corrected by the time of the inspection in the following year or it might lose its accreditation. As a result, a senior university official reportedly had all of the public photocopiers removed from the library.

5) South Africa

Librarians are restricted from digitising a valuable national collection, which is rapidly deteriorating and will soon be unreadable, because individual copyright clearance is necessary for the digitising of each item. Acquiring such permission is a cumbersome and time-consuming process ... and sometimes unsuccessful. Some rights owners cannot be located or traced; some simply refuse to give their permission; some want to be paid high fees or lay down strict conditions on the use of the copyrighted materials.

6) Ethiopia

A survey in the 1990’s revealed that the library of Addis Ababa University in Ethiopia was forced to cancel its subscriptions to a total of 1,200 academic journals.²⁰⁹ (The same survey found that the library at the University of Nigeria and the University of Yaounde’s Medical Library in Cameroon were forced to cancel, respectively, 824 and 107 academic journals.) A 1995 study of this Ethiopian university system revealed that only 4.2 per cent of the total book titles had been published since 1985 and “consequently the vast majority of books held are old and may be considered out of date.”²¹⁰ One of the largest academic journal publishers, the

²⁰⁸ Ibid.

²⁰⁹ Damtew Teferra, Knowledge Creation and Dissemination in African Universities with Special Reference to ICT, in African Universities in the Twenty-First Century, ed. by Paul Tiyambe Zeleza and Adebayo Olukoshi, Vol. 2 (Council for the Development of Social Science Research in Africa, 2004)

²¹⁰ Ibid. pg. 392

Elsevier Group, had a turnover of £4,812m for the financial year ended 31 December 2004, a sum greater than the combined national revenues of Mauritius, Maldives, Madagascar, Mozambique, Seychelles and Botswana.²¹¹

4.5 Copyright laws add to other restrictions on learning in rural South Africa: an October 2005 survey from Mpumalanga

South Africa has nine provinces. Mpumalanga is the seventh largest province and is mainly rural in nature. It is located in north-east South Africa, re-organized from the south-eastern province, formerly known as the Transvaal. Its north-western border with Northern Province is largely defined by the borders of former Bantustans ('independent' Black homelands during the Apartheid regime), namely, former Bophuthatswana, KwaNdebele, KaNgwane, Lebowa and Gazankulu. These rural regions all have a high level of poverty and unemployment. Mpumalanga shares its borders with four other provinces, namely, KwaZulu-Natal, Free State, Gauteng and Northern Province. Mpumalanga also has a common border with Mozambique running roughly due north from the Swaziland-Mozambique border along the watershed of the Lebombo Mountains.

In October 2005, the Mpumalanga Department of Education conducted a survey in some of the rural schools, literacy centres and adult basic training (ABET) centres under its jurisdiction, covering a wide area of Mpumalanga province. The questionnaire did not distinguish between schools, literacy or ABET centres, as they were all surveyed as "learning centres" in rural Mpumalanga. A survey of the remaining schools in the region (excluding literacy and ABET centres) has also been conducted, but the results were unfortunately not available for the purposes of this document.

The following results emerged from the **166** schools, literacy and ABET centres (hereinafter called "learning centres") which responded to the questionnaire:



All the respondents indicated high levels of poverty amongst learners. Most parents or adult learners were either unemployed or farm labourers earning very low wages. Most parents were unable to pay the tuition fees, let alone pay for reading material or copyright fees. A large percentage of the children at the schools were orphans, who were totally dependent on aging grandparents or one-parent households, where the incomes were very low.



The number of learners recorded in the responses totalled **48,264**, with **1,616** educators/facilitators. The teacher/learner ratio was **1:29**.



²¹¹ Kaushik Goburdhun, Copyright is an economic tool that impedes the sharing and diffusion of knowledge, Unpublished LLM Essay. Kent Law School, January 2006.

Of the 166 learning centres, **60 (or 36.4%)** did not have electricity. **45 (or 27.2%)** of the learning centres had no running water.



9 learning centres had no classrooms and had to make use of other available buildings.



155 of the learning centres received free basic textbooks from the Department of Education, whilst the remaining **11** learning centres were either subsidized or had to pay for textbooks from their own budgets. The majority of learning centres reported a shortage of textbooks or non-delivery of textbooks from the Department of Education.



60 learning centres could not make photocopies at all, since they had no electricity. Many of them said that if electricity and photocopiers were available to them, their teaching programmes would be enhanced.



The majority of learning centres said that photocopies were necessary or would be very helpful to educators and learners, since basic textbooks needed to be supplemented with other information. Some of the problems they encountered were as follows:

- a) Textbooks for the learners did not always arrive in time, or at all;
- b) Insufficient numbers of textbooks were distributed amongst learners, so many did not have the required reading material to do their studies;
- c) Reading material often had to be shared. This was problematic when learners had to do individual tasks. Teachers were prevented from setting assignments or preparing lessons or activities from books which were limited in numbers;
- d) The high price of books and other reading material was beyond the means of parents and adult basic learners, who were mostly unemployed or earned very low wages as farm labourers;
- e) Additional reading materials, such as newspapers and magazines, were necessary for projects and to supplement information in the textbooks, but were unaffordable. Learners needed to access maps, photographs, drawings, etc. in resources, other than in prescribed textbooks. If photocopies of diagrams, pictures, etc. were not permitted, learners had to hand-draw them;
- f) Libraries were either too far away from the learning centres; alternatively, they were under-stocked and lacked adequate resources;

- g) The majority of respondents stated that photocopies were necessary for effective teaching, but that copyright laws restricted them from distributing relevant material to learners.
- h) Performance levels were being affected by inadequate reading resources and lack of access to relevant information;
- i) Learners could not participate or learn properly, if they were limited in their choice of learning materials.



Many learning centres said that obtaining copyright clearance was tedious and unaffordable. Some recommended standardized clearance procedures via the Department of Education. One learning centre stated that if educators had to keep to the copyright law, their teaching/learning aids would be very restricted.



22 of the learning centres were not sure how copyright laws impacted on their lives, as they either did not have electricity or were not allowed to photocopy at all. Some claimed that they feared prosecution under the Copyright Act if they photocopied material. Most respondents indicated that copyright laws were a problem in that they affected access to information. Some requested that special provisions (or exemptions) be included in the copyright law for poor schools, literacy centres and adult basic training centres. Many felt that the current copyright laws hindered teaching and prevented educators from providing up-to-date, relevant information



Although **99** of the learning centres said that they discussed copyright with learners, few seemed to have a clear understanding of what copyright was and its impact on teaching and learning. Some seemed to understand the concept of plagiarism and some recognised that authors needed to receive money for their books. However, very few of the learning centres seemed to be aware of the exemptions permitted for educational purposes under Section 13 Regulations of the South African Copyright Act No. 98 of 1978 (as amended). Although these exemptions are inadequate in the context of a developing country, they do allow limited multiple copying for teaching purposes in a classroom situation; such exemptions do not, however, cover distance learning or informal teaching.

4.6 Copyright gets in the way when teachers want to provide student course & study packs

In South Africa, as in many other countries in the South, academic libraries which service universities have serious budgetary restraints. As a result, the development of their collections is severely hampered by a lack of adequate funds, high exchange

rates for foreign works, a 14% Value Added Tax on books and learning materials, high prices of printed and electronic publications, and databases. With student numbers increasing, the demand for material held by libraries is also increasing, sometimes many times over, and libraries are simply not able to provide enough of a range of materials, let alone enough copies of needed materials, for their students, researchers and other patrons. In many academic disciplines, e.g. law, psychology, international relations, political studies, business administration, more than 1,000 students may be taking the same course and their legitimate requirements are far beyond the capacities of even the largest and richest libraries in the South.

Faced with this crisis, most universities in South Africa (as in some other countries in the South) have attempted for some years to provide relatively-cheap course packs (or study packs) of photocopied materials to their students. (Additionally, some universities place photocopied extracts from books and journals on reserve or on short loan shelves within their libraries to enable students to copy from them.) And here is where the restrictions of copyright law come into play.

The use of transactional licences to ‘clear’ copyright

To produce a course pack, universities in South Africa are required to seek the permission of publishers, who usually own the copyright, or from authors in the case of unpublished material, out of print books or matters relating to moral rights. (Copyright law does not provide exemptions for non-profit educational uses.) And obtaining permission is a tedious and time-consuming process; in fact, publishers don’t really like the concept of course packs, they consider them unfair competition, and would much prefer that students each purchased their own individual copies of the original books. In most parts of the world, especially in the South, this is a financial impossibility.

For tertiary institutions, the majority of works may be cleared by the South African reprographic rights organisation²¹², DALRO, which has mandates from the majority of South African publishers and those represented by rights organizations in countries such as the United States, the United Kingdom, Europe, Australia, and some other countries. Most of the licensing fees collected by DALRO in South Africa are then paid to either foreign publishers or to foreign authors.²¹³ DALRO, however, does not have a comprehensive repertoire and there are many excluded works and publishers; in such cases, permission has to be obtained directly from the rights holders.

For ‘copyright clearers’, as they are called, tracing rights holders is a real headache. Many rights holders are no longer in business, have moved elsewhere, have become defunct or have merged with other organizations. Some publishers have published works which incorporates material from other published works and so permission has to be obtained from the former publishers who are not always traceable. Some publishers do not respond, some insist on high copyright royalties and restrictive conditions of use. Some publishers deny permission and do not give reasons either.

²¹² For more on RROs, see Section 2.4

²¹³ For DALRO’s financial details, see Section 2.5.

All this takes a great deal of time and human effort; it involves what economists call high “transaction costs.” Permission has to be obtained prior to reproduction and, given the delays, use of the material very often has to be abandoned or postponed until permission has been received. Or alternatively, the permission often arrives long after the material was needed and alternative or less relevant material has to be used as a substitute. In short, much wasteful labour is expended. In addition, copyright fees are expensive and are calculated on a ‘per-copied page basis’. This takes up a large part of a university’s expenditure budget. There are some local publishers who are willing to grant permission at a lower rate than DALRO or waive fees altogether if the material is for non-commercial, educational purposes.

In the case of disabled students, the problems are exacerbated, as permission first has to be obtained to make the photocopies for the course pack. Thereafter, permission has to be obtained to enable them to convert the material into a more accessible format, e.g. Braille, audiotape, or to modify or convert material into a more visual format for deaf persons, etc.²¹⁴ The technical conversion and manpower costs to do this can be very expensive. In most institutions in South Africa, this cost is borne

by the institution rather than the student personally, but some publishers insist on direct payment from students before conversions can be undertaken.

“Woe is the life of the modern day student living in “Darkest Africa” for obviously we are still being kept in the slave quarters of the world. Harsh words? My friends try and live in a society where such Acts as the Intellectual Property Acts of the world [impede] your advancement in life.”

*Louise Szente (Durban, South Africa)
Misers or Sharers? WIPOUT Contest
Essay, 23 September 2001*

When articles in an electronic (digital) format need to be used for the purpose of inclusion in printed course packs, usage and reproduction will be determined by the conditions of the licence and not by copyright law. If multiple reproductions are not permitted in the licence, it is not possible to include that material in a course pack, without permission. However, the South African Site Licensing Initiative (SASLI) has negotiated various electronic licences for universities, which include provisions to make electronic course packs and printed course packs. But in the case of printed course packs, the reproductions cannot be made by downloading one copy and photocopying the rest. (If done this way, copyright clearance would be necessary.) The licences require that the copies be made on the online system, so that the hits can be recorded by digital rights management systems.²¹⁵

At the moment, DALRO only provides a licensing system for photocopies for the tertiary institutions. DALRO and the Publishers’ Association of South Africa (PASA) have been discussing Blanket Licensing for schools in South Africa for some time, but the publishers are not in favour of a Blanket Licence scheme for schools. DALRO therefore does not clear copyright for schools at all. Schools wanting to compile course packs or study packs would have to apply directly to rights holders. If they require material from foreign publications, they would have to apply overseas and pay in foreign currencies which again creates high transaction costs. As schools do not have the infrastructure, budgets or human capacity to apply for copyright

²¹⁴ For more on copyright and the visually impaired, see Section 4.10

²¹⁵ For more on digital rights management systems, see Section 4.8

clearance on a transactional basis, many do not clear copyright at all. This is hardly surprising.

Using ‘blanket licences’ to clear copyright

Some higher education institutions have entered into a so-called “Blanket Licence” with the rights organization, which streamlines administrative and accounting procedures for the institutions concerned. The Blanket Licence currently offered by the rights organization in South Africa, i.e. DALRO, is expensive and does not include various works, such as newspapers, online works and excluded works and publishers, which have not given their mandates to DALRO. The list of excluded works in South Africa is minimal but there are many excluded works and publishers abroad.²¹⁶ So to call it a “blanket licence” is a misnomer.

The Blanket Licence is only offered to tertiary institutions and not to elementary and secondary schools, where it would, in fact, be more beneficial. Many tertiary institutions still obtain transactional licences, which in relation to Blanket Licence per-page costs are more expensive, but this is determined on their usage of photocopied materials and the number of full-time equivalent students (FTEs). The Blanket Licence is calculated using a flat rate based on 200 pages per student, multiplied by the number of FTE students (except doctoral students), plus the Consumer Price Index percentage plus Value-Added Tax (VAT) of 14%. The Blanket Licence only covers photocopied material and transient electronic copies and has specific conditions on what portion of a work one can use. For instance, it permits the reproduction of one chapter of a book or 10% of a book (whichever is the greater), one article from a journal, and one case study or law report. Any portions required in excess of these amounts plus electronic material would be excluded from the licence and transactional licences would be necessary. Excluded works would also have to be cleared via transactional licences.

Some institutions offer short certificate courses within their Faculties and provide course packs to students. Some of these courses attract FTE subsidies and form part of the DALRO Blanket Licence. However, many of the courses do not attract FTE subsidies and are excluded from the Blanket Licence. This means that institutions have to budget separately for these specific short courses and have to apply for clearance on a transactional basis.

Unfortunately, DALRO focuses its attention on the government-subsidized tertiary institutions and does not make much effort in getting the private institutions or corporate organizations on board as far as copyright clearances are concerned. There is wholesale infringement going on in private institutions and large corporations but nothing is done about it, yet the government-financed tertiary sector is constantly monitored and warned about possible litigation if they do not comply with the copyright law. Schools that do want to comply lack the infrastructure or resources to take part do so and so DALRO does not extend its services to them.

The above description is the general practice in South Africa. There are very few rights organizations in other African countries. At last count, there were eight others, most of which are hardly functioning at all. Most countries have far more pressing

²¹⁶ These can be found on <http://www.wits.ac.za/library/services/copyright>

socio-economic issues to address than copyright issues and compliance levels vary from country to country. They do not have the resources, infrastructure, and human capacity to become copyright compliant, so what is the purpose of setting up an RRO when it is set up for failure right at the start and when it would simply impose the numerous restrictions and costs that are already faced in South Africa, the richest country in Africa.

4.7 An academic from Colombia tries hard to do his research ... with great difficulty

We know an academic economist working at a university in Colombia who constantly comes up against serious obstacles if he needs to find a book to use for his research. The under-funded library at his university in Bogotá has gaping holes in its collection; it does not hold, for example, many standard books that would be available at even a second (or third) tier university library located in North America or Europe. And so if a required book is not available locally, his only alternative is to ask his university library to obtain the needed book on a short-term loan from another library located outside Colombia; such a service is called “inter-library loan” in some countries (or “document delivery” in others.)

But this University’s library copyright clearance office has concluded that only one chapter can be used from any one copy of the required book found in a foreign library; this is how his University library interprets the so-called “fair use/fair dealing” provisions of copyright law. So the book he needs cannot be sent solely from another library or scanned by computer from a single copy located in a foreign library. Instead, if there are, for example, 15 chapters in the required book, the 15 chapters must be obtained by photocopying or scanning from 15 different original copies located in 15 different foreign libraries.

Not surprisingly, the individual chapters take a long time to arrive in Bogotá and the total cost of a 15-chapter book is US\$150.00 (US\$10.00 per chapter). Such costs come out of the research budget of the academic which seldom match those available at an American or European university. Moreover, because you cannot actually look over the book (or even its table of contents) BEFORE you order it and pay US\$150.00; the actual book may not be very useful for your research when it finally arrives. And it does not matter if the required book is out-of-print ... and hence cannot be purchased even if you had sufficient funds. Copyright restrictions apply to many out-of-print books.

Under these highly restrictive working conditions for researchers, directly attributable to domestic and international copyright law, academics from the South often find it very difficult to get much research and writing done. Or, if they do, they do so with great fortitude.

4.8 Using the Internet in the South: a tangled web of copyright toll-gates and “keep out” messages

Introduction

It must first be recognized that there is nothing close to universal access to the Internet throughout the global South. A recent study conducted by the World Science Project found that lack of Internet access by African scholars was an important barrier to scholarly productivity. While computers and bandwidth do exist on University campuses in Africa, there are not enough resources to make a positive impact.²¹⁷ Increasing bandwidth and access to electronic communication is crucial to further development in African universities.²¹⁸

It is easy to assume from a Western standpoint that the global information society has become ubiquitous, but the vast majority of the world's population continues to have little to no access to the Internet. Thus, for many people living in the global South, the types of copyright barriers that make access to knowledge difficult on the Internet are not relevant because access to the Internet is simply not an option. For example, for students in Kenya, the issue is not access to the Internet, but instead access to textbooks, which are in short supply.

However, even given the limited access to Internet service throughout the global South, those who do manage to gain computer time to surf the web find that increasingly roadblocks are put up to prohibit access to documents, papers, and information. In this section, we will give a brief outline of the negative impacts of several types of barriers to Internet access.

The dangers of Digital Rights Management (DRM)

Digital Rights Management (DRM) developed in response to wide-spread concern on the part of content providers regarding what they call massive ‘piracy’ on the Internet. The primary actors on DRM have been the entertainment and computer software industries, both of which seek to limit access to movies, music, and proprietary software. They want to hinder access to these products using a protective layer of computer code that limits the possible uses of a product. DRM is as much a problem for the overdeveloped world as it is for the global South, but when already problematic access is combined with barriers to access the problem is exacerbated for the global South.²¹⁹

A recent controversy regarding Sony music's DRM system highlights some of the ongoing problems with DRM. Sony BMG Music Entertainment attached a hidden DRM program to the CDs it was selling that, it turned out, opened up a sizeable

²¹⁷ Gisele Dodji Dovi, ‘More Internet Access Needed for Science to go Global,’ Science and Development Network, November 25, 2005. Available at: <http://www.scidev.net/News/index.cfm?fuseaction=readNews&itemid=2502&language=1>.

²¹⁸ Steve Song, ‘Viewpoint: Bandwidth Can Bring African Universities up to Speed,’ IRDC Reports available at: http://www.idrc.ca/es/ev-84498-201-1-DO_TOPIC.html.

²¹⁹ ‘France about to get the worst copyright law in Europe,’ December 2, 2005. Available at: http://www.boingboing.net/2005/12/02/france_about_to_get_.html

security hole when used on a computer.²²⁰ After the security problem was announced, Sony had to issue a public apology and recall the CDs. Despite this setback and the potential damage that could be caused to user's computers, companies like Sony continue to seek methods for forcing DRM on the consuming public.

As a recent report by the Electronic Frontier Foundation notes, the application of DRM in the developed world has been relatively unsuccessful and is marked by attempts to censor research and consumer revolt against the system.²²¹ They go on to suggest that DRM in the global South will be problematic for the following reasons:

- a) DRM systems overrule local copyright limitations;
- b) DRM systems often assume infrastructure that isn't present in the developing world;
- c) DRM systems make rich-country assumptions about family and domestic life that are inappropriate to many developing countries.²²²

DRM in the developing world context can create a situation where technical considerations will take precedent over domestic considerations and development priorities.²²³ Unfortunately, if a country is a member of WIPO, which most in the global South are, they may have to sign on to anti-circumvention laws in order to ensure the level of protection granted by international treaty.²²⁴

The EFF recommends that developing country governments avoid using DRM because it is an inherently flawed system that can only function in the presence of strict anti-circumvention laws. Furthermore, DRMs are harmful to access to knowledge through libraries and for disabled persons and can eliminate the possibility of using Free and Open Software.²²⁵

Other mechanisms for limiting access on the Internet

DRMs are not the only mechanism used to limited access on-line. Large numbers of content-heavy websites come with password protection or toll gates to information. These barriers are most prevalent in scientific journals, library databases, and educational materials. In other words, the very knowledge many in the global South may require access to in order to continue innovation and development is only available for a price.

²²⁰ Paul Taylor and Aline van Duyn, 'Music Industry Asks Whether Fair Use is Fair Play,' FT.Com., November 28, 2005. Available at: <http://news.ft.com/cms/s/2594a9f8-603a-11da-a3a6-0000779e2340.html>.

²²¹ Electronic Frontier Foundation, 'Digital Rights Management: A Failure in the Developed World, A Danger to the Developing World,' For the International Telecommunications Union, ITU-R Working Party 6M Report on Content Protection Technologies, http://www.eff.org/IP/DRM/itu_drm.php.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

For example, the Google Scholar web searching tool that is designed to access materials on the Internet, which are published in scholarly spaces, often runs up against roadblocks in providing material. Instead of access to the text, one is given access to a place to purchase the article, often at a cost more expensive than the original journal. Thus, in an effort to harness even more profits, many scholarly journals continue to increase their prices and impose toll-gates on internet access to their materials.

An example of a barrier to access is the following search - "Problems with DRM" in Google Scholar. One of the top hits is an article by E.W. Felten titled "A Sceptical View of DRM and Fair Use," in *Communications of the ACM*. However, to access this article, one must have a membership in the appropriate organization or access to the appropriate library database. Thus, the ultimate benefit of Google Scholar is mitigated by the lack of access in the search. Of the materials that would be searchable, few are available for the public to read without some conditions placed upon access.

Of course a members-only organisation may make the argument that access to their publications are a benefit of membership only and seek to exclude access to others generally. While those in the global South have sought broader access to knowledge for generations, those who see knowledge as a for-profit commodity have always considered that knowledge comes at a price. We discuss the development of the open access movement in later sections of this dossier, but this movement holds up the promise of future knowledge sharing.

Even with the appropriate licences, fees, and memberships, the presence of DRM, toll-gates and passwords ensures that content remains centralized. These mechanisms have implications for the concept of 'fair use'.²²⁶ When one is prohibited from access it is unclear if any fair uses are left. As one member of the Copy/South group pointed out, libraries can only access on-line archival materials with a subscription. If the subscription is ended then the library loses not only access to current and future volumes, but to those it has paid for in the past. Paying a fee no longer ensures continued access to a copy. Furthermore, for United States journals and materials, access is dependent upon U.S. Foreign Policy. Access to educational and scholarly materials for those in Cuba has always been stifled by the US. Syria and Iran face similar embargoes on information from U.S. sources. Additionally, if political conditions in a country were to change so would the access to previously paid for documents.

Of course, downloading and copying back issues of all electronic journals is one solution to the problems of continued access. However, under many agreements, such copying may violate copyright law. For example, library licences in some countries do not allow for the copying of articles and researchers must pay for each individual access.

There are efforts to open the Internet up. For example, at the recent Internet conference in Tunis, the creation of "The Development Gateway" funding by the

²²⁶ See Glossary.

William and Flora Hewlett Foundation was announced.²²⁷ The Hewlett Foundation has also funded the Creative Commons licensing scheme and the MIT OpenCourseWare project.²²⁸

In Africa, universities are beginning to form collective organizations to bargain for better prices for Internet access. Africa is beginning to develop National Research and Education Networks (NRENs) to bring costs down and increase access.²²⁹ Steven Song hopes that providing better access to communications technology may also halt the brain drain as scholars seek better resources elsewhere.²³⁰

Seeking to overcome the barriers to access that exist on the Internet is the subject of other sections of the dossier. However, it is important to note that the problems with barriers to access are not inherent and that with planning they can be overcome as an alternative model for information sharing is developed and shared via the Internet.

4.9 Using intellectual property laws to prop up proprietary computer software

Three legal regimes

Although computer software in its earliest days in the 1960s and 1970s (and, in various ways, its most innovative days) was *not* protected by intellectual property laws, three IP regimes have more recently been employed in some, though not all, countries: patent law, trade secret law, and copyright law. Within the ever-growing ranks of the free and open source software movement (FLOSS), it is now the accepted wisdom that the patenting of software is a type of legal protection that should be opposed and, where it exists, should be rolled back and not permitted again. There are good reasons for this conclusion: the patenting of elementary programming sequences creates innumerable and often expensive barriers which are difficult to circumvent for those who want to write new software, including free software. Many leading figures in the FLOSS movement, such as Richard Stallman and Bruce Perens of the United States, have written at length about how software patents block free software development. Perens concludes, “today, they are a nuisance; tomorrow they could be much more”²³¹ and Stallman is much more scathing.²³² In Europe, a strong campaign against software patents is being waged²³³ and elsewhere, the dangers of such a policy choice are also starting to be appreciated.

²²⁷ John Blau, ‘Open Content Opens Doors to Opportunity,’ Infoworld, November 22, 2005. http://www.infoworld.com/article/05/11/22/Hnopencontent_1.html?source=NCL-TB2005-11-22. For more on the Development Gateway see:

<http://www.developmentgateway.org>.

²²⁸ Ibid.

²²⁹ Song, *op. cit.*

²³⁰ Ibid.

²³¹ See, for example, Bruce Perens, ‘Software Patents v. Free Software.’

<http://perens.com/Articles/Patents.html>

²³² See, for example, Richard Stallman, ‘Software patents victimise developers’, ZDNet UK, 28 March 2002, <http://news.zdnet.co.uk/software/developer/0,39020387,2107481,00.htm>

²³³ <http://swpat.ffii.org/intro/index.en.html>

Other commentators have explained how trade secret laws create barriers to innovation, particularly as such laws reinforce the ability of proprietary multi-nationals such as Microsoft to keep secret the all-important source and object codes found in software, as well as other features. Cunliff explains the scope of trade secrets:

Rather than focusing solely on expression [required for copyright protection] or demanding novelty as a prerequisite to protection [required, at least in theory, to obtain a patent] , the law of trade secrets will protect the ideas underlying particular software – including the software's structure or architecture and organization, and various features, routines and processes within the software, novel or not – so long as those ideas are not generally known (or readily ascertainable from the marketed software) and give, or have the potential to give, a competitive advantage by virtue of the fact that others do not know them.²³⁴

But as to the question of whether software should be protected by copyright laws, there is virtual silence; it has essentially and mistakenly become a non-issue for the FLOSS movement and many others. This disinclination—indeed often refusal—to appreciate and critique the negative impact of granting copyright to software is a relatively new development. When the protection of software by copyright laws was first initiated, chiefly as a result of the 1978 US CONTU report, progressive legal commentators and many people active in the development of software challenged this legal development as highly retrogressive. Such voices are now stilled. And, to be clear, this is a global issue, not one for the United States alone. The fact that both the 1994 TRIPS Agreement (Art. 10 (1)) and the 1996 WIPO Copyright Treaty (Art.5) state that computer programs, both in source and object code, must be protected by copyright has further raised the global stakes, including for the South.

Copyright in software

Why this disinclination to challenge and criticise the granting of copyright in software? After the US adopted software copyright in the 1980's, large multinational software companies spent extensive time and resources lobbying for the creation of similar standards and approaches in international copyright agreements. Their efforts also extended to countries of the South. Peter Menell, writing in 1994, noted that '[T]he United States government devoted substantial effort over the past decade to browbeating most of the developed world into following its path. Neither the US government nor the many entities desiring uniform protection for their products across national borders are interested in starting a new fight.'²³⁵

At the same time, some sectors of the highly positive FLOSS movement that came into existence in the 1980s embraced the notion of 'copyleft'. This approach takes the basic copyright notions of creating property rights in expressions – in this case, in software code – and awarding the 'author' of these expressions exclusive rights. But

²³⁴ V.A. Cundiff, 'Protecting Computer Software as a Trade Secret', 507 Practising Law Institute (Patents, Copyrights, Trademarks and Literary Property Course Handbook Series) 761, 1998.

²³⁵ Peter Menell, 'The Challenges of Reforming Intellectual Property Protection for Computer Software', 94 Columbia Law Review 2644, 2653 (December 1994)

the 'copyleft' approach then turns *some* of the consequences of this system on its head and requires the sharing of the expressions. A good example can be found in the GNU General Public Licence.²³⁶

'Flipping' some of the consequences of copyright into their partial opposite, 'copyleft' appeared to be a useful tactic for some sectors of the FLOSS movement. In fact, some in the FLOSS Movement strongly favour software copyright protection. The group 'Copyright4Innovation', to take one example, states in its position paper: "We believe that a system of copyright with fast, cheap and narrow claims will provide the best opportunities for innovative software-related businesses."²³⁷ It continues: "Because copyright is free and already harmonised on a global scale it is accessible to software authors worldwide, allowing those from developing countries and small companies to compete on a level playing field with the large ones."²³⁸ Other FLOSS websites speak of the 'positive nature' of copyright in all fields, including software. Copyright laws and their ideologies have thus become normalised and naturalised phenomena.

Others, particularly some of those within the Free Software arm of this movement, argue that 'copyright' and 'patents' are radically different concepts and that they are based on radically different ideologies. And so while they oppose software patents, in part because such laws create serious roadblocks for software developers and their own movement, they do not challenge software copyright and, in fact, they argue strenuously against any questioning of the benefits, including in the South, of copyrighting software. To some in this movement, copyrighting software simply does not register as an issue.

This dossier is not the place to take up a wider debate about such issues. But several matters do need re-iterating. *First*, the world's largest proprietary software firm, namely Microsoft, did *not* gain its global monopoly position primarily through the use of its software patents. Rather, its pre-eminent ranking was gained *primarily* through the protection Microsoft gained from domestic and international copyright laws, in addition to the advantages it gained from trade secret laws, the proprietary standards it established, and the economics of what are known as 'network externalities'. For almost the entire 20 years after Microsoft was founded in the United States in 1975, the patenting of software was either forbidden or of negligible importance and, even today, the patenting of Microsoft software is *not* at the centrepiece of its corporate and computer power. Most other proprietary software companies mirror this situation. *Second*, it is true some leaders of the free and open source software movements may consider that the copyrighting of software does not hinder the growth of their movement. But those who a) do not use or cannot use such software and are forced to use proprietary software, or b) are not software developers, that is, they are simply 'turn it on and use it' computer users and are indifferent to whether their machine is powered by open source or closed source (i.e. proprietary) software, do suffer many of the serious consequences that arise from the copyrighting of software. These effects in the South are explained and documented

²³⁶ <http://www.gnu.org/copyleft/gpl.html>

²³⁷ Copyright4Innovation,
<http://www.copyright4innovation.org/content/aboutus/statement.en.html>

²³⁸ Why Copyright Works where Patents Fail, Copyright4Innovation, at
<http://www.copyright4innovation.org/content/whyitworks/index.en.html>

below. And *third*, it is obviously a positive development for access to knowledge and information across the South to have more and more computers in the South powered by free and open source software; again, the reasons are detailed below. But if the actual content being used or transmitted is expensive and restricted by copyright-based toll gates – or more likely, if badly needed content for educational and other social purposes cannot be accessed, used, and shared because of copyright restrictions – the access “battle” in the South has hardly been won if the content moving (or not moving) through free software is copyright restricted.

Beyond the ‘cost of software’ issue

The main question to examine here, however, is: *what are the negative effects of proprietary software on the countries of the South, particularly as compared to free and open source software?*²³⁹ One caveat: While there are important direct financial benefits to choosing the latter options, focusing exclusively on immediate cost issues tends to narrow the stakes of the software use and accessibility debate.

In summary form, here are a number of answers to this question, many of which relate directly to access issues and wider development issues.²⁴⁰

- The fact that certain types of software are protected by various forms of intellectual property rights significantly increases the initial purchase/licensing costs and the ongoing costs. If these restrictions were struck down, e.g., if the copyrighting of software was not permitted or significantly narrowed in scope, the cost of software would diminish significantly.
- When the per capita Gross Domestic Product (GDP) figures for countries of the industrialised North are compared with those in the South, the effective costs of proprietary software are particularly harsh in the South. For example, an average person living in the United Kingdom would have to work 0.28 months (about 10 days) to purchase a Windows XP operating system and application program. In Vietnam, identical equipment would require 16.33 months of labour and in Bangladesh, 19.19 months. In the Democratic Republic of the Congo, the effective cost of the Windows XP and Office software package would be US\$199,394 and it would take the average wage earner 67.83 months – more than five years – of earnings to purchase this package.²⁴¹
- Licensing costs for proprietary software are notably onerous for governments in countries of the South, including the relatively more prosperous ones. As John Perry Barlow of the US Electronic Frontier Foundation said in a speech to the

²³⁹ For more on the advantages of embracing free software in the South, see Section 5.8 of this dossier.

²⁴⁰ This section is a brief precise of a much longer 2004 report. Alan Story, ‘Intellectual Property and Computer Software: A Battle of Competing Use and Access Visions for Countries of the South’, Issue paper #10, International Centre for Trade and Sustainable Development / United Nations Conference on Trade and Sustainable Development, Geneva. May 2004. http://www.iprsonline.org/unctadictsd/docs/CS_Story.pdf. In the dossier, most of the statistical and wider analytical material contained in that report is omitted and, instead, this text makes a number of relatively short declarative statements.

²⁴¹ See Story ICTSD, citing R.A.Ghosh, ‘Licence fees and GDP per capita: the case for open source in developing countries’, *First Monday*, Vol. 12, No. 8 (December 2003).

World Social Forum in January 2005, “already Brazil spends more in licensing fees on proprietary software than it spends on hunger.”²⁴² (In Brazil, only about 10 per cent of the population own a computer at home and the government is the country’s biggest computer purchaser.)

- The costs of proprietary software, both the initial charges costs and ongoing licensing fees, are another financial barrier to accessing the Internet. By comparison, there are no ongoing licensing fees for free software.
- In the South, only a relatively small elite can afford to purchase the licence for off-the-shelf (and ‘non-pirated’) proprietary software. As for schools, “With the exception of a few parts of South Africa, there is not a single government or a school system *anywhere in Africa* that can afford the costs of a Microsoft licence for their school systems.”²⁴³
- The regular and often annual upgrading of proprietary software requires users to also regularly upgrade their hardware to operate that software properly; this is an additional ongoing expense that is particularly onerous in parts of the world where many people would like to buy their first computer. A *Business Week* magazine computer expert noted in late 2001, “Windows XP [...] will place a lot more demands on your computer, so millions of people, especially with those more than two years old, may need new ones.”²⁴⁴
- Proprietary software does not fulfil the requirements for technology transfer, one of the stated objectives of the 1994 TRIPS Agreement, which among other things protects computer software as a copyrighted work.²⁴⁵ A key aspect of technology transfer is whether the technology is capable of local adaptation; as two commentators have explained, “in building technological dynamism, what matters most is not the transfer of technology *per se* but its adaptation and assimilation in the local economy.”²⁴⁶ The very nature of proprietary software – its non-adaptability and, indeed, the unavailability of its source code due to intellectual property protection – makes it a technology that is not transferred, but merely licensed for use *as is*, and it is a licensing process that operates in a particularly detrimental way for countries in the South.
- Instead of transferring technology, the use of intellectual property protected proprietary software leads to dependence and over-reliance on imported

“The beauty of free software...is that the freedom you receive is the freedom to learn from other people’s techniques, strategies and focus on problem solving. Something that has been unheard of in this industry (although it is a pretty common thing in science). So people have a chance to join the effort, and be part of the team of people that are producing knowledge, culture and, as a result, wealth.”

Miguel de Icaza (Mexico), president of the open source company Ximian, “Miguel de Icaza Tells All,” Slashdot, 4 April 2000.

²⁴² ‘Activists Urge Free Open Source Software’, Associated Press, 31 January 2005.
²⁴³ Tony Roberts, Computeraid International (emphasis added), in Story, CIPR study.
²⁴⁴ Cited in Story ICTSD, p. 21.
²⁴⁵ On technology transfer in TRIPS, see Articles 7, 8 and 66(2).
²⁴⁶ P. Roffe and T. Tesfachew, ‘Revisiting the Technology Transfer Debate: Lessons of the new WTO Working Group’, Bridges, Vol. 6, No. 2 (2002).

technologies. As Ivan Moura Campos, a leading developer of Brazil's Popular PC project explained several years ago, "we realised that this (lack of access) was not a First World problem. We are not going to find a Swedish or Swiss company to solve this for us. We have to do it for ourselves."²⁴⁷

- Unlike proprietary software, free and open source software allows software developers (and users) to share their technical skills/knowledge and adapt the resulting software for local needs. Here are 'testimonials' from two such developers, one from Mexico and the other from India (see boxes).

- Further economic development issues are implicated as well. For example, the

dangers to countries (and their computer users) relying on proprietary software is revealed from a recent dispute in Korea. The Korean government's Fair Trade Commission was very concerned about the anti-competitive effects of Microsoft's bundling together its instant messaging service with its Windows software and prepared to launch a legal case against the giant US-based corporation. In response, Microsoft threatened to withdraw Windows entirely from Korea, a move which, at least in the short run, would

'I'm a software engineer, a hacker. I write software and when I wrote my first software I said to myself that this is definitely a new idea and I don't think anyone else has ever thought of this before. So I went to my friend and guru, Kiren Sahi, and told him about my new idea. He said that he had some disappointing news, which was that the era of new ideas is a misnomer; you have been born after it. On the planet we have eight billion people and so if any one of us comes up with a new idea, then rest assured that because of the statistics, six other people will be thinking of the exact same idea and at the exact same time. So I said how do I find the other six? So he said you must go to Google and I found not just six, but 30,000 people who shared my new idea and 8.24 lakh free software developers were working on 78,000 new ideas. So this is the reason why technical people like me want to place our new ideas in the public domain. It is because we find collaboration and partners and consequently we are able to accomplish what we want to do in a much more rapid manner...'

Sunil Abraham (India) is the head of Mahiti and a frontline exponent of the Open Source movement. Speech at 'IPR and the Media: Emerging Paradigms' Seminar, Bangalore, 7-8 April 2004. http://www.voicesforall.org/ipr/voices_ipr_workshop.htm

have had enormous negative economic consequences for the Korean economy.²⁴⁸ (In the longer run, the Korean government might have appreciated the instability generated by such a reliance on Microsoft products and commenced building a new software regime giving a favourable prejudice to non-proprietary software, as has been done in Brazil.) But the Korean Fair Trade Commission was not intimidated by Microsoft's bargaining tactics and fined the company \$US32 million in December 2005 for its anti-competitive practices.²⁴⁹

- The government and people of Lebanon were also given a lesson, this time directly by the US government, when some legislators tried to challenge the powers of proprietary software monopolies. In both 1997 and 1999, there was vigorous opposition in the Lebanese parliament to draft government legislation

²⁴⁷ See Story, CIPR Study.

²⁴⁸ Dan Milmo, "South Korea fines Microsoft £18M," The Guardian, 8 December 2005.

²⁴⁹ Ibid.

on the subject of computer software. A number of Lebanese MPs argued against a statutory change that would permit, for the first time, software to be protected by copyright laws. They also said that computer system owners, such as Microsoft, should be required to grant compulsory software licences to poorer students and to educational institutions. As a result of pressures applied by Microsoft, Adobe, and other software multinationals, Lebanon was put on a US Trade Representatives 'Special 301 Watch List' (meaning that the US government could decide to impose trade sanctions) for considering such a reform. Lebanon complied and the bill was passed.²⁵⁰

- Proprietary software creates closed 'operating standards' that are not compatible with other types of software and uses intellectual property laws to maintain a near-monopoly for its own proprietary – that is, privately owned and controlled – standards. Here a comparison with the international postal system is useful. As is well known, if you live in Country A and want to mail a letter to Country B, you can buy a stamp and mail your letter in Country A and it will be recognised by Country B; your letter will be delivered in B without any hassles or formalities. The postal service in Country B does NOT say, "sorry, but in order to deliver a letter in our country, you have to use OUR STAMPS." That's because postal services operate on the basis of open, meaning public and compatible, standards. National telephone systems use open international standards as well. Again, can you imagine phoning another country and being told, " sorry, but to phone a friend in our country you have to use our language." One does not have to think very long to appreciate the benefits of how much easier computer-to-computer communications would be if software also operated on the basis of open and compatible standards.
- Large retailers sometimes engage in pricing wars with the principal goal of driving smaller competitors out of business and, then "having the field" to themselves, they are able to set even more uncompetitive price levels. Microsoft also engages in a wide range of questionable pricing and marketing policies to reinforce their dominating position. Indeed, sometimes Microsoft will give away its software to governments and users in the South at no cost whatsoever. But once computer users become familiar solely with systems such as Windows and Word, switching to alternative systems, such as free and open source software, is much more difficult. In other words, once they have had their "Windows fix", computer users will find it difficult to even try an alternative software system... and proprietary licensing charges will carry on annually. In Brazil, Microsoft is trying to counter the expansion of Linux, the leading open source operating system, by creating software known as the 'Windows Starter Edition'; this is basically a low-grade version of Windows. The idea is to use the lower-priced 'Starter Edition', which actually costs more to manufacture, as a way of leveraging the market, gaining market entry, and challenging Linux.
- There is little disputing the fact that levels of so-called software 'piracy' are high in the South. Although accurate and verifiable statistics are difficult to find, some unofficial estimates suggest that up to 90 per cent of the software used in Argentina is pirated. Percentages for China and some other countries are reportedly even higher. Why such high levels? On the one hand, proprietary

²⁵⁰ See Story, ICTSD, p. 15.

software owners sometimes knowingly allow 'piracy' to continue without challenge or serious enforcement efforts. Why? The 'fix' question comes up again. Getting potential customers 'hooked' on proprietary software becomes just another marketing tool; at a later stage when there are many users of the 'pirated' software, the copyright owner is then in a position to reap the financial benefits and assert their intellectual property 'rights.' , The experience of the Philippines is instructive on this point. In the past, the Philippines government was a major user of 'pirated' Microsoft software. But once Microsoft established a major presence there, one of its first moves was to negotiate a deal with the Philippines government under which all of the 'pirate' software was declared 'legal' after the payment of a small fee to Microsoft. In exchange, the government agreed to become much more aggressive in the enforcement of copyright; a special enforcement agency was established, many raids were conducted (with the assistance of and accompaniment by officials from the Business Software Association) and criminal prosecutions were conducted in special courts. As one Philippines activist put it, "every raid means increased sales for Microsoft." And in fact today, shops in Manila and elsewhere are being pressured to pay a type of royalty fee to Microsoft per unit of *hardware* sold because it is presumed that every personal computer sold has been preloaded with Microsoft products, 'legitimate' or 'pirated'.

- Many parts of the South are badly in need of skilled computer technicians and indeed hundreds of so-called 'computer academies' have been established. However, most of these programmes are essentially training shops for the installation of Microsoft products and do little to spread more widely applicable and sophisticated computer skills. As two Argentinean computer programmers have written:

The knowledge content of those programs, however, doesn't go any further than providing skills in the use of their proprietary software, and contributes little if anything to the comprehension of the general mechanisms that come into play. They don't teach the user how to use a word processor, for instance, but how to use a very specific, proprietary word processing program. Far from contributing to software literacy, these educational programs are marketing tools designed to produce users that are dependent on a particular program. People who attend these courses are typically unaware even of the existence of alternative solutions, and completely at a loss when confronted with a different program to solve the same need.²⁵¹

In fact, as Heinz concludes, "as a consequence of widespread use of proprietary software developed abroad, the local market for information technology professionals is limited to openings for 'computer janitor'."²⁵²

Conclusion

This type of statistical and anecdotal evidence begins to sketch out a picture for the South in which proprietary software, protected by a combination of patent, copyright and trade secret laws, does not lead to technological transfer or independence, but

²⁵¹ Heinz and Heinz cited in Story, CIPR study.

²⁵² Heinz cited in Story, CIPR Study.

rather reinforces a technological 'lock-in'. Proprietary software dramatically increases software costs and decreases computer access. And is it any wonder that there are such high rates of so-called 'pirated' software in many countries of the South? Nor does proprietary software provide a catalyst for sustained and substantial economic and social development, but rather leads to further subordination...and daily creates increasingly vociferous and dedicated challenges to the still dominant proprietary software ethos exported by the North.

4.10 The visually impaired in the South: shut out of reading by copyright roadblocks

Getting accurate statistics

It is difficult to get accurate figures as to the number of blind, visually-impaired and print-handicapped persons in the South; such a figure is necessary to quantify, with any precision, the total number of people negatively affected *directly* by copyright restrictions. The whole world suffers *indirectly* by the unnecessary legal restrictions on their contribution to our world.

'Official figures' significantly underestimate the situation. According to a December 2004 study by the World Health Organisation (based on the world population in 2002), more than 161 million people were visually impaired; 124 million had low vision and 37 million were blind. (An earlier estimate by the World Blind Union suggested that there were more than 180 million blind and partially sighted persons.) The WHO study concluded that "the burden of visual impairment is not uniformly distributed through the world; the least developed regions carry the largest share."²⁵³ The developing world (excluding India and China) accounted for 19.4 million of the 37 million, with India and China totalling 6.7 and 6.9 million respectively. Hence, countries of the South accounted for 33 million of the 37 million blind persons on the globe. This North-South disparity is likely to increase in coming years as the percentage of the total population aged 50+, that is, the age bracket most likely to be blind, is increasing much faster in the South. In this age bracket, there was a 16% increase in developed countries between 1990 and 2002 compared to 47% in developing countries (excluding China) over the same period. The study concluded that "the extent of low vision worldwide is underestimated."

But this quotation minimises the consequences of a key statistical issue. One of the main reasons for the WHO's underestimation, both for low vision and blind persons, is that its calculations are based *solely* on the number of persons who officially 'register' as visually disabled with their own national government. Analysing the results of a UK survey in the 1980s conducted by the Royal National Institute for the Blind, Richard Tucker says that study shows that "there were many more people who really ought to be registered as having low vision but were not."²⁵⁴ And citing another study done in the Netherlands with somewhat similar results, he has

²⁵³ Global data on visual impairment in the year 2002, World Health Organisation, Bulletin of the World Health Organisation, November 2004, 82 (11).

²⁵⁴ Richard Tucker (FORCE Foundation, The Netherlands), Vision 2002, 7th International Conference on Low Vision, Gothenburg Sweden 21-25 July 2002.

estimated that “for every registered person, there are about *ten* unregistered people who have difficulty reading [i.e. reading material that can be read by sighted people] because of a lack of visual acuity.”²⁵⁵ This is the estimate for two rich Northern countries.

The accuracy of the latest WHO figures is even more questionable in the South. Here there is less motivation to become ‘registered’ as blind with one’s own national government because government assistance programs for the blind are much less extensive. As well, governments often give little encouragement to register because full acknowledgement of the problem might give a wider lobbying impact to organisations of and for the blind, nationally and internationally. Additionally in the South, there is a less extensive communications and government infrastructure. And finally there is the critical matter of the link or ‘confusion’ between illiteracy and blindness; millions of blind people are illiterate primarily because they cannot get access to accessible reading materials. Here again, say knowledgeable observers, copyright restrictions are one key barrier to access. As well, there is the shame and embarrassment of reporting one’s own illiteracy. To conclude: *the actual number of blind and low vision persons in the South is dramatically understated.*

The basis of the access problems faced by the visually impaired

The severest hindrance to the blind and the visually impaired in accessing information and knowledge arises from the fact that the original format in which most books and other published material are printed (or available on the Internet) is *not* accessible to them. For such materials to be usable by them, they must be converted into an accessible format; such a format could be large print (especially important for those with low vision), or audio (e.g. an audio tape or CD of a book), or in braille, or in various computer-assisted formats, such as synthetic speech or on enlarged screen displays (e.g. by altering features such as colour or font.)

But, and here is the key legal issue: in order to convert a copyright-protected work to a different format (or font size) from the original work, it must be copied (or typographically altered). Copying a work (meaning, in legal language, “reproducing the work in any material form”²⁵⁶) without the permission of the owner is copyright infringement; it is a breach of statutory duty and case law. Copyright doctrine dictates that copying a work is the exclusive right of the copyright owner. Alternatively, a work could be read aloud – this is called “performing a work” – and recorded, but, again, the owner is given the exclusive right to perform a work. The legal straight-jacket is a tight and unbending one.

Some minor reforms, which do allow (in narrowly drawn situations) the ‘copying’ of the original work to make a single copy – without the prior permission of the copyright owner – have been won in countries of the North, such as the US, Canada, the UK, some Scandinavian countries, and New Zealand. This is undertaken by the conversion of copyrighted hard copy or digital works to accessible formats. (Previously it had been illegal, for example in the UK, to make even one accessible

²⁵⁵ Op cit. (italics added)

²⁵⁶ See, for example, Section 17.2 of the United Kingdom’s *Copyright, Designs and Patents Act 1988*. This approach mirrors that found in other national copyright legislation, including in the South.

copy without receiving permission from the rightsholder.) But David Mann, a copyright and access specialist with the World Blind Union, says he does not know of a single country in the South which has implemented even this narrow exception.

The problem is further exacerbated because such a small percentage of material in accessible formats is available in the normal marketplace for blind persons; what we could call 'self-conversion' (or non-market conversion) is often the *only route* to access. To cite another UK example, the World Blind Union has estimated that "only around 5% of published titles ever become available in accessible formats and it is rare indeed for the accessible version to come out until months or years after the original."²⁵⁷ More recent research conducted by the Royal National Institute for the Blind in the UK shows that the proportion of books available in accessible formats in the UK is even less today than it was five years ago. It is fair to say, conclude spokespersons for blind rights organisations, that *an even smaller percentage* of accessible works is available in countries of the South; moreover, accessible works produced in rich countries often cannot be exported to the South because of copyright restrictions as is discussed below.

The access problems in the South created by copyright

For blind and partially-sighted persons in the South (and in the North as well), there are a wide range of pressing access issues. Although copyright laws are often *not* the only source of the access problem for the visually impaired and wider economic disparities should not be forgotten, rights owners and their representatives continually raise presumptions derived from copyright laws and its accompanying ideology to block needed access... and render access either unnecessarily complicated or *often impossible*.

Among the practical consequences of the current copyright regime for Southern countries, the following should be noted:

- a) Copyright licensing restrictions do *not* allow materials that have been converted, with permission, into accessible formats in one country to be exported to another. For example, the Royal National Institute for the Blind in the UK has reached a licensing agreement with a few UK publishers under which the RNIB has been permitted, usually upon payment of a licensing fee, to convert a limited number of standard university textbooks into accessible formats. However, students in the South (for example, the 90 blind English-speaking students who enter university and colleges each year in Ghana) are not able to get access to these converted materials because of the copyright restrictions found in the RNIB licence. Instead (and given that accessible materials are so limited across the South) these Ghanaian students are often required to employ sighted person to act as readers for their studies. This is hardly an ideal learning situation; it is also expensive for such blind students and often prolongs their studies for many years, says Chris Friend, an official with Sight Savers International, which does work in this region.
- b) In fact, the most serious problem for countries of the South (and for organisations of and for the blind) seeking to provide access to the blind is that they must

²⁵⁷ Presentation by the World Blind Union to the Standing Committee on Copyright and Related Rights, the World Intellectual Property Organisation, 3 November 2003.

duplicate, in nearly every instance, the conversion process completed elsewhere *on the very same materials*. Converting books to Braille or other formats is an expensive process, yet, because of copyright and related licensing restrictions, the very same book must be converted again and again by organisations located in different countries. “It is a huge waste of resources, especially so when resources for access by the blind are already so limited in developing countries,” says Richard Tucker of the Force Foundation, a Dutch-headquartered organisation that assists in the production of accessible materials for the visually impaired across the South. Although it is difficult to give precise figures on the costs of conversion, Tucker says that the cost of converting a book to an accessible format operates on about a 1 to 5 ratio (per page). This means that a ‘regular’ book retailing for US \$20.00 will cost about US\$100.00 to produce in an accessible format. Most of the per-page cost comes from producing the master and such a cost assumes, to take one of several factors, that the converting producer is using automatic page-turning equipment. Such equipment is not found in the South. Using manual page turning equipment, which is also rarely found in Southern countries, escalates the cost ten-fold. In other words, this same US\$20.00 book would now cost US\$200.00 to convert. Certainly labour costs are much lower in the South, but “a very large percentage of the budget [of organisations in the South producing accessible books] is taken up in producing Braille and large print books,” says Tucker. Yet, the very same books have often already been converted in the North and could be transmitted to the South in digital format, either through e-mail or by regular post. But the restrictions of copyright law prevent this occurring. “It should be possible for accessible materials created under an exception in one jurisdiction to be imported for the benefit of blind or partially sighted people in another”,²⁵⁸ states the World Blind Union in an implicit critique of the single jurisdiction-based limits on users' rights. We believe it is difficult to disagree.

- c) A related problem occurs between even adjoining countries in the South. If a blind rights organisation in one country in the South, for example Ghana, negotiates an agreement to convert materials in one country and expends significant funds to produce such an accessible work, that same work cannot be used in another African country. Instead, organisations of the blind in other African countries must not only negotiate a separate agreement, but also produce their own Braille or audio version. Again, this is extremely wasteful of already limited resources.

The partial nature of reforms in rich developed countries

In past decades, organisations of the blind in rich countries, such as those in the UK and the USA, have been able to lobby successfully for very limited copyright exceptions for the production in an accessible format of single copies. Since 2003, unlike before, users in the UK have no longer been required to get the written permission by a rights owner to convert a single copy.²⁵⁹ The UK’s *Copyright (Visually Impaired Persons) Act 2002*, which came into force on 31 October 2003, is an example of the type of legislation that some people are advocating should also be adopted by Southern countries. To produce a single accessible copy, this UK Act removed the

²⁵⁸ World Blind Union, An Advice Note- Exceptions or Limitations to Copyright for Blind, Partially Sighted or other Print Disabled People, 30 June 2004. The author is David Mann.

²⁵⁹ As noted above, even these limited reforms are confined to the North.

need for prior permission by the copyright owner. This was a small step forward. But many access restrictions remain. Accessible materials which are commercially available, often at high prices for blind purchasers, cannot be copied and, as Kevin Garrett notes, “there is no requirement [in the Act] that the commercially-available copies should be available at a cost which is either reasonable or one which the visually impaired person can afford.”²⁶⁰ Data bases cannot legally be converted. The master copy cannot be used by an individual to make a second copy and a visually-impaired person must retain the master copy or, strangely, that person would be considered as being in the possession of an infringing copy...and thus breaking the law. The making of multiple copies is possible in certain limited circumstances, but the process is highly constricted. Overall, this statute is “convoluted” with “ill-drafted provisions” that are “onerous” and which “do not seem to be required by the [highly restrictive] Berne [Convention] three step test ...”²⁶¹ It is an orientation and a set of restrictions that should *not* be exported to the South.

The numerous time and money problems that arise in both getting permission to create an accessible version of a work and actually carrying out the production of accessible materials are an additional access issue. The set of hurdles is similar, in one sense, to those faced by sighted persons, such as students, and their teachers. For example, publishers (i.e. copyright owners) in the North and South create as many administrative burdens and financial roadblocks as possible – and greatly increase the transaction costs – for the production by teachers of course packs required for their students and, indeed, they actively discourage the process.²⁶² Rights holders would much prefer teachers to assign publishers’ books (that is, their own books) to students as the profit margins are much higher for them. But for the blind and visually impaired, this ‘discouragement’ becomes a complete roadblock as very few accessible texts are even produced, let alone sold. Denise Nicholson, a South African specialist in copyright matters related to access to educational materials, highlights the problem in her country:

*Someone who is partially-sighted may be able to enlarge a 'fair and reasonable' portion of a work in a photocopied format, in terms of 'fair dealing' for his/her own personal use, but if they need to convert the [whole] work [which is the more obvious and pressing need as access to and the use of mere short passages permitted by fair dealing are seldom sufficient for learning purposes] into a more accessible format, e.g. Braille; a digitized format, audiotape, etc., they cannot do so, without first getting permission from the publisher. Unfortunately, getting copyright clearance can take several months. When a blind learner needs his/her educational and study material immediately for his course, test, etc. this is a great hindrance. Where sighted learners would be able to get on and do their work, the visually-impaired learner would be disadvantaged, as he/she would have to wait for permission and if granted, wait for someone to convert the material to an accessible format.*²⁶³

²⁶⁰ Kevin Garnett, ‘The Copyright (Visually Impaired Persons) Act 2000’, European Intellectual Property Review 2003, 25(11), 522, 524.

²⁶¹ Garnett, 526-527.

²⁶² See materials on the website of the (UK) Copyright in Higher Education Workgroup (CHEW); accessible at <http://www.ukcle.ac.uk/copyright/index.html>

²⁶³ Denise Nicholson, ‘Does copyright have any significance in the lives of illiterate or visually-impaired persons, WIPOUT contest essay, 2001. Accessible at:

Making multiple copies needed for teaching purposes in accessible formats is even more difficult. There is no provision in South African copyright law to address and overcome any of these problems, Nicholson concludes. And the situation is even more desperate in poorer countries in the South than South Africa.

The copyright prohibitions against translations are a further barrier. It is already difficult enough to undertake technical conversions for the visually impaired and to make them internationally available to persons understanding the same language. Because the translation (of copyrighted works) from another language cannot be done without permission,²⁶⁴ the production of accessible translated works (either by converting existing hard copy translations or by doing 'new' translations for conversions) is, again, all but impossible.

In the few countries that allow exceptions in their copyright statutes (and none, seemingly, are in the South), only particular organisations of and for the blind within that same country have been designated as the sole beneficiaries of these exceptions. This means that other organisations within that country cannot take advantage of this exception and thus cannot produce materials. More significantly, this practice does not allow any organisations producing accessible materials to share their materials with the blind in other countries, including the South.

Copyright can also be a problem for the blind and the deaf in accessing materials that are already in the public domain- at least for sighted people. (In the case of the deaf, digital rights management schemes used for E-books block the use of text-to-speech software. Moreover, conversion from one format to the other has to be cleared first; any modifications, e.g. to make information more visual for deaf persons or to convert from one format to another for better access, has to be cleared before they can be used.) The World Blind Union's Manifesto for a United Nations Convention on the Rights of People with Disabilities of 2003 states, under Section 5.4, that the 'Right to information and Communication' includes: "The right to the provision, in a timely manner and without additional cost, of all information in the public domain in formats that are accessible to blind and partially sighted people, such as Braille, audio, large print and electronic text, regardless of any copyright laws. This is to include all correspondence and information from public services, such as hospitals, public utilities and government departments, as well as those providing an essential service such as banks."²⁶⁵

A concluding note

Prominent copyright scholars have written that copyright laws seek "to encourage the widest possible production and *dissemination* of literary, musical, and artistic works."²⁶⁶ From this it follows that for this dissemination to be meaningful it must be accessible. "If an author [more accurately, the copyright owner] seeks to benefit by commercializing a work, then the public should be able to benefit by having access to

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

²⁶⁴ For more on translation and copyright, see Section 4.11

²⁶⁵ WBU Manifesto, at <http://www.euroblind.org/fichiersGB/wbumanif.htm> (italics added)

²⁶⁶ Paul Goldstein, Copyright, Section 1.1, cited in Robert A. Kreiss, Accessibility and Commercialization in Copyright Theory, 43 UCLA Law Review 1 (1995), note 1.

the work. If access is denied to the public for a work where the author [owner] is receiving the economic benefits made available by the copyright system, then the goals of copyright are not being served.”²⁶⁷ Blind persons, nationally and globally, are certainly members of ‘the public’, yet they cannot get access to most materials that are copyright protected – or, more appropriately copyright restricted – by their own national laws and the international ideology of copyright. And conversion of such materials into accessible formats *does not entail any loss of revenues for copyright owners*. Finally, computer technology (e.g. scanners, the Daisy system) has dramatically increased the ease and decreased the cost of converting printed materials into accessible formats for the blind and the visually-impaired. Taking the fullest possible advantage of these technological advances is, however, repeatedly stymied, in both the North and the South, by copyright restrictions. A central problem: On the one hand, rights holders are automatically given legally-enforceable rights and protections on a world-wide basis (e.g. through the ‘national treatment’ provisions of the Berne Convention explained in Section 2.7), but, on the other hand, users’ rights, however limited, are restricted to single national jurisdictions and cannot be shared by other blind people in the other countries. In short, property rights trump the user rights of the visually impaired.

4.11 How copyright presumptions trump translation possibilities ... and limit the sharing of knowledge

Translating written texts from one language to another – or to a number of other languages – is one of the most beneficial and simplest ways to share knowledge and for readers to learn about and learn from other cultures and other peoples. Copyright laws, however, become an important restriction on such translation possibilities.²⁶⁸

The essential legal barriers to translations of copyrighted work into other languages are the following: Under the traditional presumptions of copyright law, the first author of a work is given the ‘exclusive right’ to ‘adapt’ a work; the adaptation of a work includes the ‘translation of a work’ into another language.²⁶⁹ As publishers, rather than authors, own copyright in works, the publisher ‘steps into the shoes’ of the author and is given the legal power to authorise – usually for a fee – the translation of a work. Or the rights holder can refuse permission. This approach, found in most domestic copyright laws across the globe, mirrors what is stated in Article 8 of the Berne Convention.²⁷⁰ This legal power to prevent translation lasts for as long as the work is protected by copyright.

²⁶⁷ Kreiss, op. cit. p. 4. It is true that unpublished (and hence inaccessible) works also receive copyright protection, but the owner does not receive economic benefits from such works, unlike the owners of published materials who choose, primarily for economic reasons, not to make such works accessible to the visually impaired.

²⁶⁸ On the small number of books that are translated into Arabic each year for the Arab market, see Section 3.4

²⁶⁹ For the United Kingdom, see Copyright, Designs and Patents Act 1988, Art. 16 (1) (e) and Art. 21

(3), (I).

²⁷⁰ On the Berne Convention, see Glossary.

The lengthy copyright term and the difficulties in making translations reinforce each other as access barriers. Significantly, even though an author may often assign (sell or give away without payment) copyright in his/her work to a publisher and will no longer have any economic rights in the work, the duration of copyright held by a publisher will be determined solely with reference to the date that the author dies. Only after copyright has expired, which may be more than 100 years after a book or article is first published, can it be translated into other languages without getting the permission of the owner of the work (in the first language). Furthermore, the translator of a work into a second language may also gain 'new' copyright in the translation he or she has done. As well, each translation into each specified language usually requires individual permission; sometimes permissions into more than one language are granted jointly. Moreover, sometimes the content of the actual translation must be approved, prior to publication, by the rights holder of the first work. And, finally, in some jurisdictions (though not all), the author of the original work can object to the content of the translation on 'moral rights' grounds, that is, the translation is considered as so poor, in the opinion of the original author, that it amounts to a 'derogatory treatment.'²⁷¹

All of these legal rules and restrictions can block or delay translation into another language for decades and decades and is highly dependent on when an author dies and into what languages a book or article is translated. Each new translation begins a new copyright cycle. For example, if a book A written in language X (for example, an uncommon or local language) is translated into language Y (a more common language), book A might not be able to be translated into language Z from the copy available in language Y until more than 150 years after book A was first printed.

The 1971 Appendix to the Berne Convention does make some very marginal changes for developing countries though, interestingly, a country such as South Africa is not designated as a 'developing country' under the provisions of the Berne Convention. However, arranging such translations under the Berne Appendix creates high transaction costs for publishers in the South, and there are numerous delays and restrictions that remain. The Berne Appendix is, not surprisingly, seldom used.

The privileging of European languages

The translation problem is particularly pronounced in the South, especially in Asia and Africa where many countries are multi-lingual. This situation is in contrast to that found in most countries of the North where one or two languages are typically spoken by the majority of people within a given country. This significant difference is an important one. Within Northern countries, translation into another language often means translation into a non-domestic language, that is, into a language spoken by people living in another country. This is somewhat similar to the situation that prevailed in 1886 when the French author Victor Hugo headed the movement to establish the Berne Convention; the French took a very 'hard line' on the translation question, while other nations, such as the Scandinavians who were users, wanted a more relaxed approach. Yet, the 1886 assumptions about translation still hold sway globally and are found both in the Berne Convention and national copyright legislation. But such assumptions simply don't hold true in the South. A wide range

²⁷¹ On moral rights, see Glossary.

of languages are spoken and written in India and a significant number of African countries, for example, have more than ten languages. And in the production of materials across Africa, “local languages are ignored in favour of English, French or Portuguese” as Colin Darch has written.²⁷² There are also few translations of works from one African language into another (e.g., from Bantu group languages of southern and eastern Africa into Igbo, Yoruba or Hausa from Nigeria, or vice versa). Generally the right to make a translation must be individually acquired for each translation into a different language; it may be difficult, for example, to acquire the translation rights for all of the languages used in Nigeria or South Africa. The latter has some 200 languages and 11 official languages. In fact, a third of the world’s languages are spoken in Africa and so it is not hard to imagine the problems trying to get works translated for educational purposes.

The overall situation reinforces the inequality of languages, privileges European languages, and means that tens of millions of Africans and Asians are unable to get access to or read books and articles originally published in languages other than their own, even languages used within their own national borders.

Translation restrictions mirror other restrictions

The legal barriers established for translations reveal and mirror many of the basic restrictive features of copyright: a) the original work becomes the exclusive preserve of the owner (who is often not the actual author) ; b) the work is propertised (meaning the subject of exclusive use like other commodities) for a very lengthy period of time; and c) there is no positive requirement or obligation to share or spread the knowledge to others, even if in this case, no negative consequences (e.g. the loss of a market) will result from the sale and distribution of a book that has not been translated into a local or national language. And in the case of translation, the ‘others’ at stake are those who read materials originally written in another language.

Lacking any obligation to share, the owner of the initial copyrighted work can simply sit back and wait with all of the ‘trump cards’. *On the one hand*, some day in the future the owner *may* want to have the work translated into another language and so he/she has no desire to create potential competition for a potential translation, which might bring in a fee. In other words, why share it today? *On the other hand*, those in the South (and sometimes in countries in the North who read another language) will often not have sufficient funds to pay the additional fees demanded by the publisher of the work for translation purposes. Southern publishers trying to acquire translation rights often face an unequal bargaining power situation (compared to large Northern publishers) and may be trying to serve a small market composed of one language grouping; they can be regarded simply as a low-rent nuisance for the publishers of English, Spanish or French publications. As one African publisher explained, acquiring translation rights from European publishers is a highly complicated process and “in the few exceptional circumstances where European publishers grant rights to their African counterparts, this is usually done on harsh

²⁷² C. Darch ‘The ‘Alexandrian’ Library, Digital Resources, and the Shrinking Public Domain: the Current Model for Delivering Academic Information in Africa’ (Paper presented to the LIASA Conference on ‘African Renaissance through Libraries’, Pretoria, 24-28 September 2001)

and unfavourable terms."²⁷³ In the end, cross-cultural and cross-language barriers to communication and understanding and learning from others *who happen to speak and write in another language* remain in place.

At the same time, it needs to be recognised that copyright restrictions are only one roadblock to the sharing of literature and other written texts among the people of the world. Cultural isolation and a sense of cultural superiority also play a role. A prize-winning US translator, John E. Woods, has examined a list containing the number of 'serious' books of literature (in other words, cookbooks and tour guides and the like are excluded) that are available in English in the US, the world's largest book market, as translations *from other languages*. The annual list of books seeking to win the annual PEN translation prize, which Woods suggests covers "most of the serious prose and poetry that gets published in a given year" and which are translated into English, does not exceed 200 to 250 titles a year. As a result, he continues, "every year we Americans are getting no more than about 200 peeks a year over the literary fence into the outside world. Then, if you start looking at the individual languages, about 60 per cent are translated from five languages, and in this order: French, Spanish, German, Russian, Italian. So that's about 120 titles. All of the rest of the world's languages get the other 80."²⁷⁴

4.12 Three legal questions related to access

As this section of the dossier has already detailed, domestic copyright laws and international copyright conventions erect a wide range of restrictions that severely limit the use of copyrighted work across the globe. 'Keep out' signs are erected everywhere. The owner of the copyrighted work is given a legally-recognised property right over the work, whether a book, a film, an artistic work, a television broadcast or a myriad of other types of literary, musical and artistic expressions. But such property rights are **not absolute** or total. If they were, a student writing an essay could, for example, **not quote a single sentence** from a copyrighted book in her or his essay without the prior permission of the owner of the copyright. In other words, establishing absolute rights to exclude all uses would be an absurdity.

Users do possess certain narrowly-drawn rights to use copyrighted works. Legally, such access and use rights are called 'limitations and exceptions' to copyright; the highly questionable assumption behind such terminology is that copyright and its many restrictions are the 'normal' and 'natural' – and preferred – state of affairs and that the right of the public to freely use such works is an aberration that needs to be strictly controlled. In any event, there are three legal questions that need further analysis in looking at access questions in the South: one involves an exception, a second is concerned with a legal agreement created especially for developing countries more than 30 years ago, and the third is a 'test' for whether a use is permitted. These are respectively: a) fair use/ fair dealing; b) the 1971 Appendix to the Berne Convention; 3) the Berne Convention ' three-step' test. Here we provide solely a brief treatment that covers only the high points (and low points) of what are quite complicated legal questions. What is notable is how each of these provisions

²⁷³ See Story, CIPR Study, p. 49

²⁷⁴ John E. Woods, San Diego Weekly Reader, no. 32 (August 14, 1997), 20-22.

has been given *far more importance than it deserves* as a method and/or tactic for overcoming the access and use requirements for peoples of the South.

a) The question of fair use/ fair dealing

'Fair use' is an important part of US copyright doctrine (and also used in the copyright laws in the Philippines) that allows a user to legally access and use limited sections of copyrighted works without the permission of the copyright owner and sometimes without the payment of any fees. In most other parts of the world, that is, almost every country except the United States and the Philippines, this right is labelled 'fair dealing.' ('Fair use' and 'fair dealing' do not, in practice, operate in exactly the same fashion ; the statutes and case law that deal with 'fair dealing' are, in general, *not* as sympathetic to users' rights as those covering 'fair use.'²⁷⁵) The absolute ownership rights of the owner are said to be overridden by other interests, such as the public interest in making works much more widely available. It is the 'fair use'/ 'fair dealing' exception, for example, that permits a student to quote passages from a copyrighted work in her or his essay without getting permission from the owner. If a use falls within such guidelines, which are not clear-cut and can depend on, for example, why the copyrighted work is being used and how much is being used, the user may be provided with a good defence if the owner decides to launch a copyright infringement action.

What is the situation in countries of the South regarding 'fair use' and 'fair dealing' provisions? There is no single pattern. While some countries do have 'fair dealing' provisions that are basically similar to those in the developed world, a number of countries do not have any statutory provisions that expressly permit 'fair dealing' (or 'fair use.')

The reason? Until quite recently, the copyright statutes in numbers of countries across Africa and Asia were essentially colonial transplants drafted by Europeans or their colonial underlings. Such statutes were often carbon copies of those that existed in the homeland of their then (or previous) colonial master, whether England or France or Spain. If such statutes supposedly 'worked' in England, then they were considered equally valid in countries such as Kenya, even though the conditions were radically different. Yet, in some African and Asian statutes, the 'fair dealing' clauses were, curiously, omitted. (Or perhaps not so curiously, as 'fair dealing' would at least have given some minimal rights to users when accessing works which, in most cases, would have been owned by publishers and other companies based in Europe.) Significantly, the leading global copyright agreement, the Berne Convention, does *not* require that members draft domestic copyright laws which mandate 'fair dealing' (or 'fair use') provisions. In an era when the call to 'harmonise copyright laws' is growing increasingly shrill and when the rights of owners are becoming strengthened, protected, enforced -and more and more harmonised - through international agreements such as the WIPO Copyright Treaty 1996, the call for 'harmonising users' rights' across the globe is seldom heard, let alone acted upon.

So a call for the creation of 'fair dealing' (or 'fair use') laws in every country in the world is certainly a demand worth supporting. And the best or broadest users' rights established anywhere in the world should become the global harmonised standard.

²⁷⁵ To read more on the concepts of 'fair use' and 'fair dealing', see <http://en.wikipedia.org>

Such provisions are particularly needed in the South where libraries are generally funded at much lower levels, where access to printed works is more tenuous and where the needs are especially pressing. Yet, at the same time – *and this point cannot be made strongly enough* – the transplanting of Northern ‘fair dealing’ (or ‘fair use’) laws and standards to the South is *not* the essential or principle solution to the information and knowledge needs, especially technical knowledge needs, of countries of the South and both their students and their teachers.

Organisations which advocate the transplanting of US ‘fair use’ standards as the main access solution simply do not appreciate the ‘on the ground’ situation in the South. Looking across the full spectrum of the education field provides numerous instances of where a ‘fair dealing’/‘fair use’ approach simply does not fit the bill. Four brief examples should suffice here:

- First, the amount of material that can be used legally (that is, using the ‘fair use’ exemptions) from any given copyrighted book or article is pitifully small. A person trying to learn to read on a literacy programme in the South cannot learn to read if she or he can only have access to the odd sentence or a couple of paragraphs; this is the amount which typically is allowed at no charge under a ‘fair use’/ ‘fair dealing’ standard. Rather, they need access at no charge to complete books, many books, and other materials; ‘fair dealing’/ ‘fair use’ approaches forbid this. How can this be ‘fair’ to persons who are illiterate?

“I’ve spent the past several years trying to negotiate with publishers for uses. We also have access to fair dealing, under the usual terms, ‘a reasonable portion’, ‘no impact on commercial use.’ But no one knows what this means and no one knows what’s reasonable. Only the courts know and litigation is too expensive. One technical question on labour law that we litigated cost us 5,000,000 Rand. As educational sector, we don’t have the kind of money needed to challenge the publishers. (We) need (an) interpretation of (the) legislation. Publishers say they have taken a reasonable position. They have no problem with individual students and teachers making copies. But when an institution makes copies, even of a single page, they must pay royalties. For instance, English literature professor making copies of a single poem from an anthology of 600 of them. There is no fair dealing from the standpoint of administrative teaching.”

Professor Julien Hofman, Commonwealth of Learning, Department of Commercial Law, University of Cape Town, Cape Town, South Africa. Speaker, Information Meeting on Educational Content and Copyright in the Digital Age, World Intellectual Property Organization, Geneva, Switzerland. 21 November 2005
<http://www.eff.org/deeplinks/archives/004193.php#004193>

- Second, ‘fair dealing’/ ‘fair use’ statutes typically only permit use of copyrighted material for individual “research” and “private study.”²⁷⁶ Such laws typically do not cover the provision of course and study packs in schools, even though each student receiving such a course pack will, in most cases, be engaged in “private study” when she or he is reading and using the pack. Again, ‘fair use’ is of no value.

²⁷⁶ For the restrictions in the United Kingdom, see the UK Copyright, Designs and Patent Act, 1988, Sec. 29.

- Third, as we saw above in the case of the Colombian academic,²⁷⁷ the ‘fair dealing’/‘fair use’ approach may allow an academic in the South to quote a few passages from copyrighted works in their own research. But this orientation creates all sorts of hurdles to accessing many printed materials in the first place.
- Fourth, as Professor Julien Hoffman of South Africa explains above, ‘fair dealing’/‘fair use’ standards are very difficult to understand; not every primary school teacher is a copyright expert and every use that exceeds such ‘fair dealing’/ ‘fair use’ limits means that copyright royalties must be paid to publishers. If some university students in rich countries such as the United States and Britain justifiably complain about the costs of their educational materials (costs that are principally, though not exclusively, the result of copyright restrictions), the complaints of students from countries such as Mexico, Malawi or the Philippines are even more valid.

In other words, importing Northern ‘fair dealing’/ ‘fair use’ standards to the South is simply not ‘fair.’

b) The Appendix to the Berne Convention

The Berne Convention is the leading international agreement that governs copyright relations between countries as well as dictating a number of requirements that must be inserted into the domestic copyright statutes of all member states. First drafted in 1886 and amended, mostly in minor and technical ways, a number of times since then, the Berne Convention is an agreement or treaty that was written by developed countries and represents the approaches to copyright law that predominate in these countries. As more and more colonies and dependent countries in the South gained their independence in the 1950’s and 1960s, the failings, indeed the oppressiveness, of the Berne Convention became more and more obvious to countries of the South. It simply did not meet or contribute to their nation-building requirements.

A Southern-led revolt in the 1960s against the presumptions and ideology of the Berne Convention created what some commentators called an “international crisis of copyright.” The wider reasons for this important revolt, its background, and its demands are detailed elsewhere in the dossier;²⁷⁸ here in this section on access questions, we will do a brief analysis of the single international agreement that resulted from this crisis, namely the 1971 Appendix to the Berne Convention. (This Appendix, which is part of Article 21 of the Berne Convention, is now included in the 1994 TRIPS Agreement under Article 9.) Although the Berne Appendix is labelled as a set of “special provisions regarding developing countries,” it is, in reality, a distraction from the real struggle to win better access rights for the South; it is a mere table scrap, a tactical cul de sac, a legal nightmare. The ‘special’ situation found across many parts of the South is *not* addressed and, not surprisingly, its provisions have seldom been used by countries of the South in the 35 years since it came into existence. A leading commentator on the Berne Convention, Professor Sam Ricketson of Australia – and someone who is hardly a radical copyright activist – has

²⁷⁷ See Section 4.7

²⁷⁸For more on this period of conflict, see ‘The late 1950s and 1960s: the Southern revolt against copyright’ in Section 5.2 of the dossier.

concluded that the Appendix has brought “no obvious benefits” to developing countries.

The essential purpose of the Appendix was to make it easier for publishers in the South to get authorisation to publish materials already published in the more developed North. For example, translation of works by Southern publishers for teaching and research purposes is made somewhat easier to undertake if a Northern publisher decides not to have their works (originally published in European languages such as French or English) translated into the languages found across Africa and Asia. But, not only do few publishers in the South even know about the 1971 Appendix ²⁷⁹, the Appendix reinforces the idea that Southern publishers should be the one (and only) conduit for the reprographic copying and the production of materials and their delivery in the South. (Of course, many Northern-based publishing giants, such as Oxford University Press and Reid-Elsevier, also have a significant market share of the Southern textbook market.) In the case of education, for example, the Appendix gives *no additional rights whatsoever* to teachers who may want to *independently* access and distribute materials for the use of their students with the assistance of two of the more common communication tools: a) a photocopier or low-priced duplicator or offset press; b) a computer and the Internet. So not only is the Appendix a technological anachronism which reinforces the privileged, in fact exclusive, position of publishers, Northern and Southern, in deciding upon the use of information and knowledge. It does nothing to alleviate other pressing access issues documented earlier in this section of the dossier, such as the use of the fields of distance learning, in libraries, or in research. For the South, it is a fatally flawed copyright agreement.

c) The Berne Convention ‘Three-Step’ Test

One of the current and ongoing controversies about the Berne Convention (and international copyright law more generally) involves the question of real (and potential) limitations and exceptions to copyright that might, for example, allow much freer use of copyrighted works. The Berne Convention ‘three-step test’ determines whether such exceptions will be permitted; in other words, it establishes in what circumstances the exclusive rights granted by law to rights holders under national copyright laws might be constrained and over-ridden by competing interests, such as the right to education. ²⁸⁰

The test, similar to that used in copyright questions, is included in Article 13 of the TRIPS agreement. It reads:

²⁷⁹ In an interview conducted in 2001, the Ghanaian president of the African Publishers Council said he had only learned recently of the existence of the Appendix. See Story, CIPR Study, pg. 51.

²⁸⁰ The ‘three step’ test was first applied to the exclusive right of reproduction by Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967. Since then, it has been transplanted and extended into the Article 13 of the TRIPs Agreement, Article 10 of the 1996 WIPO Copyright Treaty, and Article 16 of the 1996 WIPO Performances and Phonograms Treaty.

For more on the “three-step test”, see http://en.wikipedia.org/wiki/Berne_three-step_test.

Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.

To date, there has been only one case before a World Trade Organisation dispute settlement panel that can help to give us a better idea of exactly what these words mean in practice and whether the 'three step' might be a legal way to pry open existing access and use restrictions.²⁸¹ We do know that the test applies cumulatively; in other words, for a particular limitation to be permitted, all three prongs of the test must be satisfied. We also know that the 'three-step' test may become an important site of future conflict. If any nation attempts to reduce the scope of its own domestic copyright law by using this test, such states are likely to face severe legal pressures if the World Trade Organisation does not also agree that such domestic modifications comply with the test.

More generally we need to ask: is the Berne 'three-step' test - on its own terms - a valuable and viable test to use for establishing copyright exemptions if we wish for greater access possibilities? Might it, for example, be a legal tool that could be of use in a situation highlighted earlier in the dossier, namely the more than 200 million blind and visually-impaired people in the world who can't access printed materials, in part because of the exclusive reproduction rights given to copyright owners which prevent the unauthorised changing/converting of formats? There is no hint to date that the 'three-step' test would regard their access needs as 'special' - in fact, the reverse is true - and hence they would be required to act 'normally'; in other words, they could not change formats to make such books accessible for themselves. In the same vein, there is not a hint that the pressing need to get cheap access to books for a literacy programme in the South would, under the 'three-step' test, be able to trump other 'rights', namely, the property rights of publishers, normal money-making practices, 'the right' of collecting societies to collect revenues. And so this test provides not a single step, let alone three, along the road to better access.

4.13 Copyright and cultural domination by the North: a long-standing conflict that is getting sharper

It was not particularly shocking when a newspaper reported in December 2005 that the United States government had established "a (US) \$300 million Pentagon psychological warfare operation" which "includes plans for placing pro-American messages in foreign media outlets without disclosing the U.S. government as the source."²⁸² The details of this expensive campaign, which has included ghost-written articles, advertisements, radio spots, television programmes, and what are labelled 'public service announcements', were first exposed on the eve of elections in Iraq; it is a campaign that is being taken up as part of US President George Bush's high-profile 'war on terror'.

²⁸¹ The case involved US copyright exemptions allowing restaurants, bars, and shops to play radio and TV broadcasts without paying licensing fees; the exemption was included as a rider to the 1998 Sonny Bono Copyright Term Extension Act.

²⁸² Matt Kelley, 'Pentagon rolls out stealth PR', USA Today, 13 December 2005.

Such news is hardly surprising because the United States has been spreading its dominant ideology and world-view to the countries of the South for decades, indeed for more than a century. It is, of course, not the first or the only imperial power to believe in its own 'civilizing mission' ; the British considered they had the same duty in the 'glory days' of their own empire upon which, they repeatedly bragged, 'the sun never set.' (The French, the Spanish and other European powers also operated across their own colonial terrains in many similar - and some dissimilar - ways.) And the rationale for the current 'civilising mission'? To maintain its dominant position in this era of globalisation, United States must do more than simply profit from the strongest and most rapacious economy in the world or operate military and naval bases in 130 countries. Information domination is required as well. As an official in the former Clinton administration explained "... for the United States, a central objective of an Information Age foreign policy must be to win the battle of the world's information flows, dominating the airwaves as Great Britain once ruled the seas." ²⁸³

Commentators have explained how, on the US 'home front', these information flows have been essential in shaping the political, social and economic attitudes of the American people. Those "who are not permanent residents of the West on a day-to-day basis are always struck by the incredible saturation by the dominant media - a virtual carpet bombing of the public consciousness."²⁸⁴ In the age of the Internet, this 'carpet bombing' has gone digital - and international- and the South is more and more directly in the drop zone for the US-based information/ideology offensive.

Here is how a leading US newspaper described the situation a decade ago in one edition devoted to the theme 'How the World Sees Us':

The crumbling of the Berlin Wall in 1989 marked the beginning of America's ascendancy to a new level of world domination. No traveller can miss the evidence abroad. In music, television and the movies, America's influence is approaching what advertising people call 'market saturation.' The emblems of American mass culture have infiltrated the remotest outposts: the Coca-Cola is on the street corners from Kazakhstan to Bora-Bora; CNN emanates from television sets in more than 200 countries; there are more 7-Eleven stores in Japan than in the United States. Our technology - computerized weapon systems, medical scanners, the Internet - sets the standard to which developing countries aspire. ²⁸⁵

You may be asking, "yes, all of this may be true (or simply wishful boasting by a US newspaper), but what has this got to do with copyright and access barriers to knowledge?" In fact, a great deal. While this dossier documents some of the serious barriers to knowledge that exist and argues - sometimes quite passionately - that the current copyright regime is one (though not the only) cause of these access restrictions, we also suggest that an unrestricted 'free flow' of such knowledge, whether copyrighted or not, is not the answer for the South.

²⁸³ Foreign Policy, no. 107, (Summer 1997); 38-53 Cited by Herbert I. Schiller, *Living in the Number One Country*, (Seven Stories Press, New York, 2000).

²⁸⁴ Samir Amin, 'The Future of Socialism', *Monthly Review* 42, 1990, p. 29.

²⁸⁵ *The New York Times Magazine*, June 7, 1997, p. 37.

Such a supposed 'free flow' raises a whole number of other questions including: Is any 'flow' actually free? What ideology and biases are obvious – or encoded – in such knowledge flows, including that available on the Internet? Are some countries, such as the countries of Europe and North America (and a few others), actually the source of most of the world 'knowledge' that needs to be circulated and spread? Why is such a high percentage of the knowledge flow one-way, that is, from North to South? Doesn't the North have lots of things to learn from the South? We certainly think it does. And which voices from the North (and the South) actually get a chance to speak and be transmitted?

At the same time, what are the best ways to improve the global sharing of knowledge, to dampen down the reach of the McGlobalisation propaganda machine, and to ensure that a greater diversity of voices is heard in the South? Is it to proclaim the superiority of certain cultures, races, and, countries in the South? Surely this cannot be the answer. Is the solution to launch campaigns against 'decadent Western music' and forbid such music from being played by radio station or in public performances? And should it be governments in the South which are given the sole prerogative as to what knowledge can be exchanged and 'imported' by their residents? We think this approach would only add to the democratic deficit.

These are only a few of the questions related to the dangers of cultural domination or 'cultural imperialism', as it is sometimes called. And there is certainly not the space here to even begin expanding on these questions or attempting to answer them. Yet, to talk about providing greater 'access to knowledge' and lowering copyright barriers without also talking about 'what knowledge' from 'where' and promoting 'which values and which ideologies' is to miss much of the point. In other words, copyright and content must both be examined.

Behind the 'free flow of information' approach

One question that we can take up here is: what are the objectives and methods of the US-led campaign for a global 'free flow of information'? What follows is a series of quotations from a number of leading US government officials, spokesmen, and commentators over the past five decades who have endorsed, explained and led this continuing "free flow of information" orientation. ²⁸⁶

- a) John Foster Dulles, former US Secretary of State in the 1950's, on the eve of the 'Cold War':

*"If I were to be granted one point of foreign policy and no other, I would make it the free flow of information."*²⁸⁷

- b) US Assistant Secretary of State William Benton in 1946:

²⁸⁶ All the quotations used have been collected by the US communications theorist Herbert Schiller and are available in his book, *Living in the Number One Country*, (Seven Stories Press, New York, 2000).

²⁸⁷ Cited in a 1946 speech John S. Knight, 'World Freedom of Information' and published in *Vital Speeches*, 1946, 472-77.

"The State Department plans to do everything within its power along the political or diplomatic lines to help break down the artificial barriers to the expansion of private American news agencies, magazines, motion pictures, and other media of communication ... Freedom of the press- and freedom of exchange of information generally – is an integral part of our foreign policy."

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- c) US academic Daniel Lerner writing in the 1960's as the "Third World" was emerging:

*"The long era of imperialism (subordination) is recently ended; the campaign for international development (equalization) has just begun. In the new process, international communication operates on behalf of different policy purposes under different socioeconomic conditions by different psychopolitical means. Indeed, in the transition from imperialism to international development, there has been a fundamental change in the role of communication. Under the new conditions of globalism, it has largely replaced the coercive means by which colonial territories were seized and held...The persuasive transmission of enlightenment is the modern paradigm of international communication."*²⁸⁹

- d) US writer and strategist Richard N. Hauss in 1997:

*"The aim of American foreign policy is to work with other like-minded actors to 'improve' the market place, to increase compliance with basic norms, by choice if possible, by necessity, i.e. coercion, if need be. At the core, regulation [of the international system] is an imperial doctrine in that it seeks to promote a set of standards we endorse...."*²⁹⁰

- e) US commentator Irving Kristol in 1997:

*"Our missionaries live in Hollywood."*²⁹¹

- f) US academics Joseph S. Nye Jr. and William A. Owens in 1996:

*"Just as nuclear dominance was the key to coalition leadership in the old era, information dominance will be the key in the information age...Information is the new coin of the international realm, and the United States is better positioned than any other country to multiply the potency of its hard and soft power resources through information."*²⁹²

²⁸⁸ Department of State Bulletin 14, no. 344 (1946): 160

²⁸⁹ Daniel Lerner, 'Managing Communication for Modernization: The Development Construct.' in Politics, Personality and Social Change in the Twentieth Century: Essays in Honor of Harold D. Lasswell, ed. Arnold A. Rogow (Chicago: University of Chicago Press, 1979). 182.

²⁹⁰ Richard N. Hauss, The Reluctant Sheriff (New York; Council on Foreign Relations, 1997), 70.

²⁹¹ Irving Kristol, 'The Emerging American Imperium' Wall Street Journal, August 18, 1997, A-14

²⁹² Joseph S. Nye Jr. and William A. Owens, 'America's Information Edge' Foreign Affairs, March / April 1996, 20-36. .

- g) David Rothkopf, former Clinton administration official and former managing director of Kissinger Associates in 1997:

*“it is in the economic and political interests of the United States to ensure that if the world is moving to a common language, it is English; that if the world is moving towards a common telecommunications, safety, and quality standards, they be American; that if the world is becoming linked by television, radio, and music, the programming be American; and that if common values are being developed, they be values with which Americans are comfortable.”*²⁹³

²⁹³ David Rothkopf, ‘In Praise of Cultural Imperialism?’, *Foreign Policy*, no. 107, (Summer 1997) ; 38-53

SECTION 5 – RESISTANCE FROM THE SOUTH TO THE GLOBAL COPYRIGHT SYSTEM

5.1 Introduction

Countries of the South have not recently learnt about the problems associated with copyright; resistance has been present for some time. Resistance from the global South can, and does, take many forms. Resistance happens within the framework of copyright and intellectual property. For example, the General Public License (GPL) turns copyright on its head by providing incentives to share ideas instead of own them, but the GPL resists copyright from within the paradigm of copyright. A second way of looking at resistance is to see the system of copyright as a system of rights which legitimates a type of violence as people round the world are forced to adhere to the law. Thus, one should ask: how do you go outside copyright and intellectual property rights? Third, given the commonalities with other traditions, it is important to consider building alliances with other areas of resistance to IPRs. This 'environmentalism for the net,' as described by James Boyle, seeks to formulate a diverse movement working towards the same cause. Just as the early days of the environmental movement saw people from different paths of life coming together for a single cause, it is possible to conceptualise resistance to copyright along similar lines. One possibility is to think about intellectual property in the context of the International Information Order as a way of building convergence around the topic.

Though TRIPS is not the only intellectual property regime impacting on the global South, it has served as a focal point for resistance because it clarified the international dimensions of intellectual property and created the conditions for resistance along north/south lines. The TRIPS+ agenda reinforced the view from the South that linking intellectual property to 'free trade' means free trade for the global north and continued poverty for the global south. Thus, ten years after its inception, there are numerous streams of resistance to TRIPS and to copyright specifically.

First, governments in the global south have resisted the TRIPS agreement since the earliest negotiations over the terms of the agreement and have sought to mitigate the most damaging aspects of the agreement (with little success). Second, social movements resisting different aspects of the TRIPS agreement have emerged to raise awareness of how the agreement threatens indigenous culture and creative work and the relationship of TRIPS to the larger agenda of neo-liberal trade harmonization. Third, a growing number of scholars in both the north and the south seek to develop alternative theoretical conceptions to intellectual property. For example, scholars and activists emphasizing the value of the public domain as an alternative to copyright are seeking to provide a different starting point for understanding creative work. Furthermore, developing notions of collective authorship and de-emphasising the role of original creation are conceptual moves important to seeking alternatives to the western copyright model. Fourth, given the fact that most people do not know, or understand, the complexity of copyright law, sharing cultural products freely becomes a form of resistance (and civil disobedience). Fifth, resistance also takes the

form of using the language of intellectual property against those who seek to benefit from it. For example, extending the concept of intellectual property to traditional knowledge usurps the language of property and flips the claim of piracy to account for the actions of Westerners who appropriate freely from 'the heritage of mankind' but claim their own 'original authorship' is the result.

Some of these forms of resistance have been covered by other propositions in the dossier. For example, discussing the cultural underpinnings of copyright and the importance of the public domain can be seen as forms of resistance. In this section we will focus more specifically on direct forms of resistance. However, it is important to acknowledge that resistance will vary given the different approaches countries within the global South may take towards copyright. Within the 'global South' category are developing countries that are signatories to the TRIPS agreement and members of the WTO; indigenous actors within the global South who define their concerns in terms of traditional knowledge and the preservation of traditional culture and not in terms of state interests; and, finally, there are indigenous groups within developed states. In other words, the state may not necessarily represent the interests of indigenous actors and developing states may have different agendas than those of indigenous rights activists. Furthermore, not all states in the global South speak with a unified voice. This makes for a variety of different platforms.

5.2 A brief history of Southern resistance to copyright's laws and assumptions

This section focuses on three pre-1990 periods, namely the establishment of the Berne Convention in 1886 and in particular, the initial 'coverage' of this Convention in countries of the South, many of them then colonies and not politically independent countries; the late 1950s and 1960s when many countries became independent and when their dissatisfaction with the inequities of the global copyright system lead to what has been called 'the international crisis of copyright'; and the late 1970s and early 1980s when a number of leading countries in the South proposed a 'New World Information and Communications Order' (NWICO). Any movement must know its own history and this is a 'snap-shot' and 'broad-brush' treatment of this history.²⁹⁴ The history presented here, it does need to be recognised, remains an institutional history of government action due to the paucity of sources available; a history of how individual 'activists' in the South resisted copyright is yet to be researched and written.

The early days of Berne in the South

The Berne Convention, the leading international copyright convention that has also been incorporated into the TRIPS agreement – meaning it must be followed by all members of the World Trade Organisation – is a Western-based and unreconstructed colonial relic which countries of the South had no role in drafting and which was imposed on them without consultation in an earlier era. The only non-European countries represented at the Berne Convention drafting table in 1886 were Tunisia,

²⁹⁴ Some parts of this section are adapted from Story, CIPR Study, pp. 49-52.

Haiti and Liberia. (Japan and the US attended as observers; the latter did not join for more than 100 years, finally signing in 1989.)

However, many former colonies that today comprise most of the countries of the South became incorporated into Berne when they were under direct colonial rule. 'When nations such as France, Germany, and the United Kingdom signed the Berne Convention in 1886, they effectively committed their colonies to the Convention's obligations.'²⁹⁵ For example, all areas that were part of the British Empire in 1886 (e.g., many parts of Africa and Asia) have been under the jurisdiction of the Berne Convention since 1887 when Britain ratified Berne. A map showing the territorial extent of Berne in 1914 shades in vast areas of Africa, the Indian sub-continent and Australia as 'dependent territories'; Berne's foothold in Latin America, by contrast, was limited to a few colonies in the north-eastern section. When colonies across the South became formally independent countries, many during the 1950s and 1960s, they 'increasingly chafed at the imposition of copyright treaty standards that had effectively been imposed on them by a foreign power.'²⁹⁶

The importance of the wording of the first 1886 Convention, as originally ratified and thoroughly reflecting Western copyright values, is reinforced by the fact that any amendments or changes to the Convention require the unanimity of all members. Moreover, 'reservations' (an international law concept allowing a country to make exceptions in its own legislation for its own jurisdiction²⁹⁷) to the Berne Convention are *not* permitted. Hence, Berne is a particularly rigid and inflexible treaty. And although Berne has been amended – in minor ways – on different occasions between 1886 and 1971, when the Paris 'revision' (the current version) was formulated, its basic structure and ideology has remained in place.

A bit more understanding on the question of reservations is required. Reservations are *not* permitted after a country has acceded to a treaty. Take the example of what might occur if one of the more progressive countries in the South decided it wanted a reservation to Berne allowing much wider educational use of materials within its borders; such a step might significantly loosen the grip of the rich developed countries and their rights holders over the global use of such works. And such a step could provide a significant legal basis upon which to oppose 'the one size fits all' orientation of Berne and the TRIPS Agreement and the WIPO Copyright Treaty. But there is one major hurdle such a country would face; the Berne Convention (and similar international treaties) forbids such a step to be taken. This prohibition reinforces, for countries of the South, the colonial nature of Berne.

²⁹⁵ Paul Goldstein, *International Copyright: Principles, Law, and Practice* (New York: Oxford University Press, 2001) p. 22.

²⁹⁶ *Ibid.*

²⁹⁷ The official UN definition of reservation: 'Reservation' means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization. See: chapter VI, Reservations to treaties, Part C at <http://www.un.org/law/ilc/reports/1999/english/chap6.htm>

Here is when a sampling of some other 'leading' countries in the South who joined and became a party to the Berne Convention: Argentina (1967), Brazil (1922), Egypt (1977), India (1928), Mexico (1967), Pakistan (1948), Philippines (1951), South Africa (1928). Numbers of African countries joined in the 1960s and 1970s – and some others in the 1990s.

The late 1950's and 1960's: the Southern revolt against copyright

As is well known, a great number of countries in Asia and Africa gained their political independence in the late 1940's, the 1950's, and early 1960's, sometimes through armed liberation struggles (e.g. Algeria, Angola, and Cuba, among others). Schiller explains that in many of these countries "the impositions of colonialism were still fresh in their minds", that "these countries and their leaderships were in no mood to accept renewed subservience, be it economic, political and cultural" and the "class interest was not, in many cases, strong enough to override the powerful expectations for economic improvement and equality and sovereign control of domestic resources that the liberation struggle generated."²⁹⁸

Economic growth and development often led the list of their national priorities. Their needs in the information field – greatly expanded levels of literacy, the rapid establishment of schools and universities at all levels, getting even limited access to printed materials, especially in technical and scientific fields – were very different from those of rich nations. And their proposed solutions were very different as well. For example, the position of India was that "the high production costs of scientific and technical books standing in the way of their dissemination in developing countries could be substantially reduced if the advanced countries would freely allow their books to be reprinted and translated by underdeveloped countries."²⁹⁹

Independent Third World countries faced three choices in the 1950s and 1960s:

- a) Join (or remain in) the Berne Convention with its 'traditionally very high' standards and strong author's bias (the main/sole purpose of Berne, according to the preamble, is protecting "in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works");
- b) Join the marginally looser Universal Copyright Convention (1952); UNESCO and the US (not yet within Berne) were the main proponents of the UCC.
- c) Not join either because the standards required for membership were too demanding.

Most countries in the South quickly realised that international copyright conventions had not been set up with their particular interests or requirements in mind. "Their opinion of the world copyright situation as of 1963 was that it was essentially European in orientation and [...] opposed to their interests."³⁰⁰

²⁹⁸ Herbert Schiller, *Mass Communications and American Empire* (Boulder, Colorado, USA: Westview Press: 1992 – Second edition). pp. 19-20

²⁹⁹ C.F. Johnson, 'The Origins of the Stockholm Protocol', *Bulletin of the Copyright Society of the USA*, XVIII (1970).

³⁰⁰ *Ibid.*

Meanwhile during the same period, Third World leaders such as Fidel Castro were denouncing the dangers of copyright and intellectual property ideologies. Here are a few excerpts from a speech he delivered in 1967 in Guane, Pinar del Rio, in Cuba on the problems of printing and supplying books in his country. While noting that historically “intellectual creators have generally been poorly paid and many have suffered hunger”, he continued that Cuba had adopted a decision to “abolish” intellectual property.

What does this mean? We think that technical knowledge should be the patrimony of all mankind. We feel that what man's intelligence has created should be the patrimony of all mankind. Who pays Cervantes his royalties? For intellectual property? Who pays Shakespeare? Who pays the ones who invented the alphabet, those who invented numerals, arithmetic, mathematics? All mankind has benefited in one way or another. All mankind in one way or another uses the creations of man's intelligence throughout history. From the first primitive man who took a stick in his hand to knock down a fruit, mankind began to benefit from a creation of intelligence [...] In other words, all or rather the large majority of man's creations have been accumulating through thousands of years and all mankind feels it is entitled to the enjoyment of the creation of intelligence [...] How is it possible to want to deny man today, hundreds of thousands of human beings, not hundreds of thousands, I am wrong, hundreds of millions, billions of human beings who now live in poverty, in underdevelopment – how is it possible to want to block the access to technology for billions of human beings, a technology that they need for such basic things as nourishment, such as life itself [...] We proclaim that we consider all technical knowledge a patrimony right of all mankind and that the peoples who have been most exploited have a particular right to it because, where is there hunger, where is there underdevelopment? Where is there ignorance? Where is the lack of technical knowledge?³⁰¹

As a follow-up to several UNESCO-initiated discussions in the early 1960's, representatives from 23 African countries met in Brazzaville Congo in 1963 to begin formulating proposals to reform international copyright conventions in such a way that the needs of 'new' African nations (and Third World countries more generally) could be accommodated. Over the next several years, a number of proposals were drafted; they included a reduction in the duration of copyright, translation rights, easier acquisition of licensed reproduction rights from Western publishers, national jurisdiction over the regulation of uses for educational or scholastic purposes (by contract, Berne did not and does not contain a basic education exemption), the protection of folklore, and some other related matters. Although there was some sympathy among certain organisations in the developed world to the particular needs of developing countries and all governments (with the possible exception of the United Kingdom) agreed to some concessions, the copyright access proposals of the Third World countries were further restricted and further qualified, conference by conference and draft by draft, over the next few years. And even a supposedly final draft, known as the Stockholm Protocol of 1967, which had removed many of the key earlier proposals of developing countries, was still not acceptable to authors' organisations, publishers, and other rights holders in the developed world. To take one example, the sharpest difference between the developed and Southern countries

³⁰¹ <http://lanic.utexas.edu/la/cb/cuba/castro/1967/19670430>

occurred over the educational use issue, according to commentators. Although the term 'educational purposes' was strictly defined in the Protocol, the addition of the words "in all fields of education" was "wide enough to apply to mass literacy and adult education campaigns extending far beyond the confines of the classroom."³⁰²

Opposition quickly mounted in developed countries, especially in Europe, particularly among rights holders and their vociferous organisations. Indeed, the period – and the conflicts raised – has led commentators to state that there was 'an international crisis' in copyright law and regulation. Among governments in the developed world, the United Kingdom was the Protocol's principle opponent. On the one hand, UK's official representatives did speak with a certain honesty and forthrightness in its commentary on the Stockholm Protocol. The UK said that "[t]he Berne Convention is an instrument primarily designed to meet the needs of countries which have reached a certain stage of development."³⁰³ On the other hand, most British publishers did not mince their words. Sir Alan Herbert, chairman of the British Copyright Council, called the Protocol "a delayed action bomb of dangerous principle into the flagship of copyright; a tunnel under the walls of the copyright fortress."³⁰⁴ To continue with Herbert's military metaphor, the Stockholm Protocol and its principles sank with little trace when confronted with such an onslaught by the well-armed legions from the richest nations. The final set of copyright proposals aimed at meeting the needs of developing countries became the 1971 Appendix to the Berne Convention. But the Appendix contained no provisions for free educational use or for any reduction in duration of copyright. Nor did it adequately address the indigenous knowledge issue. It did, however, permit the possibility of invoking the compulsory licensing of works if voluntary negotiations over translations and reproduction rights – available only under very qualified conditions – were not successful. Since 1971, these compulsory licensing provisions have rarely been invoked by countries of the South. Writing in 1987, Sam Ricketson stated that "only a handful of developing countries have so far availed themselves of its provisions."³⁰⁵ But while after 1971 the 'crisis' had subsided, opposition then moved to another forum, UNESCO, within a few years.

The New World Information and Communication Order (NWICO)

After limited research, it appears to be the case that copyright issues did *not* play a leading role in the call for a 'New World Information and Communications Order' (NWICO) led by the Non-Aligned Movement in the late 1970s. At the same time, repressive copyright laws that prevented access did play an important background role in the concerns about media monopolies and glaring inequalities in the existing information order that had been voiced in the 1960's as noted above.

A 1976 seminar in Tunis produced a report entitled *Information in the Non-Aligned Countries*. The following excerpts give a flavour of the anti-imperialist sentiment that was being expressed:

³⁰² S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Centre for Commercial Law Studies, 1987).

³⁰³ Johnson. Op. cit

³⁰⁴ *The London Times*, 3 and 11 August 1968, cited in Johnson.

³⁰⁵ For more on the failure of the Berne Appendix, see above.

- Since information in the world shows a disequilibrium favouring some and ignoring others, it is the duty of the non-aligned countries [...] to change this situation and obtain the de-colonization of information and initiate a new international order in information.
- The peoples of developing countries are the victims of domination in information and this domination is a blow to their most authentic cultural values, and in the final analysis subjugates their interests to those of imperialism.³⁰⁶

The US media and communications theorist Herbert Schiller explains the context and the main concerns of this movement as articulated by a 1980 UNESCO Report.

*The culmination of the Third World effort to restructure the global information condition was realised in the creation by UNESCO in 1978 of the McBride Commission for the Study of Communication Problems. The commission's report, Many Voices, One World (1980), recapitulated many of the themes that had occupied the discussions from the 1960s on: the power of the transnational media conglomerates; the one-way flow of media product and information from New York, Los Angeles, Washington, London and Paris to the rest of the world; the excessive commercialisation of that flow; and the need for protection of national cultural sovereignty in the face of the cultural avalanche from the West.*³⁰⁷

NWICO had a relatively brief international profile. The McBride report and its 82 recommendations (grouped under five core policy areas of communication policy, technology, culture, human rights and international cooperation) were ferociously attacked, especially by the US government, the US media and rights holders (as well as other governments such as the UK) as a dangerous attack on free speech, free markets and a free press. Soon afterwards the US withdrew from UNESCO (it later re-joined) and UNESCO itself was overtaken by the WTO and WIPO in copyright matters.³⁰⁸

Though their policy roots are not necessarily a part of the NWICO period, certain countries have erected barriers to foreign-produced (and copyrighted) works. In China, for example, the state allows only 20 foreign films to be distributed each year. One report notes that such a release in China "is often delayed for several months, long after pirated DVD versions are available for less than a fifth of the price of a cinema ticket."³⁰⁹

³⁰⁶ These quotations are taken from Colleen Roach, *The Western World and the NWICO: United They Stand?* in Peter Goldring and Phil Harris, eds. *Beyond Cultural Imperialism* (Sage 1997).

³⁰⁷ Schiller, 20.

³⁰⁸ For more on this change, see Section 3.9 in the dossier.

³⁰⁹ Jonathan Watts, 'Snow White and the seven kung fu monks: Disney sets sights on China', *The Guardian* (UK), 5 July 2005.

5.3 National or regional movements opposing TRIPS as interference in their cultural life

There is growing national, international and regional resistance to TRIPS and the impact of copyright on cultural survival and cultural life with numerous organizations active throughout the global south resisting the expansion of TRIPS. The following are examples of regional movements focused on culture and TRIPS.

AfriTAN – the African section of the TRIPS Action Network – has focused on access to medication as part of their resistance to the TRIPS agreement. Action Aid Pakistan has developed TRIPS resistance to Agricultural Issues. The Gene Campaign has worked with the Centre for Environmental Concerns in India to focus on intellectual property, environment, and agricultural issues. RAFI (Rural Foundation Advancement International) now operating under the name Action Group on Erosion, Technology and Concentration (ETC) has also been instrumental in global south resistance to TRIPS.³¹⁰

In the Pacific region, native Hawaiians and the Maori in New Zealand have also developed a position critical of TRIPS and western intellectual property rights. Mililani B. Trask, Native Hawai'ian and Indigenous Expert to the United Nations for the Permanent Forum on Indigenous Issues stated that, 'The TRIPS agreement within the WTO which is intended to internationalise current intellectual property laws constitutes a major threat to the cultural integrity and rights of indigenous peoples, including territorial and resource rights.'³¹¹ The critique made by Trask is hinged upon the underlying argument that TRIPS puts 'traditional knowledge' outside the protective shield of copyright or patent law and thus 'free' to appropriate as the 'heritage of humankind.' (This underlying conflict between copyright and traditional knowledge is dealt with in Section 3.5 of the dossier.)

However, the fact that TRIPS protects some forms of knowledge, but not others helps to highlight the problems associated with an agreement that emphasizes individual authorship and ownership while ignoring the fact that much of the world's creative knowledge is not individually owned and perhaps should remain that way.

The Maori in New Zealand have also begun resisting cultural theft by developing property rights in cultural and intellectual heritage. They established the Waitangi Tribunal to deal with these issues.³¹² The aboriginals in Australia have perhaps moved the furthest down this path by trying to develop a system that would protect their art and culture within the framework of copyright law.

³¹⁰ For occasional papers and updates see: <http://www.etcgroup.org/publications.asp>

³¹¹ Mililani B. Trask, 'Globalization and Indigenous Rights,' Paper presented at the Third International Conference on Diversity in Organizations, Communities and Nations. East-West Center, Honolulu, Hawai'i, February 13-16, 2003, 5.

³¹² Leo Watson and Maui Solomon, 'The Waitangi Tribunal and the Maori Claim to their Cultural and Intellectual Heritage Rights Property,' *Cultural Survival Quarterly*, Vol. 24, January 31, 2001, 46.

Resistance is also growing throughout Latin America. In 1999, Brazilian indigenous peoples met at the National Encounter of Pajés to talk about traditional knowledge and bio-piracy where they issued a declaration seeking to stop the theft of indigenous knowledge.³¹³ In December of 2001, indigenous representatives in Brazil, representing over 360,000 indigenous peoples met in São Luís to again discuss the issue of Indigenous Knowledge and develop a statement resisting the western definition of intellectual property.³¹⁴

These examples suggest that disagreement with TRIPS and its methodologies can be found throughout the globe. However, it is also important to recognize that resistance exists at the governmental level and trans-national level as well. The following two sections help illustrate how resistance is coalescing around the issue of free trade and access to knowledge.

5.4 Venezuela initiative on the rights of authors

In November of 2005, negotiations surrounding the Free Trade of the Americas Agreement (FTAA) agreement broke down amidst massive social protest and differences in how to approach trade between the United States and its trading partners in Latin America. Led by Venezuela, many countries in Latin America have begun to resist the notion of a free trade agreement with TRIPS-like language. Instead, countries throughout Central and South American are beginning to coalesce around an alternative plan and one that more closely aligns trade with poverty reduction and the extension of social services. One important part of this process is the 'authors' rights' initiative developed in Venezuela.

In 2005, Venezuela's Autonomous Service of Intellectual Property (SAPI) created a new initiative to articulate the growing concern of the Venezuelan government regarding corporate control over intellectual property. This new initiative seeks to develop and protect 'authors' rights' as separate from the commercialization of copyrights. The Director of SAPI, Eduardo Samán, said of the initiative that, "The idea is to capture the essence of the author's right, and that this belongs to the natural person, the composers, the writers, the interpreters, the artists, and performers. And that corporations keep away from the legislation, and that they do not enjoy any human right like [sic] authorship."³¹⁵

The author's right would allow for copyright to remain with the individual author and disallow corporations from appropriating these rights to further exploit authors. The intent is to provide more autonomy to the author, who under current practice is required to sign over copyright to the publishing company and thus lose control over

³¹³ Stanley Krippner, 'The Manifesto,' Brazil, N. 162, June 30, 1999, 55.

³¹⁴ Declaration of Shamans on Intellectual Property and the Protection of Traditional Knowledge and Genetic Resources. Made available to the Intergovernmental Committee by the Delegation of Brazil. Available at:

<http://www.nativeweb.org/pages/legal/shamans.pdf>.

³¹⁵ Quoted in María Isabel Cerón, 'Intellectual Property is a Human not a Corporate Right: Propiedad intelectual es un derecho humano no corporative.' SAPI, Autonomous Service of Intellectual Property. <http://www.sepi.gob.ve/web/index.php>, 2005.

their works. Under this new paradigm, the author would retain copyright control and enter into a contract relationship with a publisher that could be renewed or ended in order for the author to seek a more mutually beneficial relationship.³¹⁶

SAPI itself sees its objectives as promoting sustainable economic and social development by improving access to knowledge.³¹⁷ While part of SAPI's task is to protect items falling under an intellectual property rubric, their goals and objectives are distinctly different from many similar organizations found in the global North. Not only does SAPI concern itself with how copyrighted works are shared, but also sees itself as integral in protecting traditional knowledge and biodiversity.³¹⁸ Protecting an 'author's right', which maps most closely to a moral rights perspective, is also essential to this initiative.

SAPI's author's rights initiative is part of a much larger resistance to neo-liberal globalization emerging out of the Bolivarian Alternative for Latin America and the Caribbean (ALBA).³¹⁹ ALBA is Venezuela's alternative to the Free Trade of the America's Agreement (FTAA) and focuses on poverty reduction and regional integration that benefits more than transnational corporations.³²⁰ ALBA also offers an alternative to intellectual property as defined by the United States:

*The ALBA is also opposed to the intellectual property rights regimes on the grounds that they only protect the areas of scientific and technological knowledge that developed countries control, while at the same time leaving unprotected those areas in which the developing countries have considerable advantage: biodiversity of their territories and the traditional knowledge of peasant and aborigine peoples. The fact also contributes to deepening the asymmetries that exist between countries.*³²¹

Venezuela has taken the lead in opposing neo-liberal trade, along with Argentina, Brazil, Paraguay and Uruguay.³²² Venezuela is developing through ALBA an alternative trade approach and has currently established an agreement to sell oil for medication with Cuba.³²³ ALBA is not without its critics. Specifically, anti-GMO activists are upset because GMOs would still be traded under the agreement.³²⁴ Furthermore, many see the agreement as not going far enough in attempting to solve the problems faced by many countries in Latin America and offering only a superficial alternative to the FTAA. However, ALBA does offer an alternative to free

³¹⁶ Andrea Coa, '¿Rights of Authors as a Form of Economic and Cultural Domination of Imperialism: Derechos de autor como medio de dominación económica y cultural del imperialismo?' Paper presented at the International Congress of Culture and Development. Ministry of Culture, June 6-9, 2005. <http://www.sapi.gob.ve> or <http://www.cult.cu>.

³¹⁷ 'History of SAPI,' <http://www.sapi.gob.ve>.

³¹⁸ Ibid.

³¹⁹ Teresa Arreaza, 'ALBA: Bolivarian Alternative for Latin America and the Caribbean,' January 30, 2004. <http://www.venezuelanalysis.com/docs.php?dno=1010>.

³²⁰ Ibid.

³²¹ Ibid.

³²² Cory Fischer-Hoffman, 'Argentina: The People's Summit Against the FTAA,' November 7, 2005. <http://www.upsidedownworld.org/main/content/view/110/1>.

³²³ 'An Alternative to the FTAA?' Bugs' Blog. Jueves, 13, 2005. <http://bbugs.blogspot.com/2005/01/alternative-to-ftaa.html>.

³²⁴ Fischer-Hoffman, Op. Cit.

trade as defined by the United States with a different framework that considers not only copyright issues, but issues related to creating a better society for all. As such, it is a form of resistance, if a small act, that is worth commenting upon and researching further.

5.5 Resisting the privatisation of cultural life

Resisting the privatisation of cultural life has been taken up in some detail in Sections One and Three of the dossier. Identifying the harms associated with privatisation suggest certain avenues for resistance. Specifically, if the problem with copyright is that it privatises cultural life, then a clear method of resistance is to foster a vibrant public domain, endorse programs that encourage the free flow of culture and information, and make the critique of privatisation as public as possible in order to allow people to understand the costs. Because the global South cannot be easily described as a single constituency with a uniform platform, how countries in the global south resist the privatisation of cultural life will vary.

First, developing countries that are members of the WTO may seek revisions to the TRIPS agreement as a form of resistance. While not the most radical form of resistance, these states have at some level endorsed (or been coerced into supporting) the neo-liberal globalisation model and thus seek to create change from within. States choosing to follow this path may find the Access to Knowledge model discussed below compelling, even if it offers only a limited critique of the current system. States pursuing change within the TRIPS agreement or WIPO through the 'development agenda' are not automatically rejecting the privatisation of cultural life - at least not at the level of publicly endorsed policy, but instead may seek to preserve their own ability to maximize cultural profits. While this dossier remains critical of any approach that seeks the privatisation of cultural knowledge, it should also be recognized that the resistance of many states in the global South takes the form of rewriting TRIPS. The rejection of copyright as currently understood is typically left to activists while governments negotiate terms more in their interests.

A second mode of resistance is constructing alternative creative paradigms. Brazil stands out as one country actively seeking such an alternative to copyright law. Brazil is developing projects focused on the use of the creative commons, free software, and the exchange of music outside the scope of copyright. In Brazil, there is growing interest in, and respect for, the language of open societies that is at the heart of many developing country platforms related to intellectual property. Thus, while the language of open source initially applied only to computer software, it is now being applied to textbooks, music and knowledge more generally. This open source language is meeting with growing endorsement around the world.³²⁵

³²⁵ TecTonic: Africa's Source for Open Source News, 'Free Software in Africa - 2005, A Year for Real Growth,' January 11, 2005. <http://www.tectonic.co.za/view.php?id=399> (looks at the application of open source computer technology to Africa); For a South African initiative on open source textbooks see: Free High School Science Texts - <http://www.nongnu.org/fhsst/>; California is seeking to develop a similar program to offset the enormous cost of textbooks in the state. See: California Open Source Textbook Project - <http://www.opensourcetext.org/index.htm>; Finally, there is an initiative to establish a

The rejection of the privatisation model is also articulated in the work of those seeking to protect traditional knowledge. These actors can be found throughout the global South, but also in developed countries (for example, the Maori or the Native Hawai'ians). There are several themes embraced by supporters of traditional knowledge that serve as the foundation for resistance. First, culture should not be commodified. Second, culture is integrally linked to traditional knowledge and both are expressions of groups of people, not individuals. Third, the relationship of people to the environment is essential and should be respected. Fourth, that much of what is considered traditional knowledge is sacred.

Many indigenous groups have attempted to resist the expansion of individualized intellectual property rights by articulating a collective or group right to traditional knowledge. Others demand compensation for the theft of knowledge and resources that have been co-opted into a system of intellectual property. Here are some examples:

The National Encounter of Pajés

Some of the demands of the National Encounter of Pajés, a meeting of Brazilian indigenous leaders from numerous different indigenous nations include:

- *There are patent laws that register under the names of outsiders what, in truth, belongs to us. These laws are neither good nor just for indigenous people. These laws permit the theft of our knowledge. We demand a new law, one that gives voice to the Pajés – as representatives of indigenous people, one that guarantees that we have the rights to what is ours. We want to be heard and we want our wishes to be respected whenever laws are made concerning this matter.*
- *We know that various plants, animals, insects, and even our own blood samples are exported from Brazil to other countries. Our land is like an open market, where anyone can enter and carry away whatever they like. We demand that the Brazilian government monitor its own gateways in order to establish a better protection of its own patrimony.*
- *The future of our traditional knowledge, a rare and precious resource for all humankind, might not be secure. Our Pajés and our elders are dying with illnesses that did not exist in the old days. Many of our children and our young people are dying of illness and starvation. Therefore, we demand that the authorities assist us in maintaining our health and guaranteeing the survival of our people.*
- *The Earth is our Great Mother. Nature is the largest and best pharmacy that exists in the world. Without nature, our traditional knowledge will not be useful to our people or to the rest of humanity. The invaders' greed has resulted in the transformation of our national resources into money. This greed has brought sickness, starvation, and death to our people. During the fires in the northern state of Roraima, many animals, herbs, and vines that we used in our medicines perished, and no longer exist. Our Great Mother Earth is mortally wounded, and if she dies, we will die as well. If she dies, the invaders will have no future. Therefore, we demand protection of our lands. We demand the*

creative commons licensing agreement for textbooks. See: Open Textbook – <http://www.opentextbook.org/>.

*guarantee, through demarcation, of the space that is necessary for our physical and cultural survival.*³²⁶

The Declaration of Shamans on Intellectual Property

The Declaration of Shamans on Intellectual Property and the Protection of Traditional Knowledge and Genetic Resources declares that:

*We propose the adoption of a universal instrument of legal protection of traditional knowledge – an alternative, sui generis system distinct from the regimes of protection of intellectual property rights and that addresses, among other aspects: the recognition of indigenous lands and territories and consequently its demarcation; the recognition of the collective property of traditional knowledge as not subject to expiration in time and as non-negotiable and of the resources as public interest goods; the right of local indigenous peoples and communities to deny access to traditional knowledge and to the existing genetic resources in their territories; the recognition of the traditional forms of organization of the indigenous peoples; the inclusion of the principle of prior informed consent and a clear disposition with respect to the participation of indigenous peoples in the fair and equitable distribution of benefits resulting from the use of these resources and knowledge; and the continuity of free exchange of resources and traditional knowledge among indigenous peoples.*³²⁷

While incomplete, these examples are indicative of platforms expressing an interest in protecting traditional knowledge. They are concerned with an articulation of group rights, collective ownership, establishing walls against the appropriation of knowledge into the intellectual property system, and the establishment of control over what is deemed traditional knowledge. Other concerns over privatisation are addressed through the types of resistances described throughout this section.

5.6 Possible alternatives to copyright in the South

Numerous alternatives have been proposed. These tend to be along the lines of those outlined earlier in this section. They range from the following:

1. A system of group rights that places traditional knowledge in a permanent condition of cultural protection.
2. The use of copyright laws to protect traditional designs and culture from appropriation and misuse.
3. Resisting the expansion of TRIPS-plus type legislation at the international level.
4. Utilizing the concept of open source licensing and applying this concept to all areas of creative work and cultural exchange.
5. Arguing for a strong layer of technology transfer and information exchange at the international level in order to ensure that developing countries do not get left out of technological progress.

³²⁶ Stanley Krippner, 'The Manifesto,' Brazil, Vol. 162, June 30, 1999, p. 55.

³²⁷ <http://www.nativeweb.org/pages/legal/shamans.pdf>

6. Developing a limited system of rights with short terms for protection but without the lengthy terms inherent in the copyright system.
7. Eliminating copyright.
8. Resisting commodification and attempting to retain access to knowledge as a human right and not a commercial right.

As outlined in the first four sections of this dossier, there are serious problems associated with copyright and its application in the global South. While there may be some role for a system of copyright protection, creativity and invention certainly happen outside the boundaries of copyright law.

A system of copyright allows for creative works to be privatised and primarily benefits the owners of copyrights. The owners of copyright are often not the same as the original creators of the artistic work. Take the example of classic American jazz artists. Many of these talented musicians, responsible for creating one of America's most original musical forms, were paid flat rates for their most important contributions to this music. The bulk of the profits produced by jazz artists went to the labels and producers with many of the most talented musicians dying penniless. Copyrights did nothing to encourage innovation and creativity in this example, but rather established a system of exploitation in which those who create are not likely to benefit from their creations. Furthermore, copyright makes it difficult to build upon the earlier work of other jazz musicians by privatising the music and requiring licences to use even the smallest portions. Such monopolization of music is a barrier to the creation of new works instead of facilitating new creation. The same type of problems will exist as countries throughout the global South come to see music as a form of property instead of a cultural treasure.³²⁸

Instead of assuming the western system spurs innovation, it is important to recognize that most of the important innovation and creativity happens during relatively open and less regulated eras where people work for the common good instead of individual property rights.³²⁹

Given this framework, the alternative system must begin with normative assertions of innovation and creativity for the purposes of mutual aid. It is possible to innovate at the most sophisticated levels without the incentive of intellectual property as a guiding force, but with the incentive of providing for the public good. For example, witness the success of Cuban pharmaceutical research in developing essential medicines without recourse to patent law, but instead attempting to ensure that their contributions will not be unlawfully appropriated by the patent system.

³²⁸ Anthony McCann maps the enclosure of Irish folk music in his dissertation, 'Beyond the Commons: The Expansion of the Irish Music Rights Organization, the Elimination of Uncertainty, and the Politics of Enclosure' (2002. Available <http://www.beyondthecommons.com/beyondthecommons.html>).

³²⁹ Peter Kropotkin makes a very compelling argument for this point, arguing that the innovations of the 18th and 19th centuries often attributed to individualism would never have been possible without the paradigm of mutual aid that existed in the 15th –17th centuries. See: Peter Kropotkin, *Mutual Aid: A Factor of Evolution*, Boston, Extending Horizons Books, 1955.

It should also be recognized that sharing innovation does not necessarily mean that no profits can be made, but rather that profits will not take precedent over essential human values such as sharing and mutual aid.

5.7 The A2K (Access to Knowledge) treaty group

The Access to Knowledge (A2K) group is a relatively informal and primarily US and European-based group of activists (plus a few academics, mostly American) drafting an 'access to knowledge' treaty. The A2K group aims, in the first instance, to have this draft treaty signed by governments, particularly governments of the South, and especially those pursuing a 'development agenda' at the World Intellectual Property Organisation. There are also persons from the South involved in A2K. The main focus of the group is improving 'access to knowledge,' especially in the South - and hence its work and objectives are worth commenting upon and assessing.

The most recent large session of the A2K group was held in London on 12 and 13 May 2005. What follows is an edited 'backgrounder' to that session—prepared by Kaye Stearman of the Trans-Atlantic Consumer Dialogue (closely linked to the CP Tech group based in Washington, and Consumers International, headquarters in London)—and then it comments briefly on the orientation and direction of the A2K group.³³⁰

First, Stearman's report:

In September 2004 an expert group of academics, educators, representatives of libraries, consumer organisations, the open source movement and others gathered in Geneva to discuss reform of the World Intellectual Property Organization (WIPO). The meeting laid down a challenge to WIPO to reform rules relating to intellectual property (IP), such as copyright and patents. The problem is that the balance of some IP rules have shifted too far towards the protection of rights-holders, and removed the traditional rights of users.

A major problem was how to provide wider access to knowledge, especially for poorer consumers in developing countries. A second meeting in Geneva in February 2005 determined that the world needed a new treaty, or at least principles, to redress this imbalance as part of a 'development agenda' led by the Consumer Project on Technology (CPTech), an expert group began drafting a Treaty on Access to Knowledge

A third meeting convened at Queen Mary College in London on 12-13 May 2005 to take the draft forward. Of around one hundred participants around half were academic or legal experts, and half represented consumer and user groups. A substantial minority came from developing countries, including Brazil, India, Kenya, Malaysia, South Africa and Zimbabwe. All were keen to listen, learn and argue points of law and substance.

³³⁰ Before the London session, a 9 May draft of the draft treaty (containing a total of 12 articles on a wide range of access issues) had been prepared; it is available at: <http://www.cptech.org/a2k/consolidatedtext-may9.pdf>

*So where does the draft Treaty go from here? The next step will be to incorporate all the amendments, additions, omissions and other suggested changes to produce a new draft that will be circulated to meeting participants for final comments. When this has been completed, the draft can be presented to governments and promoted around the world, maybe even at the WIPO General Assembly in September 2005. Ultimately, it is hoped that the treaty, or at least the ideas that are driving it, will be adopted and ratified by WIPO, and incorporated into national laws and a modern way of looking at intellectual property.'*³³¹

Both prior to the London session and afterwards it seemed (and seems) clear that the starting point and overall philosophy in choosing this particular drafting language and this particular approach was often not derived from the actual on-the-ground access needs of the different users and different constituencies in the South. On the one hand, there has been an extreme paucity of research or discussion within the A2K group as to what such access needs actually are, particularly in the South. To take two examples:

- There is a constant preoccupation with delivering content/access through the Internet when, in fact, many parts of the South, especially in the poorest countries, lack even rudimentary Internet access for a variety of reasons (such as economic conditions, small percentage of population with access to a computer, poor quality telecommunications links, etc.) In any event, what type of 'knowledge' predominates on the Internet and in what language?
- Key access issues for the South, such as 'indigenous (or traditional) knowledge' and translation, are not even mentioned in the draft and others, such as distance learning and libraries, were dealt with as if the access situation under debate was that prevailing solely in Boston or Berlin.

On the other hand, and this is the more critical point, this group and its draft A2K treaty start - and essentially end - by funnelling all access questions through a traditional copyright lens, albeit a slightly more liberal and pro-user friendly version. For example, instituting a more liberal US 'fair use' or UK 'fair dealing' regime in the South is viewed as the principle and essential answer for overcoming access problems in the South. Traditional privileged actors in copyright discourse, such as 'authors' retain a privileged place (as they do with Creative Commons licences; see section 5.9 of this dossier). Well-known copyright barriers affecting, for example, the visually impaired (e.g. how any type of reproduction needed to produce materials in an accessible format is necessarily an infringement of copyright) are not challenged head-on. This document avoids suggesting that changing the format of a document to allow access should legally not be considered as reproduction. (If such changing the format was not considered reproduction, visually impaired groups would avoid any liability for a copyright infringement as they do now.) Nor are collecting societies tackled and current distance learning barriers, which are very important in the South, are simply tweaked (See Section 4.3 of this dossier on distance learning in the South and copyright barriers).

³³¹ Funders for this London session were the Rockefeller Foundation, the Open Society Institute, and the John D and Catherine T. MacArthur Foundation

Furthermore, there is an unchallenged belief in the value of existing legal measures and approaches to correct the current imbalance in copyright regimes. Examples include the inclusion of Article 7.1 and 7.2 and some of the discussions in London, such as the remarks of a leader of the A2K group, when he suggested that countries in the South should establish anti-competition and anti-trust measures and regimes as a key way to challenge copyright and IP monopolies. In fact, the litigation and regulatory history from the North (e.g. the US and EU challenges to the Microsoft software monopoly) shows how weak and ineffective such a strategy usually is, especially in isolation. In the same vein, there is an overwhelming focus on compulsory licensing, despite the high transaction costs and 'discouragement' costs they entail as shown, for example, by the abject failure of the Berne Convention Appendix to improve access as discussed in this dossier in Section 4.12. And finally the draft treaty is filled with legal 'weasel words' and phrases such as 'reasonably effective measures' (e.g. Article 3-1). The interpretation of such phrases (presumably by a World Trade Organisation panel) would be based on existing pro-owner jurisprudence and give little certainty or comfort to potential users, except for those with deep pockets who are able to fund such litigation. (See Section 4.12 of this dossier on the problems South African universities have faced in funding such litigation.) Rather than a badly needed and bold analysis of copyright law, its presumptions, its ideologies and how these act as an access barrier, the A2K drafters remain trapped in traditional copyright legal narratives; they focus on 'limitations and 'exceptions' (that is, 'limitations and exceptions' to the normal and 'natural' form of works as copyrighted works) and how to interpret them in a more favourable light. (e.g. Article 3-1).

Conversely, there is an implicit assumption that the proposed drafting language of the A2K treaty would actually 'pass muster' internationally. For example, if country X actually passed such an A2K treaty and included the proposed treaty language in its own domestic copyright legislation, it is assumed that such legislation would actually withstand a legal challenge from a WTO Panel if country Y (likely the US or the European Union) made a complaint to the WTO about such domestic legislation in X. To give one example, the proposed A2K treaty language would, in repeated instances, not fulfil the requirements of the infamous Berne Convention (and TRIPS and WIPO Copyright Treaty) 'three step' test; this test states that reproduction of copyrighted works is permitted "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." (The first (and leading) WTO panel of 2000 to examine the 'three step test' gave a very restricted reading (to users) of the 'three step' test - and the proposed treaty language would not be in accordance with that decision.³³²)

It might, of course, be a valuable exercise for country X to propose draft legislation that challenged Berne Convention presumptions, to have it enacted by country X, and to 'fight the good fight' against country Y if such legislation is challenged at the WTO. And a legal defeat at a WTO panel (say on access for the visually impaired) could, in turn, form the basis for an important agitation campaign over the longer run and an exposé of the rottenness of current international rules. But before country X actually enacted new copyright laws based on the proposed A2K treaty, X's legal

³³² The decision is available at: [http://www.worldtradelaw.net/dsc/panel/us-copyright\(dsc\)\(panel\).pdf](http://www.worldtradelaw.net/dsc/panel/us-copyright(dsc)(panel).pdf)

experts would likely (if they are good lawyers!) raise the question as to whether any proposed legislation could be squared with the access restrictions of Berne and TRIPS—and is not merely a ‘wish list.’ To do otherwise would simply be foolhardy.

Significantly, a number of the US copyright legal academics in attendance at the London A2K session admitted privately that the proposed A2K treaty would, without any doubt whatsoever, be struck down by a WTO panel for non-compliance with the Berne Convention and TRIPS. But publicly, none of these academics voiced such concerns; hearing such views might have been a sobering experience for those in attendance in London.

The slogan ‘access to knowledge’ is, on the surface, a slogan with which it is difficult to disagree. But to actually have any impact and import – beyond being a mere ‘feel good’ and Enlightenment-based slogan – the notion of ‘access to knowledge’ and especially the ‘knowledge’ component requires more assessment. What ‘knowledge’ are we talking about here? Why is some ‘knowledge’ being privileged? Who is producing ‘knowledge’ and where in the world are they doing it? What are the conditions that are leading to ‘knowledge’ production in some places – and much less so elsewhere (or at least what seems to be termed as ‘knowledge’ by the A2K proponents.)? Who needs to know about such ‘knowledge’? These rather central questions are not addressed by A2K proponents; indeed, even asking them is discouraged. The operative and unchallenged assumption is this: the aim of an ‘access to knowledge’ treaty is primarily to allow users in the North and the South to access the knowledge (and the values and ideology associated with that knowledge) produced in the North. (For more on this important question, see Section 4.13 of this dossier.)

In conclusion, the current A2K treaty approach is, on the one hand, trapped in existing legal categories, especially those prevailing in the US and Europe and wants to export them to the South. And, on the other hand, the A2K does not appreciate the restraints existing international agreements impose...and does not appear to want to know as it might ‘pop the bubble’ of this project. The words voiced by some at the closing of the London session, that the A2K movement will be able to ‘take over WIPO’, seems rather far-fetched, and even if this fantasy was realised, would actually mean little in providing wider access to ‘knowledge’ – however that term is defined.

While the ultimate intent of the A2K process is in question and while the A2K treaty remains fully within the scope of contemporary copyright ideology, there is an effort here to shift the debate, if only by a small increment, to favour the global South. Even the failure of A2K helps highlight the problems associated with copyright law at the international level and the difficulty in changing the system from within.

5.8 Free software: a viable and cheaper alternative

Proprietary software is a serious threat to social values throughout the world, and in the global South this threat is even more virulent. First, proprietary software companies engage in anti-competitive behaviour. For example, in Africa, Microsoft

gives away their software and hardware, but then ties those using their products into licensing agreements that require payments over the long term.

In Argentina and Chile, the government provides credit to buy computers with proprietary software installed, but they do not provide the same credits for free software packages. The programs in Argentina and Chile are called “Mi PC” and “Mi primera PC” respectively and are the result of a joint initiative between Intel, Microsoft and other smaller technology companies. Additionally, a program called “Partners in Learning” exists to sell discounted licences for Windows and Office to educational institutions under the condition that schools teach children to use these programs. While the program does not exclude the use of other software, most teachers are unaware of alternatives and with the limited time available simply utilize the proprietary software.

Second, when proprietary software is the primary choice made available, there is no technology transfer because the source code is not transferred with the technology. Given the control proprietary software firms and their business organizations (like the Business Software Alliance) have in the global South, the struggles facing the growing free software movement are immense. However, the free software movement offers an important form of resistance to the monopoly power of proprietary software and a better paradigm for the creation, distribution, and use of computer software.

Free software is not to be confused with open source software. While those involved in the open source movement often conflate the terms ‘free software’ and ‘open source,’ those working within the free software movement seek to keep the concepts and ideas distinct. The concept of free software originated with Richard Stallman, creator of the GNU licence and the free software foundation.³³³ Many working in the Linux tradition found the term ‘free software’ confusing (because of the connotations of the word free) and the term ‘open source’ was coined by Christine Peterson, President of the Foresight Institute, as a possible alternative. The term open source has since caught on.³³⁴ The difference between open source and free software is described by Richard Stallman as,

*For the Open Source movement, the issue of whether software should be open source is a practical question, not an ethical one. As one person put it, “Open source is a development methodology; free software is a social movement.”
For the Open Source movement, non-free software is a suboptimal solution.
For the Free Software movement, non-free software is a social problem and free software is the solution.³³⁵*

Thus, open source and free software are distinct entities, which reinforce one another: open source-style development is not possible if the software is not free, and free software is often enriched by software developed in an open source fashion.

³³³ For information on the history and theory behind free software visit Richard Stallman’s website at: <http://www.gnu.org/copyleft/gpl.html>.

³³⁴ See: Sam Williams, *Free as in Freedom: Richard Stallman’s Crusade for Free Software*, Beijing: O’Reilly, 2002, pp.161-162.

³³⁵ Richard Stallman, “Why Free Software is Better than Open Source,” <http://www.gnu.org/philosophy/free-software-for-freedom.html>.

However distinct these entities are in terms of ideas and people behind them, though, the overlap between free software and software developed in open source fashion is large enough to say that they comprise the same programs.

For the purposes of access to computer technology throughout the global south, both open source software and free software can offer substantial advantages over the proprietary model. Furthermore, these movements offer an alternative to the proprietary model that is important in staking out an independent future of countries in the global South. Thus, while not perhaps typically conceptualized in terms of resistance, these software movements are engaged in a form of constructive resistance. Instead of resisting through opposition, free software resists by constructing an important alternative model that can provide the global South with options beyond becoming beholden to the proprietary software packages of the large computer companies.

It is clear that free software is a viable and cheaper alternative to proprietary software for the following reasons.³³⁶ First, as a general rule, deploying free software is cheaper than a proprietary software package. While it is possible for the person with whom the software originates to charge whatever they like for the software, this person cannot keep the user from redistributing the software for free. The consequence is that the price of a copy sinks quickly. For example, the GNU/Linux operating system can be downloaded from the Internet for free and distributed without consequences unlike proprietary software.

Second, because there are no restrictions on how many copies can be made, free software and open source software eliminate the concept of piracy and the legal costs of implementing a software package are reduced considerably. Third, most computer programmers agree that free software is more reliable and secure, reducing costs for computer shutdowns and security patches. Under the proprietary model a user must wait for the software company to address these issues, which may not happen immediately. For example, when a new security hole is found in the Microsoft system, one must wait until Microsoft issues a patch for the hole before it can be fixed. Not so with software package where any number of programmers may issue the patch themselves. Fourth, open source or free software allows a government agency or company to create their own adaptations that tailor the software to their needs, something that is illegal under proprietary software agreements. The ability to tailor software allows companies to remain autonomous of the software companies.³³⁷ However, it is important to remember that free software is about more than the cost. It's a matter of freedom, independence and local capacity. Only by understanding proprietary software within the larger political economy can the true potential of free software and open source as tools for economic liberation be seen.

Instead of wasting resources developing anti-piracy strategies and policing the use of software, one can simply shift to a type of software where these tactics are unnecessary. Open source and free software allows us to rethink our ideas of

³³⁶ These arguments are detailed by Eric Raymond, a proponent of open source software. See: Eric Raymond, *The Cathedral & the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary* (Beijing: O'Reilly, 1999.)

³³⁷ Ibid.

property rights and is an important aspect of any future innovation model.³³⁸ Furthermore, open source and free software highlight that those who suggest a proprietary model is the only or the best way to proceed are simply wrong. Free software constitutes clear and incontestable evidence that the contention that the production of quality software depends on the enforcement of strong copyright, and that innovation depends on patents is wrong. Free Software signs strong copyright away in order to fuel production and innovation and has produced a better product in the process.

5.9 The Creative Commons approach

Creative Commons (CC) licences are a relatively new phenomenon and are growing in importance and popularity, including across the South. This section gives a brief backgrounder on CC and its various licences and then essentially lists, in a preliminary way, some of the pros and cons of this approach.³³⁹

What are the Creative Commons and what types of licences do they provide?

From Wikipedia:

The Creative Commons (CC) is a non-profit organization devoted to expanding the range of creative work available for others to legally build upon and share ... The Creative Commons website enables copyright holders to grant some of their rights to the public while retaining others, through a variety of licensing and contract schemes, which may include dedication to the public domain or open content licensing terms. The intention is to avoid the problems which current copyright laws create for the sharing of information.

*Creative Commons was officially launched in 2001. Lawrence Lessig, the founder and chairman of Creative Commons, started the organization as an additional method of achieving the goals of his Supreme Court case, *Eldred v. Ashcroft*. The initial set of Creative Commons' licences was published on 16 December 2002.*

The Creative Commons Licence refers to the name of several copyright licences released on December 16, 2002 by Creative Commons, a US nonprofit corporation founded in 2001.

These licences all grant certain baseline rights, such as the right to distribute the copyrighted work on file sharing networks. The copyright holder has the option of specifying certain extra conditions:

³³⁸ Steven Weber, *The Success of Open Source*, Cambridge and London: Harvard University Press, 2004. Weber argues the open source allows us to radically rethink our ideas about property.

³³⁹ The main website of CC is <http://creativecommons.org/>.

- Attribution (by): Permit others to copy, distribute, display, and perform the work and derivative works based upon it only if they give you credit.
- Noncommercial (nc): Permit others to copy, distribute, display, and perform the work and derivative works based upon it only for noncommercial purposes.
- No Derivative Works (nd): Permit others to copy, distribute, display and perform only verbatim copies of the work, not derivative works based upon it.
- Share Alike (sa): Permit others to distribute derivative works only under a licence identical to the licence that governs your work. (See also copyleft.)

Mixing and matching these conditions produces sixteen possible combinations, of which eleven are valid Creative Commons licences. Of the five invalid combinations, four include both the 'nd' and 'sa' clauses, which are mutually exclusive; and one includes none of the clauses, which is equivalent to releasing one's work into the public domain. The five licences without the Attribution clause are being phased out because 98% of licensors requested Attribution.

The pros and cons of CC licences in the South

In favour of Creative Commons licences, there are several arguments. CC licences demonstrate a positive attitude towards the sharing of (and wider access to) 'knowledge' and information. CC licences provide some alternatives for authors and other creators, such as musicians, to some of the traditional proprietary presumptions of copyright law. This is obviously positive and we endorse those who wish to break away from the 'traditional' model which allows publishers, recording companies and other large rightsholders to hold unchallenged authority over distribution.

When persons use a CC licence -either as a creator or as a user - they *may become* more open to appreciating how traditional copyright restrictions and restraints block access. In other words, CC *may* provide a reformist window that will open up into a wider and systemic critique of the existing system. At the same time - see the section below - CC users *may*, in the alternative, become more entrenched as to the purported societal benefits of copyright. It will be interesting to watch which strand and which ideology triumphs.

However, there are some disadvantages and some questions that need to be asked as well. CC licences privilege the position of the author as is done in the traditional copyright paradigm: she/he (and not the wider society or users generally) is *the sole person* who decides whether and how and to what extent a work is accessible. This is not surprising as CC operates within the ideological presumptions of copyright; as explained on its website, CC "offers a flexible copyright for creative work [...] Creative Commons offers a flexible range of protections and freedoms for authors and artists. We have built upon the 'all rights reserved' of traditional copyright to create a voluntary 'some rights reserved copyright'." In other words, an actual or potential user of the work is required to accede to the access/use decisions made solely by the author ... who is the person holding copyright.

CC also privileges the notion of the desirability of creating property rights in expressions; cultural and literary products are considered as commodities, albeit ones that the creator can decide (or not decide) to make accessible, much like a person can decide whether or not to invite someone into her or his house. As Lessig

writes, "I am fanatically pro-market, in the market's proper sphere. I don't doubt the important and valuable role played by property in most, maybe just about all contexts."³⁴⁰

There is wide variety of CC licences and some of them change traditional access and use provisions by a relatively small degree. One emerging issue that should be of concern is that the increasing numbers of licensing options may become confusing and create additional costs for the use of software.³⁴¹ This concern should be watched as the types of licences may become even more complex and confusing until a single model is settled upon.

It is unlikely that more than a tiny percentage of the works created on a global basis in any year will be available under CC licences. Will the percentage be even less within the South? This seems likely. Hence, CC licences will be of limited value in meeting the expansive access needs of the South in the near future. Nor do CC licences provide access to *already published* works or music that are still restricted by copyright laws; these form the overwhelmingly majority of current material.

Focusing on CC licences *may* potentially sideline or detour people from analysing how existing copyright laws block access and how policy changes on a societal level, rather than the actions of individual 'good guys', are the key to improving access and the related problems of copyright laws and ideology which are discussed elsewhere in this draft dossier. Nor does the individualised CC approach challenge the fact that most works are produced by employees, not self-employed persons, and hence are usually owned by their employees. Nor does it confront the fact that many creators (e.g. most musicians, most academic authors) may be required, because of unequal bargaining power, to assign copyright in their own work to a record company or publisher as a condition of getting their work produced or published.

In his own writings, Larry Lessig does not take a critical stance towards copyright itself and he argues that developed copyright systems are close to a pre-requisite for cultural production. He writes: "Copyright is a critical part of the process of creativity; a great deal of creativity would not exist without the protections of the law....And as it (copyright) has expanded, it has expanded the opportunities for creativity."³⁴² This approach denies the great amount of work that is produced without the motivations of copyright (e.g. the work of most academics), the examples of creative work produced across Asia and Africa (discussed in Section 3 of this dossier), and the work of indigenous peoples.

Given the greatly reduced levels of Internet access in the South (which is the result of many technical and economic factors) and given that most works under CC licences are available – often solely available – on the Internet, what is the future and value of CC licences in the South?

³⁴⁰ Lessig, *The Future of Ideas*, p.6.

³⁴¹ R. van Wendel de Joode, J.A. de Bruijn and M.J.G. van Eeten, *Protecting the Virtual Commons: Self-Organizing Open Source and Free Software Communities and Innovative Intellectual Property Regimes*, The Hague: T.M.C. Asser Press, 2003. They discuss the types of software licences out there.

³⁴² Lessig, *Future of Ideas*, pp. 107-108.

While there are certainly concerns with the Creative Commons licensing paradigm, the Copy/South working group has multiple perspectives to offer on the subject. For example, in India, the concept of a creative commons does not resolve the problems associated with the current copyright system. Piracy in India allows access to knowledge and access to creative work and while the Creative Commons may ultimately help provide this, it will not provide the necessary transition. Furthermore, for India, copyright enforcement is characterized by massive and daily violent raids. In such a climate, access to creative commons licensing will do little to resolve the conflicts and a more direct approach to the issue of piracy and the benefits of piracy for India is needed.

However, the use of Creative Commons licensing in Brazil offers an exciting possibility to broaden access to cultural work. According to Ronaldo Lemos, the meaning of Creative Commons in Brazil is very different from that of the United States. In Brazil, the idea of Creative Commons is linked to a larger movement regarding media decentralization. For Brazilians, the Creative Commons licence will be used to 'take over the power of the catalogue' and ultimately it is hoped to end the culture industry as it exists today in Brazil. These efforts are especially prevalent in the Brazilian music scene. In music, parallel industries are emerging in part because traditional music available under copyright and centrally owned by the major labels is not working. Specifically, the centralized culture industry doesn't release Brazilian music in part because the major labels are owned and operated by the large multinationals that control most music world-wide and these industries are not interested in the Brazilian market for local music. The Canto Livre movement is an important response as outlined below.

5.10 The Canto Livre example from Brazil

Brazil has been active in staking out the territory of resistance to the intellectual property model advocated by the United States. One exciting opportunity emerging from Brazil is the experimentation happening between the creative commons licensing, Brazilian music, and new models of music creation and sharing. The Canto Livre project is one such example. Ronaldo Lemos describes the project as aiming at, "building an open creative environment for Brazilian music, relying on the idea of sharing and remixing, on the possibilities of collective creation, and on intellectual generosity."³⁴³ Canto Livre means "free singing" or "free corner" in Portuguese, but the emphasis is on the ways in which culture are shared, not necessarily free of charge.

According to Lemos, there is an entire parallel music industry emerging in Brazil taking place on the fringes of the intellectual property markets. One important example is the tecno-brega phenomenon, found in the city of Belém in the state of Pará. The tecno-brega scene turns the copyright industry upside down. Instead of the CD being the focus of copyright protection and the final product, the tecno-brega movement uses the CD as an advertising tool and musicians make their money from

³⁴³ Ronaldo Lemos, 'Brazil's Canto Livre Project: The Emergence of Society's Creativity,' World Information: IP City Edition, http://static.world-information.org/infopaper/wi_ipcityedition.pdf. 2005.

their live concerts and creating 'real-time' CDs of the large musical dance parties associated with the music.³⁴⁴

The transformation of industry is an important paradigm for music generation and exchange in the global south. As Lemos states, "Such 'under the radar' institutional arrangements can play an important role in reshaping the interplay between media, culture and the role of IP rights in the developing world. That is especially true when one considers that in fact in the examples such as the one above, copyright is simply not a factor. In this sort of business model, 'piracy' is either irrelevant or economically impracticable."

Ultimately, what the tecno-brega example illustrates is that creation does and can occur outside the copyright maximalist paradigm of the global North. Additionally, it serves as a model for how vibrant, creative and innovative music can be once released from the confines of the huge multinationals that tend to dominate the international and many local music scenes.

5.11 Open access journals and open archiving initiatives

The concept of Open Access has gained popularity in the global South recently. In September of 2005 the "Open Access for Developing Countries" international seminar was held in Salvador Bahia, Brazil. The seminar was sponsored by the Latin American and Caribbean Center on Health Sciences Information, the Pan American Health Organization and the World Health Organization. The seminar resulted in the "Salvador Declaration on Open Access: The Developing World Perspective."³⁴⁵

The Declaration includes the following mandates:

1. Scientific and technological research is essential for social and economic development.
2. Scientific communication is a crucial and inherent part of the activities of research and development. Science advances more effectively when there is unrestricted access to scientific information.
3. More broadly, open access enables education and use of scientific information by the public.
4. In a world that is increasingly globalised, with science claiming to be universal, exclusion from access to information is not acceptable. It is important that access be considered as a universal right, independent of any region.
5. Open Access must facilitate developing countries' active participation in the worldwide exchange of scientific information, including free access to the heritage of scientific knowledge, effective participation in the process of generation and dissemination of knowledge, and strengthening the coverage of topics of direct relevance to developing countries.

³⁴⁴ Ibid.

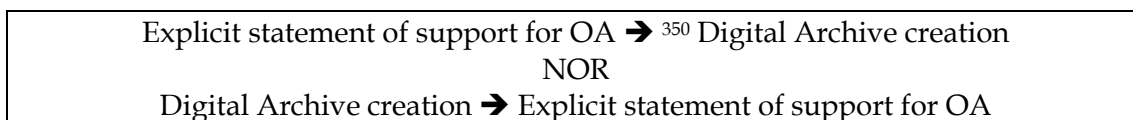
³⁴⁵ Available at:

<http://www.icml9.org/meetings/openaccess/public/documents/declaration.htm>.

6. Developing countries already have pioneering initiatives that promote Open Access and therefore they should play an important role in shaping Open Access worldwide.³⁴⁶

However, despite general agreement on the part of the developing world that open access is key to scientific development, groups in the developed world have responded by suggesting that open access is dangerous to scientific innovation and will destroy already existing peer-reviewed journals.³⁴⁷

To date Open Access scholarly communication initiatives have centred on two types of activities, namely, statements of support for Open Access and the establishment of digital archives or repositories.³⁴⁸ These two activities are not mutually exclusive, but one does not logically follow from the other either. For instance, statements of support (say at a country level) cannot be read as automatically entailing the wide-scale creation of digital archives. Similarly, the creation of digital archives might not be accompanied by explicit statements of support from the institution developing the archive.³⁴⁹



That said, two schools of thought exist within the Open Access scholarly communication arena; that of the journal reform school, and the self-archiving school, and both can be regarded as alternative models for access to academic and scientific information, and hence, as ‘open archiving initiatives’.

Open Access Journals

The central tenet for any Open Access journal is that the subscriber (reader) does not pay to access the intellectual content of the journal. The latter is the necessary condition for its status as an Open Access journal. Other conditions may apply but

³⁴⁶ Ibid.

³⁴⁷ David Dickson, ‘Open Access Deemed ‘Dangerous’ by Royal Society,’ SciDevNet, November 24, 2005. Available at: <http://www.scidev.net/News/index.cfm?fuseaction=readnews&itemid=2498&language=1>. Some complained that the Royal Society did not understand the distinction between open access and open archiving. For more on open archiving see: Leslie Chan, Barbara Kirsop, and Subbiah Arunachalam, ‘Open Access Archiving: the fast track to building research capacity in developing countries,’ Science Development Network, Available at: <http://www.scidev.net/ms/openaccess/>. In response to the royal society statement, 42 fellows of the Royal Society issued a letter criticising the statement. See: <http://www.frsoopenletter.org/>.

³⁴⁸ Adrian K. Ho and Charles W. Bailey, Jr. ‘Open Access Webliography.’ Available at: <http://www.escholarlypub.com/cwb/oaw.htm>. The authors list resources available through the open access movement. Baily has also published ‘The Open Access Bibliography: Liberating Scholarly Literature with E-Prints and Open Access Journals,’ Available at: <http://www.escholarlypub.com/oab/oab.htm>

³⁴⁹ Digital archive is referred to here in a generic way, entailing both journals and stand alone articles, papers (or other works) not ‘wrapped’ in journal format.

³⁵⁰ → denotes ‘leads to’

may not always be invoked. One such condition, regarded as a revenue stream, is for research authors to pay article processing fees.³⁵¹ Another condition may be the length of time elapsed between the writing of a research piece, and making it available via an Open Access forum. There are differing views on this, but the generally accepted timeframe is anywhere between 'immediately' or 'six months after' the creation of the piece. The latter 'timeframe' argument is usually invoked with self-archiving, rather than OA journals.

From the perspective of the South, OA journals that require Article Processing fees may defeat the purpose of the shift from the traditional journal. While the end user may have 'free' access to the materials, global South researchers may be unable to contribute to these journals because the processing fees could be too prohibitive. The latter has implications for their entry into the science system.

Some OA publishers, such as BioMed Central, allow institutional memberships, which mean that authors from member institutions are exempted from the article processing fee. Starting in 2003, institutions, especially from developing countries, have become members of BioMedCentral with funding support from the Open Society Institute. However, it is doubtful that this funding can be sustained in the long-term. Once the funding is unavailable, the access is also ended and it is unclear how the South can sustain participation.

Self-archiving

Self-archiving takes the form of researchers making versions³⁵² of their research output available in what are called institutional repositories, and/or subject or topic-based archives. As the names denote, institutional repositories are created by research institutions, usually higher education institutions or science councils. Subject/topic-based archives are usually created by discipline-based scholars for their research community, with funding from either scholarly societies or other interested funders. Another type of institutional repository is referred to as an ETD (Electronic Theses and Dissertations) repository, where only the research works of postgraduate students are made available. The term 'institutional repository' usually denotes that academic research staff are also making their works available in that repository, and it is thus not limited to postgraduate works.

Questions from the South

There are two key and pressing issues for the South in self-archiving their works. One is content-oriented, the other infrastructure-oriented. The first (content-oriented) matter has to do with publisher agreements between authors and publishers. Many developing countries have small yet sustained scholarly publishing industries (existing outside of the large STM publishers arena), and the extent to which small publishers are negotiating copyright terms with developing country authors is unclear. There is much international pressure for multinational publishers to change

³⁵¹ The 'article processing fee' is analogous to the 'page fee' familiar to most actively publishing academic authors. However, the terminology differs at an ideological level, where the 'article processing fee' is propounded by (some) OA proponents, and the 'page fee' denotes the model used in the paid-subscription based journal model.

³⁵² Whether it is a pre-print, post-print, etc depends on the institution's archiving policy.

their copyright agreements, and for them to support OA self-archiving. The results of the RoMEo study attest to this. It is unclear however how amenable small publishing establishments, especially in developing countries, are to OA self-archiving.

The second (infrastructure-oriented) issue centres on the required technical skills within a developing country to set up and maintain digital archives. These technical skills may be quite limited given that skilled technical staff migrate to other parts of the globe; prefer working outside of the higher education / research sector; or lack sufficient skills to create and maintain their own digital archives using established open source software. Another infrastructure-oriented issue frequently mentioned is the lack of affordable bandwidth capacity in developing countries.

It cannot simply be stated as yet which model(s) is or are the best for those in the South, since both primary models have issues which need to be addressed. However, the concept of open access is a subtle form of resistance to copyright. The growing popularity of open access suggests that academics are beginning to understand that copyright can stand as a barrier to the diffusion of their academic work and it may be the case that an open access model will be a viable alternative.

5.12 Co-ordinating activities across the South

Local organizations are forming with links to the surrounding communities, to international NGOs and to international bodies such as WIPO. Thus, the network of resistance grows outward and upward. The Internet and email is an important tool for communicating strategies and linking to other groups around the world. Meetings and conferences at all levels (local, regional, international) help bring together people interested in similar issues and provide strategies for moving forward. Increasingly, WIPO has become a forum for indigenous peoples to meet and develop a common strategy. The same can be said of developing countries who are attempting to use WIPO to help formulate their needs at the international level.

There are numerous strategies that are being employed to resist the expansion of intellectual property. First, direct action against entities attempting to assert strong intellectual property rights are utilized. These tactics are perhaps most visible in the access to medicines struggle in South Africa. Public protests, marches, and acts of civil disobedience are all part of the direct action. Global protests have also used street theatre and humour to highlight the issues.

Second, trying to control the way intellectual property is discussed is an important strategy. Activists successfully made access to medicine an issue of human rights instead of piracy of intellectual property rights. The same can be said to be true about the use of the term biopiracy and bio-colonialism, both of which turn the rhetorical advantage to those resisting intellectual property rights.

Third, activists have developed networks that transcend local areas and integrate the south with the north, local with global, and developed with developing. These networks can be mobilized along many fronts to facilitate action.

5.13 Satire and art as resistance

The World Intellectual Property Organization published a comic book in 2001 depicting the problems with piracy and why people around the world should adhere to copyright law. In the comic, Marco wants to be a musician but his parents are against the idea because there is no money in music. Marco comes to understand that in fact he could make a living as a musician if only copyright were respected.

In response to this piece of copyright ideology, the Alternative Law Center in Bangalore, India produced its own version of the comic telling the story of the public domain and the essential need to share and copy from each other. Such satire helps highlight the flaws in the copyright story and expresses an alternative vision of the world that may otherwise be difficult to see. In that way activists are able to assert control over the way the general public perceives creativity.³⁵³

Art is also being used in an attempt to develop public consciousness regarding copyright and its impact. The World Information City Project is hosting public domain art in city streets throughout Bangalore, India in an attempt to highlight the problems of copyright.³⁵⁴ The art included in this dossier is a final example of art as resistance that can help render the problems associated with a copyright maximalist position visible.

5.14 Co-operation in the South as part of wider intellectual property activism

At the international level - in resistance to TRIPS and the WTO - there is significant overlap between groups that all have an interest in seeing intellectual property law change. For example, resisting the expansion of TRIPS brings environmental activists and HIV-AIDS activists together over issues of patent rights. However, these forms of cooperation do not replace the autonomy of these organizations in many other areas. The relationship between these types of groups is perhaps better described as a network than a partnership. However, when interests coincide within the broader IP framework, activists work together to resist.

³⁵³ See: <http://www.altlawforum.org/lawmedia/CC.pdf>

³⁵⁴ See: <http://world-information.org/wio/program/events/1131370562>

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.”³⁵⁵ 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.

³⁵⁵ 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.³⁵⁶

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

³⁵⁶ 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."³⁵⁷ 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.³⁵⁸). 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

³⁵⁷ Will Woodward, 'Chancellor pledges record UK aid package,' The Guardian (London), 10 April 2006.

³⁵⁸ 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.*³⁵⁹

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.

³⁵⁹ 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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